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SUPREME COURT, U.S.

Vol. I

TRANSCRIPT OF RECORD

(Pages 1a to 430a)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 226

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 227

THOMAS W. STREETER, ET AL., PETITIONERS,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 243

THE HOME INSURANCE COMPANY AND TRADESMENS NATIONAL BANK AND TRUST COMPANY, PETITIONERS,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 266

CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, PETITIONERS,

vs.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR CERTIORARI FILED { AUGUST 16, 1948 (Nos. 226 and 227).
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IN THE

District Court of the United States

FOR THE DISTRICT OF DELAWARE

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY.	Civil Action No. 995.

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2.	Jan. 9, 1947	Order fixing time for hearing on plan and re giving notice.
3.	Feb. 10, 1947	Objections of Central Illinois Securities Corp. and Christian A. Johnson.
4.	Feb. 10, 1947	Objections of Lucille White and Frances Boehm.
5.	Feb. 10, 1947	Objections of Thomas W. Streeter *et al.*, preferred stockholders.
6.	Feb. 13, 1947	Motion of S. E. C. to supplement application to enforce the plan; order on same.
7.	Feb. 13, 1947	Brief on behalf of Central Illinois Securities Corp. and Christian A. Johnson.
8.	Feb. 17, 1947	Appearance of Caleb R. Layton, 3rd, as counsel for Tradesmans National Bank.
9.	Feb. 17, 1947	Affidavit re publication and notice of hearing on plan.
10.	Feb. 17, 1947	Supplemental objections of Thomas W. Streeter.

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15.	Mch. 4, 1947	Brief of Engineers Public Service Co. in opposition to objections of Streeter, *et al.*
16.	Mch. 8, 1947	Brief on behalf of objectors Lucille White and Frances Boehm.
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21.	Mch. 21, 1947	Reply Brief of Central Illinois Securities Corp. and Christian A. Johnson.
22.	May 15, 1947	Opinion.
23.	May 26, 1947	Memo on behalf of Thomas W. Streeter, *et al.*, preferred stockholders, in opposition to proposed order.
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26.	May 29, 1947	Findings of Fact and Conclusions of the Court.
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28.	May 29, 1947	Petition for stay of the order and consummation of the plan; same day order denying said petition.
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30.	May 29, 1947	Notice of appeal by Thomas W. Streeter (Notice to 3rd C. C. A. and counsel).
31.	May 29, 1947	Cost Bond on appeal by Streeter with U. S. Guarantee Co. as surety.
32.	June 2, 1947	Reporter's notes of hearing on proposed order confirming the plan.
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36.	June 10, 1947	Cost Bond on appeal of Home Insurance Co., *et al.*
37.	June 12, 1947	Petition of S. E. C. for transmittal of original exhibit to Circuit Court of Appeals; same day order granting same.
38.	June 12, 1947	S. E. C.'s Designation of Record on Appeal.
39.	June 13, 1947	Designation of record on appeal by appellant Thomas W. Streeter.
40.	June 18, 1947	Designation of record on appeal by appellants, Home Insurance Co., *et al.*

Application of Securities and Exchange Commission.

41. June 18, 1947 Designation of portions of record on appeal by appellees, Central-Illinois Securities Corporation and Christian A. Johnson.

42. June 19, 1947 Affidavit re service of notice of designation of Christian A. Johnson, *et al.* of portions of record on appeal.

43. June 26, 1947 Transcript of hearing on May 26, 1947 re proposed order confirming the plan.

44. June 26, 1947 Transcript of hearing on May 29, 1947 re proposed order confirming the plan.

Application of Securities and Exchange Commission.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY.	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action No. 995. (Filed Jan. 9, 1947)

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE:

The Securities and Exchange Commission, by its attorneys, Harry G. Slater and Bernard S. Kanton, respectfully states:

Application of Securities and Exchange Commission (Cont'd)

(1) The applicant, Securities and Exchange Commission (hereinafter sometimes referred to as the "Commission") is an agency and instrumentality of the United States created by and organized pursuant to Section 4 of the Securities Exchange Act of 1934, being Title I of the Act approved June 6, 1934, 48 Stat. 885, 15 U. S. C. Sec. 78(d).

(2) This application is made pursuant to the authority vested in the Commission and the jurisdiction vested in this Court by Sections 11(e), 18(f) and 25 of the Public Utility Holding Company Act of 1935 (hereinafter sometimes referred to as the "Act"), being Title I of an Act of Congress approved August 26, 1935, Stat. 803, 15 U. S. C., Sec. 79(a) *et seq.*

(3) Engineers Public Service Company (hereinafter sometimes referred to as "Engineers") is a corporation organized under the laws of the State of Delaware, and is a holding Company within the meaning of Section 2(a)(7) of the Act. Engineers has filed notification of registration under Section 5(a) of the Act and is a registered holding company under the Act.

(4) El Paso Electric Company (hereinafter sometimes referred to as "El Paso") is a corporation organized under the laws of the State of Texas and is a public utility company within the meaning of Section 2(a)(5) of the Act. El Paso is also a subsidiary of Engineers within the meaning of Section 2(a)(8) of the Act.

(5) Gulf States Utilities Company (hereinafter sometimes referred to as "Gulf States") is a corporation organized under the laws of the State of Texas and is a public utility company within the meaning of Section 2(a)(5) of the Act. Gulf States is also a subsidiary of Engineers within the meaning of Section 2(a)(8) of the Act.

(6) Virginia Electric & Power Company (hereinafter sometimes referred to as "Virginia") is a corporation

Application of Securities and Exchange Commission (Cont'd)

organized under the laws of the State of Virginia and is a public utility company within the meaning of Section 2(a)(5) of the Act. Virginia is also a subsidiary of Engineers within the meaning of Section 2(a)(8) of the Act.

(7) On September 16, 1942 and October 6, 1942, after notice and opportunity for hearing, the Commission in a proceeding instituted by it, pursuant to the provisions of Section 11(b)(1) of the Act directed, in substance, that Engineers sever its relationship with certain of its subsidiary companies by disposing of its direct and indirect ownership, control, and holding of securities issued and properties owned, controlled or operated by certain of its subsidiary companies. A petition to review the Commission's orders of September 16, 1942 and October 6, 1942 was filed subsequently with the United States Court of Appeals for the District of Columbia, which Court, reserving, in part, the determination of the Commission, set aside the orders of the Commission and remanded the case to the Commission for further proceedings in accordance with its opinion. Both the Commission and Engineers applied to the Supreme Court of the United States for writs of certiorari which were granted. A decision of the Supreme Court has been delayed for lack of a quorum. In the meantime, Engineers has partially complied with said orders of the Commission by disposing of certain of the investments ordered divested. At the present time, Engineers' assets consist of investments in El Paso, Gulf States, and Virginia, and cash.

(8) On September 10, 1945, Engineers filed an application with the Commission, pursuant to Section 11(e) of the Act, for approval of a plan designed to effectuate compliance with the provisions of Section 11(b) of the Act and with the orders of the Commission dated September 16, 1942 and October 6, 1942, said plan providing in substance for the disposition of Engineers' interest in El Paso and

Application of Securities and Exchange Commission (Cont'd)

Gulf States and for the dissolution and liquidation of Engineers. El Paso and Gulf States filed related declarations pursuant to Section 7 of the Act for the purpose of facilitating the effectuation of such plan.

(9) On October 15, 1945, the Commission issued its notice of and order for hearing on said plan and related declarations, in a consolidated proceeding, directing that notice of such hearing be given to all security holders of Engineers by mailing to each of said persons a copy of said order for hearing at least 15 days prior to the date of hearing. Notice of said order for hearing was also published in the Federal Register, published by the Commission as Holding Company Act Release No. 6131 (a copy of which is attached hereto and marked "Exhibit A"), was mailed to all persons on the Commission's mailing list for releases under the Act, and was released to the press. The requirements of the Commission's order as to the giving of said notice to such persons were complied with.

(10) Public hearings were duly held from time to time, briefs were filed, and the Commission heard oral argument on the plan and the related declarations. On December 4, 1946, the Commission issued its Findings and Opinion in which it found that the disposition of Gulf States and El Paso and the dissolution of Engineers were necessary to effectuate the provisions of Section 11(b), but that various aspects of the transactions proposed to accomplish these results were unnecessary, and unfair and inequitable. The Commission further stated that if the plan were amended within a period of 30 days, in accordance with modifications which it suggested, an appropriate order would be entered approving the plan as thus amended. Said Findings and Opinion of the Commission was published as Holding Company Act Release No. 7041, a copy of which is attached hereto and marked "Exhibit B".

Application of Securities and Exchange Commission (Cont'd)

(11) On December 17, 1946, for the purpose of complying with the modifications suggested in the Findings and Opinion of the Commission dated December 4, 1946, Engineers filed an amended plan, El Paso and Gulf States filed amended declarations and Virginia filed a declaration pursuant to Section 7 of the Act. On December 31, 1946, Engineers filed a further amendment to its plan. A copy of the plan as amended to December 31, 1946, is attached hereto and marked "Exhibit C" and will hereinafter be referred to as "the amended plan".

(12) Pursuant to the Notice and Order of the Commission dated December 19, 1946, the record was reopened for hearing and argument before the Commission. A copy of said Notice and Order was sent to all stockholders of record of Engineers at least 10 days before said hearing and argument. Notice was given to all other persons by publication of said Notice and Order in the Federal Register. Said Notice and Order was also published by the Commission as Holding Company Act Release No. 7077 (copy of which is attached hereto and marked "Exhibit D"), was mailed to all persons on the Commission's mailing list for releases under the Act, and released to the press. Such reconvened hearing and argument were completed, and the record in the matter closed, on January 3, 1947.

(13) On January 8, 1947, the Commission entered its Supplemental Findings and Opinion and Order, finding the amended plan necessary to effectuate the provisions of Section 11(b) and fair and equitable to the persons affected thereby, and approving the amended plan. Said Supplemental Findings and Opinion of January 8, 1947 was published as Holding Company Act Release No. 7119 (copy of which is attached hereto and marked "Exhibit E").

(14) The amended plan fully set forth in Exhibit C herein provides in substance for the disposition by Engi-

Application of Securities and Exchange Commission (Cont'd)

neers of its interests in El Paso, Gulf States and Virginia; the retirement of the preferred stocks of Engineers at $110 per share and accrued dividends in the case of the $5.50 and $6 preferred stocks and at $105 per share and accrued dividends in the case of the $5 preferred stock; and the liquidation and dissolution of Engineers.

(15) Engineers has requested the Commission to apply to a United States District Court in accordance with the provisions of Sections 11(e) and 18(f) to enforce and carry out the provisions of the amended plan and the Commission makes this application pursuant to such request.

(16) Pending a final order herein, the institution of any action or proceeding in this or any other forum by or on behalf of Engineers or its security holders or any other person with respect to any of the actions or transactions encompassed by the amended plan or the Commission's Order of January 8, 1947, would interfere with or tend to interfere with compliance with said Order and the orderly enforcement of the amended plan in this Court and would result in unnecessary expense and delay.

WHEREFORE, applicant respectfully prays that the Court, in accordance with the provisions of Section 11(e) of the Act, take the following action:

(a) Hold a hearing on this application;

(b) Order Engineers to give such notice of said hearing to its security holders, to the participants in the proceedings before the Commission, and to other persons, as the Court may deem appropriate;

(c) Enjoin, during the pendency of these proceedings, all security holders of Engineers and all other persons from doing any act or taking any action interfering with, or tending to interfere with, these proceedings or with the

Application of Securities and Exchange Commission (Cont'd)

carrying out of the amended plan, and compliance with the Order of the Commission approving it, including the commencement or prosecution of any action, suit or proceeding at law or in equity or under any statute in any Court or before any executive or administrative officer, commission or tribunal, other than such proceedings before the Commission or this Court or the Circuit Court of Appeals as may be appropriate under the Act or the Rules and Regulations promulgated thereunder;

(d) After notice and opportunity for hearing, approve the amended plan as fair and equitable and appropriate to effectuate the provisions of Section 11(b) of the Act, and to such extent as the Court deems necessary for the purpose of carrying out the terms and provisions of the amended plan, take exclusive jurisdiction and possession of Engineers and its assets wherever located;

(e) Enter an appropriate order enforcing and carrying out the terms and provisions of the amended plan and directing Engineers and its officers, directors and agents to take such steps and do such acts as may be necessary for the purpose of carrying out the terms and provisions of the amended plan and such order of the Court;

(f) After approval of the amended plan, enjoin all security holders of Engineers and all other persons from doing any action or taking any action interfering with or tending to interfere with these proceedings, with the enforcement of said Order of the Commission or with the carrying out of the amended plan, including the commencement or prosecution of any action, suit or proceeding at law or in equity or under any statute in any court or before any executive or administrative officer, commission or tribunal, other than such proceedings before the Commission or this Court or the Circuit Court of Appeals as may

be appropriate under the Act or the Rules and Regulations promulgated thereunder;

(g) Grant such other, further and different relief and enter such other orders or decrees as the Court may find to be just and equitable in the premises.

(s) HARRY G. SLATER
Harry G. Slater
Chief Counsel, Public Utilities Division

(s) BERNARD S. KANTON
Bernard S. Kanton
Attorneys for the Applicant Securities and Exchange Commission
18th and Locust Streets
Philadelphia 3, Pennsylvania

January 9, 1947.

Exhibit A to Application of Securities and Exchange Commission.

SECURITIES AND EXCHANGE COMMISSION
PHILADELPHIA

HOLDING COMPANY ACT OF 1935
Release No. 6131

October 15, 1945

The Commission today issued its Notice of Filing and Order. (Holding Company Act Release No. 6131) directing that a hearing on the plan recently filed by Engineers Public Service Company be held on November 13, 1945. In connection with the issuance of such notice, a copy of which is

Exhibit A to Application of Securities and Exchange Commission (Cont'd)

annexed hereto, the Commission made the following statement:

> "On September 10, 1945, Engineers Public Service Company, a registered holding company, filed a plan pursuant to Section 11 (e) of the Public Utility Holding Company Act of 1935 for divestment of its interests in Gulf States Utilities Company and El Paso Electric Company, the retirement of its preferred stock, and other related matters. The plan, however, refers to review proceedings now pending in the Supreme Court of the United States with respect to Engineers Public Service Company and states that it is not expected that any portion of the plan will be consummated until after the Supreme Court's decision. At the present time no specific date has been set for oral argument in the matter before the Supreme Court, although it is understood that argument may be ordered for a date in November. Moreover, while the plan provides that court approval and enforcement by a United States District Court is a condition to consummation, no request for court enforcement has yet been made. Under the provisions of Section 11 (e) of the Act the plan cannot be enforced by a United States District Court unless Engineers Public Service Company requests such enforcement.
>
> "In view of the foregoing some doubt has existed as to whether, at the present time, the plan should be set down for hearing. However, we have decided that hearings on the plan should commence on November 13, 1945. We have reached this decision because we realize that proceedings will be necessarily time consuming and that the period prior to the decision of the Supreme Court might well be utilized profitably if the proceedings were gotten under way at this time."

Exhibit A to Application of Securities and Exchange Commission (Cont'd)

SECURITIES AND EXCHANGE COMMISSION

Philadelphia

HOLDING COMPANY ACT OF 1935

Release No. 6131

UNITED STATES OF AMERICA

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission held at its office in the City of Philadelphia, Pa., on the 15th day of October, A. D., 1945.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY File No. 54-132 EL PASO ELECTRIC COMPANY File No. 70-1149 GULF STATES UTILITIES COMPANY File No. 70-1150 (Public Utility Holding Company Act of 1935)	Notice of Filing of Plan Under Section 11(e) of the Act and Declarations to Effectuate Related Transactions, Order Consolidating Proceedings, and Order for Hearing on Consolidated Matters.

The Commission having previously instituted proceedings pursuant to Section 11(b)(1) of the Public Utility Holding Company Act of 1935 (File No. 59-4) with respect to Engineers Public Service Company (Engineers), a registered holding company, and each of its subsidiaries, to

Exhibit A to Application of Securities and Exchange Commission (Cont'd)

determine what action is necessary in order that the Engineers holding company system shall so limit its operations as to comply with the standards of that Section; and

The Commission having entered orders on July 23, 1941, December 29, 1941 and September 16, 1942, pursuant to Section 11(b)(1) of the Act, directing Engineers to sever its relationship with certain of its subsidiary companies by disposing or causing the disposition of its direct and indirect ownership, control and holding of securities issued and properties owned, controlled or operated by certain of its subsidiary companies; a petition to review the Commission's order of September 16, 1942 having been filed with the United States Court of Appeals for the District of Columbia, which Court set aside the order of the Commission and remanded the case to the Commission for further proceedings in accordance with its opinion; and both the Commission and Engineers having applied to the Supreme Court of the United States for writs of certiorari which have been granted and before which Court the review proceeding is now pending; and Engineers having partially complied with such orders of the Commission by disposing of certain investments ordered divested therein, but still retaining investments in four public utility subsidiaries, namely, El Paso Electric Company (El Paso), Gulf States Utilities Company (Gulf States), Virginia Electric and Power Company (Virginia) and The Western Public Service Company (Western);

NOTICE IS HEREBY GIVEN that Engineers has filed an application for approval of a plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for the divestment of its interests in El Paso and Gulf States; and that El Paso and Gulf States, for the purpose of facilitating the effectuation of such plan, have filed declarations pursuant to Section 7 of said Act regarding the reclassification of their respective shares of common stock. The plan consists of Parts I, II, and III and separate orders are

Exhibit A to Application of Securities and Exchange Commission (Cont'd)

requested on each of said Parts. It is stated that it is not expected that any portion of this plan shall be consummated until after the decision of the Supreme Court in the review proceeding referred to above. The plan, as filed, does not contain any request for court enforcement.

All interested persons are referred to said documents which are on file in the offices of this Commission for a statement of the transactions therein proposed, which are summarized below:

Part I of the plan provides for the following transactions:

1. Engineers proposes to borrow $3,000,000 from a bank, such loan to be evidenced by a two-year note, payable $750,000 semi-annually. The loan agreement is to contain a provision for the borrowing of additional amounts, if needed, which provision is to be availed of in the event Western is not sold before the effective date of Part I of the plan or for any other reason. The agreement is to provide further that Engineers shall not, until the bank note is fully paid, pay any dividends in cash on its common stock.

2. Engineers then proposes to mail warrants to its common stockholders, each of which warrants will evidence the right to acquire from Engineers one share of Gulf States common stock for each share of Engineers common stock at the rate of $11.50 per share to be payable in cash or by exchanging whole shares of Engineers preferred stock at the rate of $100 per share plus accrued dividends, with a cash payment for the difference between the exchange value of Engineers preferred stocks and Gulf States common stock, provided, however, that Engineers may withhold the mailing of such warrants in the event that, in its opinion, market conditions are such as to render it inadvisable to proceed with the issuance of such warrants. The warrants must be exercised on or before a specified date (to be approximately ten days after the mailing of the warrants).

Exhibit A to Application of Securities and Exchange Commission (Cont'd)

Upon the mailing of such warrants, Part I of the plan is then to be deemed effective. All warrants will be registered in the names of the common stockholders and will be transferable on the books of Engineers. Such warrants will be issued and distributed without the surrender by the common stockholders of Engineers of their common stock. Furthermore, any holder of Engineers preferred stock who surrenders such stock in exchange for Gulf States common stock will be entitled to receive, in respect to such surrendered shares, the same amount, if any, which preferred stockholders depositing their stock under the provisions of the following paragraph herein receive, in addition to $100 a share. To the extent warrants are not exercised, Engineers will sell the shares of Gulf States common stock represented thereby as promptly thereafter and in such manner as the Board of Directors of Engineers deems to be in the best interest of Engineers, subject to the obtaining of the requisite regulatory approvals.

3. Engineers will deposit an amount equal to $100 per share plus accrued dividends for each share of Engineers preferred stock not surrendered in exchange for Gulf States common stock as provided in paragraph 2 above (which sum is to be realized from the bank loan, the exercise of the warrants and the remaining balance from treasury cash) in trust with a bank or trust company for the benefit of its preferred stockholders. Five days prior to such deposit notice will be given to the preferred stockholders and will state that upon surrender of the preferred stock certificates to a Transfer Agent, the preferred stockholders will be paid $100 per share plus accrued dividends; and from and after the date of such deposit, dividends on the preferred stock are to cease. Thereafter the only right remaining to the registered holder of a preferred stock certificate will be the right to receive an additional amount if any as is determined to be payable as provided in Part II below.

Exhibit A to Application of Securities and Exchange Commission (Cont'd).

4. Engineers will distribute as a dividend in partial liquidation its portfolio holdings of common stock of El Paso pro rata to the common stockhloders of Engineers on the basis of 1/5th of a share of El Paso common stock for each share of common stock of Engineers. No fractional shares of common stock will be issued or delivered, but in lieu thereof scrip will be issued and delivered. Such scrip will not be entitled to dividends, voting rights or any other stockholders' rights. When combined in lots aggregating one or more full shares of stock, scrip may, up to the date of sale of such shares of stock, be exchanged for such shares, together with any dividends which shall have been paid to stockholders of record on any date subsequent to the effective date of Part I of the plan. Engineers proposes to undertake to provide facilities whereby any holder of scrip certificates may dispose of such scrip, or acquire additional scrip so as to enable the holder to exchange such scrip for full shares of stock. All shares of stock reserved for issuance and delivery upon the exchange of scrip which shall not have been issued or delivered in connection with such exchange within two years after the effective date of Part I, shall, promptly after the expiration of such period, be sold by the Transfer Agent and the Transfer Agent shall, as soon as possible thereafter, distribute to the holders of scrip certificates not theretofore surrendered their proportionate part of the proceeds of sale, plus their proportionate part of any dividends which shall have been declared to holders of record as of a date prior to the date of sale.

5. In order to provide a reserve for the payment, if any, to which Engineers' preferred stockholders shall be held to be entitled in addition to $100 per share and accrued dividends, Engineers will retain its interest in the Virginia common stock until a final determination is so made.

Exhibit A to Application of Securities and Exchange Commission (Cont'd)

6. Epsco, Inc., a mutual service company for the Engineers holding company system, will cancel its service contracts with Engineers, Virginia, El Paso, and Gulf States.

The plan provides that the consummation of Part I of the plan is dependent upon the satisfaction of certain conditions, among others, as follows:

> (a) the Commission, when requested by Engineers, shall have instituted a proceeding in a court of competent jurisdiction pursuant to Section 11(e) of the Act and such court shall have entered a separate decree or order finding Part I of the plan to be fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act and such court shall have taken action to enforce and carry out the terms and provisions of Part I of the plan;
>
> (b) there shall have been obtained from the United States Treasury Department (unless Engineers, in its discretion, shall waive this condition) a closing agreement or ruling or closing agreements or rulings as to the tax consequences of the transactions necessary to carry out Part I of the plan and such agreements or rulings shall be satisfactory to counsel for Engineers; and
>
> (c) any corporate action in connection with Part I of the plan, which may be deemed necessary by counsel for Engineers shall have been carried out in a manner satisfactory to such counsel.

Part II of the plan requests that the Commission issue a separate order finding that it is fair and equitable that no amount in addition to $100 per share and accrued dividends be paid the Engineers preferred stockholders. However, it is provided that if the Commission finds and orders that some additional amount shall be paid to the preferred stockholders of Engineers, then and in such event Part II of

Exhibit A to Application of Securities and Exchange Commission (Cont'd)

the plan becomes automatically amended so as to provide that Engineers shall pay its preferred stockholders such additional amount as the Commission shall have so specified; provided, however, that Engineers reserves the right to petition for a review of any such order.

Part III provides that within one year after all liabilities of Engineers have been finally determined and liquidated, Engineers will be legally dissolved and liquidated, with the remaining common stock of Virginia and the other remaining assets of Engineers being distributed pro rata to the Engineers common stockholders, or Engineers will be merged with Virginia with the Engineers common stockholders receiving their pro rata interest in the merged company. The details of Part III are to be supplied at a later date by amendment to this Part of the plan.

The plan provides that the consummation of Part III of the plan is dependent upon the satisfaction of certain conditions, among others, as follows:

> (a) there shall have been obtained from the United States Treasury Department (unless Engineers, in its discretion, shall waive this condition) a closing agreement or ruling or closing agreements or rulings as to the tax consequences of the transactions necessary to carry out Part III of the plan, and such agreements or rulings shall have been satisfactory to counsel for Engineers; and
>
> (b) any corporate action in connection with Part III of the plan which may be deemed necessary by counsel for Engineers shall have been carried out in a manner satisfactory to such counsel.

Engineers has requested the Commission to issue appropriate orders and findings in connection with the proposed transactions hereinabove described in Parts I and III of the plan to conform and contain the recitations and

Exhibit A to Application of Securities and Exchange Commission (Cont'd)

requirements of Supplement R and Section 1808(f) of the Internal Revenue Code, as amended.

In connection with the proposed reclassification of the common stocks of El Paso and Gulf States so as to enable Engineers to effectuate properly the carrying out of paragraphs 2 and 4 of Part I of the plan above, El Paso and Gulf States have filed with the Commission separate declarations under Section 7 of the Act requesting, in effect, that the Commission issue orders at the same time or prior to the time it issues orders under Part I of the plan so as to enable both companies to amend their respective charters prior to the consummation of Part I of the plan.

El Paso proposes in its filing (File No. 70-1149) to amend its charter in order to change its presently authorized 150,000 shares of no par value common stock which are presently outstanding and held by Engineers into 381,994 shares of no par value common stock.

Gulf States proposes in its filing (File No. 70-1150) to amend its charter in order to (1) decrease its presently authorized 300,000 shares of no par value common stock by eliminating therefrom 20,000 shares of no par value common stock not heretofore issued and not now outstanding, (2) change the authorized 280,000 shares of no par value common stock which are presently outstanding and held by Engineers into 1,909,968 shares of no par value common stock and (3) change the voting rights of the holders of 120,000 shares of preferred stock of Gulf States now issued and outstanding so that in lieu of one vote per share of preferred stock, each share of preferred stock shall be entitled to seven votes.

El Paso and Gulf States have also requested the Commission to issue appropriate orders and findings in connection with the proposed transactions described above to conform and contain the recitations and requirements of Supplement R and Section 1808(f) of the Internal Revenue Code, as amended.

Exhibit A to Application of Securities and Exchange Commission (Cont'd)

It appearing to the Commission that the proceedings with respect to said plan and said declarations are related to and involve common questions of law and fact and therefore should be consolidated; and

It further appearing to the Commission that it is proper and in the public interest and in the interest of investors and consumers that a hearing be held with respect to said plan and said declarations, and that said plan should not be approved and that said declarations should not become effective, except pursuant to further order of the Commission; and

It further appearing appropriate in view of the Commission's order of September 16, 1942 and of the provisions of Section 11(d) with respect to court enforcement of such an order, to provide opportunity for hearing, as part of these consolidated proceedings, as to whether the Commission should approve any plan of reorganization of Engineers that may be hereafter proposed by the Commission in the first instance or by any person having a bona fide interest in the reorganization;

It is Hereby Ordered that the proceedings on the plan (File No. 54-132) and the declarations (Files Nos. 70-1149 and 70-1150) be, and hereby are, consolidated.

It is Further Ordered that a hearing be held at 10:00 A. M., E. S. T., on the 13th day of November, 1945, at the offices of the Securities and Exchange Commission, 18th and Locust Streets, Philadelphia 3, Pennsylvania, in such room as may be designated on such day by the hearing room clerk in Room 318. All persons desiring to be heard or otherwise wishing to participate in the proceedings should notify the Commission in the manner provided by its Rules of Practice, Rule XVII, on or before the 9th day of November, 1945.

It is Further Ordered that Allen MacCullen or any other officer or officers of the Commission designated by it

Exhibit A to Application of Securities and Exchange Commission (Cont'd)

for that purpose shall preside at the hearings in such matter. The officer so designated to preside at any such hearing is hereby authorized to exercise all powers granted to the Commission under Section 18(c) of said Act and to a trial examiner under the Commission's Rules of Practice.

IT IS FURTHER ORDERED that, without limiting the scope of the isues presented in the consolidated proceedings, particular attention will be directed at the hearing to the following matters and questions:

1. Whether the plan, as proposed or as modified, is necessary to effectuate the provisions of Section 11(b) of the Act and is, in all respects, fair and equitable to the persons affected thereby.

2. Whether the proposed retirement of the $5, $5.50 and $6.00 Preferred Stocks of Engineers at $100 per share plus accrued dividends without payment of any amount in excess thereof is necesary to effectuate the provisions of Section 11(b) and fair and equitable to the persons affected thereby, and, if not, what payment for the retirement of such preferred stocks would be fair and equitable.

3. Whether the securities proposed to be issued by El Paso and Gulf States meet the requirements of Section 7 of the Act.

4. Whether the proposed issuance of a $3,000,000 bank note and the proposed issuance of warrants by Engineers are necessary to effectuate compliance with Section 11(b) and conform with the standards of Section 7.

5. Whether the plan should be modified to include a provision for the payment by Engineers of all fees and expenses by whomsoever incurred in connection with said plan or the proceedings with respect thereto which the Commission may determine, award, allow or allocate and whether the fees and expenses to be paid in connection with the consummation of

Exhibit A to Application of Securities and Exchange Commission (Cont'd)

the plan and all transactions incidental thereto are for necessary services and are reasonable in amount.

6. Whether the accounting entries in connection with the proposed transactions are in conformity with the standards of the Act and the Rules promulgated thereunder.

7. Whether, in the event the Commission shall approve such plan as filed or modified, the Commission shall approve such plan for purposes of Section 11(d) of the Act so as to permit the Commission on its own motion and irrespective of request therefor on the part of Engineers, to apply to a court for enforcement of such plan pursuant to Section 11(d), or whether, in the event that the Commission shall not approve such plan as filed or as modified, a plan proposed by the Commission or by any person having a bona fide interest in the reorganization of Engineers should be approved by the Commission for purposes of Section 11(d), and, if proposed by the Commission, what the terms and provisions of such plan should be.

8. Whether, if the transactions proposed are authorized by the Commission, it is appropriate in the public interest and in the interest of investors and consumers that any terms and conditions be imposed in connection with such authorization and, if so, what such terms and conditions should be.

9. Generally, whether the proposed plan and all transactions incidental thereto are, in all respects, in the public interest and in the interest of investors and consumers and consistent with all applicable requirements of the Act and the Rules thereunder.

It is Further Ordered that jurisdiction be reserved to separate, either for hearing, in whole or in part, or for disposition, in whole or in part, any of the issues, questions or matters herein set forth or which may arise in

Exhibit A to Application of Securities and Exchange Commission (Cont'd)

these proceedings or to consolidate with these proceedings other filings or matters pertaining to the subject matter of these proceedings, and to take such other action as may appear conducive to an orderly, prompt and economical disposition of the matters involved.

IT IS FURTHER ORDERED that notice of this hearing be given to Engineers, El Paso and Gulf States and to all other interested persons, said notice be given to Engineers, El Paso and Gulf States by registered mail and to all other interested persons by publication in the Federal Register.

IT IS FURTHER ORDERED that Engineers give notice of this hearing to all its stockholders of record by mailing a communication giving the date, hour and place of hearing to each of said persons at his last known address at least 15 days prior to the date of the hearing and also advising that the company will, if requested, furnish copies of this Notice and Order for Hearing to said persons.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(SEAL)

Exhibit B to Application of Securities and Exchange Commission.

SECURITIES AND EXCHANGE COMMISSION
Philadelphia

HOLDING COMPANY ACT OF 1935
Release No. 7041

IN THE MATTER
of
ENGINEERS PUBLIC SERVICE COMPANY
File No. 54-132
EL PASO ELECTRIC COMPANY
File No. 70-1149
GULF STATES UTILITIES COMPANY
File No. 70-1150
(Public Utility Holding Company Act of 1935)

Findings and Opinion of the Commission

SIMPLIFICATION OF HOLDING COMPANY SYSTEM

Plan Under Section 11(e)—Necessity

Where a plan under Section 11(e) of the Act provides for liquidation of holding company through sale of portion of portfolio by means of warrants and distribution of balance *pro rata* among common stockholders with eventual dissolution of holding company, *held,* that plan is "necessary" to effectuate the provisions of Section 11(b) within the meaning of Section 11(e) of the Act.

Where after distribution and sale of its portfolio, holding company will remain with a single subsidiary and serve no useful purpose, *held,* that holding company would unnecessarily complicate the structure of the holding company system under the standards of Section 11(b)(2) and that a

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

plan submitted under Section 11(e) for liquidation and dissolution of the holding company is "necessary" to effectuate the provisions of Section 11(b) within the meaning of Section 11(e) of the Act.

Where Section 11(e) plan for liquidation of holding company provides that a portion of the funds needed to complete the plan will be obtained by means of bank loan, and where it appears that such loan will delay compliance with the Act and that funds can be obtained from other sources without such delay, *held,* that provision for bank loan is not "necessary" to effectuate the provisions of Section 11(b) and cannot be approved.

Where Section 11(e) plan provides that holding company serving no useful purpose will dissolve immediately but will continue for an indefinite period as a trusteeship during which time it will hold a substantial portfolio of securities and function as a registered holding company and where under the circumstances it does not appear that there is adequate justification for delaying compliance with the Act, *held,* that the trusteeship as proposed is not "necessary" to effectuate the provisions of Section 11(b) and cannot be approved.

Plan Under Section 11(e)—Fairness and Equity

Where plan under Section 11(e) provides that on liquidation of holding company to comply with Section 11(b) the preferred stock will be retired at the charter-involuntary liquidation price, *held,* that the plan is unfair and inequitable to persons affected thereby and cannot be approved where the fair investment value of the preferred stock, apart from the process of liquidation under the Act, is in excess of that price.

Plan Under Section 11(e)—Fees and Expenses

The Commission has jurisdiction over the payment of fees and expenses incurred in connection with Section 11(e)

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

plans and a plan failing to provide for Commission supervision of such fees and expenses cannot be approved.

APPEARANCES:

WILLIAM E. TUCKER, of Mudge; Stern, Williams & Tucker of New York City, for the Applicants.

LAWRENCE R. CONDON and FREDERICK ZAZOVE, of New York City, on behalf of T. W. Streeter and other preferred stockholders of Engineers.

FRANCIS H. SCHEETZ, PHILIP H. STRUBING, ARTHUR H. CLEPHANE, and EVANS, BAYARD & FRICK of Counsel, of Philadelphia, Pa., representing the Home Insurance Company and other holders of preferred stock of Engineers.

BERNARD S. KANTON, for the Public Utilities Division of the Commission.

Engineers Public Service Company ("Engineers"), a registered holding company, has filed a voluntary plan for our approval under Section 11(e) of the Public Utility Holding Company Act of 1935. The plan has been presented as a method of effectuating compliance with the requirements of Section 11 of the Act and with the previous orders of this Commission issued pursuant to Section 11 (b)(1).[1]

In summary, Engineers proposes under the plan to dispose of the common stock of its wholly owned subsidiary, Gulf States Utilities Company ("Gulf States"), by offering the stock to its common stockholders under a warrant program; to distribute as a liquidating dividend the common stock of its wholly owned subsidiary, El Paso Electric Company ("El Paso"); to retire its own outstanding preferred stock at $100 per share and accrued dividends; to

[1] *Engineers Public Service Co.*, 12 S. E. C. 41 (1942) and 12 S. E. C. 268 (1942). See also 9 S. E. C. 764 (1941) and 10 S. E. C. 904 (1941) for earlier proceedings.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

go through the statutory processes of dissolution but continue for an indefinite period as a trusteeship; and at the end of such trusteeship, to distribute its remaining assets to its common stockholders.

Hearings on the plan were held at which all interested persons were given an opportunity to participate. Briefs were submitted and we heard oral argument. Certain features of the plan have been objected to by representatives of the preferred stockholders and by the staff of the Public Utilities Division of the Commission. The findings which follow are made on the basis of the complete record before us.

General Description of the System

Engineers was organized in 1925 as a Delaware corporation. It has outstanding the following securities:

143,951 shares of $5.00 Dividend Convertible Preferred Stock, Cumulative, without par value,[2]

183,406 shares of $5.50 Cumulative Dividend Preferred Stock, without par value,[3]

65,098 shares of $6.00 Cumulative Dividend Preferred Stock, without par value, and

1,909,968 shares of Common Stock, having a par value of $1.00 per share.

All three series of preferred have a stated value of $100.00 per share and share *pari passu* in assets in liquidation. Under the charter provisions they are entitled to receive $100.00 per share, plus accrued dividends, in involuntary liquidation; on redemption or voluntary liquidation the $5.00 series is entitled to $105.00 per share, plus accrued dividends, and the $5.50 and $6.00 series are en-

[2] The conversion feature expired on June 30, 1938.

[3] At issuance the $5.50 series carried an attached warrant giving the holder the right to buy one share of Engineers' common at $68.00 per share. The warrant rights expired before any were exercised.

titled to $110.00 per share, plus accrued dividends. There is no corporate debt outstanding and there are no preferred dividend arrearages. Each share of common stock has one vote. The preferred stock has no voting rights except in statutory proceedings or when eight quarterly dividends have been passed, in which case by plurality vote the preferred stockholders as a class may elect one less than a majority of the Board of Directors.

Appendix A contains Engineers' corporate and consolidated balance sheets as at June 30, 1945, giving effect to operations from July 1, 1945, to December 31, 1945, and corporate and consolidated income statements for the twelve months ended June 30, 1945.

Engineers' principal assets at the present time consist of 99.8% of the common stock of Virginia Electric & Power Company ("Virginia"), and all of the common stocks of El Paso and Gulf States.[4] These three subsdiaries operate in the states of Virginia, West Virginia, North Carolina, Louisiana, New Mexico, and Texas, while Engineers exercises control and renders supervisory services from its principal office in New York. A mutual service company, Epsco, Inc., is used by all the companies and they share its cost.

Virginia

In 1944 Virginia Public Service Company was merged with Virginia. The company is engaged principally in the business of generating and purchasing electric energy and of transmitting, distributing and selling it at retail and wholesale in approximately 990 communities and surrounding areas located in eastern and central Virginia, northeastern North Carolina and east central West Virginia and hav-

[4] When the plan was filed, Engineers also owned securities of Western Public Service Company (Delaware). These securities were disposed of by sale in February 1946, during the pendency of these proceedings, and the cash proceeds are now included in the company's treasury. *Engineers Public Service Co.*, ... S. E. C. ..... (1946)., Holding Company Act Release No. 6420.

ing a population of about 1,694,000. The principal communities served are: Richmond, Norfolk, Portsmouth, Alexandria, Petersburg and Charlottesville. Virginia's transportation business was sold in 1944 and 1945. It also operates a manufactured gas business in Norfolk, South Norfolk, Newport News and Hampton, Virginia. Our orders requiring the disposition by Engineers of the Virginia gas properties are presently pending on certiorari before the United States Supreme Court.[5]

Plant and Property

The utility plant and property as at June 30, 1945, was carried at $135,370,856 which, together with applicable reserves, was classified in the following manner:

TABLE I

Utility Plant and Property		
Electric and common plant, at original cost		$118,619,541
Gas plant, at cost[6]		5,513,847
Acquisition adjustments, Account 100.5[7]		11,237,468
Total utility plant and property		$135,370,856
Reserves:		
Depreciation reserve	$18,658,749	
Reserve for amortization of plant acquisition adjustments	2,221,265	20,880,014
Net utility plant and property		$114,490,842

As noted in the above table, the electric and common plant, at original cost, and the gas plant, at cost, amounted

[5] *Engineers Public Service Co.*, 12 S. E. C. 41 (1942) and 12 S. E. C. 268 (1942); aff'd in part and reversed in part, 138 F. 2d 936 (Ct. App. D. C., 1943), cert. granted, 322 U. S. 723 (1944).

[6] In September 1945 original cost studies for gas properties were filed with the State Regulatory Commission increasing plant acquisition adjustments by $93,374.

[7] Provision is being made, pursuant to orders of regulatory Commissions, for the amortization of plant acquisition adjustments by charges to income over a 15-year period commencing in 1943.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

to $124,133,388, against which there is a depreciation reserve of $18,658,749 (or 15%), leaving adjusted net utility plant and property of $105,474,639.

Capitalization and Surplus

The capitalization and surplus of Virginia as of June 30, 1945, is shown below:

TABLE II

	Amount	%
Funded debt:		
First and refunding mortgage bonds, Series E, 2¾% due 1975	$ 59,000,000	47.7
Notes payable, due 1946-1954	12,715,000[8]	10.3
Total funded debt	$ 71,715,000	58.0
Preferred Stock, $5.00 dividend ($100 par)	$ 28,947,100	23.4
Common Stock, no par, 2,938,445 shares	$ 13,546,555	10.9
Capital surplus	1,031,324	.8
Earned surplus	8,479,016[9]	6.9
Common Stock and Surplus	$ 23,056,895	18.6
Total capitalization and surplus	$123,718,995	100.0

Earnings.

Virginia's earnings and pertinent ratios for the twelve months ended June 30, 1944, and for the twelve months ended June 30, 1945, are as follows:

[8] On December 31, 1945, $1,135,000 due currently was paid together with $5,100,000 of notes paid in advance of maturity, leaving outstanding on that date notes amounting to $6,480,000. On July 3, 1946, we granted an application to sell $6,500,000 of 1¾% notes to mature serially from February 1, 1947 to August 1, 1956, proceeds to be used to retire all notes then outstanding and to make capital additions. *Virginia Electric & Power Co.*, Holding Company Act Release No. 6763, July 3, 1946.

[9] Under the terms of the indenture securing the Series E Bonds, earned surplus as of June 30, 1945, was restricted as to dividends on the common stock in the amount of approximately $6,593,000.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

TABLE III

	Twelve Months Ended June 30	
	1944	1945
Gross income [10]	$ 6,946,611	$10,342,109
Income deductions		
Interest and amortization	$ 2,030,247	$ 2,916,036
Amortization of plant acquisition adjustments	209,985	693,168
Total income deductions	$ 2,240,232	$ 3,609,204
Net income	$ 4,706,379	$ 6,732,905
Preferred dividend requirements	1,189,992	1,447,348
Balance for common stock	$ 3,516,387	$ 5,285,557
Ratio of gross income to:		
Total income deductions	3.10	2.87
Total income deductions and preferred dividend requirements	2.03	2.05

Gulf States

Gulf States is engaged principally in the business of generating and purchasing electric energy and transmitting, distributing and selling it at retail and wholesale in an area in southeastern Texas and southwestern Louisiana comprising approximately 27,500 square miles and serving an estimated 581,000 people. The principal cities served are Beaumont, Port Arthur, and Orange, Texas; and Baton Rouge and Lake Charles, Louisiana. The company also

[10] Gross income is shown after deduction of special charges in lieu of Federal taxes on income arising from premiums and expenses on redemption of bonds and losses on sale of transportation properties. Such special charges amounted to $2,091,177 in the twelve months' period ended June 30, 1944, and $4,424,813 in the twelve months' period ended June 30, 1945. The inclusion of special charges in income deductions would result in the following ratios:

	Twelve Months Ended June 30	
	1944	1945
Ratio of gross income before deductions of special charges to:		
Total income deductions	2.69	1.84
Total income deductions and preferred dividend requirements	1.64	1.56

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

supplies steam to two industrial consumers and natural gas is purchased and distributed in Baton Rouge, Louisiana, and vicinity. Our order of September 16, 1942, required Engineers, if it determined to retain Gulf States as its principal system, to dispose of Gulf States' gas business, and of a water and an ice business which it also operated.[11] The ice business has been sold, but no action has been taken to dispose of the water or the gas business.

Plant and Property

Attached hereto as Appendix B is the condensed balance sheet of Gulf States as at June 30, 1945.

The utility plant and property at that date was carried at $64,476,718 which, together with applicable reserves, was classified in the following manner:

TABLE IV

Utility Plant and Property		
Electric plant, at original cost		$ 56,761,267
Other utility plant at cost		4,485,274
Electric plant acquisition adjustments Account 100.5 [12]		750,989
Common utility plant acquisition adjustments Account 108.15 [12]		2,479,188
Total utility plant and property		$ 64,476,718
Less		
Depreciation reserve	$11,859,127	
Reserve for amortization of plant acquisition adjustments	807,553	12,666,680
Net utility plant and property		$ 51,810,038

[11] See note 5, *supra*.

[12] Pursuant to an order of the Federal Power Commission, the company is providing a reserve for amortization of plant acquisition adjustments by charges to income over a 15-year period beginning January 1943. The company may, at its option, accelerate the charges to income and credits to the reserve for amortization of plant acquisition adjustments by utilizing certain anticipated reductions in taxes arising from the amortization of emergency facilities.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

As noted in the above table, the electric and other utility plant at original cost and cost, respectively, amounted to $61,246,541 as at June 30, 1945, against which there was a reserve for depreciation of $11,859,127 (or 19.4%), leaving a net electric and other utility plant of $49,387,414.

Capitalization and Surplus

The capitalization and surplus of Gulf States as at June 30, 1945, is shown below:

TABLE V

	Amount	%
Funded debt		
Mortgage bonds, 3½%, due 1969	$27,300,000[13]	51.5
Preferred Stock		
$4.40 cumulative dividend, par $100	$12,000,000	22.7
Premium on preferred stock	$ 306,870	0.6
Common stock and surplus		
Common stock, no par, 280,000 shares	$11,101,125	20.9
Earned surplus	2,268,625	4.3
Total common stock and surplus	$13,369,750	25.2
Total capitalization and surplus	$52,976,620	100.0

The proposed plan provides as a condition precedent that the presently outstanding 280,000 shares of no par value common stock will be reclassified into 1,009,968 of no par value common stock with no change in the capital account.

Earnings

Attached hereto as Appendix C is the income statement of Gulf States for the twelve months ended June 30, 1945.

[13] This issue was recently refunded by the issuance of $27,000,000 principal amount 2¾% mortgage bonds due 1976 and $2,000,000 principal amount of 10 year 1¾% serial notes. See *Gulf States Utilities Co.*, ... S. E. C. ..... (1946), Holding Company Act Releases Nos. 6700 and 6720. This refunding is not reflected in any of the financial data in the record or in these Findings.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

The earnings and pertinent ratios for the periods ended June 30, 1944 and June 30, 1945, are as follows:

TABLE VI

	Twelve Months Ended June 30,	
	1944	1945
Gross income	$3,862,033	$4,262,475
Income deductions		
Interest and amortization	$1,210,289	$1,014,877
Amortization of plant acquisition adjustments	193,810	193,810
Total income deductions	$1,404,099	$1,208,687
Net income	$2,457,934	$3,053,788
Preferred dividend requirements	584,968	560,917
Balance for common stock	$1,872,966	$2,492,871
Ration of gross income to:		
Total income deductions	2.75	3.53
Total income deductions and preferred dividend requirements	1.94	2.41
Earned per share (on basis of reclassification of 1,909,968 shares	$0.98	$1.31

Attached hereto as Appendix D are pro forma income statements for the years 1939 through 1945 (last two months of 1945 estimated) adjusted to give effect to present fixed charges, preferred dividends and proposed number of shares of common stock.

The average earnings per share on the proposed number of shares for the periods shown in Appendix D amounted to $1.18 per share and earnings for the years 1944 and 1945 (partly estimated) amounted to approximately $1.47 per

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

share.[14] Gulf States has paid common stock dividends of approximately 50% of the balance available for common stock from 1939 through June 1945.

El Paso

El Paso is engaged in the business of generating and purchasing electric energy and distributing and selling it at retail and wholesale in the City of El Paso, Texas, and surrounding territory in the Rio Grande Valley in extreme western Texas and southeastern New Mexico. The company serves an estimated population of 170,000.

Plant and Property

Attached hereto as Appendix E is the condensed balance sheet of El Paso as at June 30, 1945.

The utility plant and property at the above date was carried at $12,466,430, which is stated to be at original cost. The depreciation reserve as of the above date amounted to $2,162,198 (or 17.3%), leaving net utility plant and property of $10,304,231.

Capitalization and Surplus

The capitalization and surplus of El Paso as at June 30, 1945, is shown below:

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[14] After reduction in Federal income taxes resulting from amortization of emergency facilities amounting to $84,497 in 1943, $523,102 in 1944 and $1,254,290 in 1945 (partly estimated). Before this extraordinary reduction, average earnings for the periods shown in Appendix D amounted to $1.04 per share and for the years 1944 and 1945 (partly estimated) amounted to $1.01 per share.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

TABLE VII

	Amount	%
Funded debt:		
Mortgage bonds, 3¼% due 1970	$ 6,500,000[15]	51.5
Notes payable, 2¼% due 1946-47	280,000	2.2
Total funded debt	$ 6,780,000	53.7
Preferred stock:		
$4.50 cumulative dividend, no par, 15,000 shares	$ 1,500,000	11.9
Premium on preferred stock	$ 33,750	0.3
Common stock and surplus:		
Common stock, no par, 150,000 shares	$ 3,848,692	30.4
Earned surplus	462,063	3.7
Total common stock and surplus	$ 4,310,755	34.1
Total capitalization and surplus	$12,624,505	100.0

The proposed plan provides as a condition precedent that the presently outstanding 150,000 shares of no par value common stock will be reclassified into 381,994 shares of no par value common stock with no change in the capital account.

Earnings

Attached hereto as Appendix F are income statements of El Paso for the twelve months' period ended June 30, 1945. The earnings and pertinent ratios for the twelve months' periods ended June 30, 1944, and June 30, 1945, are as follows:

[15] This issue has been recently refunded by the issuance of $6,000,000 principal amount 2¾% mortgage bonds due 1976. *El Paso Electric Co.*, ... S. E. C. ..... (1946), Holding Company Act Release No. 6944. This refunding is not reflected in any of the financial data in the record or in these Findings.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

TABLE VIII

	Twelve Months Ended June 30 1944	1945
Gross income	$834,055	$923,449
Interest and amortization	259,055	239,047
Net income	$575,000	$684,402
Preferred dividend requirements	67,501	67,501
Balance for common stock	$507,499	$616,901
Ratio of gross income to:		
Interest and amortization	3.22	3.86
Interest, amortization and preferred dividend requirements	2.55	3.01
Earned per share (on the basis of the proposed reclassification to 381,994 shares)	$ 1.33	$ 1.61

The present dividend rate on the common stock is equal to approximately $1.00 per share of common stock, based on the proposed number of shares to be outstanding. This would amount to $381,994 annually or approximately 60% of the earnings for the twelve months' period ended June 30, 1945.

Prior Proceedings

Integration proceedings under Section 11(b)(1) of the Act were instituted with respect to Engineers and its subsidiaries in 1940. On July 23, 1941, the Commission issued an order in those proceedings directing Engineers to dispose of its interest in The Key West Electric Company and in Puget Sound Power and Light Company.[16] On December 29, 1941, the Commission issued a further order directing Engineers to dispose of its interest in Missouri Service Company, The Northern Kansas Power Company, and The Western Public Service Company.[17] These orders have been fully complied with. On September 16, 1942, and October 6, 1942, the Commission issued further orders

[16] 9 S. E. C. 764.
[17] 10 S. E. C. 994.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

directing Engineers to dispose of all of its remaining holdings except Virginia or Gulf States, giving the company 15 days within which to choose between those two companies as its principal system, and designating Virginia as the principal system if the company failed to make a choice. The orders also provided that if Virginia is retained it must dispose of its gas and transportation properties.[18] Engineers has complied with the 1942 orders to the extent of disposing of all the holdings ordered to be divested except those in Gulf States, El Paso and Virginia and, with respect to the latter two companies, it has disposed of their transportation properties. Engineers filed a petition with the United States Court of Appeals for the District of Columbia for review of the 1942 orders and on November 22, 1943, the Court set those orders aside and remanded the case to the Commission for further proceedings in accordance with its opinion.[19] Both Engineers and the Commission thereupon applied to the Supreme Court of the United States for writs of certiorari, which were granted.[20] The decision of the Supreme Court has been delayed for lack of a quorum.

Since 1939 and during the pendency of the proceedings described above, Engineers has on several occasions endeavored to repurchase a portion of its outstanding preferred stock. In 1939 and again in 1941 we approved repurchase of 7,000 shares and 5,000 shares, respectively, by a call for tenders or by purchases in the open market. On both occasions the preferred stocks were selling within a range of 69 to 87¾ and the money used to effect the purchase program had been obtained from the sale or retirement of a portion of Engineers' holdings in its sub-

[18] 12 S. E. C. 41 and 12 S. E. C. 268.
[19] 138 F. 2d 936 (1943).
[20] 322 U. S. 723 (1944).

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

sidiaries.[21] However, in 1943, when it had become apparent that substantial readjustments would be necessary within the Engineers system to bring it into compliance with the Holding Company Act, we denied a request by the company to repurchase 35,000 shares on the same terms. At that time the stocks were selling within a range of 61 to 74. We found the proposed repurchases would be unfair since there was no reasonable relationship between the prices to be paid and the treatment the preferred would receive under a comprehensive plan for compliance with the Act.[22] By 1944 the market prices had risen and 25,560 shares were retired with our approval at an average price of over $99.00.[23] No other shares have been retired, although Engineers has accumulated a substantial balance of treasury cash.

Provisions of the Amended Plan

The plan as amended is segregated into two parts. A separate order has been requested by Engineers for each part.

Gulf States and El Paso have also filed declarations under Section 7 of the Act which provide for the following transactions to be consummated prior to the effectiveness of Part I of the plan:

(a) Reclassification of the 150,000 shares without par value of El Paso, being all of the authorized and issued common stock, into 381,994 shares.

(b) Reclassification of the 280,000 shares of common stock without par value of Gulf States, being all of the issued common stock (there being 20,000 shares of such

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[21] See *Engineers Public Service Company*, 4 S. E. C. 615 (1939) and 9 S. E. C. 84 (1941).

[22] *Western Public Service Co., et al.*, 12 S. E. C. 804 (1943).

[23] *Engineers Public Service Company*, S. E. C. (1944), Holding Company Act Release No. 4997 and Holding Company Act Release No. 5814 (1945).

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

common stock authorized but unissued) into 1,909,968 shares.[24]

Part I of the plan provides for the following transactions:

1. Engineers proposes to borrow from a bank the sum of $3,000,000 at an annual interest rate of approximately 1½%. The loan is to be evidenced by a two-year note payable $750,000 semi-annually. The loan agreement will permit the borrowing of additional amounts, if needed, in order to carry out the plan.[25] The agreement will provide that until the loan has been fully repaid Engineers shall not pay any dividends in cash on its common stock or make any distributions other than those provided in the plan.

2. Engineers will issue warrants to its common stockholders as of a record date evidencing the right to purchase from Engineers, at a subscription price of $11.50 per share, one share of Gulf States common stock for each share of Engineers common stock held. The subscription price will be payable in cash or by exchanging whole shares of Engineers preferred stock (which the common stockholder may hold) at the rate of $100.00 per share, plus accrued dividends, with a cash payment for the difference. Any common stockholder who surrenders preferred stock in payment of the subscription price will be entitled to receive, in respect to such surrendered shares, any amount in addition to $100.00 which is found to be payable to the preferred stock on its retirement. The warrants must be exercised on or before a specified date which will be ap-

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[24] The proportionate voting power of the preferred stockholders of Gulf States will be preserved by giving them seven votes for each share held.

[25] Additional amounts up to $4,500,000 may be borrowed on the same terms, except that repayment of the additional amounts is not to commence until the first loan has been repaid in full. Under the plan it is anticipated that this additional amount might be needed if the preferred is to be paid more than $100.00 per share and accrued dividends.

proximately 10 days after the mailing of the warrants.[26] Each warrant will be registered in the name of the common stockholder and will be transferable on the books of Engineers. The warrants will be issued and distributed without the surrender by the common stockholders of their common stock. Engineers will sell the shares of Gulf States common stock represented by unexercised warrants promptly after the expiration date and in such manner as the Board of Directors of Engineers deems to be in the interests of Engineers, subject to the obtaining of requisite regulatory approvals. Upon the mailing of the warrants, Part I of the plan is to be deemed effective. However, Engineers will reserve the right to withhold the mailing of the warrants in the event that, in its opinion, market conditions are such as to render it inadvisable to proceed with their issuance.[27]

3. Engineers will deposit in trust with a bank or trust company an amount equal to $100.00 per share, plus accrued dividends, for each outstanding share of Engineers preferred stock not surrendered in exchange for Gulf States common stock under the provisions outlined in paragraph 2 above. Five days prior to such deposit, notice will be given to the preferred stockholders stating that, upon surrender of the preferred stock certificates, the preferred stockholders will be paid $100.00 per share, plus accrued dividends. The right of the preferred stock to dividends will cease on the date of the deposit. Thereafter, the only right remaining to the registered holder of a preferred stock certificate will be the right to receive such additional amount, if any, as is determined to be payable in retirement as provided in Part II of the plan. It is estimated

[26] It was indicated at the hearing that this period would be increased to 15 days.

[27] An original proposal to list the warrants on the New York Stock Exchange on a "when issued" basis was abandoned when it was learned that the Exchange would probably not permit listing as long as the company reserved the right to withhold mailing the warrants.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

that approximately $39,245,500, plus an amount equal to accrued dividends, will be deposited to retire the preferred on this basis. This sum will be obtained from the sale of Gulf States common stock through warrants, treasury cash, and the bank loan. On the date the deposit is made the certificate of incorporation will be amended to reflect the complete elimination of the preferred from the capital of the company.

4. Engineers will distribute as a dividend in partial liquidation its portfolio holdings of common stock of El Paso *pro rata* to the common stockholders of Engineers, on the basis of ⅕ of a share of El Paso common stock for each share of common stock of Engineers. Scrip will be issued in lieu of fractional shares. The scrip will not be entitled to dividends or voting rights. When combined in lots aggregating one or more full shares of stock, the scrip may, up to the date of sale of such shares of stock, be exchaged for full shares, together with any dividends which have been paid on the stock. Engineers will undertake to provide facilities for the exchange of scrip for a period of approximately two years after the effective date of Part I. At the expiration of that time, all shares which shall not have been issued or delivered will be sold by the transfer agent, who shall, as soon as possible thereafter, distribute to the record holders of the scrip their proportionate share of the proceeds of the sale and any dividends, after subtracting the costs of the sale.

5. Engineers' holdings in Virginia, which are to be retained for an estimated period of three years under the trusteeship described in paragraph 7, *infra*, will provide a reserve for any payment in addition to $100.00 per share and accrued dividends to which Engineers preferred stockholders shall be found entitled.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

6. Epsco., Inc., a mutual service company for the Engineers holding company system, will cancel its service contracts with Engineers, Virginia, El Paso and Gulf States.

7. Within 60 days after the plan becomes effective (that is, within 60 days after the mailing of the Gulf States warrants), the company shall go through the necessary statutory processes of dissolution and the company shall be deemed dissolved. It is proposed, however, that Engineers will continue as a body corporate for the purpose and term specified under Section 42 of the general corporation law of Delaware for an estimated period of three years unless at the end of that time there is unfinished litigation. This will establish a trusteeship, consisting of the Board of Directors at the time of dissolution, who will liquidate the company and settle its unfinished business. The trustees will be authorized to fill vacancies that occur by a vote of one-third of the trustees then in office. In paying the debts of the company, the trustees will be directed, in so far as possible, not to use the common stock of Virginia, which is to be retained to the end that the final liquidation of Engineers shall be accomplished by the distribution *pro rata* among its common stockholders of as many shares as possible of the common stock of Virginia. The trustees are empowered to borrow funds needed to effectuate the plan.

Part II of the plan requests that the Commission issue a separate order finding that it is fair and equitable that no amount in addition to $100.00 per share and accrued dividends be paid the Engineers preferred stockholders upon retirement. However, it is provided that, if the Commission finds and orders that some additional amount shall be paid to the preferred stockholders of Engineers, then Part II of the plan will become "automatically amended" so as to provide that Engineers shall pay its preferred

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

stockholders the additional amount specified by the Commission. Engineers reserves the right to contest such additional payments before the Commission and in court or to petition for a review of any such order.

The following conditions are expressly established for the effectuation of Part I of the plan:

1. Reclassification of the common stock of Gulf States and El Paso.

2. Approval by this Commission of the plan.

3. Application by the Commission to a Federal district court under the provisions of Section 11(e) of the Act for court approval of the plan; the effectiveness of the plan is conditioned upon such court approval.

4. Obtaining from the Treasury Department, unless Engineers waives this condition, of a closing agreement or ruling as to the tax consequences of the plan which shall be satitsfactory to counsel for Engineers.

5. Carrying out of any corporate action in connection with the plan which may be deemed necessary by counsel for Engineers in a manner satisfactory to such counsel.

6. Obtaining of approval from any regulatory bodies having jurisdiction of transactions under the plan.

7. Concluding arrangements to borrow the necessary funds.

8. Issuance of the Gulf States warrants.

Part II is conditioned upon Part I of the plan being consummated.

Appendix A contains Engineers' corporate and consolidated balance sheets and income statements *pro forma* giving effect to the provisions of the plan.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

Statutory Standards.

Section 11 (e) establishes a voluntary procedure whereby a registered holding company or a subsidiary may propose a plan for compliance with Section 11 (b) and present it to the Commission for approval. If the Commission approves the plan, and the initiating company so requests, the plan may be presented to a Federal district court for approval and enforcement.

Section 11 (e) sets forth the standards which we must apply in considering whether a voluntary plan can be approved. We are required to find

"1. That the plan is "necessary to effectuate the provisions" of Section 11 (b), and

2. That the plan is "fair and equitable to the persons affected" thereby.

In applying these standards to the Engineers plan, we shall indicate our views on some of the objections which have been raised against the plan.

1. *Necessity.*

As indicated above, our order of September 16, 1942, directed Engineers to dispose of its holdings in El Paso and its holdings in either Virginia or Gulf States. As to the latter, the company was given 15 days within which to choose, if it so desired, the principal system which it wished to retain. To the extent that the present plan provides for the immediate disposition of Gulf States, Engineers may be deemed to have selected Virginia as its principal system. However, the plan goes further than our order by also providing for the formal dissolution of Engineers and for the eventual distribution in liquidation of the Virginia common stock *pro rata* among the Engineers common stockholders.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

In so far as the plan proposes the disposal of El Paso and Gulf States, it is designed to comply with the express findings in our Opinion and Order of September 16, 1942, that those properties cannot be retained under the integration standard of Section 11 (b) (1) in the same system with Virginia. Accordingly, we find that the disposal of El Paso and Gulf States is necessary to effectuate the provisions of Section 11 (b).

We have consistently held that to be "necessary" a plan need not be the only possible method for complying with the Act or that each of its details must be specifically dictated by express terms in the Act. We have held that a proper construction of the "necessary" clause permits the approval of plans which provide "a suitable means of achieving results required" by Section 11 (b).[28] It is sufficient if the plan affords an appropriate means for achieving compliance with the Act even though other means might have been chosen. However, the means chosen must be designed to achieve compliance with fairness to all persons affected and as expeditiously as is possible under the particular circumstances of the case.

Engineers has produced an abundance of evidence showing that once it has disposed of El Paso and Gulf, it will have no reason to continue as a separate corporate entity for it would then be the parent of a single operating company, Virginia. In that situation, Engineers admits that it would be an "economic monstrosity" and all participants in this proceeding seem to be in agreement with that conclusion. The record does not clearly indicate what it will cost to maintain Engineers after Gulf States and El Paso have been divested. Estimates range from $172,000 to $365,000 a year. The company freely admits that Engineers could in no way justify any such continuing expendi-

[28] *The United Light and Power Company*, ... S. E. C. ..... (1945); Holding Company Act Release No. 5840; *United Public Utilities Corp.*, ... S. E. C. ..... (1946), Holding Company Act Release No. 6908.

ture. Virginia is able to undertake its own financing and service and is large enough to stand independently. Any functions Engineers might perform should more properly be carried out by Virginia's own management. We find that the presence of Engineers would unduly complicate the structure of the system and that it would, therefore, come within the prohibition of Section 11 (b) (2). Accordingly we find that the proposal to dissolve Engineers is "necessary" to effectuate the provisions of Section 11 (b) of the Act.

In finding that the major objectives of the plan—the disposition of El Paso and Gulf States and the dissolution of Engineers—are required by Section 11 (b) and are, therefore, "necessary" we do not thereby approve all of the mechanics proposed by Engineers to accomplish those objectives. As we have indicated, the plan must provide a fair and expeditious method for effectuating compliance with the Act. We cannot approve mechanics of the plan which will result in substantial delay in achieving such compliance. Although considerable latitude is permitted the company in framing a voluntary plan which is appropriate and suitable, we must also review the detailed manner in which the plan is to be performed in order to assure that the mandate of the Act that all necessary steps be taken "as soon as practicable" is being obeyed.

The staff and the preferred stockholders have raised strong objections to the provisions in the plan for a trusteeship and a bank loan. Since the bank loan is one of the asserted justifications for the trusteeship it will be considered in connection with our discussion of the trusteeship.

As has been indicated, it is proposed that within 60 days after the effective date of the plan Engineers will take steps to dissolve the corporation. However, it is also proposed that Engineers will continue as a trusteeship for a period of three years in order to pay off the bank loan and litigate the question of whether payment above the involun-

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

tary liquidation price is due the preferred. It is further proposed to retain the stock of Virginia for that period and to use its earnings for repayment of the loan; the stock itself is to serve as security both for the loan and for any additional payment which may be found due the preferred stockholders.[29] The staff contends that, under the Act, Engineers' continuance as a trusteeship in the form proposed will be no different in substance from Engineers as a corporation in its present form and that, since the three-year trusteeship would serve to delay unjustifiably the complete disappearance of Engineers required by the Act and burden the common stockholders with unnecessary additional expense, the Commission cannot approve this feature of the plan. It is pointed out, in this connection, that, although the trusteeship is patterned after the provisions of the Delaware Corporation law applying to dissolved corporations, it is not being established pursuant to it. As a consequence, the trusteeship is not limited, as it probably would be under the statute, to conducting litigation and marshaling assets. The proposed trusteeship of Engineers would continue a substantial number of the present top management of Engineers at their present salaries and would retain a substantial portfolio of securities (Virginia) with an estimated value of $65,000,000[30] which it will continue to supervise for an estimated three-year period. The record indicates that this supervision will include not only the selection of management for Virginia but the overseeing of all of the company's activities. The staff and the preferred stockholders maintain that the trusteeship in the form proposed is wholly unnecessary and is simply a device to continue the holding company in another form. It is asserted that the principal reason for

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[29] The loan agreement itself would provide that no part of Virginia could be distributed to stockholders until the loan was paid in full.

[30] Barnes, President of Engineers, testified that the value of the Virginia common stock owned by Engineers is worth, in his opinion, not less than $65,000,000.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

this feature of the plan is to be found in the personal tax problems of certain large common stockholders of Engineers; that the trusteeship is to permit accumulation of earnings within the system which will ultimately be realized by such stockholders as capital gains rather than as income.

Engineers advances the following reasons as justification for continuance of the enterprise as a trusteeship for three years: (a) That period is required to pay off the bank loan which will supply the balance needed to retire the preferred. (b) The trusteeship will conduct litigation arising over the preferred premium and will retain Virginia common as security for payment of any additional amount required. (c) Certain Federal tax problems remain unsettled and the possibility that additional liability may be found against the company for past years requires that assets be retained. (d) The income of Engineers for the period of the trusteeship would accrue as a capital gain to its stockholders when distribution is finally made and the aggregate savings of income tax during those years to individual stockholders exceed the expense of maintaining Engineers and is thus an additional reason for the trusteeship.

We have carefully analyzed each of these reasons and have come to the conclusion that they do not, individually or in sum, justify continuance of the enterprise for a three-year period and the withholding during that period of assets estimated to be worth $65,000,000 which properly belong and should be distributed to Engineers' stockholders. We discuss each of the asserted reasons in turn.

a. *The bank loan.* It is urged that adequate funds to retire the preferred can best be obtained by means of a bank loan, originally estimated at $3,000,000, to supplement treasury cash and the amount to be obtained for Gulf States, and that Virginia must be retained as security for the bank loan. In the first place, there seems to be an obvious weak-

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

ness in that portion of the argument which seeks to justify retention of $65,000,000 of Virginia assets for the purpose of securing a $3,000,000 loan. But more important, we think the bank loan is wholly unnecessary since it can easily be demonstrated that there are several other simple and feasible methods of obtaining the necessary additional cash without delaying full compliance with the Act.

Engineers has 392,455 preferred shares outstanding. Assuming that all of these will be retired at $100 per share, a total of $39,245,500 in cash is needed.[31] Retirement of the preferred at more than $100 per share will require an estimated additional $4,000,000, including expenses.[32] At the close of the hearings Engineers had on hand approximately $14,650,000 of treasury cash. The brief of applicant states that since the record was closed earnings of approximately $1,500,000 have accumulated to October 1946, while estimates in the record show that a total of approximately $2,175,000 will accumulate in 1946. We shall adopt this latter figure, which brings treasury cash at the end of 1946 to about $16,825,000. Sale of the Gulf States common by warrants at $11.50 per share, as proposed in the plan, will yield an additional $21,964,632, leaving a balance to be obtained for retiring the preferred of approximately $500,000, if no premium is required, or of approximately $4,500,000 if the additional amount is payable.[33]

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[31] To the extent that preferred shares are exchanged for the Gulf States common, fewer shares of preferred will remain to be retired for cash; but the amount of cash received from the warrants would, of course, be reduced by the same amount. Since they cancel out, we may use the full $39,245,500 figure in our discussion.

[32] The origin of this figure and its propriety is discussed later in this opinion. See page 36 [page 75a of this appendix].

[33]

Par value of Preferred	$39,245,500
Less cash end 1946	16,825,000
	$22,420,500
Less subscription price Gulf States	21,964,632
Additional cash necessary if preferred paid at $100	$ 455,868
Estimated cost of additional payments to preferred	4,000,000
Additional cash necessary if preferred paid more than $100	$ 4,455,868

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

It is apparent that if the balance needed, after treasury cash, of $26,420,000 (including $4,000,000 for payment in excess of $100) can be obtained from other sources, the bank loan will be wholly unnecessary. The Gulf States warrants were proposed to supply the major portion of the funds. In that connection the method by which the $11.50 subscription price was derived is not without significance. D. C. Barnes, President of Engineers, testified that the price was arrived at as follows: It was originally proposed to set the price at $10, an arbitrary figure, which would have resulted in a $6,000,000 bank loan. When our staff raised objections, the company halved its amount; this resulted in increasing the subscription price to $11.50.

This price of $11.50 was not intended to represent Engineers' estimate of the worth of each share of reclassified Gulf States common. According to one of Engineers' witnesses no effort was ever made to get a true valuation of the Gulf States shares. Engineers carries its investment in Gulf States at $19,914,347.[34] However, an exhibit introduced by the company compared the price-earnings ratios of four unaffiliated operating companies (having market quotations) which were deemed somewhat comparable to Gulf States for the period from 1938 to June 30, 1945. The average yield of those securities, when applied to Gulf States' earnings, showed the equity of Engineers in Gulf States to be about $29,981,000, or $15.70 per share. R. N. Benjamin, Secretary for Engineers, testified that in his opinion Gulf States common should sell somewhere between $13 and $16.50 per share, and he referred to an analysis made by a brokerage firm placing the value as high as $20 per share. Barnes was unwilling to place a value on Gulf

[34] The "tax cost" of Gulf States is $12,839,697. Any amounts received in excess of that amount will be subject to capital gains tax of 25%. However, Engineers experienced a substantial capital loss in its sale of Puget Sound which can be carried over and applied to any gain realized in the sale of Gulf States. This must occur before 1949.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

States, but he stated that while he would refuse an offer of $30,000,000 ($15.71) for the properties, he would "be interested" in an offer of $35,000,000 ($18.32). R. E. Badger, an expert witness on behalf of certain preferred stockholders, stated the value of Gulf States in his opinion to be $30,000,000.

For our purposes, it is unnecessary to appraise the value of Gulf States with any more definiteness than what is already set forth. All that is required under the plan to retire the preferred is a maximum of $26,420,000, or something less than $14 per share. The price of $14 per share is equivalent to about 8.5 times earnings for 1945 (last two months estimated), after reduction in Federal income tax resulting from amortization of emergency facilities. Before this reduction the price of $14 per share is equivalent to about 14.1 times earnings for the same period.

The only objection which Engineers has raised to increasing the warrant price is the asserted additional burden it will place on the common stockholders of Engineers who elect to exercise the warrants. Considerable evidence was introduced into the record showing the extent and size of individual holdings of Engineers common in order to prove that the burden on the individual stockholder will be great, especially when it is considered that Engineers common has sold as low as $1.25 per share in 1942. However, it should be recognized that the use of warrants is not the only method available for raising cash from the disposition of Gulf States, for there is nothing to prevent sale in the open market through competitive bidding. If the object of the warrants is to permit stockholders so desiring to maintain their position in the system companies without being subjected to an underwriting expense, it must be realized that the retirement of the preferred cannot be carried out without some expenditure, and that the expenditure in any event is only commensurate with the benefit resulting

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

to the common.[35] We consider the question of the fairness of the warrant program to the common stockholders later in this opinion.

In view of the change which has taken place in the market since the plan was first presented the management may feel that it is not presently feasible to dispose of Gulf States at a price sufficient to supply all of the cash needed to retire the preferred and we do not mean to indicate that this method is the only proper one to raise the additional cash. The plan, as filed, completely overlooks the possibility of obtaining the relatively small amount of additional cash required through the sale of El Paso stock or through the sale of some of the Virginia stock. There seems to be no reason why El Paso could not be offered to Engineers' stockholders on separate warrants or otherwise sold to raise the additional cash needed. A further alternative would be to dispose of a small quantity of Virginia for cash or possibly to revise the plan and offer Virginia, rather than Gulf States, under the warrant program. We believe that the choice of methods is best left to the discretion of the management of the company. In our view none of these methods should present any difficult or complex problems and any one of them, if properly presented, would be an acceptable solution to the company's difficulty, would enable the plan to be completed without a bank loan, and would thereby expedite compliance with the Act.

It is true that on several occasions we have approved provisions in Section 11(e) plans for bank loans, the proceeds of which were to be used for retiring the company's preferred stock. However, in each of those cases the company was to continue in operation for other reasons and we ascertain that the bank loan would in no way interfere with the ability of the company to comply expeditiously

[35] The Federal Reserve Board's recent amendment to Regulation U will permit margin purchases of up to 50% on the warrants to be issued under the plan. This will make for a substantial reduction in the cash outlay required of Engineers' common stockholders.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

with the Act.[36] On the other hand, we have been unable to find any other justification for Engineers' continuing beyond the consummation of this plan and the bank loan would only impede immediate compliance with the Act and add unnecessary expense.

We find that the bank loan is not necessary to the effectuation of a valid plan and that provision of the plan cannot be approved. And since we find the bank loan unnecessary, we must of course reject any argument which attempts to justify the proposed three-year trusteeship on the basis of the loan.

b. *Conduct of litigation and security therefor.* It is argued that the trusteeship is required in order to conduct any litigation arising over the amount payable to the preferred on retirement and that Virginia must be retained as security for any payment in addition to $100 and accrued dividends which may be found due. We cannot agree. It appears that the state law makes adequate provision for conducting litigation on behalf of a dissolved corporation and there would seem to be no need for retaining a large staff of Engineers for that purpose. In addition, it should be pointed out that the District Court having jurisdiction over the plan will also have adequate power to assure that the interests of the corporation are protected in any proceedings which may continue beyond the consummation of the plan.

We do agree on the necessity for a provision to assure the availability of assets to pay any excess over $100 which is found to be due the preferred stock. But we cannot accept the argument that $65,000,000 of Virginia stock is necessary as security for the $4,000,000 in dispute. And there is no reason why security for this $4,000,000 cannot be provided by an escrow arrangement, which will require

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[36] See e. g. *Cities Service Co. et al.*, ... S. E. C. ..... (1944), Holding Company Act Release No. 4944; *Electric Bond & Share Co. et al.*, ... S. E. C. ..... (1946), Holding Company Act Release No. 6879-1.

retention of only that amount. We have in other cases approved such arrangements in similar situations.[37] We think a suitable escrow can easily be devised; the details of such an escrow are the subject of discussion later in this opinion. See p. 36 *infra* [page 75a of this appendix]. We conclude, therefore, that there is no validity in this asserted justification for the three-year trusteeship as proposed.

c. *Unsettled tax problems.* During the hearings Engineers attempted to justify the trusteeship principally by the bank loan and the possibility of litigation over the payment due the preferred. It was only when briefs were submitted and at oral argument that an additional reason was advanced. It is asserted that there are unsettled Federal tax questions arising from returns filed in past years on which possible liability may accrue. These returns are currently under review by the Treasury Department.

An examination of the record in the light of this claim reveals little testimony as to Engineers' tax situation and does not disclose with any definiteness the nature of the liability which might result. It does appear that, during the years 1940 to 1945, Engineers filed consolidated returns with certain of its system companies for all or part of that period. Except for El Paso and Virginia, these companies have either been sold or dissolved, and Engineers, as parent of the group, maintains that it may be primarily liable for any tax deficiencies which may emerge from an examination of the returns by the Treasury Department for the years subsequent to 1943. In addition, it appears that Engineers has claimed excess profits tax refunds for the calendar years 1942 and 1943, aggregating nearly $5,000,000, which have not yet been acted upon by the Treasury Department. While the record contains some testimony concerning the rebate, there is a dearth of evidence bearing on possible tax liabilities, or their extent, or as to the

[37] See *The United Light and Power Co., et al.*, 10 S. E. C. 1215 (1942).

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

estimated time required for their settlement. When pressed at oral argument for a more definite statement of these possible additional tax liabilities, counsel for Engineers was unable to make one.

In the present state of the record, the claim of possible tax liability and even the limits of such claim are wholly indefinite. We certainly cannot find that such a claim justifies the three-year trusteeship, retention of all of Virginia, and a failure to comply with the Act for that period of time. Engineers, if it so desires, may establish a reserve of appropriate amount, to be administered through escrow or otherwise, to take care of any liability which may be found. There would certainly be no need to retain $65,000,000 of Virginia stock for this purpose or to continue in office for three years a large part of the present management of the company at present full-time salaries as provided in the plan.

The brief for Engineers indicates that "it might not be deemed necessary to hold all of the common stock of Virginia for this purpose as protection, but the Engineers' directors would undoubtedly not desire to distribute as much as 5% of the Virginia common stock, for such distribution would make it impossible for Engineers and Virginia to file consolidated returns (at least 95% ownership being required for such purposes), and Engineers would then become subject to tax on the dividends received from the balance of the Virginia common stock".[38] Although it is not possible to estimate what this tax would be without some knowledge of the size of the reserve required, the taxes which might result should be compared with savings resulting from the immediate distribution of the balance of Virginia, i.e., substantially all of the cost of maintaining Engineers as a separate entity would be

[38] Brief for Engineers, filed August 19, 1946, at p. 36 [page 75a of this appendix].

saved,[39] and it would be unnecessary to pay the 2% tax on income for the privilege of filing consolidated returns. Even if the balance were in favor of continuing to file consolidated returns, it does not appear that the amount of the difference would be sufficiently large to warrant a continuing of the trusteeship in the form proposed.

d. *Tax savings to certain stockholders.* Finally, it is urged that the trusteeship would result in substantial tax savings to individual stockholders of Engineers. If the company were to borrow money to retire the preferred and repay the loan from earnings of Virginia retained for the period of the trusteeship, the resulting increase in the asset value attributable to each share of common stock would be a capital gain to the stockholder. On the other hand, if the preferred is retired with money received from sources other than earnings, and the Virginia stock is distributed immediately, the earnings of Virginia distributed as dividends become taxable immediately as dividend income to the stockholder at rates determined by each stockholder's individual circumstance. It is impossible to ascertain how much difference this would make to the stockholders as a whole, but we can agree that it would impose substantial additional taxes on those of the Engineers' stockholders who are in the higher surtax brackets. It should be noted, however, that this argument is primarily applicable to those Engineers' common stockholders who are in the tax brackets in which there is a significant difference between the tax rate on a capital gain and the tax rate on income.[40] To those of the Engineers' common stockholders who are not in those tax brackets, it would seem more desirable to obtain immediate distribution of their pro rata share of Virginia and immediate receipt of Virginia divi-

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[39] See discussion of these expenses at p. 18, *supra* [p. 51a of this appendix].

[40] 338 common stockholders own 72.54% of the common stock and 1308 stockholders own 84.77%, while the balance of 15.23% is divided among 12,083 stockholders.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

dends. Under the plan Engineers' common stockholders would not only not receive Virginia dividends directly but under the terms of the bank loan could not be paid any dividends by Engineers during the existence of the loan.

We have always recognized the importance of tax considerations in Section 11(e) proposals. We have sought to cooperate in achieving that type of rearrangement which imposes the least tax burden on the company and the security holders, so long as the choice does not result in frustrating the Act or in delaying attainment of its objectives. We have found that the continued existence of Engineers would unduly complicate the system. The Act requires that unnecessary entities be eliminated "as soon as practicable."[41] Under these circumstances, the desire of stockholders to withhold income and thereby realize capital gains cannot justify ignoring the plain dictates of the Act.

Conclusion on Necessity

For the reasons indicated, we find that the provisions of the plan providing for the disposition of Gulf States and El Paso and the dissolution of Engineers are "necessary" under the standards of the Act; we find that the provisions for a bank loan and a trusteeship are not "necessary" under the standards established by Section 11(e) of the Act, and cannot be approved.

We turn to a consideration of the fairness of the plan.

H. *Fairness*

The reduction of the Engineers holding company system from its previous size and diversity to a single operating company necessitates a commensurate contraction of its financial structure. Engineers' outstanding preferred, instead of providing valuable leverage for the common, has become a financial burden. Engineers has accumulated

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[41] Sections 1(c) and 11(b).

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

from previous property dispositions and retained earnings a large reserve of idle cash, which is yielding no return; at the same time there is in excess of $39,000,000 of preferred stock outstanding with a fixed claim to prior dividends. Ordinarily a company in this position would exercise its call privilege and redeem the preferred at its call price. However, Engineers has proposed to dissolve by paying off the preferred in cash and distributing the remaining assets to its common stockholders.

The rights of the preferred on retirement are fixed as follows in the charter of Engineers:

> "III. Preference on liquidation, etc. In the event of liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, the holders of the preferred stock of each series shall be entitled to receive, for each share thereof, an amount equal to $100, together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premium for such series, if any, before any distribution of its assets shall be made to the holders of the common stock; but the holders of the preferred stock shall be entitled to no further participation in such distribution . . ."

It is the position of Engineers that the liquidation of the company is compelled by the Holding Company Act; that the action being taken is, therefore, involuntary; and accordingly that under the particular circumstances of this case, the involuntary liquidation prices established in the charter of the company should control.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

A. *Fairness to the Preferred Stockholders*

Before we can approve the Engineers plan under Section 11(e), we must find that its provisions are "fair and equitable" to the persons affected by the plan. It is important to note that the present case is not one in which the proponent of the plan is asserting its desire to liquidate voluntarily in accordance with its charter provisions and state law nor is it one in which it is asserted that the company would or might have been liquidated apart from the Act; here it is specifically stated—and, indeed, strenuously argued by Engineers, that the sole reason for the dissolution is the impact of Section 11 and that the liquidation is wholly involuntary.[42] *Otis & Company* v. *Securities and Exchange Commission,* 323 U. S. 624 (1945) held that a reorganization or liquidation impelled by Section 11 does not mature preferred stockholders' claims. The court pointed out that the reason for this conclusion "lies in the fact that Congress did not intend that its exercise of power to simplify should mature rights created without regard to the possibility of simplification of system structures which otherwise would arise only by voluntary action of the stockholders, or involuntarily, through action of creditors" (at p. 638). Accordingly, while we may assume the validity of Engineers' assertion that the proposed dissolution is being caused by the Act and is in that sense "involuntary," we cannot accept any argument that the preferred claim is thereby matured and that the involuntary liquidation provision of the charter is therefore the conclusive measure of the claim.

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[42] At oral argument counsel for Engineers stated:

"Engineers would not be dissolving if Section 11 of the Act had not been passed. It would have continued into the future for many years. . . . fact it is difficult to imagine any likely circumstances or set of circumstances which would have caused its liquidation at any time. Thus, Section 11 of the Act is the cause without which the liquidation would not have happened."

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

It is settled that in a Section 11 reorganization a security holder must receive, in the order of his priority, from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered.[43] Since under the circumstances of this case, we do not think it proper to regard the liquidation provisions of the charter as conclusive in determining those rights, we must consider all provisions of the charter applicable to the preferred, such as the dividend rate and the call price as well as the liquidation preferences, and we must analyze the financial condition of the company with particular regard to the asset and earnings coverage of the preferred.

As we have indicated, the preferred stocks of Engineers have annual dividend rates of $5.00, $5.50 and $6.00, and call prices of $105.00, $110.00 and $110.00, plus accrued dividends, respectively, and are entitled to a preference of 100.00 and accrued dividends on "involuntary" liquidation or dissolution and to a preference equivalent to their call prices on "voluntary" liquidation or dissolution.

The $5.00 series was issued in March 1928 and sold to the public at $100.00 per share; the $5.50 series was issued in October 1928 and sold to the public at $99.50 per share;[44] and the $6.00 preferred was issued in September 1930 and sold to the public at $100.00 per share. Dividends have always been maintained on the three series of preferred stocks since their issuance, except during the period from July 1, 1933, to July 31, 1936. The arrearages which accumulated in this period were paid off in 1936 and 1937.[45]

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[43] *American Power & Light Company*, S. E. C. (1946), Holding Company Act Release No. 6176, p. 5 quoting *Group of Instituitonal Investors* v. *Chicago M., St. P. & P. R. Co.*, 318 U. S. 523 (1943), cited in *Otis & Company* v. *Securities and Exchange Commission*, 323 U. S. 624, 639-40 as applicable to Section 11(e).

[44] A portion of this series was issued in exchange for securities of The Puget Sound Power and Light Company; these were entered on the books of Engineers at $99.50 per share.

[45] The market history of the three series of preferred may be summarized as follows: The $5.00 series reached a high of $123.00 in 1929; its average

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

Table IX shows the corporate and consolidated capitalization and surplus of Engineers and its subsidiaries, as of June 30, 1945, adjusted for the sale of Western:

TABLE IX

	Corporate Amount	Corporate %	Consolidated Amount	Consolidated %
Securities of subsidiaries Held by public				
Funded debt	$	....	$105,795,000[46]	47.1
Preferred stock	.....	....	42,447,100	18.9
Premium on preferred stock	.....	....	340,620	0.2
Minority interest	.....	....	50,003	....
	$	....	$148,632,723	66.2
Securities of Engineers				
Contract payments	$ 81,812	0.1	$ 81,812	....
Preferred stock	$39,245,500	60.0	$ 39,245,500	17.5
Common stock and surplus				
Common stock	$ 1,909,968	2.9	$ 1,909,968	0.9
Capital surplus	17,076,576	26.1	17,076,576	7.6
Earned surplus	7,095,022	10.9	17,591,664	7.8
Total common stock and surplus	$26,081,566	39.9	$ 36,578,208	16.3
Total capitalization and surplus	$65,408,878	100.0	$224,538,243	100.0

Thus it appears that the preferred stock of Engineers represents 17.5% of consolidated capitalization and sur-

price with the conversion privilege was $60.94; and $80.50 since the expiration of that privilege, its overall average since issue is $67.16. The $5.50 series had an average of $53.98 while its warrant right existed, and an average of $85.23 since; it reached a high of $109.00 in 1929, and its overall average since issue is $64.52. The $6.00 preferred reached its highest market price in 1945; its average price since issue is $62.77. As of February 13, 1946, the latest date covered in the hearings, the $5.00 series was selling at 105⅛, the $5.50 series at 105¼, and the $6.00 series at 109.

Engineers common, issued in 1925, reached a high of 79⅝ in 1929 and a low of 1⅛ in 1935. On February 13, 1946 it was selling at 36.

[46] Of this amount $2,500,000 is due within one year.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

plus; that the preferred is junior to 66.2% and that it is senior to 16.3%.

Table X shows the earnings available for fixed charges and preferred dividends of the Engineers system for the period 1937 to 1945. The average coverage of fixed charges and preferred dividends for the last five periods was 1.4 times.

TABLE X

(000 Omitted)

Year	Consolidated Earnings Available for Fixed Charges Including Preferred dividends of Subsidiaries[47]	Fixed Charges, Preferred Dividends and Minority Interest of Subsidiaries[48]	Preferred Dividends of Engineers	Total Fixed Charges and Preferred Dividends	
				Amount	Times Earned
1937	$ 15,936	$12,168	$ 2,323	$ 14,491	1.1
1938	16,226	12,383	2,323	14,706	1.1
1939	17,553	12,264	2,295	14,559	1.2
1940	16,966	11,810	2,285	14,095	1.2
1941	16,773	11,620	2,263	13,883	1.2
1942	16,629	11,351	2,256	13,607	1.2
1943	11,700	6,105	2,256	8,361	1.4
1944	14,234	7,281	2,176	9,457	1.5
12 mos. to 6/30/45	15,610	7,454	2,119	9,573	1.6
Total	$141,627	$92,436	$20,296	$112,732	1.3

Table XI gives Engineers' corporate income, corporate expenses, and income available for preferred dividend requirements for the period 1937 through June 1945. For the past five periods preferred dividend requirements on a corporate basis have been earned an average of 1.5 times. It should be observed that the sale of Puget Sound in 1943 and 1944 has strengthened the earnings of the company.

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[47] Consolidated earnings for the year 1944 and the twelve months ended June 30, 1945 are shown after deduction of special charges in lieu of Federal taxes on income arising from premiums and expenses on redemption of bonds and losses on sale of transportation properties.

[48] Fixed charges as shown include amortization of utility plant acquisition adjustments.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

TABLE XI

(000 Omitted)

Year	Total Corporate Income	Corporate Expenses, Interest, Taxes	Income Available for Pfd. Div. Req.	Preferred Div. Req.	Times Earned
1937	$ 2,977	$ 235	$ 2,742	$ 2,324	1.2
1938	3,227	258	2,969	2,324	1.3
1939	3,716	259	3,457	2,295	1.5
1940	3,715	321	3,394	2,285	1.5
1941	3,655	474	3,181	2,263	1.4
1942	2,810	438	2,372	2,256	1.1
1943	4,026	452	3,374	2,256	1.6
1944	3,979	478	3,501	2,176	1.6
12 mos. to 6/30/45	4,821[49]	533	4,288	2,119	2.0
Total	$ 32,926	$ 3,448	$29,478	$ 20,298	1.5

Dr. R. A. Badger, an expert witness for certain preferred stockholders, prepared an analysis of the three series of Engineers' preferred stocks. After analyzing the earnings and assets of Engineers, he selected for comparison the preferred stocks of five public utility holding companies which he believed to be similar to Engineers. These companies were compared with Engineers for the years 1940 to 1945 with reference to "times all charges and preferred dividends earned," "proportion of prior obligations to total capitalization," "book value of equity per share of preferred," "percent of net quick assets to prior obligations" and "times parent company dividends were earned." It appeared that in general the position of Engineers' preferred was somewhat below the average of the five other companies until the disposition of Puget Sound in 1943. As a consequence of that disposition, its position improved to slightly over the average for those companies. Badger concluded that on an overall basis Engineers was in a median or average position as compared to the five companies studied. On the basis of a comparison of the yields of the five securities studied, he concluded that the $5.00 preferred of Engineers had an average value of $107.49

[49] Does not include unusual dividend paid by El Paso Electric Company in the amount of $900,000.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

a share, the $5.50 preferred an average value of $118.31 a share, and the $6.00 preferred an average value of $129.07 a share.

Badger also prepared a study of the preferred stocks of ten operating and holding companies selected for the similarity of their earnings to those of Engineers. These companies on an average earned all charges and preferred dividends 1.49 times in 1943, as against 1.40 times for Engineers. In 1944 they earned overall charges 1.48 times, as against 1.54 times for Engineers. They covered preferred dividends, 2.52 times in 1943, as against 2.48 for Engineers, and in 1944 covered preferred dividends 2.46 times, as against a similar coverage of 3.20 for Engineers. The stocks selected sold at prices to yield between 3.9 and 5.4%, or an average yield for the ten stocks of 4.5%.[50] Badger applied this yield to the several classes of Engineers' preferred and obtained corresponding values of $111.11 for the $5.00 preferred, $122.22 for the $5.50 preferred, and $133.33 for the $6.00 preferred. Badger concluded, however, that in his opinion, and in view of the "investment characteristics" of the company and the conditions of the money market, a proper yield for the Engineers preferred, absent a call price, would be 4.6%, so that the corresponding investment worth per share of the three series would be $108.70, $119.57 and $130.33, respectively. He concluded further that, because of the redemption privilege, "the present investment values are represented by their call price, plus a slight premium to account for the time required to effect a call." This time he estimated at approximately three months and concluded that the fair investment values of the three series of Engineers' preferred are as follows:

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[50] A recomputation during cross-examination resulted in a slight alteration in the figures for one company, but the change was insignificant in its relation to Badger's final conclusion.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

$5.00	cumulative	preferred	$106.25
5.50	"	"	111.38
6.00	"	"	111.50

No additional expert testimony on value was introduced into the record and no serious challenge was made in the proceedings to Badger's conclusion that the fair investment value of the preferred on a going concern basis is in excess of the call price. As a matter of fact, witnesses for Engineers testified several times to the same effect. Thus Barnes, president of Engineers, testified that, if there were no Holding Company Act or if the Act were to be repealed today, he would expect each of the series to sell somewhat above its voluntary redemption price; that the excess, however, would be small and would represent the discount of the present dividend yield for such time as the company might require to effect a refunding at a lower dividend rate; and that the voluntary redemption price acts as a "stopper." And Engineers in its brief states (at p. 5):

> "The record in this case shows that these amounts ($106.25, $111.38, $111.50, respectively) are substantially the present value or investment worth of these three series of stock, on a going concern basis and apart from the Act, under prevailing yields applied to comparable securities."

It is apparent that the preferred has an investment value at least equal to the respective call prices. We have indicated in previous opinions that the call price will ordinarily set a ceiling on the value of a security, for it provides a means, apart from the Act, whereby the security can be retired at a maximum price.[51] Accordingly, we need not

[51] *Buffalo, Niagara & Eastern Power Corp.*, S. E. C. (1945), Holding Company Act Release No. 6083; *New England Power Associates, et al.*, S. E. C. (1946), Holding Company Act Release No. 6470; *American Power & Light Co.*, S. E. C. (1945), Holding Company Act Release No. 6176. The New England plan has been approved by the United States District Court, 66 F. Supp. 376 (Mass. 1946).

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

attempt to determine whether, apart from the call provisions, the investment value of the preferred would exceed that ceiling.

Upon a full consideration of the record before us, we conclude that the payment of $100.00 per share, plus accrued dividends, to the preferred in retirement is not fair and equitable to the preferred stockholders, and that the fair and equitable standard would require the payment of an amount equal to the call prices of the securities, plus accrued dividends. We cannot, therefore, approve the provisions of Part I of the plan relating to the retirement of the preferred.

Counsel for one group of preferred stockholders has raised objection to a feature of the warrant plan which he claims is unfair as between groups of preferred stockholders. This provision would permit common stockholders of Engineers who also own preferred stock to use their preferred stock in payment of the subscription price of the Gulf States warrants. The unfairness is alleged to arise because these stockholders will be permitted to obtain Gulf States at the subscription price while a preferred stockholder owning no common who desires to acquire Gulf States stock will be forced to purchase warrants in the market. We are unable to see any unfairness in this provision. Any advantage to a stockholder owning both preferred and common comes wholly from his ownership of the common and is derived from rights properly issued to the common. Counsel could certainly not complain if a stockholder holding both common and preferred used cash received for his preferred to exercise the warrants received by reason of his holdings of common. This feature of the plan is merely a short cut to the same result. Counsel also asserts unfairness because a common stockholder who uses preferred in payment will have the benefit of a tax-free exchange, while the preferred stockholder owning no common will be immediately taxable for any profits which ac-

crue upon retirement of his stock for cash. We do not believe that this difference in tax consequences to the individual shareholder causes the plan to be unfair.[52]

B. *Fairness to the Common Stockholders*

The retirement of the preferred stock will be of immediate benefit to the common stockholders. As indicated above, the company at the time of the hearings had on hand idle treasury cash of over $14,650,000, while it is estimated that this sum will reach approximately $16,825,000 by the end of 1946. These funds have been accumulated through property dispositions and retained earnings. The management has pursued a policy of withholding dividends on the common stock until it is satisfied that the system has made all the adjustments that will be required of it under the Holding Company Act.[53] As a consequence the company has now accumulated a large amount of idle funds while it continues to have outstanding three substantial issues of preferred stock having fixed dividend requirements. Under the circumstances the elimination of this prior charge is highly beneficial to the common. Moreover, in so far as the retirement of the preferred is a step toward bringing the Engineers system into compliance with the Act, it hastens the day when the common will begin receiving dividend income.

No objection has been raised to the use of warrants for raising the cash needed to retire the preferred stock and as a method for distributing the shares of Gulf States to the common stockholders of Engineers. We recently had occasion to consider the fairness of the use of warrants for such purposes. In *Electric Bond and Share, et al.,* S. E. C. (1946), Holding Company Act Release No. 6879-1 we stated:

> "Generally speaking we have considered the use of warrants to be a satisfactory and appropriate means

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[52] *Cf. New England Power Association,* S. E. C. (1946), Holding Company Act Release No. 6470.

[53] No dividends have been paid on the common since 1932, although earnings have been available since 1938.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

of distribution of portfolio securities required by Section 11."

In that case a common stockholder had urged that the warrants were unfair because he lacked sufficient cash to exercise them and feared that he would be unable to realize the full value of his interest in a sale of the warrants. We pointed out that warrants give the stockholder several choices: he may exercise his rights to subscribe or he may elect to sell his warrants; or he may sell part of them and exercise the remainder; or he may elect to sell all or part of his stock and use the proceeds to exercise the warrants. We also pointed out that the stockholder would be harmed only in those cases where he sells all or part of his warrants and the amount received is inadequate to compensate him for his loss of position in the company. We were unable in that case to find that there was any reason to believe that the stockholder would be so harmed, and we are likewise unable in this case to see any reason why there will not be a "substantial correspondence between the market price of the warrants and the difference between the offering price of the stocks and the market price of the stocks."[54]

We have elsewhere discussed the proposed offering of reclassified Gulf States common stock and concluded that a price of $14 per share would provide an adequate margin for the warrant program. The present dividend rate of the Gulf States common is equal to approximately 80¢ per share on a reclassified basis. At $14 per share a dividend of 80¢ would provide a yield of 5.72%, and on an earnings

[54] Engineers has introduced an exhibit showing that when new issues appear on the market there may be a tendency for them to be underpriced until they become seasoned; it is suggested that this would be reflected by a lower market price for the warrants. To the extent that this may hold true in the case of Gulf States, it is unlikely that this underpricing would exceed the expense of an offering through underwriters (the alternative to a warrant program), which expense would have to be borne by the common stockholders.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

basis of $1.31 a share, the times earnings ratio would be 10.7. These earnings indicate an inherent value in the warrants should they be issued with a subscription price of $14 or less.

On the basis of earnings available for common stock for the 12 months ended June 30, 1945, the following effect on a share of Engineers' common stock will take place upon operation of the plan, assuming the bank loan were deleted and the warrant price increased to $14 per share:

TABLE XII

Per share of common stock	
Earnings on a consolidated basis	3.16
Earnings on a consolidated pro forma basis	2.57
Decrease in Engineers' earnings	$0.59
Earnings on 1/5 share of El Paso	0.32
Net decrease in earnings	$0.27
Earnings per share of Gulf States	1.31
Net increase in earnings if Engineers' stockholder purchases Gulf States' common stock	$1.04

The additional earnings of $1.04 per share would be realized by the purchase of Gulf States' common stock at $14.00 per share—13.4 times the increased earnings, or a return of 7.43% on such cost. The foregoing facts bear on the fairness of the plan to the holders of Engineers' common. However, since the present plan cannot be approved without amendment and since the proposed warrant price may be one of the provisions amended, we need not now enter a finding on the fairness of this price.

There is one further matter which merits discussion. Engineers argues that the payment to the preferred of any amount in excess of $100.00 per share would be inequitable to the common stockholders. It points out that the Act has required substantial dispositions of property, some of which,

notably Puget Sound, were sold at a substantial loss, while the disposition of others is asserted to have eliminated whatever benefit the common once obtained from its investment in a company with a diversified portfolio of securities. Engineers contends that only by restricting the amount paid the preferred can the "loss", which it is said was imposed by the Holding Company Act, be shared by the preferred and the common stockholders and that any premium would only be a "windfall" to the preferred. Although there is novelty in this argument we think it is without substance.[55] The Supreme Court in the *Otis* case indicated that the Holding Company Act was not intended to create a "windfall" to any class of security holders; but what was meant by the Court was that the Holding Company Act should not be permitted to mature claims and thereby transform the existing value of a security in a going concern into a matured claim which might be greater or less than such existing value. If, as in the *Otis* case, the matured claim of the preferred is greater than its existing value and the Act were permitted to mature the claim, the Act would create a windfall to the preferred. Conversely, if the matured claim were less than the existing value, and payment were permitted on that basis, the Act would create a windfall to the common. To argue here in terms of a windfall to the preferred at the expense of the common, however, is to beg the question. Whatever is taken *unfairly* from one class of security holders of necessity becomes a windfall to the recipient; but whatever is the *fair* measure of a security holder's claim

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[55] In passing, we should point out that we do not accept counsel's hypothesis that the *Act* has caused the asserted losses. In all of its divestments, Engineers has been free in its choice of methods, and, within limits, to choose the time for divestment. All sales have been negotiated by Engineers at arm's-length. If, as in the case of Puget Sound, the sale brought less than the carrying value on the books of Engineers, the indication is that the carrying value was excessive and not that the sales price was low. It is significant that the market price of Engineers' common when the plan was filed was the highest since 1932 and that the price has been rising steadily since 1942 when the program of simplification got under way. As shown in Footnote 45, *supra*, Engineers' common reached a low of 1⅛ in 1935. By 1945, when the plan was filed, it had reached a high of 37.

should properly be given to him. We are required by Section 11(e) to apply the fair and equitable standard to liquidations and recapitalizations occurring under the Holding Company Act. The courts have reiterated that the fair and equitable standard is that of "absolute priority", which requires that full compensation be given the senior securities before any payment or participation is permitted to the junior securities. In our treatment of fairness to the preferred stockholders under the plan we have found that full compensation to the preferred requires that they be paid an amount equal to their redemption prices in order to satisfy their prior claim to the assets and earnings of the company. The common cannot now contend that recognition of the full priority of the preferred stockholders as required by the statute is unfair to the common.

We conclude that the plan, if amended in accordance with this Opinion, would be fair and equitable to the common stockholders of Engineers.

Other Matters

Separability of Parts of the Plan

As we have indicated, the proposed plan is separated into two parts. Part I sets forth the mechanics of the plan and provides for the retirement of the preferred at $100.00 per share and accrued dividends. Part II provides for a separate finding on any amount which may be found payable to the preferred in addition to $100.00. Engineers has made a formal motion that we deal separately with the two parts and issue a separate order for each part. This motion was opposed by the staff and the preferred stockholders.

The purpose of the separation is set forth in applicant's brief (at p. 44):

> ". . . In this manner it is hoped that a large portion of the program for the elimination of Engineers as

Exhibit B to Application of Securities and Exchange Commission (Cont'd).

> a holding company can be carried into effect promptly and without awaiting the determination of the admittedly controversial question as to the amount, if any, in addition to $100 per share of the preferred stock of Engineers plus accrued dividends, which should be paid to such stockholders."

The company's need to put its idle cash to use and reduce its preferred dividend charges as soon as possible is obvious. And we are in complete accord with the stated objectives of immediate distribution of $100.00 to the preferred (without prejudice to its right to assert a further claim) and expeditious solution of the Section 11 problems of Engineers. However, we do not believe the attainment of these objectives requires two separate orders or a separation of the plan into two parts and we see no need for any such procedure. We think the objectives can easily be achieved, with fairness to both the common and the preferred, by the method which we have followed in other similar cases.

We have approved plans whereby immediate payment was made of the amount conceded to be due and the question of any additional amounts payable was reserved for further litigation. There would seem to be no reason why, upon the District Court's approval of this plan, a similar payment could not be made to the preferred here, thereby ending any claim to dividends while their rights to any additional payment are being litigated and are secured in an escrow. This of course assumes that the escrow would cover not only the amount in dispute but also compensation for the withholding, during the period of litigation, of any additional amount found payable.

Engineers has also indicated that the proposed severance was designed to preserve its right to challenge before the Commission or the courts any additional payment which we find due the preferred. We agree that Engineers should

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

have this right, and we see nothing incongruous in the company's challenging before the courts this portion of the plan which has been inserted at our insistence and with which it finds itself in disagreement.[56]

For the reason indicated, we must deny Engineers' motion for separate consideration and decision on each of the two parts of the plan.

Escrow Provision

We have concluded that the preferred stockholders are entitled to receive on retirement an amount equal to the redemption price. Engineers has expressed its intention to contest any such finding in the courts, thus giving rise to the possibility that litigation will ensue which may last for some period of time. We have also indicated our belief that this litigation does not justify retaining Virginia or continuing Engineers for that period, and have stated that ample provision can be made to safeguard the preferred by means of an escrow arrangement. Engineers has indicated a willingness to amend the plan so as to provide such an escrow.

The staff has submitted an estimate of $4,000,000 which it considers an adequate amount for the escrow. This figure was obtained as follows:

Premium on preferred stock	$3,204,795
Dividend adjustment (assuming delay in payment for three years)	484,455
	$3,689,250

An additional sum of about $310,750 was included to cover all fees and expenses, including the fees and expenses of a depositary. No challenge has been raised to these figures

[56] *Cf. Electric Bond & Share Company,* S. E. C. (1946), Holding Company Act Release No. 6879-1 at p. 14.

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and on examination we find them to be adequate and reasonable.[57]

Should the additional payment to the preferred be sustained we believe that they are entitled to compensation for the sum withheld from them during the period of litigation and the escrow should so provide. This return should be determined by ascertaining the yield for each series of preferred on the basis of its dividend rate and the price ultimately deemed payable. In this manner the preferred will receive for the period of the escrow a return on the amount in escrow which is measured by the return which would have been received by it if the stock remained outstanding.

The company has indicated that it would prefer to place in escrow shares of Virginia rather than cash in order to receive some return during the period of the escrow. However, since the purpose of the escrow is to protect the preferred stockholders, we cannot permit the pledging of any securities whose value may fluctuate with the vicissitudes of the market. It is necessary that the company place in escrow cash or government securities of appropriate type. We recognize that this escrow may result in some loss to the common who might otherwise employ the funds at a higher return. But the escrow serves two purposes: it enables the common to retire $100 per share of the preferred immediately, thereby stopping the payment of further dividends on that amount, and it provides security for the payment of any additional amount which may be found due the preferred. The immediate cessation of preferred dividends can be justified only if the preferred can be assured of its eventual full payment. The immediate cessation of preferred dividends is, of course, of substantial advantage to the common and the loss of a return on the escrowed amount is merely a necessary cost of securing this advantage.

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[57] Applicant's brief uses the figure $3,700,000 as the approximate amount of the premiums payable on call plus an amount to cover compensation for the delay in effecting payment of the full amount which may be found payable to the preferred.

Exhibit B to Application of Securities and Exchange Commission (Cont'd).

Fees and Expenses

Thomas W. Streeter, a director of Engineers and the owner of a substantial amount of preferred stock, voiced continuing objection to the plan while it was being considered by the Board of Directors. At his suggestion a resolution was adopted authorizing the company to reimburse preferred stockholders for costs up to $5,000 incurred in the employment of Lawrence R. Condon as their counsel "in order to assure that the interests of the preferred stockholders of this company will be represented by counsel in the proceedings . . . involving the plan . . . ." The resolution also stated that the payment to Condon would be subject to prior approval by this Commission, that it was without prejudice to his right to apply for a larger amount or the company's right to oppose it, and that "nothing herein shall be deemed to be an admission by the company that the Securities and Exchange Commission has jurisdiction over the payment of fees in connection with the pending Section 11 (e) plan." The plan contains no provision for the supervision by the Commission over fees and expenses. In setting the plan for hearing we ordered that attention would be directed, among other things, to:

> "5. Whether the plan should be modified to include a provision for the payment by Engineers of all fees and expenses by whomsoever incurred in connection with said plan or the proceedings with respect thereto which the Commission may determine, award, allow or allocate and whether the fees and expenses to be paid in connection with the consummation of the plan and all transactions incidental thereto are for necessary services and are reasonable in amount."

Engineers has taken the position in its brief and at oral argument that the Commission has no jurisdiction to

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supervise fees and expenses incurred in connection with plans submitted for approval under Section 11 (e). It argues that Section 11 (e) contains no specific provision covering fees and that this omission indicates a Congressional intent not to give the Commission such jurisdiction; in this connection it points to Section 7 (d) (4) of the Act and Sections 241 to 250 of Chapter X of the Bankruptcy Act which include express language conferring jurisdiction with respect to fees.

Although Section 11 (e) contains no specific provision covering the allowance of fees and expenses, it has been our consistent practice over a long period of time to exercise jurisdiction over fees and expenses in Section 11 (e) plans. This is the first case in which substantial question has been raised as to our power in this respect.[58]

Plans presented for approval frequently are opposed by one or more groups of security holders. The management's responsibilities are, of course, to all of the company's security holders. But it would be naive to overlook the normal responsiveness of management to the class of securities which controls the voting power and which has selected it. And, once the management has devised and filed its plan, it is natural that, as a proponent of the plan, it should exert its best efforts towards securing approval. There is thus a strong possibility that opposing groups, unless they are willing to employ separate counsel at their own expense, will not be adequately represented and that, as a consequence, the thoroughness of our hearings and our ability to explore all aspects of the plan would be impaired for lack of the beneficial contributions such interested persons might otherwise make. We have been charged with responsibilities to all security holders, regardless of class, and the fulfillment of that obligation requires adequate representation of their respective interests and points of

[58] *Cf. Utilities Employees Securities Co.*, S. E. C. (1944), Holding Company Act Release No. 5349.

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view in proceedings before us. Unless there were some assurance that persons who contribute to the development of a plan and otherwise benefit the estate will receive fair compensation, constructive suggestions would be discouraged. The payment of fees and allowances to such persons from the estate, under court supervision, is an accepted principle of equity receivership and corporate reorganization law. In exercising jurisdiction over fees and expenses we have endeavored to assure adequate compensation to qualified representatives of the various groups of security holders and thereby to assure adequate coverage of the issues before us.[59] We think it clear that the statute confers that power and obligation.

First, we believe that the "fair and equitable" standard which we must apply in approving the plan necessitates a consideration by us of fees and expenses incurred in connection with the plan. Section 11 (e) is a general and broad grant of power to this Commission. The section establishes two general standards by which we must judge a plan: It must be necessary to effectuate the provisions of Section 11 (b) and it must be fair and equitable to the persons affected by such plan. These two standards, in spite of their generality, have clearly ascertainable meanings. The objectives of Section 11 (b) are contained in the Act and our findings that a plan is "necessary" to effectuate those objectives is thus measured by the Act itself. On the other hand, although the "fair and equitable" standard is not defined in the Act, it has attained a definite meaning through usage in reorganization law[60] and that meaning has been incorporated in Section 11 (e).[61] The courts have held that the "fair and equitable" standard covers all aspects of the reorganization process and includes not

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[59] *Cf. In Re Mountain States Power Co.*, 118 F. 2d 405 (C. C. A. 3, 1941).

[60] *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939).

[61] *Otis & Co. v. S. E. C.*, 323 U. S. 624 (1945).

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only the strict priority rule, but also extends to subordination of claims, full disclosure, prevention of overreaching by insiders and all other considerations of equity, depending upon the "exigencies of varying situations."[62] It seems obvious that supervision over fees must be exercised not only to encourage participation of interested persons in the exploration of all equitable considerations but also for the even more direct purpose of insuring against overreaching through payment of excessive fees to insiders and guarding against a depletion of assets to the detriment of security holders. While it is true that Chapter X contains specific provisions relating to fees, it must be recognized that it is a complete catalog of the reorganization process and endeavors to cover in detail all of its aspects; Section 11 (e), on the other hand, is in general terms and adopts only the key phrase of "fair and equitable" as the criterion to be applied to all aspects of the plan.

Second, we think it most significant in ascertaining our powers under Section 11 (e) that Sections 7, 10 and 12 do contain express grants of authority over fees and expenses. These are specific sections relating to sales and acquisitions and set forth in elaborate detail the standards, requirements and tests which we must apply in determining whether to approve such transactions. By including specific reference to fees, Congress indicated that it considered the question of fees and expenses of importance in the issuance or acquisition of securities. Every plan under Section 11 (e) involves in some manner the exchange, issue, distribution, alteration or cancellation of securities. Congress cannot have intended that in so far as a plan involves a transaction within the purview of Section 7, 10 or 12, we can supervise fees—but only to the extent that the fees relate to that particular transaction. In a thoroughgoing recapitalization or liquidation under Section 11 (e) the ex-

[62] *American Ins. Co. v. City of Avon Park*, 311 U. S. 138, 146 (1940).

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

change or issuance of securities is but one aspect of the larger transformation of the corporation and is inextricably bound up with that change. It would be impossible to rule separately on fees for particular portions of a plan. In the preparation of a plan, considerations of its policy, economy, legality, tax consequences, and its fairness and feasibility are all interrelated. Thus, even though the Engineers plan involves relatively few transactions, each of its parts are interrelated. The price at which the warrants on Gulf States will be exercised was determined, in part, by the size of the bank loan contemplated. The bank loan, in turn, gave rise to the trusteeship, which in turn raises the problem of when disposition will be made of the Virginia holdings. The entire plan depends on a favorable tax consequence. We obviously could not segregate the services performed in connection with each segment of the plan or in any way appraise their value without considering the plan in its entirety.

Third, the importance of obtaining adequate representation before us of all interested persons, the need to prevent overreaching in order to conserve assets so that the plan will be fair to all, and the express statutory duty to control fees and expenses with respect to at least some portions of the plan, all indicate that the supervision of fees in Section 11 (e) plans is in the public interest and necessary for the protection of investors. Thus, apart from the other considerations we have discussed, Section 11 (e) in expressly providing that plans may be submitted for our approval "in accordance with such rules, regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers," permits us to act by order to require that the matter of fees be covered by the plan and subject to our supervision. Counsel for Engineers argue that, since no rule or regulation or order is now in general effect, the Commission may not impose such a restriction on their

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plan. In so arguing they misinterpret the meaning of the word "order" and misconstrue the power of the Commission to act in individual cases. An order issues in a particular case and is used with reference to the situation presented in the particular case. If that were not true, there would be little point in the Act's enumeration of the power to act by "rule, regulation or order."

For the reasons indicated, we believe it is clear that we have the power and obligation to supervise fees and expenses incurred in connection with a Section 11 (e) plan.[63] Accordingly, we find that the plan is incomplete in failing to provide that the payment of fees and expenses shall be subject to award or allocation by the Commission and the plan should be amended to include such a provision.

Compliance with the Standards of Section 7

We have examined the proposals to reclassify the common stock issues of Gulf States and El Paso in order to facilitate their distribution under the plan. At the present time the outstanding common of both companies is entirely owned by Engineers; consequently, the reclassification is merely a book entry which will not affect any public holders of the stock. Both companies, however, have preferred stock outstanding in the hands of the public. To the extent that the preferred stock has voting rights, any increase in the number of shares of common will normally diminish the proportionate voting power of the preferred. Section 7 (e) requires that we examine into the effect of any such reclassification on the voting power existing among the holders of securities of the company.

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[63] Jurisdiction over fees has been reserved in practically every Section 11(e) plan which we have approved. See, e.g., *Buffalo, Niagara and Eastern Power Assoc.*, S. E. C. (1945), Holding Company Act Release No. 6083. It is not without some significance that this is the first occasion in which this jurisdiction has been the subject of substantial challenge. In *Puget Sound Power & Light Co., et al.*, 13 S. E. C. 226 (1943), where Engineers had joined in the application, the plan there proposed also lacked adequate provisions for Commission supervision of fees and expenses. Counsel for preferred stockholders objected to this deficiency and the Commission's order contained a condition reserving such jurisdiction. Engineers did not challenge this condition.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

In the case of Gulf States, it is proposed to change the voting rights so as to give the present preferred stock seven votes for each share in lieu of the present one vote for each share. At the present time there are authorized a total of 300,000 shares of common and 120,000 shares of preferred, giving the preferred 28.5% of the voting power. After reclassification of the common to 1,909,968 shares and the increase in preferred voting power to seven votes per share the preferred will have 30.5% of the voting power. Under the circumstances, we do not believe the reclassification will result in an unfair or inequitable distribution of voting power.

At the present time El Paso has outstanding 15,000 shares of preferred and 150,000 shares of common. It is proposed to increase the common to 381,994 shares. The preferred has no voting power on ordinary corporate matters unless there has been a failure to pay dividends for eight consecutive quarters, in which case they may elect one less than a majority of the board of directors. The voting power of the preferred will not be affected by the proposed reclassification and no unfair or inequitable distribution of voting power will result.

We are informed that no approval of the transactions by any state agency is required.

We find no reason for making any adverse findings under Section 7 and accordingly we can approve the applications to reclassify the Gulf States and El Paso common stocks. However, since these applications are presented for the purpose of facilitating the plan which cannot be approved in its present form, we will withhold action on the applications pending the submission of an amended plan.

Form of Order

Applicant has requested that we make findings necessary to bring the plan within the provisions of Sections 371

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and 1808(F) and Supplement R of the Internal Revenue Code. Such findings would be clearly appropriate and upon receipt of an amended plan in accordance with this opinion we shall enter an order containing those findings.

Summary of Conclusions

1. We have found those provisions of the plan providing for the disposition of Gulf States and El Paso and for the dissolution of Engineers to be necessary under the requirements of the Act. We are unable to make a similar finding as to certain mechanics of the plan and accordingly we cannot approve the plan in its present form.

2. We believe that a bank loan is unnecessary and would serve only to delay without justification full compliance with the Act; the record indicates that there are several other sources of funds open to the company which would not have any delaying effect.

3. We believe that the purposes for which the three-year trusteeship was proposed can be satisfied in ways which would not require retention of a large part of the staff of Engineers and retention of $65,000,000 of Virginia stock during this period; upon payment of $100.00 per share and accrued dividends to the preferred stockholders of Engineers and creation of an appropriate escrow to protect their right to any additional payment found due, all or substantially all of the stock of Virginia can be distributed immediately.

4. If the management feels that some provision should be made to earmark a part of the company's assets as a reserve for any tax liabilities which may be found against the company, it would appear that appropriate provision could be made.

5. We have found that the plan is unfair in its treatment of the preferred stockholders and that fairness requires

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

that they be paid an amount equal to their respective call prices on retirement.

6. While we cannot grant applicant's motion for separate orders on the two parts of the plan, we do believe that the company is justified in its desire to stop the accrual of dividends while the controversy over the amount payable to the preferred is being litigated. We believe this objective can be achieved by the creation of an escrow which includes a provision to compensate the preferred stockholders for the time full payment is withheld from them.

7. We believe the plan is incomplete and unfair in failing to include a provision for supervision by the Commission over the payment of fees and expenses incurred in connection with the plan.

8. We can approve the applications under Section 7 providing for the reclassification of the common stock of Gulf States and El Paso.

We shall not enter any order at this time. If within a period of thirty days Engineers files a plan amended in conformity with this Opinion, we shall enter an order approving the amended plan and we shall apply to an appropriate District Court for approval and enforcement of the plan. If no amended plan is filed within the period specified (or such further extension as we may grant), we shall enter an order disapproving the present plan and we shall take such action as seems appopriate to enforce expeditious compliance with Section 11.

By the Commission (Commissioners McConnaughey and McEntire), Chairman Caffrey and Commissioner Hanrahan concurring in the result.

(SEAL)

ORVAL L. DUBOIS.
Secretary.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

Appendix A
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ENGINEERS PUBLIC SERVICE COMPANY

Condensed Corporate Balance Sheets Actual Adjusted as at June 30, 1945 and Pro Forma Giving Estimated Effect to Operations During the Period July 1 to December 31, 1945 and to Consummation of Part I of the Plan

Assets and Other Debits	Actual Adjusted	Adjustments	Pro Forma
Investments:			
Investments in subsidiary companies:			
El Paso Electric Co.	$ 6,645,389	$(6,645,389)	$ —
Gulf States Utilities Co.	19,914,347	(19,914,347)	—
Virginia Electric and Power Co.	27,762,261	—	27,762,261
Total investments in subsidiaries companies	$54,321,997	$(26,559,736)	$27,762,261
Less reserve for depreciation in value of investments	2,000,000	(2,000,000)	—
	$52,321,997	$(24,559,736)	$27,762,261
Miscellaneous investments	6,079	—	6,079
Total investments	$52,328,076	$(24,559,736)	$27,768,340
Current assets:			
Cash in banks and on hand	$ 8,527,768	$(8,115,323)	$ 412,445
U. S. Treasury securities, at cost	4,650,000	(4,650,000)	—
Other current assets	4,372	—	4,372
Total current assets	$13,182,140	$(12,765,323)	$ 416,817
Deferred charges	$ 246,688	$ —	$ 246,688
Total assets and other debits	$65,756,904	$(37,325,059)	$28,431,845
Liabilities and Other Credits			
Capital stock:			
Common stock	$ 1,909,968	$ —	$ 1,909,968
Preferred stock	39,245,500	(39,245,500)	—
Total capital stock	$41,155,468	$(39,245,500)	$ 1,909,968
Long-term debt	$ 81,812	$ 1,500,000	$ 1,581,812
Current liabilities:			
Note payable due within one year	$ —	$ 1,500,000	$ 1,500,000
Other current liabilities	332,576	—	332,576
Total current liabilities	$ 332,576	$ 1,500,000	$ 1,832,576
Reserve for taxes on income for prior years	$ 15,450	$ —	$ 15,450
Capital surplus	$17,076,576	$(4,645,389)[1]	$12,431,187
Earned surplus	$ 7,095,022	$ 3,565,830 [2]	$10,660,852[3]
Total liabilities and other credits	$65,756,904	$(37,325,059)	$28,431,845

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

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ENGINEERS PUBLIC SERVICE COMPANY

Condensed Corporate Balance Sheets Actual Adjusted as at June 30, 1945 and Pro Forma Giving Estimated Effect to Operations During the Period July 1 to December 31, 1945 and to Consummation of Part [illegible] of the Plan

EXPLANATION OF ADJUSTMENTS

[a] Adjusted to give effect to sale of The Western Public Service Company (Delaware) on February 28, 1946 for approximately $1,500,000.

[1] The net decrease of $4,645,389 in capital surplus is explained as follows:

Decrease:	
The distribution of the common stock of El Paso as a dividend in liquidation from the capital of Engineers, pro rata to common stockholders	$6,645,389
Increase:	
Transfer of unused portion of reserve for depreciation in value of investments applicable to securities of El Paso to capital surplus	2,000,000
Total decrease	$4,645,389

[2] The increase of $3,565,830 in earned surplus is explained as follows:

Estimated increase in earned surplus resulting from operations during the period July 1 to December 31, 1945		$1,515,545
Book profit on sale of Gulf States:		
Proceeds from sale of common stock	$21,964,632	
Less: Carrying value of common stock	19,914,347	2,050,285
Increase		$3,565,830

[3] Engineers will covenant that it will not pay any dividends on its common stock until the $3,000,000 note payable is fully paid.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

Appendix A
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ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARIES

Condensed Consolidated Balance Sheets Actual Adjusted as at June 30, 1945 and Pro Forma Giving Estimated Effect to Operations During the Period July 1 to December 31, 1945, Certain Adjustments and Consummation of Part I of the Plan

Assets and Other Debits	Actual Adjusted[a]	Adjustments[b]	Adjusted	Elimination of El Paso and Gulf States	Adjustments	Pro Forma
Plant and other investments:						
Utility plant (including intangibles):						
Electric and common, at original cost	$185,357,888	$ 2,570,000 [1]	$187,927,888	$(69,227,697)	$ —	$118,700,191
Gas, at original cost	2,489,349	5,420,473 [2]	7,909,822	—	—	7,909,822
Other, at cost	9,999,122	(5,513,847) [2]	4,485,275	(4,485,275)	—	—
Plant acquisition adjustments	14,467,645	93,374 [2]	14,561,019	(3,230,176)	—	11,330,843[c]
Cost of investments in shares of subsidiaries in excess of the relative net assets shown by the books of subsidiaries at dates of acquisition of such shares	24,131,242	93,172 [3]	24,224,414	—	(11,609,919) [12]	12,614,495[d]
Total utility plant	$236,445,246	$ 2,663,172	$239,108,418	$(76,943,148)	$(11,609,919)	$150,555,351
Other physical property (less reserve)	1,922,754	—	1,922,754	(161,554)	—	1,761,200
Investment in associated company	62,825	—	62,825	(22,845)	(39,980) [13]	—
Excess profits tax refund bonds	650,858	—	650,858	(35,797)	—	615,061
Total plant and other investments	$239,081,683	$ 2,663,172	$241,744,855	$(77,163,344)	$(11,649,899)	$152,931,612
Special funds	$ 1,020,266	$ —	$ 1,020,266	$ (1,020,266)	$ —	$ —
Current assets:						
Cash in banks and on hand	$ 19,066,222	$(2,439,455) [4]	$ 16,626,767	$ (3,796,293)	$ (9,590,888) [14]	$ 3,239,586
U. S. Treasury securities, at cost	10,514,500	—	10,514,500	(4,092,500)	(4,650,000) [14]	1,772,000
Other current assets (less reserves)	7,483,514	—	7,483,514	(2,498,365)	—	4,985,149
Total current assets	$ 37,064,236	$(2,439,455)	$ 34,624,781	$(10,387,158)	$(14,240,888)	$ 9,996,735
Deferred debits:						
Unamortized debt, discount and expense	$ 3,441,367	$ —	$ 3,441,367	$ —	$ —	$ 3,441,367
Postwar refund of Federal excess profits tax	1,039,104	(219,755) [5]	819,349	(166,528)	—	652,821
Other deferred debits	1,286,927	1,986,093 [6]	3,273,020	(351,190)	—	2,921,830
Total deferred debits	$ 5,767,398	$ 1,766,338	$ 7,533,736	$ (517,718)	$ —	$ 7,016,018
Total assets and other debits	$282,933,583	$ 1,990,055	$284,923,638	$(89,088,486)	$(25,890,787)	$169,944,365

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

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ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARIES

Condensed Consolidated Balance Sheets Actual Adjusted as at June 30, 1945 and Pro Forma Giving Estimated Effect to Operations During the Period July 1 to December 31, 1945, Certain Adjustments and Consummation of Part I of the Plan

Liabilities and Other Credits	Actual Adjusted[a]	Adjustments[b]	Adjusted	Elimination of El Paso and Gulf States	Adjustments	Pro Forma
Capital stock of Engineers:						
Preferred stock	$ 39,245,500	$ —	$ 39,245,500	$ —	$(39,245,500) [14]	$ —
Common stock	1,909,968	—	1,909,968	—	—	1,909,968
Total capital stock of Engineers	$ 41,155,468	$ —	$ 41,155,468	$ —	$(39,245,500)	$ 1,909,968
Subsidiary companies:						
Preferred stock	$ 42,447,100	$ —	$ 42,447,100	$(13,500,000)	$ —	$ 28,947,100
Premium on preferred stock	340,620	—	340,620	(340,620)	—	—
Common stock	—	—	—	(14,949,817)	14,949,817	—
Minority interest in common stock and earned surplus	50,003	17,719	67,722	—	—	67,722
Total subsidiary companies	$ 42,837,723	$ 17,719	$ 42,855,442	$(28,790,437)	$ 14,949,817	$ 29,014,822
Long-term debt:						
Contract payments	$ 81,812	$ —	$ 81,812	$ —	$ —	$ 81,812
Note payable	—	—	—	—	1,500,000 [14]	1,500,000
Subsidiary companies:						
Bonds	92,800,000	—	92,800,000	(33,800,000)	—	59,000,000
Notes payable	10,435,000	(6,235,000) [7]	4,200,000	(140,000)	—	4,060,000
Total long-term debt	$103,316,812	$(6,235,000)	$ 97,081,812	$(33,940,000)	$ 1,500,000	$ 64,641,812
Current liabilities:						
Bonds and notes payable due within one year	$ 2,560,000	$ —	$ 2,560,000	$ (140,000)	$ 1,500,000 [14]	$ 3,920,000
Taxes accrued	11,386,857	(3,151,177) [8]	8,235,680	(5,380,315)	—	2,855,365
Other current liabilities	4,298,998	(146,223) [9]	4,152,775	(1,225,579)	—	2,927,196
Total current liabilities	$ 18,245,855	$(3,297,400)	$ 14,948,455	$ (6,745,894)	$ 1,500,000	$ 9,702,561
Deferred credits:						
Unamortized premium less expense on bonds	$ 1,350,836	$ —	$ 1,350,836	$ (1,111,786)	$ —	$ 239,050
Other deferred credits	1,063,428	—	1,063,428	(324,246)	—	739,182
Total deferred credits	$ 2,414,264	$ —	$ 2,414,264	$ (1,436,032)	$ —	$ 978,232
Reserves:						
Depreciation	$ 32,680,074	$ 1,633,600 [10]	$ 34,313,674	$(14,021,326)	$ —	$ 20,292,348
Amortization of plant acquisition adjustments	3,028,818	93,374	3,122,192	(807,553)	—	2,314,639
Other reserves	2,586,329	—	2,586,329	(616,556)	—	1,969,773
Total reserves	$ 38,295,221	$ 1726,974	$ 40,022,195	$(15,445,435)	$ —	$ 24,576,760
Parent Company's reserve for depreciation in value of investments in subsidiaries	$ 2,000,000	$ —	$ 2,000,000	$ —	$ (2,000,000) [15]	$ —
Capital surplus	$ 17,076,576	$ —	$ 17,076,576	$ —	$ (1,220,351) [16]	$ 15,856,225
Earned surplus May 31, 1938 parent company's proportion	$ 3,661,847	$ —	$ 3,661,847	$ (236,809)	$ (3,425,038) [16]	$ —
Earned surplus since May 31, 1938 parent company's proportion	$ 13,929,817	$ 9,777,762 [11]	$ 23,707,579	$ (2,493,879)	$ 2,050,285 [17]	$ 23,263,985[c]
Total liabilities and other credits	$282,933,583	$ 1,990,055	$284,923,638	$(89,088,486)	$(25,890,787)	$169,944,365

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARIES

Condensed Consolidated Balance Sheets Actual Adjusted as at June 30, 1945 and Pro Forma Giving Estimated Effect to Operations During the Period July 1 to December 31, 1945, Certain Adjustments and Consummation of Part I of the Plan

EXPLANATION OF ADJUSTMENTS

a Adjusted to give effect to sale of The Western Public Service Company (Delaware) on February 28, 1946 for approximately $1,500,000.

b Gives effect to estimated operations for the period July 1, 1945 to December 31, 1945, tax adjustments resulting from loss claimed on sale during 1945 of transportation properties and accelerated amortization of war facilities due to termination of war emergency period, and payment of $5,100,000 notes payable on December 31, 1945, all pertaining to Virginia.

c Provision is being made, pursuant to orders of regulatory commissions, for the amortization of plant acquisition adjustments in the amount of $11,237,468, by charges to income over 15-year periods, commencing in 1943 and 1944. This amount excludes $93,374 applicable to gas properties which has been fully reserved.

d Represents the excess ($12,614,495) of the recorded investment in shares of Virginia over the adjusted net assets applicable to such shares at dates of acquisition which is explained as follows:

Investment		$27,762,262
Less:		
Capital represented by such shares	$14,546,228	
Surplus of Virginia at dates of acquisition	601,539	15,147,767
		$12,614,495

e Approximately $7,042,000 of the pro forma consolidated earned surplus is not available for the payment of dividends on common stock of Virginia due to covenants made by such company restricting the payment of dividends on common stock, and the parent company earned surplus of $10,660,852 included in the pro forma consolidated earned surplus would not be available for the payment of dividends on its common stock until the $3,000,000 note payable is paid in full.

1 Increase in utility plant of Virginia in the amount of $2,570,000 representing estimated construction from July 1 to December 31, 1945.

2 To state the Norfolk gas utility plant at original cost.

Book value of Norfolk gas utility plant	$5,513,847
Original cost of Norfolk gas utility plant	5,420,473
Plant acquisition adjustments	$ 93,374

3 Reduction in acquired surplus representing establishment of reserve for gas plant acquisition adjustments.

Plant acquisition adjustments	$ 93,374
Minority interest	202
Engineers' proportion	$ 93,172

4 Decrease in cash of $2,439,455 is explained as follows:

Payment of notes payable of Virginia prior to maturity	$5,100,000
Net increase in cash from operation of Engineers and Virginia from July 1 to December 31, 1945	2,660,545
Net decrease	$2,439,455

5 Decrease in post-war refund of Federal excess profits tax in the amount of $219,755 due to an adjustment of over accrual for 1944 Federal income taxes of Virginia and its subsidiary.

6 Anticipated refund in the amount of $1,986,093 of Federal income taxes of Virginia applicable to prior periods, as shown in items (c) and (d) of Footnote 11.

7 Decrease in notes payable in the amount of $6,235,000 is explained as follows:

Payment of notes payable of Virginia prior to maturity	$5,100,000
Retirement of notes payable of Virginia during the period July 1 to December 31, 1945 at maturity dates	1,135,000
Total decrease	$6,235,000

8 Decrease in taxes accrued in the amount of $3,151,177 is explained as follows:

Portion of over accrual for 1944 Federal income taxes of Virginia and Citizens Rapid Transit Corporation (prior subsidiary of Virginia) resulting from sale of transportation properties	$3,004,512
Over accrual for 1945 Federal income taxes of Virginia resulting from termination of accelerated amortization	146,665
Total decrease	$3,151,177

9 Decrease in other current liabilities in the amount of $146,223 is explained as follows:

Adjustment of post-war refund applicable to Federal income taxes of Citizens Rapid Transit Corp.	$ 18,459
Transfer to earned surplus of the balance of the provision for Federal income taxes of Citizens Rapid Transit Corp. for 1944 in excess of the liability due	127,764
Total decrease	$ 146,223

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

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ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARIES

Condensed Consolidated Balance Sheets Actual Adjusted as at June 30, 1945 and Pro Forma Giving Estimated Effect to Operations During the Period July 1 to December 31, 1945, Certain Adjustments and Consummation of Part I of the Plan

EXPLANATION OF ADJUSTMENTS (Continued)

10 Increase in depreciation reserve from operations for the period July 1, 1945 to December 31, 1945, in the amount of $1,633,600.

11 Increase in "Earned surplus since May 31, 1938 parent company's proportion" in the amount of $9,777,762 is explained as follows:

(a) Estimated operations for the period July 1 to December 31, 1945, after giving effect to $3,354,604 reduction in Federal income taxes due to accelerated amortization of war facilities	$ 4,878,610	
(b) Portion of over accrual for 1944 Federal income taxes of Virginia resulting from sale of transportation properties (recorded in August 1945)	2,797,149	
(c) Adjustment of 1944 provision for Federal income taxes of Virginia representing claim for refund resulting from sale of transportation properties (recorded in December 1945)	1,009,750	
(d) Claim for refund of Federal income taxes applicable to prior years due to accelerated amortization of war facilities of Virginia (recorded in December 1945)	976,343	
(e) Adjustment of 1944 provision for Federal income taxes of Citizens Rapid Transit Corp. as shown in 9 above	127,764	
Total	$ 9,789,616	
Less amount applicable to minority interest	11,854	
Net increase in "Earned surplus since May 31, 1938 parent company's proportion"		$ 9,777,762

12 Elimination of excess cost of investments in shares of subsidiaries over stated value on books of subsidiary companies at dates of acquisition is as follows:

	Investments	Stated Value on Books of Subsidiary Companies	Excess Cost
El Paso	$ 6,645,389	$ 3,848,692	$ 2,796,697
Gulf States	19,914,347	11,101,125	8,813,222
	$26,559,736	$14,949,817	$11,609,919

13 Decrease of investment in associated company representing the sale by Virginia of its investment in Epsco, Inc. in the amount of $39,980.

14 Decrease of cash in the amount of $9,590,888 is explained as follows:

Cash payment to preferred stockholders ($100 per share)		$39,245,500
Cash to be received as follows:		
Bank note to be issued	$ 3,000,000	
Conversion of U. S. securities	4,650,000	
Sale of Gulf States	21,964,632	
Sale by Virginia of its investment in Epsco, Inc.	39,980	
Total increases		$29,654,612
Net decrease in cash		$ 9,590,888

15 Unused portion of Engineers' reserve for depreciation in value of investments applicable to securities of El Paso transferred to capital surplus in the amount of $2,000,000.

16 Decrease in capital surplus in the amount of $1,220,351 is explained as follows:

Decrease resulting from distribution of the common stock of El Paso as a partial dividend in liquidation from the capital of Engineers pro rata to common stockholders		$ 6,645,389
Increases:		
Transfer from reserve for depreciation in value of investment in securities of El Paso	$2,000,000	
Consolidating adjustment representing earned surplus of Virginia at May 31, 1938 earned subsequent to date of acquisition and prior to May 31, 1938, restricted at that date as a result of an accounting reorganization of Engineers transferred to capital surplus	3,425,038	5,425,038
Net decrease		$ 1,220,351

17 Increase in consolidated earned surplus of $2,050,285 is explained as follows:

Proceeds from sale of Gulf States common stock	$21,964,632
Book cost to Engineers	19,914,347
Book profit on sale of Gulf States common stock credited to earned surplus	$ 2,050,285

There is a contingent asset of approximately $2,000,600 representing possible refunds of Federal income and excess profits taxes.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

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Part III
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ENGINEERS PUBLIC SERVICE COMPANY

Condensed Corporate Income Statements Actual for the Twelve Months Ended June 30, 1945 and Pro Forma Giving Estimated Effect to the Consummation of Part I of the Plan

	Actual	Adjustments	Pro Forma
Revenue from subsidiary companies:			
Common dividends	$5,091,739	$(2,159,674)[1]	$2,932,065
Preferred dividends	24,999	(24,999)[2]	.....
Interest	48,440	(48,440)[3]	.....
Miscellaneous revenue	555,723	(555,723)[4]	.....
Total revenues	$5,720,901	$(2,788,836)	$2,932,065
Deductions:			
Expenses	$ 256,779	$(124,779)[5]	$ 132,000
Taxes (other than income taxes)	15,995	105 [6]	16,100
Interest	.....	45,000 [7]	45,000
Total deductions	$ 272,774	$(79,674)	$ 193,100
Income before Federal taxes	$5,448,127	$(2,709,162)	$2,738,965
Income taxes (Federal)	259,880	(95,480)[8]	164,400
Balance	$5,188,247	$(2,613,682)	$2,574,565
Preferred dividend requirements	2,119,092	(2,119,092)[9]	.....
Balance for common stock and surplus	$3,069,155	$(494,590)	$2,574,565

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

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ENGINEERS PUBLIC SERVICE COMPANY

Condensed Corporate Income Statements Actual for the Twelve Months Ended June 30, 1945 and Pro Forma Giving Estimated Effect to the Consummation of Part I of the Plan

Explanation of Adjustments

[1] The decrease in common stock dividends is explained as follows:

Decreases:	
Gulf States	$1,330,000
El Paso	993,750
Western	41,250
Total decrease in common dividends	$2,365,000
Less increase in VEPCO common dividends	205,326
Net decrease	$2,159,674

[2] The decrease in preferred stock dividends represents income from Savannah Electric and Power Company (sold) and El Paso Electric Company of Delaware (dissolved) in the amounts of $22,000 and $2,999, respectively, or a total decrease of $24,999.

[3] The decrease in interest resulting from the sale of Western and Missouri Service Company amounted to $25,440 and $23,000, respectively, or a total of $48,440.

[4] The decrease of miscellaneous revenue in the amount of $555,723 is detailed as follows:

From miscellaneous investments:	
Savannah Electric and Power Company (preferred dividend)	$ 11,000
Savannah Electric and Power Company (common dividend)	458,555
Missouri Service Company (bond interest)	64,475
Northern Kansas Power Company (open account interest)	125
Total miscellaneous investments	$534,155
From miscellaneous revenue:	
Principally on interest from U. S. securities	21,568
Total decrease	$555,723

[5] The decrease in expenses of $124,779 is due to the elimination of subsidiary companies.

[6] The net increase in other taxes of $105 is explained as follows:

Increase in New York State and City taxes	$5,039
Less reduction Federal capital stock, Delaware franchise and miscellaneous taxes	4,934
Net increase	$ 105

[7] Estimated interest at 1½% per annum on proposed $3,000,000 bank loan.

[8] The decrease of $95,480 in Federal income taxes is due to a reduction in income of Engineers.

[9] Engineers preferred stock will be entirely eliminated.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

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ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARIES

Condensed Consolidated Income Statement Actual Adjusted for the Twelve Months Ended June 30, 1945 and Pro Forma Giving Estimated Effect to the Consummation of Part I of the Plan

	Actual Adjusted[a]	Adjustments	Consolidated Pro Forma
Operating revenues	$47,199,571	$ 927[1]	$47,200,498
Operating expenses:			
Operation	$18,591,814	$ (115,184)[2]	$18,476,630
Maintenance	3,502,971	.....	3,502,971
Depreciation	3,373,579	.....	3,373,579
Taxes—Federal income (after extraordinary reductions of $5,274,813)	3,652,162	(102,662)[3]	3,549,500[b]
Taxes—other	3,775,651	105[4]	3,775,756
Total operating expenses	$32,896,177	$ (217,741)	$32,678,436
Net operating revenues	$14,303,394	$ 218,668	$14,522,062
Other income—net	37,053	(105,909)[5]	(68,856)
Gross income	$14,340,447	$ 112,759	$14,453,206
Interest and other charges			
Special charges of those portions of premium and expenses on redemption of bonds ($2,367,940) and of loss on sale of property ($2,056,873) which are equivalent to resulting reduction in Federal excess profits taxes	$ 4,424,813	$	$ 4,424,813
Interest and amortization	2,867,864	93,172[6]	2,961,036
Amortization of plant acquisition adjustments	693,168	.....	693,168
Total interest and other charges	$ 7,985,845	$ 93,172	$ 8,079,017
Consolidated net income	$ 6,354,602	$ 19,587	$ 6,374,189
Preferred dividend requirements of subsidiary companies	1,423,849	23,500[7]	1,447,349
Balance	$ 4,930,753	$ (3,913)	$ 4,926,840
Amount applicable to minority interests	11,517	.....	11,517
Balance	$ 4,919,236	$ (3,913)	$ 4,915,323
Preferred dividend requirements of parent company	2,119,092	(2,119,092)[8]	.....
Balance for common stock and surplus of parent company	$ 2,800,144	$2,115,179	$ 4,915,323

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

Appendix A
Part IV
Page 2 of 3 pages

Explanation of Adjustments

[a] Actual adjusted to reflect the elimination of subsidiaries that have been sold within the twelve-month period, sale of Western on February 28, 1946, distribution of El Paso and Gulf States common stock.

[b] The provision for Federal income taxes includes provision for estimated excess profits taxes after reductions (1) of $850,000 resulting from amortization of emergency facilities and (2) of $4,424,831 related to and applied against items totaling $6,359,232 charged directly to surplus.

[1] The increase in operating revenue in the amount of $927 represents a reversal in consolidation for inter-company power sales between Missouri Service Company and The Northern Power Company which had been previously eliminated in giving effect to the consolidated income statement of Engineers.

[2] The net decrease in operation in the amounts of $115,184 is explained as follows:

Decrease in expenses of Engineers		$124,511
Increases:		
Increase in expenses of Virginia due to cancellation of service contract with Epsco, Inc.	$8,400	
Increase in expenses represents the contra in item (1) above	927	9,327
Net decrease		$115,184

[3] The decrease in Federal income taxes of $102,662 is explained as follows:

Reduction due to decrease in income of Engineers	$ 95,480
Reduction due to increase in expenses of Virginia	7,182
Total decreases in Federal income taxes	$102,662

[4] The net increase in other taxes of $105 is explained as follows:

Increase in New York State and City taxes	$ 5,039
Less reduction in Federal capital stock, Delaware franchise and miscellaneous taxes	4,934
Net increase in other taxes	$ 105

Exhibit B to Application of Securities and Exchange Commission (Cont'd):

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5 The decrease in other income in the amount of $105,909 consists of a decrease in earnings of $84,341 from subsidiaries which were sold prior to June 30, 1945 and a decrease of miscellaneous revenue of $21,568.

6 The net increase in interest and amortization of $93,172 is explained as follows:

Increases:	
The increase in interest income to Engineers from The Western Public Service Company and Missouri Service Company represents a reversal in consolidation for inter-company interest which had been previously eliminated in giving effect to the consolidated income statement of Engineers in the amounts of $25,440 and $23,000, respectively	$ 48,440
Interest at 1½% per annum on proposed $3,000,000 bank loan	45,000
Total increases	$ 93,440
Decrease resulting from the elimination of non-recurring interest of Engineers	268
Net increase	$ 93,172

7 The increase in preferred dividend requirements of $23,500 represents a reversal in consolidation for inter-company preferred dividend income from Savannah Electric and Power Company and El Paso Electric (Del.) in the amounts of $22,000 and $1,500, respectively, which had been previously eliminated in giving effect to the consolidated income statement of Engineers.

8 Engineers preferred stock will be entirely eliminated.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

Appendix B

GULF STATES UTILITIES COMPANY

Condensed Balance Sheet as at June 30, 1945

Assets and Other Debits		Liabilities and Other Credits	
Plant and other investments:		Capital stock:	
Utility plant (including intangibles):		Common stock	$11,101,125
Electric plant, at original cost	$56,761,267	Preferred stock ($4.40 cum. div., $100 par)	12,000,000
Other utility plant, at cost	4,485,275	Premium on preferred stock	306,870
Plant acquisition adjustments	3,230,176	Total capital stock	$23,407,995
Other physical property	118,704	Long-term debt:	
Investment in associated company	18,410	First Mortgage and Refunding Bonds:	
Total plant and other investments	$64,613,832	Series D 3½% due 1969	$27,300,000
Current assets:		Current liabilities:	
Cash	$ 3,263,028	Taxes accrued	$ 4,331,556
U. S. Treasury securities	2,075,000	Interest accrued	192,181
Special deposits	2,500	Other current liabilities	756,554
Other current assets, less reserve	2,048,567	Total current liabilities	$ 5,280,291
Total current assets	$ 7,389,095		
Deferred debits:		Deferred credits:	
Capital stock expense	$ 257,987	Unamortized premium on debt	$ 951,913
Postwar refund of Federal excess profits tax	137,180	Other deferred credits	320,607
Other deferred debits	79,429	Total deferred credits	$ 1,272,520
Total deferred debits	$ 474,596	Reserves:	
		Depreciation	$11,859,127
		Amortization of plant acquisition adjustments	807,553
		Other reserves	281,412
		Total reserves	$12,948,092
		Earned surplus[1]	$ 2,268,625
Total assets and other debits	$72,477,523	Total liabilities and other credits	$72,477,523

[1] The company has covenanted that, so long as any shares of its $4.40 dividend preferred stock remain outstanding, it will not declare or pay any dividend or make any other distribution to the holders of its common stock (other than a dividend in common stock of the company) except out of net income (as defined in the company's amended charter) accumulated subsequent to June 30, 1944, after deducting the sum of $18,190 per month in respect of such of the first 120 full calendar months after October 9, 1944 as shall have elapsed; provided, however, that no common stock dividend may be paid in excess of 75% of the net income available as aforesaid, if, after giving effect thereto, the common stock capital and surplus (excluding premiums) would be less than 25% of the company's capitalization (including surplus but excluding premiums). Earned surplus unrestricted as to common stock dividends amounted to $608,000 at June 30, 1945.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

Appendix C

GULF STATES UTILITIES COMPANY

Condensed Income Statement for the Twelve Months Ended June 30, 1945

Operating revenues	$18,245,479
Operating expenses:	
Operation	$ 6,438,216
Maintenance	891,037
Depreciation	1,532,417
Taxes—Federal income[1]	3,767,260
—Other	1,316,367
Total operating revenue deductions	$13,945,397
Net operating revenues	$ 4,300,182
Other income net	(37,707)
Gross income	$ 4,262,475
Income deductions:	
Interest and amortization	$ 1,014,877
Amortization of plant acquisition adjustments	193,810
Total income deductions	$ 1,208,687
Net income	$ 3,053,788
Preferred dividend requirements	560,917
Balance for common stock and surplus	$ 2,492,871

[1] The provision for Federal income taxes for the twelve months ending June 30, 1945 includes provision for estimated excess profits taxes of $2,652,722 after giving effect to reduction of $533,599 resulting from amortization of emergency facilities and after deducting estimated postwar credit of $294,747

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

Appendix D

GULF STATES UTILITIES COMPANY

Condensed Income Statements for the years 1939 through 1945 (last two months of 1945 estimated) Pro Forma Giving Effect to Present Fixed Charges, Preferred Dividends, Proposed Number of Shares of Common Stock

	1939	1940	1941	1942	1943	1944	1945
Operating revenues	$10,369,097	$10,733,468	$11,836,157	$12,571,804	$15,398,189	$17,484,302	$17,816,000
Operating expenses:							
Operation	$ 3,242,342	$ 3,319,263	$ 3,861,877	$ 4,088,825	$ 5,073,299	$ 6,032,723	$ 6,532,400
Maintenance	571,397	584,278	574,582	686,600	753,085	899,658	984,600
Depreciation	1,411,403	1,456,930	1,552,856	1,602,267	1,460,357	1,519,712	1,546,700
Taxes:							
Federal income and excess profits	483,151	706,368	1,358,645	1,921,901	3,235,611	3,617,928	2,625,877
Other	899,000	1,002,754	1,093,806	1,124,414	1,188,976	1,272,973	1,298,000
Total operating expenses	$ 6,607,293	$ 7,069,593	$ 8,441,766	$ 9,424,007	$11,711,328	$13,342,994	$12,987,577
Net operating revenues	$ 3,761,804	$ 3,663,875	$ 3,394,391	$ 3,147,797	$ 3,686,861	$ 4,141,308	$ 4,828,423
Other income net	5,214	16,986	20,210	(62,409)	54,012	(15,551)	(43,000)
Gross income	$ 3,767,018	$ 3,680,861	$ 3,414,601	$ 3,085,388	$ 3,740,873	$ 4,125,757	$ 4,785,423
Deductions:							
Interest and amortization	$ 946,567	$ 930,310	$ 930,797	$ 934,076	$ 945,525	$ 928,455	$ 926,300
Amortization of plant acquisition adjustments	.....	.....	.....	.....	193,810	193,810	193,800
Total deductions	$ 946,567	$ 930,310	$ 930,797	$ 934,076	$ 1,139,335	$ 1,122,265	$ 1,120,100
Net income	$ 2,820,451	$ 2,750,551	$ 2,483,804	$ 2,151,312	$ 2,601,538	$ 3,003,492	$ 3,665,323
Preferred dividend requirements	528,000	528,000	528,000	528,000	528,000	528,000	528,000
Balance for common stock and surplus	$ 2,292,451	$ 2,222,551	$ 1,955,804	$ 1,623,312	$ 2,073,538	$ 2,475,492	$ 3,137,323
Earnings per share of common stock based on 1,909,968 shares	$1.20	$1.16	$1.02	$ .85	$1.09	$1.30	$1.64

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

Appendix E

EL PASO ELECTRIC COMPANY

Condensed Balance Sheet as at June 30, 1945

Assets and Other Debits		Liabilities and Other Credits	
Plant and other investments:		**Capital stock:**	
Electric plant (including intangibles), at original cost	$12,466,430	Common stock	$ 3,848,692
Other physical property	42,850	Preferred stock ($4.50 cum. div., no par)	1,500,000
Investment in associated company	4,435	Premium on preferred	33,750
Excess profits tax refund bonds	35,797	Total capital stock	$ 5,382,442
Miscellaneous special funds	1,035,268[1]		
Total plant and other investments	$13,584,780	**Long-term debt:**	
		First Mortgage Bonds, Series A, 3¼%, due 1970	$ 6,500,000
Current assets:		Note payable to bank, 2¼%, due 1946-1947	140,000
Cash	$ 533,265	Total long-term debt	$ 6,640,000
U. S. Treasury securities	2,017,500		
Other current assets, less reserve	432,296	**Current liabilities:**	
Total current assets	$ 2,983,061	Taxes accrued	$ 1,048,759
		Interest accrued	39,272
Deferred debits:		Other current liabilities	377,572
Postwar refund of Federal excess profits tax	$ 29,348	Total current liabilities	$ 1,465,603
Other deferred debits	13,774		
Total deferred debits	$ 43,122	**Deferred credits:**	
		Unamortized premium on debt	$ 159,873
		Other deferred credits	3,639
		Total deferred credits	$ 163,512
		Reserves:	
		Depreciation	$ 2,162,199
		Other reserves	335,144
		Total reserves	$ 2,497,343
		Earned surplus[2]	$ 462,063
Total assets and other debits	$16,610,963	Total liabilities and other credits	$16,610,963

[1] Includes $1,017,753.85 deposited with Trustee under First Mortgage of the company.

[2] The company has covenanted that it will not declare or pay any dividend or make any other distribution to the holders of its common stock (other than a dividend payable in common stock of the company) except out of net income (as defined in the charter of the company) accumulated subsequent to December 31, 1939 reduced by the aggregate principal amount of note payable to bank which has matured ($630,000 to June 30, 1945) until such reductions aggregate $1,000,000. Earned surplus unrestricted as to common stock dividends amounted to $284,000 at June 30, 1945.

Exhibit B to Application of Securities and Exchange Commission (Cont'd)

Appendix F

EL PASO ELECTRIC COMPANY

Condensed Income Statement for the Twelve Months Ended June 30, 1945

Operating revenues	$3,962,035
Operating expenses:	
Operation	$1,298,563
Maintenance	194,895
Depreciation	290,622
Taxes—Federal income[1]	902,342
—Other	384,784
Total operating revenue deductions	$3,071,206
Net operating revenues	$ 890,829
Other income net	32,620
Gross income	$ 923,449
Income deductions:	
Interest and amortization	$ 239,047
Total income deductions	$ 239,047
Net income	$ 684,402
Preferred dividend requirements	67,501
Balance for common stock and surplus	$ 616,901

[1] The amount shown above for Federal income taxes includes provision for estimated excess profits taxes of $703,952 for the 12 months ending June 30, 1945 after deducting estimated postwar credit of $78,217.

Exhibit C to Application of Securities and Exchange Commission.

ENGINEERS PUBLIC SERVICE COMPANY

(Incorporated)

Plan Pursuant to Section 11(e) of the

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

DIVISION A

Purposes of Plan

1. Compliance with orders of the Securities and Exchange Commission ("the Commission") directing the divestment by Engineers Public Service Company (Incorporated) ("Engineers") of its interest in El Paso Electric Company ("El Paso") and Gulf States Utilities Company ("Gulf States").

2. The divestment by Engineers of its interest in Virginia Electric and Power Company ("Virginia").

3. The retirement of the Preferred Stock of Engineers at $110 per share and accrued dividends in the case of the $6 Cumulative Dividend Preferred Stock and the $5.50 Cumulative Dividend Preferred Stock and at $105 per share and accrued dividends in the case of the $5 Dividend Convertible Preferred Stock.

4. The dissolution and liquidation of Engineers.

DIVISION B

Introductory Statement

Engineers, organized and existing under the laws of the State of Delaware, is a registered holding company under

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

the Public Utility Holding Company Act of 1935 ("the Act").

Engineers holds the following securities:

150,000 shares of Common Stock without par value of El Paso, being all of the authorized and issued Common Stock of said Company. These shares are to be reclassified into 381,994 shares of Common Stock, without par value, prior to the divestment of El Paso by Engineers.

280,000 shares of Common Stock without par value of Gulf States, being all of the issued Common Stock of said Company, there being 20,000 shares of such Common Stock authorized but unissued. The 280,000 outstanding shares of Common Stock are to be reclassified into 1,909,968 shares of Common Stock, without par value, prior to the divestment of Gulf States by Engineers.

2,932,065 shares of Common Stock without par value of Virginia Electric and Power Company ("Virginia"), there being, in addition, 6,360 shares of such Common Stock in the hands of the public and 20 shares of such Common Stock reserved for scrip and 1,061,555 shares of such Common Stock authorized but unissued.

Engineers has outstanding the following securities:

143,951 shares of $5 Dividend Convertible Preferred Stock ("$5 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $105 per share, plus accrued dividends, on redemption or voluntary liquidation.

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

183,406 shares of $5.50 Cumulative Dividend Preferred Stock ("$5.50 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $110 per share, plus accrued dividends, on redemption or voluntary liquidation.

65,098 shares of $6 Cumulative Dividend Preferred Stock ("$6 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $110 per share, plus accrued dividends, on redemption or voluntary liquidation.

1,909,968 shares of Common Stock of the par value of $1 per share.

Early in 1940 the Commission brought a proceeding against Engineers and its subsidiaries under Section 11(b)(1) of the Act. This Section provides for the restriction of integrated systems and incidental businesses which a holding company may control. On July 23, 1941, the Commission issued an order in that proceeding directing Engineers to dispose of its interest in The Key West Electric Company and Puget Sound Power & Light Company. This order has been fully complied with. On December 29, 1941, the Commission issued a further order under Section 11(b)(1) directing Engineers to dispose of its interest in Missouri Service Company, The Northern Kansas Power Company and The Western Public Service Company. This order also has been fully complied with. On September 16, 1942 and October 6, 1942, the Commission issued further orders under the same Section directing Engineers to dispose of all of its remaining investments except that in Virginia, which, if retained, must dispose of its gas and transportation operations. Engineers has complied with these 1942 orders by disposing of all of the investments ordered di-

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

vested by those orders except its investments in Gulf States, El Paso and Virginia and with respect to the latter two companies, has partially complied with said orders by the disposal of their transportation properties. Engineers filed a petition with the United States Court of Appeals for the District of Columbia, for a review of the 1942 orders and on November 22, 1943, the Court set these orders aside and remanded the case to the Commission for further proceedings in accordance with its opinion.

The Supreme Court of the United States granted writs of certiorari to both the Commission and Engineers but the case has not yet been decided.

Division C

The Plan

1. Engineers, except as below provided, will mail warrants to its Common Stockholders of record on a date to be fixed by the Board of Directors of Engineers, each of which warrants will evidence the right to acquire from Engineers shares of Gulf States Common Stock (reclassified) on the basis of one share of Gulf States Common Stock for each share of Engineers Common Stock held by such Stockholders on such date either

   (a) by purchasing from Engineers whole shares of such Gulf States Common Stock at the rate of $11.50 per share, or in the alternative,

   (b) by exchanging with Engineers whole shares of Engineers Preferred Stock for shares of Gulf States Common Stock on the basis of equivalent values, assigning $11.50 per share for each share of Gulf States Common Stock and $105 plus accrued dividends to the expiration date of the warrant for each share of $5 Preferred and $110

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

plus accrued dividends to the expiration date of the warrant for each share of $5.50 Preferred and $6 Preferred; provided that, on the basis of the relative values above stated, the value of the whole shares of Engineers Preferred Stock surrendered in exchange shall not exceed the value of the shares of Gulf States Common Stock which the warrant holder is entitled to and intends to acquire, but to the extent that the value of such shares of Engineers Preferred Stock surrendered in exchange is less than the value of such shares of Gulf States Common Stock to which the warrant holder is entitled and intends to acquire, the difference shall be paid by the warrant holder to Engineers.

The Board of Directors of Engineers may, however, withhold the mailing of such warrants in the event that, in its opinion, market conditions are such as to render it inadvisable to proceed with the issuance of the warrants. Upon the mailing of such warrants, the Plan shall be deemed effective. In cases where the addresses of such Stockholders are unknown or are outside continental United States and Canada, warrants will not be mailed to Common Stockholders of this Company of record on such date but will be held in the name of Transfer Agent against instructions of the record owners, or their duly authorized agents, until the opening of business on the second business day before the expiration date of the warrant period, at which time all warrants so held with respect to which no such instructions have been received shall, subject to the provisions of paragraph 9 hereof, be sold by the Company and the pro rata share of the aggregate net proceeds, if any, remitted to each Stockholder on whose behalf warrants are so sold, or, in cases where such remittance is not law-

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

ful or the address is unknown, held for the account of each such Stockholder subject to payment upon receipt of lawful instructions. In cases where the Engineers' Common Stockholder cannot be located and where no valid claim is made for such net proceeds within a period of ten years from the effective date of the Plan, such net proceeds shall be paid to Gulf States. The warrants must be exercised on or before a specified date (to be approximately sixteen days after the date of mailing warrants). All warrants will be registered in the names of the Common Stockholders, except as above provided, and will be transferable on the books of Engineers. Such warrants will be issued and distributed without the surrender by the Common Stockholders of Engineers of their Common Stock certificates.

2. The Transfer Agent will mail or deliver certificates for Gulf States Common Stock to those persons who exercise the warrants. To the extent warrants are not exercised, Engineers shall sell shares of Gulf States Common Stock represented thereby as promptly thereafter and in such manner as the Board of Directors of Engineers deems to be in the best interests of Engineers, subject to the provisions of paragraph 9 hereof.

3. Engineers will deposit in trust for the benefit of its Preferred Stockholders with a solvent bank or trust company an amount equal to $105 per share plus accrued dividends to the date of such deposit for each share of $5 Preferred and $110 per share plus accrued dividends to the date of such deposit for each share of $5.50 Preferred and $6 Preferred not surrendered in exchange pursuant to (b) of paragraph 1 and will give to all holders of such Preferred Stock five days' prior notice of such deposit at their

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

respective registered addresses, and such notice shall state that upon surrender by the Preferred Stockholders of their certificates for Preferred Stock to the Transfer Agent, they will be paid $105 per share plus such accrued dividends for each share of $5 Preferred and $110 per share plus such accrued dividends for each share of $5.50 Preferred and $6 Preferred; and from and after the date of such deposit, dividends on the Preferred Stock will cease and determine. Such deposit will be in cancellation of the whole of the outstanding Preferred Stock of Engineers. The President or a Vice President and the Secretary or an Assistant Secretary of Engineers shall, without further action by Directors and Stockholders of Engineers, file a certificate or certificates of Engineers reflecting the elimination of the capital represented by the Preferred Stock and the elimination of the authorized Preferred Stock in the Office of the Secretary of State of the State of Delaware and shall record in the office of the Recorder of Deeds of New Castle County, Delaware, a copy or copies thereof certified by the Secretary of State.

4. Immediately after filing the certificate provided for in paragraph 3, the President or a Vice President, and the Secretary or an Assistant Secretary, of Engineers, shall without further action by the directors or stockholders of Engineers:

(1) deposit for filing in the office of the Secretary of State of the State of Delaware, a certificate signed by them and verified by the oath of one of said officers, which shall state that Engineers is dissolved, in which certificate there shall be included a list of names and residences of the directors and officers of Engineers as of the date of such filing;

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

(2) deposit for recordation in the office of the Recorder of Kent County, Delaware, being the county in which the principal office of Engineers is maintained, a duplicate original of the certificate referred to in (1) above;

(3) cause to be published a copy of such certificate in one issue of a newspaper published in Kent County, Delaware, being the county in which the principal office of Engineers in the State of Delaware is situated; and

(4) deposit for filing in the office of the Secretary of State of the State of Delaware an affidavit of the Manager or Publisher of the newspaper referred to in (3) above, that said certificate has been published one time in said newspaper;

and thereupon, when the steps specified in (1), (2), (3) and (4) above shall have been taken, the dissolution of Engineers shall thereby become effective.

5. Promptly after the dissolution of Engineers shall have so become effective Engineers will distribute (1) all of the Common Stock (reclassified) of El Paso pro rata to the Engineers Common Stockholders, on the basis of one-fifth of a share of El Paso Common Stock for each share of Engineers Common Stock and (2) approximately 94.4% of the Common Stock of Virginia pro rata to the Engineers Common Stockholders on the basis of 1.45 shares of Virginia Common Stock for each share of Engineers Common Stock. Such distribution will be without the surrender by the Common Stockholders of Engineers of their Common Stock certificates. No fractional shares of Common Stock of either El Paso or Virginia will be issued or delivered, but in lieu thereof scrip will be issued and delivered. Such scrip will not be en-

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

titled to dividends, voting rights or any other stockholders' rights. When combined in lots aggregating one or more full shares of stock, scrip may, up to the date of sale (hereinafter in this paragraph described) of such shares of stock, be exchanged for such shares, together with any dividends which shall have been paid to Stockholders of record on any date subsequent to the effective date of the Plan and prior to the date of such exchange. Engineers will undertake to provide facilities whereby, prior to the date on which the distribution referred to in this paragraph is made, any holder of scrip certificates may dispose of such scrip, or acquire additional scrip so as to enable the holder to exchange such scrip for full shares of stock. All shares of stock reserved for delivery upon the exchange of scrip which shall not have been delivered in connection with such exchange within two years after the effective date of the Plan, shall, promptly after the expiration of such period and subject to the conditions of paragraph 9 hereof, be sold by the Transfer Agent and the Transfer Agent shall, as soon as possible thereafter, distribute to the holders of scrip certificates not theretofore surrendered their proportionate part of the net proceeds of sale, plus their proportionate part of any dividends which shall have been declared to holders of record as of a date after the effective date of the Plan and prior to the date of sale. In cases where the Engineers' Common Stockholders cannot be located and where no valid claim is made for the net proceeds from the sale of stock and the proportionate part of dividends referred to above and within a period of ten years from the effective date of the Plan, such net proceeds and proportionate part of dividends shall be paid, with respect to net proceeds of El Paso stock and dividends, to El Paso, and with

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

respect to net proceeds of Virginia stock and dividends, to Virginia.

In cases where the Engineers' Common Stockholder cannot be located and where no valid claim is made for the whole shares of El Paso and Virginia Common Stocks distributable to such stockholder within a period of ten years from the effective date of the Plan, such shares of stock shall be returned to the issuing Company for cancellation and the claims to dividends payable to holders of record of said shares after the effective date of the Plan shall be cancelled.

6. After the dissolution of Engineers shall have been effective as aforesaid, Engineers shall, nevertheless, be continued as a body corporate for the purposes and for the term specified in Section 42 of the General Corporation Law of the State of Delaware, and Engineers, acting under the direction of its Board of Directors, shall collect its assets and settle its debts and liabilities, with full power, subject to the provisions of paragraph 9 hereof, to sell and dispose of any or all of the assets of Engineers not distributed as aforesaid. Any vacancy occurring in the Board during the continuance of Engineers as a body corporate as aforesaid may be filled by the Board, as provided in its By-laws. After the final settlement of the affairs of Engineers and payment of or provision for its debt and liabilities, the Directors shall cause the distribution to the Engineers Common Stockholders of the remaining assets of the Company either in kind or in cash in exchange for their certificates of Engineers Common Stock. The Directors shall have power to authorize an agent to vote all shares of Virginia Common Stock held by the Company at any time after the making of the distribution referred to in paragraph 5 above at all meetings of

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

stockholders at which such stock is entitled to vote except as to any matter which is being contested by any stockholder.

7. Within 60 days after the dissolution of Engineers shall become effective in accordance with paragraph 4 above, Epsco, Inc., the mutual service corporation, will cancel it service contracts with Engineers, Virginia, Gulf States and El Paso, and Epsco, Inc. will then be dissolved and liquidated.

8. Engineers will pay all fees and expenses by whomsoever incurred in connection with the Plan or the proceedings in respect thereto, to the extent approved by the Commission.

9. Sales by Engineers of warrants in cases where the addresses of stockholders are unknown or are outside the Continental United States or Canada provided to be made under the provisions of paragraph 1 above, by Engineers of shares of Gulf States Common Stock represented by warrants not exercised provided to be made under the provisions of paragraph 2 above, by Engineers of any assets not distributed provided to be made under the provisions of paragraph 6 above, and by the Transfer Agent of shares of stock of Virginia and El Paso, represented by scrip, which shall not have been delivered in connection with the rights of combination of such scrip provided to be made under the provisions of paragraph 5 above, shall all be made subject to the following provisions: Engineers or the Transfer Agent, as the case may be, may sell such warrants or shares of stock on the New York Stock Exchange without further action by the Commission, but neither the Company nor the Transfer Agent shall sell any such warrants or shares in any other manner unless the Company or the Transfer Agent, as the case may be,

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

shall by telephone or telegraph have given to the Commission at least 24 hours prior notice of its intention so to do and of the details in respect thereof. Upon the expiration of such 24 hour period the Company or the Transfer Agent, as the case may be, may proceed with such sale in the manner specified in such notice unless during such period the Company or the Transfer Agent, as the case may be, shall have been informed by the Commission that the Commission intends to issue an order to show cause why the sale should be consummated, in which event such sale shall not be consummated without the approval of the Commission.

Engineers believes and alleges that the approval of this Plan is necessary for compliance with the orders issued by the Commission on September 16, 1942 and October 6, 1942 under Section 11 of the Act and to effectuate the provisions of subsection (b) of Section 11 of the Act, and if the Commission shall find the Plan necessary to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby, Engineers prays that the Commission shall enter an order approving the Plan containing a recitation that the relevant transactions of the Plan are necessary or appropriate to the integration or simplification of the holding company system of which Engineers is a member and necessary or appropriate to effectuate the provisions of subsection (b) of Section 11 of the Act, all in accordance with the meaning and requirements of the Internal Revenue Code, as amended, including Sections 371 and 1808(f) and Supplement R thereof.

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

DIVISION D

Conditions to Effectuation of the Plan

The effectuation of the Plan is dependent upon the satisfaction of the following conditions:

1. Gulf States shall have reclassified its Common Stock into 1,909,968 shares of Common Stock, without par value; Gulf States shall have given to its Preferred Stock seven votes per share instead of the one vote per share it now carries; El Paso shall have reclassified its Common Stock into 381,994 shares of Common Stock, without par value; the charters of Virginia and El Paso shall have been amended to provide for cumulative voting in respect of the Common Stock for the election of Directors; and the charters of Virginia, Gulf States and El Paso shall have been amended to provide for pre-emptive rights to Common Stockholders to subscribe for additional Common Stock issued for cash except in the case of public offerings.

2. The Commission shall have issued the order prayed for.

3. The Commission shall have instituted a proceeding in a court of competent jurisdiction pursuant to Section 11(e) of the Act and such court shall have entered a decree or order for the purpose of enforcing the Plan.

4. There shall have been obtained from the United States Treasury Department (unless Engineers, in its discretion, shall waive this condition) a closing agreement or ruling or closing agreements or rulings as to the tax consequences of the transactions necessary to carry out the Plan and such agreements or rulings shall be satisfactory to counsel for Engineers.

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

5. Any corporate action in connection with the Plan, which may be deemed necessary by counsel for Engineers shall have been carried out in a manner satisfactory to such counsel.

6. Authorization satisfactory to counsel for Engineers shall have been given for the carrying out of the Plan and for the issuance for all securities provided to be issued pursuant to the Plan, by all regulatory commissions, the consent of which is legally necessary.

7. The warrants referred to in paragraph 1 of the Plan shall have been mailed to Engineers Common Stockholders within the exceptions therein provided.

Division E

Amendments to the Plan and Other Provisions

Until approved by the Commission, the Plan may be modified or amended in any respect or particular by Engineers. After being approved by the Commission and before being approved by a court, the Plan or any part thereof may be modified or amended in any respect or particular by Engineers with the approval of the Commission. After the approval by the Court and before the Plan has been consummated, pursuant to the order or decree of a court of competent jurisdiction, the Plan may be modified or amended in any respect or particular by Engineers with the approval of both the Commission and the Court. No amendments to the Plan shall be made without the consent or agreement of Engineers.

Engineers may employ such agents, attorneys or others as it may deem desirable for the purpose of carrying out the Plan. Engineers may from time to time delegate to others any power or discretion conferred upon it by the Plan.

Exhibit C to Application of Securities and Exchange Commission (Cont'd)

The statements, opinions and conclusions contained in the Plan are intended solely for the purpose of assisting the Commission, any court and the Stockholders in any steps or proceedings with respect to the Plan and are not intended for use or information by prospective purchasers of any securities whether now existing or proposed to be issued or for any purposes other than the purposes set forth in this paragraph; and no one is authorized to make any statements regarding the Plan, whether with reference to any securities referred to herein or otherwise which are not set forth herein.

By Order of the Board of Directors

Engineers Public Service Company
(Incorporated)

By D. C. Barnes
President

Exhibit D to Application of Securities and Exchange Commission.

SECURITIES AND EXCHANGE COMMISSION
Philadelphia

HOLDING COMPANY ACT OF 1935
Release No. 7077

UNITED STATES OF AMERICA

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pa., on the 19th day of December, A. D., 1946.

IN THE MATTER

of

ENGINEERS PUBLIC SERVICE COMPANY

File No. 54-132

EL PASO ELECTRIC COMPANY

File No. 70-1149

GULF STATES UTILITIES COMPANY

File No. 70-1150

VIRGINIA ELECTRIC AND POWER COMPANY

File No. 70-1419

(Public Utility Holding Company Act of 1935)

Notice of Filing of Amendment and Order for Argument and Hearing on Plan, as Amended, Pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935, and Order Reopening Record.

Notice of Filing

Engineers Public Service Company ("Engineers") having filed on September 10, 1945 an application for ap-

Exhibit D to Application of Securities and Exchange Commission (Cont'd)

proval of a plan pursuant to Section 11 (e) of the Act for the divestment of its interests in El Paso Electric Company ("El Paso") and Gulf States Utilities Company ("Gulf States"); and El Paso and Gulf States, for the purpose of facilitating the effectuation of such plan, having filed declarations pursuant to Section 7 of said Act regarding the reclassification of their respective shares of common stock; and

The Commission, in its Notice of Filing and Order for Hearing issued October 15, 1945 (Holding Company Act Release No. 6151), having summarized therein the terms of such plan and declarations (which matters were consolidated) and ordered a hearing thereon; and having required Engineers to give notice of such hearing to all its stockholders of record by mailing a communication giving the date, hour and place of hearing to each of its stockholders at their last known address and also advising its stockholders that Engineers would, if requested, furnish copies of said Notice of Filing and Order for Hearing; and hearings having been held, extensive testimony having been taken and numerous exhibits having been introduced, the record having been closed, and briefs having been submitted and the Commission having heard oral argument; and

The Commission having on December 4, 1946 issued its Findings and Opinion (Holding Company Act Release No. 7041) stating that if within a period of thirty days from the date of said Opinion the plan were amended in accordance with the views expressed therein, an appropriate order approving said plan, as so amended, would be entered and the Commission would apply to an appropriate District Court for approval and enforcement of the plan; and

Engineers having filed an amendment to the plan on December 17, 1946, in which it is stated that the plan has been amended in accordance with the Commission's views

Exhibit D to Application of Securities and Exchange Commission (Cont'd)

expressed in its Findings and Opinion issued December 4, 1946; and El Paso and Gulf States, for the purpose of facilitating the effectuation of such plan, as amended, having filed amendments to their declarations pursuant to Section 7 of the Act; and Virginia Electric and Power Company ("Virginia"), for the purpose of facilitating the effectuation of such plan, as amended, having filed a declaration pursuant to Section 7 of the Act, all as more particularly described hereafter;

All interested persons are referred to said documents which are on file in the offices of the Commission for a full statement of the transactions therein proposed, which are summarized as follows:

1. Engineers will mail warrants to its common stockholders, which warrants will be transferable on the books of the company and will evidence the right to acquire shares of Gulf States common stock from Engineers, on the basis of one share of Gulf States common stock (reclassified into 1,909,968 shares of common stock, which is the same number of shares as the outstanding Engineers common stock) for each share of Engineers common stock, either by purchasing from Engineers whole shares of Gulf States common stock at the rate of $11.50 per share, or in the alternative, by exchanging whole shares of Engineers preferred stock for shares of Gulf States common stock on the basis of equivalent amounts, assigning $11.50 per share for each share of Gulf States common stock and $105 plus accrued dividends to the expiration date of the warrants for each share of $5 preferred stock and $110 plus accrued dividends to the expiration date of the warrants for each share of $5.50 and $6 preferred stock. However, it is provided in the amended plan, that the Board of Directors of Engineers may withhold the mailing of such warrants in the event that, in its opinion, market conditions are such as to render it inadvisable to proceed with the issuance

Exhibit D to Application of Securities and Exchange Commission (Cont'd)

of the warrants. The warrants are to be exercised on or before a specified date to be approximately sixteen days after the date of mailing the warrants. Such warrants will be issued and distributed without the surrender by the common stockholders of Engineers of their common stock. In cases where the addresses of Engineers' common stockholders are unknown or outside continental United States and Canada, warrants will not be mailed to such stockholders but will be held by a transfer agent against instructions of the record owners until the opening of business on the second business day before the expiration date of the warrant period, at which time all warrants so held with respect to which no instructions are received, shall, subject to the provisions of paragraph 8 below, be sold by the company and the *pro rata* share, if any, remitted to each stockholder, or in cases where such remittance is unlawful or the address unknown, held for the account of each such stockholder. In cases where the Engineers' common stockholder cannot be located within a period of 10 years from the effective date of the amended plan, such net proceeds shall be paid to Gulf States. It is stated in the amended plan that upon the mailing of such warrants the amended plan shall be deemed effective.

2. To the extent that the warrants are not exercised, Engineers proposes to sell shares of Gulf States common stock represented thereby as promptly thereafter and in such manner as the Board of Directors of Engineers deems to be in the best interests of the company, subject to the provisions of paragraph 8 below.

3. Engineers will deposit in trust for the benefit of its preferred stockholders an amount equal to $105 per share plus accrued dividends to the date of deposit for each share of $5 preferred stock and $110 per share plus accrued dividends to the date of deposit for each share of $5.50 preferred and $6 preferred not surrendered in exchange pursuant to

Exhibit D to Application of Securities and Exchange Commission (Cont'd)

paragraph 1 above, and will give to all holders of such preferred stock five days prior notice of such deposit. From and after the date of such deposit, dividends on all three series of preferred stock will cease. It is stated that such deposit will be in cancellation of the whole of the outstanding preferred stock of Engineers.

4. Immediately after the filing of a certificate reflecting the elimination of the capital represented by the preferred stock of Engineers in the Office of the Secretary of State of the State of Delaware, Engineers is to be legally dissolved as a corporate entity.

5. Promptly after the dissolution of Engineers becomes effective, Engineers will distribute the common stock of El Paso pro rata to the Engineers common stockholders on the basis of 1/5 of a share of El Paso common stock (reclassified into 381,994 shares of common stock) for each share of Engineers common stock and also distribute approximately 94.4% of the Virginia common stock to the Engineers common stockholders on the basis of 1.45 shares of Virginia common stock for each share of Engineers common stock. Such distribution will be without the surrender by the common stockholders of Engineers of their common stock certificates. No fractional shares of common stock of either El Paso or Virginia will be issued or delivered but in lieu thereof scrip will be issued and delivered. Such scrip will not be entitled to dividends, voting rights or any other stockholders' rights. When combined in lots aggregating one or more full shares of stock, scrip may, up to the date of sale of such shares of stock, be exchanged for such shares, together with any dividends which shall have been paid to stockholders of record on any date subsequent to the effective date of the amended plan and prior to the date of exchange. Engineers proposes to undertake to provide facilities whereby any holder of scrip certificates may dispose of such scrip, or acquire additional scrip so

Exhibit D to Application of Securities and Exchange Commission (Cont'd)

as to enable the holder to exchange such scrip for full shares of stock. All shares of stock reserved for issuance and delivery upon the exchange of scrip which shall not have been issued or delivered in connection with such exchange within two years after the effective date of the amended plan, shall, promptly after the expiration of such period and subject to the conditions of paragraph 8 below, be sold by the transfer agent and the transfer agent shall, as soon as possible thereafter, distribute to the holders of scrip certificates not theretofore surrendered their proportionate part of the proceeds of sale, plus their proportionate part of any dividends which shall have been declared to holders of record after the effective date of the amended plan and prior to the date of sale. If within a period of 10 years from the effective date of the amended plan, common stockholders of Engineers cannot be located, the proportionate part of the net proceeds and dividends attributable thereto shall be paid with respect to net proceeds of El Paso stock and dividends, to El Paso, and with respect to net proceeds of Virginia stock and dividends, to Virginia. Furthermore, it is also provided that if within a period of 10 years from the effective date of the amended plan certain Engineers common stockholders cannot be located, the whole shares of El Paso and Virginia common stocks not so claimed shall be returned to the respective issuing company for cancellation and the claims of dividends payable to holders of record of said shares after the effective date of the plan shall be cancelled.

6. It is further provided that after Engineers shall have become dissolved, Engineers is to be continued as a body corporate for the purposes and for the term specified in Section 42 of the General Corporation Law of the State of Delaware, and Engineers, acting under the direction of its Board of Directors, is to collect its assets and settle its debts and liabilities, with full power to sell and dispose of

Exhibit D to Application of Securities and Exchange Commission (Cont'd)

any or all of the assets of Engineers not distributed as aforesaid. After the final settlement of the affairs of Engineers and payment of or provision for its debts and liabilities, the Directors shall cause the distribution to the Engineers common stockholders of the remaining assets of the company either in kind or in cash in exchange for their certificates of Engineers common stock. It is further provided that the directors shall have power to authorize an agent to vote all shares of Virginia common stock held by the company at all meetings of stockholders at which such stock is entitled to vote except as to any matter which is being contested by any stockholder.

7. Within 60 days after the dissolution of Engineers shall have become effective, Epsco, Inc., the mutual service company, will cancel its service contracts with Engineers, Virginia, Gulf States and El Paso and thereupon be dissolved and liquidated.

8. Sales by Engineers of warrants in cases where the addresses of stockholders are unknown or are outside the continental United States or Canada provided to be made under the provisions of paragraph 1 above; by Engineers of shares of Gulf States' common stock represented by warrants not exercised provided to be made under the provisions of paragraph 2 above; by the transfer agent of shares of stock of El Paso and Virginia represented by scrip which shall not have been delivered in connection with the rights of combination of such scrip provided to be made under the provisions of paragraph 5 above; and by Engineers of any assets not distributed provided to be made under the provisions of paragraph 6 above, shall all be made subject to the following provisions: Engineers or the transfer agent may sell such warrants or shares of stock on the New York Stock Exchange without further action by the Commission, but neither Engineers nor the transfer agent shall sell any such warrants or shares of

Exhibit D to Application of Securities and Exchange Commission (Cont'd)

stock in any other manner unless the company, or the transfer agent, as the case may be, shall by telephone or telegram have given to the Commission at least 24 hours prior notice of its intentions so to do and of all the details in respect thereof, and upon the expiration of such 24-hour period, Engineers or the transfer agent may proceed with such sale in the manner specified in said notice unless during said period Engineers or the transfer agent shall have been informed by the Commission that the Commission intends to issue an order to show cause why the sale should be consummated, in which event such sale shall not be consummated without the approval of the Commission.

The following conditions, among others, are expressly established for the effectuation of the amended plan:

a. Reclassification of the common stocks of Gulf States and El Paso.

b. Approval by the Commission of the amended plan.

c. Obtaining from the United States Treasury Department, unless Engineers waives this condition, a closing agreement or ruling as to tax consequences of the transactions necessary to carry out the amended plan, which agreement or ruling shall be satisfactory to counsel for Engineers.

d. The issuance of the Gulf States warrants.

Engineers states that the approval of the amended plan is necessary for compliance with the orders issued by the Commission on September 16, 1942, and October 6, 1942, under Section 11 of the Act and to effectuate the provisions of Section 11 (b) of the Act, and if the Commission shall find the plan necessary to effectuate the provisions of Section 11 (b) of the Act and fair and equitable to the persons affected thereby, the Commission should issue an order

Exhibit D to Application of Securities and Exchange Commission (Cont'd)

approving such amended plan. Engineers also requests that the Commission's order approving the amended plan contain the recitation that the relevant transactions contained therein are necessary or appropriate to the integration or simplification of the holding company system of which Engineers is a member and necessary or appropriate to effectuate the provisions of subsection (b) of Section 11 of the Act, or in accordance with the meaning and requirements of the Internal Revenue Code, as amended, including Sections 371 and 1808 (f) and Supplement R thereof. The amended plan provides for the payment by Engineers of all fees and expenses by whomsoever incurred in connection with said amended plan or the proceedings with respect thereto to the extent approved by the Commission.

In connection with the amended plan, Virginia has filed a declaration and El Paso and Gulf States have filed amended declarations pursuant to Section 7 of the Act proposing, among other things, that the respective charters of Virginia, El Paso, and Gulf States will be amended to provide for cumulative voting for the election of the respective boards of directors for each company and for preemptive rights to the holders of common stock in respect to common stock of each company issued for cash, except in respect to any such stock issued in connection with a public offering.

The Commission being required by the provisions of Section 11 (e) of said Act, before approving the plan, as amended, to find that such plan is necessary to effectuate the provisions of Section 11 (b) and is fair and equitable to the persons affected thereby; and

It appearing to the Commission that the proceeding heretofore instituted with respect to the plan filed by Engineers (File No. 54-132) and the declarations filed by El Paso (File No. 70-4149) and Gulf States (File No. 70-1150) are related to and involve common questions of law and fact with the declaration filed by Virginia (File No. 70-1419) and therefore should be consolidated; and

Exhibit D to Application of Securities and Exchange Commission (Cont'd)

The Commission deeming it appropriate to afford interested persons opportunity for hearing and argument on the plan and declarations, as amended, and deeming it appropriate that any such hearing and argument should be held before the Commission and should be directed to whether the plan, as amended, conforms to the standards of Section 11 (e) and whether the declarations, as amended, satisfy the requirements of Section 7:

IT IS HEREBY ORDERED that the declaration filed by Virginia be, and hereby is consolidated with these proceedings.

IT IS FURTHER ORDERED that any person desiring to present argument or to be heard on such plan, as amended, shall appear before the Commission at 10:30 A. M., E. S. T., on the 3rd day of January, 1947, at the offices of the Securities and Exchange Commission, 18th and Locust Streets, Philadelphia, Pennsylvania, in such room as may be designated at that time by the Hearing Room Clerk in Room 318, at which time the record herein will be reopened and the hearing herein will be reconvened. Any person desiring to present argument or to be heard shall, on or before the 2nd day of January, 1947, file a written request or application with the Secretary of the Commission in accordance with the provisions of Rule XVII of the Commission's Rules of Practice. Such request shall set forth the nature of such person's interest in the proceedings and the matters concerning which it is desired to present argument or to be heard.

IT IS FURTHER ORDERED that notice of this argument and hearing be given to Engineers, El Paso, Gulf States and Virginia, and all other participants in the proceeding, by mailing to them copies of this order by registered mail, and to all other persons by general release of this Commission which shall be distributed to the press and mailed to the mailing list for releases issued under the Holding Com-

Exhibit D to Application of Securities and Exchange Commission (Cont'd)

pany Act of 1935, and by publication in the Federal Register.

IT IS FURTHER ORDERED that Engineers give notice of this argument and hearing to all its stockholders of record by mailing a copy of this Notice and Order at least 10 days prior to the date of this argument and hearing.

IT IS FURTHER ORDERED that jurisdiction be and is hereby reserved to separate, in whole or in part, any of the issues, questions or matters in these proceedings or which may arise in these proceedings, or to consolidate with these proceedings other filings or matters pertaining to said consolidated proceedings or to take such other action as may appear conducive to an orderly, prompt and economical disposition of the matters involved.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(SEAL)

Exhibit E to Application of Securities and Exchange Commission.

SECURITIES AND EXCHANGE COMMISSION
PHILADELPHIA

HOLDING COMPANY ACT OF 1935
Release No. 7119

IN THE MATTER
of

ENGINEERS PUBLIC SERVICE COMPANY
File No. 54-132

EL PASO ELECTRIC COMPANY
File No. 70-1149

GULF STATES UTILITIES COMPANY
File No. 70-1150

VIRGINIA ELECTRIC AND POWER COMPANY
File No. 70-1419

(Public Utility Holding Company Act of 1935)

Supplemental Findings and Opinion

Supplemental Findings and Opinion

APPEARANCES:

William E. Tucker, of Mudge, Stern, Williams & Tucker, of New York City, for the Applicants and Declarants.

Lawrence R. Condon and *Frederick Zazove*, of New York City, for T. W. Streeter and other preferred stockholders of Engineers.

Exhibit E to Application of Securities and Exchange Commission (Cont'd)

Francis H. Scheetz, and *Evans, Bayard & Frick* of counsel, of Philadelphia, Pa., for the Home Insurance Company and other holders of preferred stock of Engineers.

Louis Boehm and *Morton S. Schorr*, of New York City, for Frances Boehm and Lucille White, common stockholders of Engineers.

Bernard S. Kanton, for the Public Utilities Division of the Commission.

On December 4, 1946, we issued our Findings and Opinion with respect to the Section 11(e) plan filed by Engineers Public Service Company ("Engineers"); we stated that no order would be entered until the company had been afforded thirty days within which to present amendments to the plan to meet the objections indicated in the Opinion.[1] On December 18, 1946, Engineers filed the amended plan now before us.

On December 19, 1946, we issued notice that an amended plan had been filed and ordered hearing and argument before us on January 3, 1947.[2] Our order provided that notice of hearing be sent to all participants in the proceeding, to all stockholders of record of Engineers, mailed to the appropriate mailing list for Commission releases, published in the Federal Register, and distributed to the press. Such notice was given and the hearing and argument took place as ordered. Objections to the amended plan were raised by certain common and preferred stockholders. These objections are considered below.

Reference is made to our Findings and Opinion of December 4, 1946, for a full analysis of the Engineers' holding company system, the voluntary plan which had been pre-

[1] *Engineers Public Service Company*, ... S. E. C. ..... (1946), Holding Company Act Release No. 7041.

[2] Holding Company Act Release No. 7077.

Exhibit E to Application of Securities and Exchange Commission (Cont'd)

sented for our approval, and our discussion of the plan. We found that the plan met the standards of the Act in providing for (1) the distribution of the common stock of Gulf States Utilities Company ("Gulf States") through its sale under warrants to be issued to Engineers' common stockholders; (2) the distribution as a liquidating dividend of the common stock of El Paso Electric Company ("El Paso"); and (3) the eventual dissolution and liquidation of Engineers. We found the plan "unfair" in failing to provide for payment of the equivalent of the voluntary redemption price on retirement of the outstanding preferred stock of Engineers. We suggested that, if Engineers intended to litigate the question of the proper amount payable to the preferred, the plan should provide for immediate payment of $100 per share and accrued dividends and that an escrow for the additional amount in dispute and appropriate compensation for the delay in payment should be established to protect the rights of the various parties. We found that provisions in the plan for a bank loan to raise cash, and for a trusteeship which would retain all of the present investment in the common stock of Virginia Electric and Power Company ("Virginia") for an indeterminate period, were not "necessary" under the standards of the Act. We also found the plan unfair and inadequate in failing to provide for Commission jurisdiction over the allocation and award of fees and expenses.

The provisions of the amended plan are detailed in the notice and order for hearing. See n. 2, *supra*. The substance of the original plan has been retained; the principal features of the modified plan can be summarized as follows:

1. The plan retains the provision for distributing Gulf States common stock through sale at $11.50 per share under warrants issued to Engineers' common stockholders. The warrant period has been extended to sixteen days. The plan will be deemed effective upon mailing of the warrants, although the company reserves the right to withhold mailing,

Exhibit E to Application of Securities and Exchange Commission (Cont'd)

and therefore delay the effective date of the plan if, in its opinion, market conditions have changed so as to render the warrant program inadvisable.

2. The bank loan has been deleted from the plan. An exhibit filed with the amended plan indicates that cash which would have been provided by the bank loan will be obtained from special dividends declared by the three operating subsidiaries.[3]

3. Engineers will retire and cancel its outstanding preferred stock by depositing in trust an amount equal to $105 per share plus accrued dividends to date of deposit for each share of $5 preferred stock and $110 per share plus accrued dividends to date of deposit for each share of $5.50 and $6.00 preferred.[4] Five days' notice will be given stockholders in advance of deposit. The right to further dividends will cease on the date of deposit.

4. Engineers will dissolve.

5. The common stock of El Paso will be distributed in liquidation *pro rata* to Engineers' common stockholders on the basis of one-fifth of a share of El Paso for each share of Engineers common held.

6. 94.4% of the common stock of Virginia will be distributed *pro rata* to Engineers' common stockholders on the basis of 1.45 shares of Virginia common stock for each share of Engineers' common held.

7. Engineers will continue as a trusteeship under its Board of Directors for the purposes and term specified in Section 42 of the General Corporation Law of the State

[3] Special dividends will be paid as follows: Virginia, $2,932,000; Gulf States, $756,000; El Paso, $105,000. Except for the regular quarterly dividend payable in March 1947, no further common stock dividends will be paid by Virginia until June 15, 1948 or by Gulf until December 15, 1947.

[4] The plan retains the provision permitting common stockholders owning preferred stock to use the preferred in exchange for the Gulf States being distributed on warrants. To the extent that preferred is so exchanged the amount of the deposit will be reduced.

RECORD

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of Delaware in order to marshal its assets, meet its liabilities and wind up its affairs. For this purpose 162,612 shares of Virginia common (5.4%) will be retained after the distribution described in paragraph 6 above.[5] The staff of the trusteeship will consist of one full-time officer and a part-time tax consultant, with clerical assistance, at an estimated expense of $48,000 per year. The only other expense will be that of a transfer agent and registrar estimated at $20,000 per year, or a total estimated annual expense for operating the trusteeship of $68,000. The trusteeship would receive no income until June 15, 1948.[6] Assuming continuance of the present Virginia dividend rate, dividends thereafter would be at the rate of $1.00 per share, or a total income to the trusteeship of $162,612 per year after June 15, 1948, until the stock is either sold or distributed. After final settlement of the company's affairs, all remaining assets will be distributed to Engineers' common stockholders in cash or in kind.

The directors constituting the trusteeship will have power to authorize an agent to vote the Virginia common stock retained by the trusteeship at all meetings of stockholders, except as to any matter being contested by any stockholder.

8. Within sixty days after the dissolution of Engineers shall have become effective, EPSCO, Inc., the mutual service company for the system, will cancel its contracts with the companies in the system, dissolve and liquidate.

The plan requests that the Commission apply, pursuant to Section 11 (e) of the Act, to an appropriate United States District Court for approval and enforcement of the plan. The plan is conditioned, among other things on (1) Commission and Court approval, (2) the receipt of satisfactory tax agreements from the Treasury, (3) reclassifi-

[5] Engineers owns 99.8% of the common stock of Virginia. Two-tenths of one percent is publicly held.

[6] See n. 3, *supra*.

cation of the common stock of Gulf States and El Paso, and (4) issuance of the Gulf States warrants. It also contains a provision reserving to the Commission jurisdiction to pass on the payment of fees and expenses in connection with the plan.

Statutory Standards

The amended plan removes those features found objectionable in our previous Opinion and provides for expeditious compliance with the Act. There will be an immediate distribution of the maximum amount of Engineers' holdings commensurate with the need to wind up its affairs in an orderly manner. The trusteeship, as modified by the present amendment, overcomes the principal objections raised to the original proposal. While the form of a trusteeship is retained, the staff of the trusteeship has been reduced to a minimum, with an annual expense now estimated at $68,000, as compared with previous estimates ranging as high as $365,000. Moreover, instead of retaining all of the stock of Virginia for the period of the trusteeship, all but a small portion will be distributed immediately. The comparatively small amount retained, having an estimated value of approximately $3,600,000, does not appear excessive in view of the tax questions and other matters which remain unsettled.

The bank loan has become unnecessary in view of the cash which will become available to Engineers through the declaration of special dividends by the three operating subsidiaries. The unrestricted surplus accounts of those companies are adequate to permit these dividends. A common stockholder has filed a letter in these proceedings objecting to the special dividends and to the stated intention of the directors of Virginia and Gulf States to pay no further dividends for a given period regardless of earnings.[7] It is

[7] See n. 3, *supra*.

his belief that, as a consequence, the value of the securities received by him on the break-up of Engineers will be depressed. He suggests, as an alternative, that the warrant price for Gulf States be increased to raise the additional cash required to retire the preferred. Our previous Opinion left to the management the choice of methods for raising the necessary cash, as long as such choice did not delay compliance with the Act and was otherwise appropriate. The method chosen—declaration of special dividends—was one that had been suggested during the hearings on the original plan. Since there appears to be adequate unrestricted surplus available for that purpose, we can, under the circumstances here presented, see no objection to the declaration of such dividends. We note that the alternative suggested by the objecting common stockholders would require an increase in the warrant price for Gulf States from $11.50 to approximately $14. This would, of course, require that common stockholders desiring to exercise the warrant pay in an additional $2.50 per share for the Gulf States common and would thus impose an increased burden on them; it would also narrow the margin between the warrant price and the value of the Gulf States common. These were appropriate factors for the management to consider along with all other relevant matters in making its choice as to how to raise the additional cash required. We conclude that the method chosen to generate the necessary cash cannot be considered to be unfair to Engineers' common stockholders.

The preferred stockholders will receive upon retirement the full call price of their securities, including accrued dividends, the amount for which they have contended and the amount which our previous Opinion found to be fair. The plan is fair to the common stockholders and otherwise conforms with the applicable standards of Section 11 in that it provides for a rapid winding up of the affairs of the company at a minimum expense and distributes to them the

residue of the estate after payment of liabilities and the retirement of the preferred stock.

Accordingly, we find the amended plan necessary to effectuate the purposes of Section 11 (b) and fair and equitable to all persons affected.

Objections to the Amended Plan

In addition to the objection raised by a common stockholder to the special dividends mentioned above and which we have found to be without substance, common stockholders have objected to other aspects of the plan.

C. A. Johnson, a common stockholder, has submitted a letter in which he objects to the payment of any amount to the preferred in excess of $100 per share plus accrued dividends and indicates that he may contest any Commission order approving such additional payment. Similar objection was stated informally by the representative of another group of common stockholders.[8] The matter of fair treatment in the payment to be made to the preferred has been one of the principal issues in these proceedings and the position now being taken by these common stockholders was zealously presented by the company. The arguments presented were the subject of careful consideration and our Opinion treats the matter in detail. Under the circumstances, the objections appear to have been urged principally to preserve the rights of these stockholders to contest our order in the courts and there is no reason to change our previous findings on this aspect of the plan.

The preferred stockholders of the Streeter group have expressed the fear that the amended plan does not afford

[8] Counsel for this group requested a stay of one week for the purpose of filing a formal request to be heard. In view of the time factor, the expense incurred in any delay of these proceedings, and the fact that our notice and order for hearing have been outstanding for 10 days, we do not feel that any further delay in this matter would be warranted and we would deny a request for any such stay. However, since counsel's request merely relates to his right to be heard, and since he has been already afforded that right, the matter appears to be moot.

adequate protection of their interests in view of the opposition now expressed to the treatment of the preferred and the possibility that some objecting common stockholders may elect to litigate the matter. They have accordingly urged that the plan be further amended to include an escrow provision similar to that outlined in our previous Opinion to protect the preferred in the event of litigation.

We do not agree that any such amendment is necessary at this time. There is considerable question whether the eventuality on which the contention is based will occur at all. Should the plan be approved by the District Court, it is conjectural whether further appeals will be undertaken in view of the delay involved and the consequent expense to the company which would, of course, ultimately be borne by the common stockholders. We believe that prompt payment of the full amount which we have found due the preferred will most expeditiously accomplish compliance with the Act. Should our view be approved by the Court and should the objecting stockholders continue their objections and indicate an intention to appeal, there is the further question whether a court, under the circumstances and in view of the considerations of substantial expense and delay, would grant a stay. Only at this stage, and in such event, is there any need to consider the necessity of an escrow arrangement. In such event, to achieve expeditious compliance with the Act and fairness to the persons affected, it would be appropriate for Engineers to make prompt payment of $100 per share and accrued dividends in order to stop the accrual of further dividends, and set up an escrow arrangement, along the lines suggested in our previous Opinion, to protect the interests of the various groups. As indicated in our previous Opinion, such an escrow would have to be large enough to assure payment not only of the amount in issue, but of an additional amount to provide the preferred "for the period of the escrow a return on the amount in escrow which is measured by the return which

would have been received by it if the stock remained outstanding." We do not believe that it would be necessary to return the case to the Commission in order to set up such an escrow. Presumably, any such escrow would be established under Court supervision and our counsel before the Court will be available to present our views. We conclude that it is unnecessary to amend the plan further at this time since it is at least questionable whether an escrow will be needed and since the matter can be raised and dealt with in court if and when the need arises.[9]

Other Matters

1. Our previous Opinion indicated that upon the filing of a plan which meets the statutory standards we would approve the declarations now on file with us to reclassify the common stock of Gulf States and El Paso in order to facilitate the distribution of those shares under the plan. These declarations have been consolidated with the proceedings on the plan, and our order will provide for their approval.

The El Paso declaration has been further amended to provide for an amendment to the company charter to include provisions for cumulative voting and for preemptive rights to the holders of common stock on additional issues of common stock issued for cash except in connection with a public offering. The Gulf States declaration has been similarly amended as to preemptive rights, but not as to cumulative

[9] In this connection it should be pointed out that the plan can be amended, according to its terms, at any time before its consummation. We do not understand that the plan would permit the proposed deposit in trust of the full amount to relieve Engineers of any further responsibilities to the preferred if the payment to the preferred of the amounts deposited were the subject of a stay. Any such provision would obviously be unfair unless there were assurance that the preferred would receive adequate compensation for any delay in payment to them.

voting.[10] In addition, a declaration has been filed by Virginia to amend its charters to provide both for cumulative voting and preemptive rights. These changes are in accord with the general policy of the Commission in other cases and we find them to be consistent with the applicable provisions of the Act.[11] Our order will provide for the approval of the Section 7 declarations, as amended, of the three companies.

2. Engineers has requested that our order contain necessary findings under Sections 371 and 1808 (f), and Supplement R of the Internal Revenue Code. Such findings are clearly appropriate and will be included in our order.

By the Commission (Chairman Caffrey, Commissioners McConnaughey, McEntire and Hanrahan); special concurring opinions of Chairman Caffrey and Commissioner Hanrahan are issued herewith.

ORVAL L. DUBOIS,
Secretary.

(SEAL)

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[10] The company is advised by Texas counsel that an amendment of the charter to provide for cumulative voting would require the unanimous consent of all stockholders. In view of the substantial number of public holders of preferred stock, the management does not believe that such consent could be obtained at this time from all stockholders of Gulf States.

[11] See *American Power & Light Co., Texas Utilities Company*, ... S. E. C. ..... (1945), Holding Company Act Release No. 6158; *Kings County Lighting Co.*, ... S. E. C. ..... (1946), Holding Company Act Release No. 7060.

Exhibit E to Application of Securities and Exchange Commission (Cont'd)

Caffrey, C., concurring:

I join fully in this Opinion.

In the prior Opinion herein I noted my concurrence in the result (..... S. E. C. ....., Holding Company Act Release No. 7041). I think it appropriate to explain here the reasons for my concurrence.

The Opinion concluded that redemption prices should be paid to Engineers' preferred stocks because their investment value is equal at least to that amount. I agreed. However, it is only when the liquidation provisions of the charter cannot be found applicable to a given situation that there is room for an exploration of investment value. While the Opinion seemed to presume that those provisions of the charter do not apply under the particular circumstances of the case, I think it necessary to state at greater length the reasons why this is so.

There is no order outstanding which compels Engineers to liquidate. We have already inspected the Engineers system under Section 11 (b) (1) and have indicated that Engineers might retain as its principal system either the electric utility operations of Virginia or of Gulf States (12 S. E. C. 41, and 268). There is no formal compulsion on Engineers to liquidate, and, in fact, it has proposed its liquidation in the form of a voluntary plan under Section 11 (e) on the ground that it would be an "economic monstrosity" left with only a single system.

However, that is not, in my view, enough to make a case for voluntary liquidation. Our orders under Section 11 (b) (1) do not preclude a careful investigation of the surviving holding company system under Section 11 (b) (2) to determine what action might be necessary (including dissolution of the top company) in order to simplify the system and distribute its voting power equitably). I think that Engineers would have been subject to such a proceeding had it not come forth with a voluntary plan. Engi-

neers' "voluntary" proposal did no more than forestall the necessity for action by the Commission.

Further, Engineers' decision to liquidate came as a logical step following the necessity to comply with our Section 11 (b) (1) orders. It is the operation of Section 11 and not mere managerial discretion that has brought about the liquidation.

Under these circumstances, I do not believe that the liquidation can properly be termed voluntary.

On the other hand, our precedents make it clear that such a liquidation is not "involuntary" within the meaning of a charter drafted without the Holding Company Act in view. The situation of a liquidation necessitated by creditor or other action reasonably foreseeable in the ordinary business life of a corporation is not presented by the necessity of compliance with Section 11. Liquidation has commended itself to Engineers' management because the company will no longer serve any useful economic function within the system. But that step is made desirable (and, in all probability inevitable) by the operation of Section 11. To hold otherwise would be contrary to our prior views and to the decision of the Supreme Court in *Otis* v. *S. E. C.*, 323 U. S. 624.

These views do not, however, apply in a case where liquidation can reasonably be demonstrated to have commended itself to management for reasons not related to the operation of the Act.

Hanrahan, C., concurring:

I agree with the conclusions in the original and supplemental Opinions in this matter and with all of the reasoning except that in the original Opinion relating to the fairness of the price to be paid to the preferred stockholders. In my view, the discussion of the investment value of the preferred is wholly unnecessary. The charter provides for

Exhibit E to Application of Securities and Exchange Commission (Cont'd)

payment of the premiums in the event of a voluntary call or voluntary liquidation and it seems clear to me that, within the meaning of such charter provision, the action proposed by Engineers is "voluntary." Consequently it follows that fairness and equity require payment to the preferred stockholders of the prices specified in the charter in the event of voluntary liquidation.

UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission held at its office in the City of Philadelphia, Pa., on the 8th day of January, A. D., 1947.

IN THE MATTER

of

ENGINEERS PUBLIC SERVICE COMPANY
File No. 54-132

EL PASO ELECTRIC COMPANY
File No. 70-1149

GULF STATES UTILITIES COMPANY
File No. 70-1150

VIRGINIA ELECTRIC AND POWER COMPANY
File No. 70-1419

(Public Utility Holding Company Act of 1935)

Order Approving Amended Plan

Engineers Public Service Company ("Engineers"), a registered holding company, having filed on September 10,

Exhibit E to Application of Securities and Exchange Commission (Cont'd)

1945, an application pursuant to the provisions of Section 11 (e) and other applicable sections of the Public Utility Holding Company Act of 1935 and the Rules and Regulations of the Commission promulgated thereunder, for approval of a plan of reorganization for the purpose of complying with the provisions of Section 11 (b) (1) of the Act and with orders of this Commission dated September 16, 1942, and October 6, 1942; and El Paso Electric Company ("El Paso"), Gulf States Utilities Company ("Gulf States") and Virginia Electric and Power Company ("Virginia"), having filed declarations pursuant to Section 7 of said Act for the purpose of facilitating the effectuation of such plan;

Public hearings having been held on the plan of reorganization and declarations filed pursuant to Section 7 in consolidated proceedings after appropriate notice in which all interested persons were given opportunity to be heard, briefs having been filed and oral argument having been heard; and the Commission having on December 4, 1946, issued its Findings and Opinion stating that, if within a period of 30 days from the date of said Findings and Opinion the plan were amended in accordance with the views expressed therein, an appropriate order approving said plan as so amended would be entered; and the applicants having filed on December 17, 1946 an amendment to the plan and amendments to the declarations filed pursuant to Section 7 of the Act; and the applicants having filed certain other amendments to said amended plan of reorganization and said declarations on December 31, 1946, January 2, 1947 and January 3, 1947;

Public hearings having been held on said amended plan and said amended declarations after appropriate notice in which all interested persons were given opportunity to be heard and oral argument having been heard;

The applicants having requested that the Commission enter an order finding that the proposed transactions are

Exhibit E to Application of Securities and Exchange Commission (Cont'd)

necessary to effectuate the provisions of Section 11 (b) of the Public Utility Holding Company Act of 1935, fair and equitable to the persons affected thereby, and that such order contain recitals in accordance with the requirements of Sections 371 and 1808 (f) and Supplement R of the Internal Revenue Code, as amended; and having further requested the Commission to enter an order permitting said declarations, as amended, to become effective forthwith; and having also requested the Commission pursuant to Section 11 (e) of the Act, to apply to the appropriate United States District Court to enforce and carry out the terms of the amended plan of reorganization;

The Commission having considered the record and oral argument herein, and having on January 8, 1947 made and filed its Supplemental Findings and Opinion herein; and

The Commission having found that the amended plan of reorganization is necessary to effectuate the provisions of Section 11 (b) and is fair and equitable to the persons affected thereby and the Commission having further found that said declarations, as amended, should be permitted to become effective;

IT IS ORDERED pursuant to the applicable provisions of the Act that the amended plan of reorganization be, and hereby is, approved, and that said declarations filed pursuant to Section 7 be permitted to become effective, respectively, subject, however, to the conditions specified in Rule U-24 and subject to the following terms and conditions:

1. That jurisdiction be and it hereby is reserved to the Commission to approve, disapprove, modify, allocate or award from the estate of Engineers by further order or orders, all fees or other compensation and all remuneration or expenses claimed or hereafter claimed by any persons in connection with the amended plan, the transactions incident thereto and the consummation thereof;

Exhibit E to Application of Securities and Exchange Commission (Cont'd)

2. That jurisdiction be and it hereby is reserved to the Commission to take such further action as the Commission may deem necessary or appropriate to effectuate the requirements of Section 11 (b) of the Act; and

3. That jurisdiction be and it hereby is reserved to the Commission to entertain such further proceedings, to make such supplemental findings and to take such further action as the Commission may deem appropriate in connection with the amended plan, the transactions incident thereto and the consummation thereof, and in the event such amended plan be not consummated, to enter such further orders as the Commission may deem appropriate under Sections 11 (b), 11 (f) and 20 (a) of the Act.

It Is Further Ordered that counsel for the Commission be, and they hereby are, authorized and directed to make application forthwith on behalf of the Commission to an appropriate United States District Court pursuant to the provisions of Section 11 (e) and subsection (f) of Section 18 of the Act, to enforce and carry out the terms and provisions of the amended plan.

It Is Further Ordered that this order shall not be operative to authorize the consummation of any of the transactions proposed in the amended plan until an appropriate United States District Court shall, upon application thereto, enter an order enforcing such amended plan.

It Is Further Ordered and Recited that all steps and transactions involved in the consummation of the amended plan, including particularly the issuances, transfers, exchanges, conveyances, expenditures, acquisitions, receipts, distributions and sales, hereinafter described and recited in subparagraphs I through VIII below, are necessary or appropriate to the integration and simplification of the Engineers Public Service Company holding company system and are necessary or appropriate to effectuate the provisions

Exhibit E to Application of Securities and Exchange Commission (Cont'd)

of Section 11 (b) of the Public Utility Holding Company Act of 1935, are hereby authorized, approved and directed; the stock and securities and other property which are ordered to be issued, exchanged, received, acquired, transferred, conveyed, distributed or sold upon such transactions, and the expenditures which are ordered to be made, being specified and itemized as follows:

I. A. Engineers, except as recited below, will issue and distribute by mail to the holders of its common stock of record on a date to be specified by its Board of Directors, without the surrender by such stockholders of their certificates for Engineers common stock, warrants described in the amended plan evidencing the right to acquire from Engineers 1,909,968 shares of common stock (reclassified) of Gulf States, on a share for share basis and on the terms hereinafter more particularly set forth.

B. In cases where the addresses of the record holders of Engineers common stock are unknown or are outside the continental United States and Canada, such warrants will not be mailed, but will be held in the name of a Transfer Agent and will be issued and distributed upon instructions of said record owners, or their duly authorized agents, until the opening of business on the second business day before the expiration date of the warrant period, at which time all warrants so held with respect to which no such instructions have been received will be sold by Engineers, subject to the provisions of paragraph 9 of Division C of the amended plan and the pro rata shares of the aggregate net proceeds, if any, will be remitted to each holder of common stock of Engineers on whose behalf warrants are so sold, or, in cases where such remittance is not lawful or the addresses are unknown, held for the account of each such stockholder subject to payment upon receipt

Exhibit E to Application of Securities and Exchange Commission (Cont'd)

of lawful instructions. In cases where the Engineers common stockholder cannot be located, and where no valid claim is made for such proceeds within a period of ten years from the effective date of the amended plan, such net proceeds will be paid to Gulf States.

II. Pursuant to the provisions of the above mentioned warrants, Engineers will transfer and deliver Gulf States common stock to those persons who exercise said warrants before the expiration date thereof, and upon such exercise the holders of said warrants will either (1) pay Engineers $11.50 for each share of Gulf States common stock so acquired, or (2) deliver to Engineers in exchange for said Gulf States common stock whole shares of Engineers preferred stock on the basis of equivalent values, assigning $11.50 per share for each share of Gulf States common stock, and $105 plus accrued dividends to the expiration date of the warrant for each share of Engineers $5 preferred stock and $110 plus accrued dividends to the expiration date of the warrant for each share of Engineers $5.50 preferred stock and $6 preferred stock; provided that, on the basis of the relative values above stated, the value of the whole shares of Engineers preferred stock to be exchanged under the warrants will not exceed the value of the shares of Gulf States common stock which the warrant holder is entitled to and intends to acquire, and to the extent that the value of such shares of Engineers preferred stock exchanged for Gulf States common stock under said warrants is less than the value of such shares of Gulf States common stock to which the warrant holder is entitled and intends to acquire, the difference will be paid by the warrant holder to Engineers in cash.

III. Any of the 1,909,968 shares of Gulf States common stock not sold or exchanged upon exercise of the above mentioned warrants will be sold by Engineers,

subject to the provisions of paragraph 9 of Division C of the amended plan.

IV. Engineers will thereafter deposit in trust with a solvent bank or trust company for the benefit of its preferred stockholders an amount equal to $105 per share plus accrued dividends to the date of such deposit for each share of its $5 preferred stock, and $110 per share plus accrued dividends to the date of such deposit for each share of its $5.50 preferred stock and $6 preferred stock, not surrendered in exchange upon exercise of the above mentioned warrants, in cancellation of all its preferred stock.

V. A. Engineers will dissolve and, promptly thereafter, distribute pro rata to the holders of its common stock, without surrender by said holders of their certificates for common stock of Engineers:

(1) the entire 381,994 shares of El Paso common stock (reclassified) which will then be held by Engineers, on the basis of one-fifth of a share of El Paso common stock for each share of Engineers common stock held, and

(2) approximately 94.4% (2,769,453 shares) of the common stock of Virginia, on the basis of 1.45 shares of Virginia common stock for each share of Engineers common stock held.

B. In any case where the above proportions would result in a fraction of a share of common stock of either El Paso or Virginia, instead of fractional shares Engineers, through a Transfer Agent, will issue and distribute scrip, as described in the amended plan, exchangeable, when combined in lots aggregating one or more full shares of stock, for certificates for said shares, together with any dividends which shall have

Exhibit E to Application of Securities and Exchange Commission (Cont'd)

been paid in respect of such shares to stockholders of record on any date subsequent to the effective date of the amended plan and prior to the date of exchange.

C. Upon surrender for exchange of such scrip aggregating one or more full shares of common stock of El Paso or Virginia, prior to the date of sale of such stock hereinafter referred to, said Transfer Agent will, in exchange for said scrip, deliver to the holder thereof a share or shares of such stock, together with any dividends which shall have been paid in respect of such shares to stockholders of record on any date subsequent to the effective date of the amended plan and prior to the date of exchange, and new scrip for any fraction in excess of a full share or shares.

D. All shares of common stock of El Paso or Virginia reserved for delivery upon exchange of such scrip which shall not have been delivered in connection with such exchange within two years of the effective date of the amended plan will be sold by the Transfer Agent, subject to the provisions of paragraph 9 of Division C of the amended plan, and the Transfer Agent will distribute to the holders of scrip certificates not theretofore surrendered their proportionate part of the net proceeds of sale, plus their proportionate part of any dividends which shall have been declared to holders of record as of a date after the effective date of the amended plan and prior to the date of sale; except that in cases where the Engineers common stockholders cannot be located and where no valid claim is made for the net proceeds from the sale of said stock and the proportionate part of dividends referred to above within 10 years from the effective date of the amended plan, such net proceeds and proportionate part of dividends will be paid, with respect to net proceeds of El Paso stock and dividends, to El Paso, and

Exhibit E to Application of Securities and Exchange Commission (Cont'd)

with respect to net proceeds of Virginia stock and dividends, to Virginia.

E. In cases where an Engineers common stockholder cannot be located and where no valid claim is made within 10 years from the effective date of the amended plan for the whole shares of El Paso or Virginia common stock distributable to such stockholder, such shares of stock will be returned to the issuing company for cancellation and the claims to dividends payable to holders of record of said shares after the effective date of the amended plan will be cancelled.

VI. Engineers will thereafter collect its assets and settle its debts and liabilities, and in connection therewith will, to the extent determined by its Board of Directors and subject to the provisions of paragraph 9 of Division C of the amended plan, sell and dispose of any or all of the assets not distributed as aforesaid, including all or any part of the Virginia common stock not theretofore distributed as above provided.

VII. After the final settlement of the affairs of Engineers and the payment of or provision for its debts and liabilities, it will distribute to its common stockholders its remaining assets, either in kind or in cash, in exchange for the certificates of Engineers common stock, and the Engineers common stockholders will surrender said certificates in exchange for such final distribution.

VIII. The foregoing transactions or any of them may be effected through and deliveries may be made to or through trustees, attorneys, transfer, exchange or other agents, or otherwise, and/or the stock and securities and other property may be delivered directly to those ultimately entitled thereto, all in any manner

consistent with the Court order enforcing the amended plan and within the time limits, if any, specified in the amended plan or in said Court order.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(SEAL)

Order Setting Case for Hearing.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935 Civil Action No. 995 (Filed Jan. 9, 1947)

Order.

This 9th day of January 1947, upon consideration of the Application of the Securities and Exchange Commission, filed herein the 9th day of January 1947, and motion of counsel for said Common, IT IS ORDERED as follows:

(1) That a hearing be held on the 17th day of February 1947, at 11:00 A. M., E. S. T., in the District Court of the United States for the District of Delaware at the United States Court House, Wilmington, Delaware, before the Honorable Paul Leahy, District Judge, for the purpose of determining whether the Court should enforce and carry

Order Setting Case for Hearing (Cont'd)

out the terms and provisions of the plan of Engineers Public Service Company to effectuate the provisions of Section 11(b) of the Public Utility Holding Company Act of 1935, referred to in said Application and approved by the Securities and Exchange Commission by its Order dated January 8, 1947, and whether such plan is fair and equitable and appropriate to effectuate the provisions of Section 11(b) of the Public Utility Holding Company Act of 1935, and for such other purposes as may appear necessary or appropriate in the premises;

(2) That Engineers Public Service Company give notice of said hearing to each holder of record of its outstanding securities by mailing postage prepaid to his or her last known address a copy of the notice attached hereto and marked "Exhibit 1" and a copy of the Findings and Opinion and Order of the Securities and Exchange Commission dated January 8, 1947; that notice of said hearing be given to the participants in the proceedings or to their counsel of record; and that notice be given to all other persons by publications once in a newspaper of general circulation published in the cities of New York, New York; Wilmington, Delaware; and Boston, Massachusetts, in the form hereto annexed as Exhibit 1; and that such notice be mailed and published, respectively, on or before the 15th day of January, 1947;

(3) That on or before February 10, 1947, any person who proposes to oppose the Application of the Securities and Exchange Commission or the enforcement and carrying out of the terms and provisions of said plan, or the approval by this Court of said plan, shall serve by mail on Harry G. Slater, Chief Counsel, Public Utilities Division, Securities and Exchange Commission, 18th and Locust Streets, Philadelphia 3, Pennsylvania; and on Mudge, Stern, Williams & Tucker, Counsel for Engineers Public Service Company, 40 Wall Street, New York 5, New York, copies of a written statement of objections and any brief proposed

Order Setting Case for Hearing (Cont'd)

to be filed in support thereof and shall file such statement and brief on or before such date with the Clerk of this Court. Such statement of objections shall be addressed to the Commission's Application herein and to the Commission's Findings and Opinion dated December 4, 1946, and to the Commission's Supplemental Findings and Opinion dated January 8, 1947, and shall state in detail and in the manner required for pleadings by the Rules of Civil Procedure for the District Courts of the United States, the extent to which such statement challenges the allegations and findings therein contained together with any affirmative defense or objections to said Application;

(4) That during the pendency of these proceedings all security holders of Engineers Public Service Company, and all other persons be, and they are hereby, enjoined and restrained from doing any act or taking any action interfering with, or tending to interfere with, these proceedings or with the carrying out of the plan and compliance with the Order of the Commission approving it, including the commencement or prosecution of any action, suit or proceeding at law or in equity or under any statute in any court or before any executive or administrative officer, commission or tribunal, other than such proceedings before the Commission or this Court as may be authorized by the Act or the Rules and Regulations promulgated thereunder and such review, if any, in the Circuit Court of Appeals as may be provided by law.

By the Court,

(s) PAUL LEAHY
United States District Judge

Dated:
January 9, 1947.

Statement of Objections of Central-Illinois Securities Corporation and Christian A. Johnson.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action No. 995. (Filed Feb. 10, 1947.)

NOTICE IS HEREBY GIVEN, pursuant to an Order of United States District Court for the District of Delaware in the above-entitled cause, dated January 9, 1947, that CENTRAL-ILLINOIS SECURITIES CORPORATION (a corporation organized and existing under the laws of Delaware) and CHRISTIAN A. JOHNSON, being the owners of 5000 shares of Common Stock and 1000 shares of Common Stock of Engineers Public Service Company (hereinafter referred to as "Engineers"), respectively, acting in their own behalf and on behalf of all other owners of Common Stock of Engineers, do hereby OBJECT to the approval by the Court and to the enforcement and carrying out of the terms and provisions of the plan of Engineers under Section 11(e) of the Public Utility Holding Company Act of 1935 ("the Act"), approved by the Securities and Exchange Commission by its Order dated January 8, 1947, the enforcement of which is the subject of the above-entitled proceedings.

The grounds of objections are that the aforementioned plan of Engineers does not conform with the requirements of Section 11(e) of the Act in that said plan is not "fair and equitable" to the Common Stockholders of Engineers and is not "appropriate" to effectuate Section 11(b), in the following particulars:

Statement of Objections of Central-Illinois Securities Corporation and Christian A. Johnson (Cont'd)

1. Said plan provides for the payment to the holders of the Preferred Stocks of Engineers of amounts aggregating approximately $3,200,000 in excess of the amounts to which such stockholders are entitled under the applicable charter provisions of Engineers and in consonance with the standards of fairness and equity;

2. Said plan, in failing to provide for the establishment of an escrow fund with respect to the aforementioned excess or bonus payments to the Preferred Stockholders is deficient of any mechanics for the effectuation and carrying out of the other phases of the plan of Engineers during such period as the legality and propriety of payment of the excess or bonus amounts is in litigation.

Dated, February 7, 1947.

Yours, etc.,

GUGGENHEIMER & UNTERMYER,
Attorneys for Objectors,
30 Pine Street,
New York 5, N. Y.

To:

CLERK, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE,
Wilmington, Delaware.

HARRY G. SLATER, ESQ., Chief Counsel,
Public Utilities Division,
Securities and Exchange Commission,
18th & Locust Streets,
Philadelphia 3, Pa.

MUDGE, STERN, WILLIAMS & TUCKER, ESQS.,
40 Wall Street,
New York 5, N. Y.

Statement of Objections of Lucille White and Frances Boehm.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER of ENGINEERS PUBLIC SERVICE COMPANY.	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Court Action No. 995. (Filed Feb. 10, 1947.)

TO THE HONORABLE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE:

Lucille White and Frances Boehm, common stockholders of Engineers Public Service Company by Louis Boehm and Raymond L. Wise, their counsel, do hereby object to the Plan of Engineers Public Service Company to effectuate the provisions of Section 11(b) of the Public Utility Holding Company Act of 1935 and do further object to the application of the Securities and Exchange Commission for the enforcement and carrying out of the terms and provisions of said plan, and do further object to the approval by this Court of said plan as follows:

With Respect to the Findings and Opinion of the Securities and Exchange Commission Dated December 4, 1946

1. Object to so much of the Findings and Opinion as states: (p. 26) "Since under the circumstances of this case, we do not think it proper to regard the liquidation provisions of the charter as conclusive in determining those

Statement of Objections of Lucille White and Frances Boehm (Cont'd)

rights, we must consider all provisions of the charter applicable to the preferred, such as the dividend rate and the call price as well as the liquidation preferences, and we must analyze the financial condition of the company with particular regard to the asset and earnings coverage of the preferred."

On the ground that the liquidation provisions of the charter are conclusive.

2. Object to so much of the Findings and Opinion as states: (p. 31) "It is apparent that the preferred has an investment value at least equal to the respective call prices."

On the ground that the investment value of the preferred stock is not in excess of $100.00 per share plus accrued dividends and on the further ground that no evidence was introduced for the common stockholders to substantiate that fact.

3. Object to so much of the Findings and Opinion as states: (p. 31) "Upon a full consideration of the record before us, we conclude that the payment of $100.00 per share, plus accrued dividends, to the preferred in retirement, is not fair and equitable to the preferred stockholders, and that the fair and equitable standard would require the payment of an amount equal to the call prices of the securities, plus accrued dividends. We cannot, therefore, approve the provisions of Part I of the plan relating to the retirement of the preferred."

On the grounds set forth in Objections 1 and 2.

With Respect to the Supplemental Findings and Opinions of the Securities and Exchange Commission Dated January 8, 1947

4. Object to so much of the Supplemental Findings and Opinion as states: (p. 5) "The plan is fair to the common

Statement of Objections of Lucille White and Frances Boehm (Cont'd)

stockholders and otherwise conforms with the applicable standards of Section 11 in that it provides for a rapid winding up of the affairs of the company at a minimum expense and distributes to them the residue of the estate after payment of liabilities and the retirement of the preferred stock.

Accordingly, we find the amended plan necessary to effectuate the purposes of Section 11(b) and fair and equitable to all persons affected.''.

On the ground that the payment to the preferred of the call price is unfair and inequitable to the common stockholders in that it provides for the payment to the preferred in excess of $100.00 per share, plus accrued dividends, contrary to the involuntary liquidation provisions of the charter.

Louis Boehm
60 Broad Street
New York 4, N. Y.

Raymond L. Wise
80 Broad Street
New York 4, N. Y.
Attorneys for Lucille White
and Frances Boehm

Statement of Objections of Thomas W. Streeter, et al.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action No. 995. (Filed Feb. 10, 1947.)

Statement of Objections of Thomas W. Streeter et al. Preferred Stockholders of Engineers Public Service Company to Application Filed by the Securities and Exchange Commission.

Thomas W. Streeter, a preferred stockholder and a director of Engineers Public Service Company, together with other stockholders holding 10,494 shares of preferred stock of the company, by their attorney, Lawrence R. Condon, respectfully state:

1. Pursuant to the authorization of the Company's Board of Directors they have retained counsel, above named, on behalf of the preferred stockholders and have participated throughout the course of these proceedings before the Securities and Exchange Commission.

2. They admit that if the amended plan is consummated in accordance with the prayer for relief contained in the application of the Securities and Exchange Commission such plan would be fair and equitable and appropriate to effectuate the provisions of Section 11(b) of the Public Utility Holding Company Act of 1935.

Statement of Objections of Thomas W. Streeter, et al.
(Cont'd)

3. They admit that the proposed dissolution of Engineers Public Service Company is necessary to effectuate the provisions of the Act, as alleged by the Commission in paragraphs 10 and 13 of its application but allege that such dissolution is not required by the Act or by any order of the Commission and is entirely voluntary within the meaning of the Company's charter.

4. They admit that the preferred stocks have investment values of at least their respective call prices and that the preferred stockholders are entitled to such amounts if the dissolution is required by the Act but allege that the proposed retirement of the preferred stocks is tantamount to a redemption of such stocks within the meaning of the Company's charter.

5. They object to the Commission's finding contained in its Supplemental Findings Opinion and Order, entered January 8, 1947, that in the event the common stockholders should secure a stay preventing the payment of the full amount of the call prices of the respective preferred stocks, it would be appropriate for Engineers to make a part payment on the preferred stocks of One Hundred ($100.00) Dollars per share and thus stop the accrual of further dividends. Under the Company's charter, the preferred stockholders are entitled to be paid their dividend preference before the common stockholders may receive any dividends or assets unless the preferred stockholders are paid their respective redemption preferences in full together with accrued dividends to the date of payment. Your objectors allege that any action in accordance with the finding of the Commission would be a violation of the contract rights of the preferred stockholders and, further under all the circumstances of this case, if such action were taken the plan would not be fair and equitable.

6. This statement of objections is filed in accordance with the order of this court entered January 9, 1947 but in

view of the fact that any objection to termination of dividends would be academic if the plan is consummated according to its terms and the application of the Commission, your objectors respectfully submit that the filing at this time of a brief on the question of dividends would not be within the contemplation or intent of such order and might well be an imposition on the Court's time. Your objectors construe the Court's order as permitting such action and they respectfully reserve the right at an appropriate time, to support the objections stated herein with a brief if, as, and when, any application is made for a stay of an order of this Court directing the consummation of the plan according to its terms.

WHEREFORE, your objectors respectfully pray that the Court: (1) enter an order in accordance with the application of the Securities and Exchange Commission, and (2) in the event such request is made, deny any request for a stay of such order.

February 6th, 1947.

LAWRENCE R. CONDON,

LAWRENCE R. CONDON,
Attorney for Thomas W. Streeter, *et al.*,
Preferred Stockholders of Engineers
Public Service Company,
165 Broadway,
New York 6, New York.

LAWRENCE R. CONDON,
FREDERICK ZAZOVE,
of Counsel.

Statement of Objections of Thomas W. Streeter, et al.
(Cont'd)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

I, Frederick Zazove, being first duly sworn, do affirm and say that on February 8, 1947 I caused to be mailed to Harry G. Slater, Chief Counsel, Public Utilities Division, Securities and Exchange Commission, 18th and Locust Streets, Philadelphia 3, Pennsylvania and to Mudge, Stern, Williams & Tucker, 40 Wall Street, New York 5, New York, copies of a written Statement of Objections of Thomas W. Streeter, *et al.*, Preferred Stockholders of Engineers Public Service Company.

/s/ FREDERICK ZAZOVE.

Subscribed and sworn to before me
this 8th day of February, 1947.

THOMAS CAPEK, JR.,
Attorney and Counsellor-at-Law, etc.
Commission expires March 30, 1947.

Motion of Securities and Exchange Commission to Supplement Application and Order Granting Same.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY	Motion to Supplement Application to Enforce Plan Civil Action No. 995. (Filed Feb. 17, 1947.)

PLEASE TAKE NOTICE that on the 17th day of February, 1947, at 11:00 o'clock A. M., at the hearing to be held before this Court pursuant to the Court's Order of January 9, 1947, the undersigned will present the motion of the Securities and Exchange Commission to supplement its Application herein dated January 9, 1947, so as to include therein the additional paragraph annexed hereto as "Exhibit I."

Yours, etc.

/s/ HARRY G. SLATER

HARRY G. SLATER
Chief Counsel Public Utilities Division Securities and Exchange Commission,
18th and Locust Streets,
Philadelphia 3, Pennsylvania.

February 12, 1947.

Motion of Securities and Exchange Commission to Supplement Application and Order Granting Same (Cont'd)

IT IS ORDERED that the above motion be, and hereby is, granted.

/s/ PAUL LEAHY
United States District Judge.

February 17, 1947.

To:

GUGGENHEIMER & UNTERMYER, Esqs.,
30 Pine Street,
New York 5, New York.

LOUIS BOEHM, Esq.,
60 Broad Street,
New York 4, New York.

RAYMOND L. WISE, Esq.,
80 Broad Street,
New York 4, New York.

LAWRENCE R. CONDON, Esq.,
165 Broadway,
New York 6, New York.

WILLIAM E. TUCKER, Esq.,
Mudge, Stern, Williams & Tucker,
20 Pine Street,
New York 5, New York.

FRANCIS H. SCHEETZ, Esq.,
Evans, Bayard & Frick,
Land Title Building,
Philadelphia, Pa.

Exhibit 1 to Motion of Securities and Exchange Commission to Supplement Application.

"On February 11, 1947, at the request of Engineers, the Commission amended its Supplemental Findings and Opinion and Order dated January 8, 1947, in the manner set forth in its Order of Amendment dated February 11, 1947, a copy of which is attached hereto and marked "Exhibit F" (Holding Company Act Release No. 7190), so as to make appropriate findings and recitals to enable Engineers to obtain the benefits of Supplement R and Sections 371 and 1808 (f) of the Internal Revenue Code, as amended, in the event that it becomes necessary and desirable, in order to consummate uncontested portions of the amended plan, to make an appropriate escrow arrangement which will preserve the rights of affected persons pending any protracted litigation with respect to any contested portion of said amended plan."

Exhibit 1 to Motion of Securities and Exchange Commission to Supplement Application (Cont'd)

EXHIBIT F

For IMMEDIATE Release Tuesday, February 11, 1947

SECURITIES AND EXCHANGE COMMISSION

PHILADELPHIA

HOLDING COMPANY ACT OF 1935

Release No. 7190

UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pa., on the 11th day of February, A. D. 1947.

IN THE MATTER
of
ENGINEERS PUBLIC SERVICE COMPANY
File No. 54-132
EL PASO ELECTRIC COMPANY
File No. 70-1149
GULF STATES UTILITIES COMPANY
File No. 70-1150
VIRGINIA ELECTRIC AND POWER COMPANY
File No. 70-1419
(Public Utility Holding Company Act of 1935)

Order of Amendment.

The Commission on December 4, 1946, having issued Findings and Opinion with respect to the Section 11 (e)

Exhibit 1 to Motion of Securities and Exchange Commission to Supplement Application (Cont'd)

plan filed by Engineers Public Service Company ("Engineers"), and having on January 8, 1947, issued Supplemental Findings and Opinion and Order approving said plan as amended;

The Commission having found in said Supplemental Findings and Opinion that the plan as amended meets the applicable standards of the Public Utility Holding Company Act of 1935 and that, if in the course of securing court approval and enforcement of said plan it should appear that protracted litigation might ensue over the question of the amount payable to the preferred stockholders, and thereby impede expeditious enforcement of the plan and compliance with the Act, it would be in conformity with said Act and the Commission's Findings and Opinion to separate the contested issue from the uncontested issues and consummate the uncontested portion of the plan and that ample latitude exists in the plan and in the powers of the enforcement court to approve the plan with an appropriate escrow arrangement which will achieve that result; and

Engineers having subsequently indicated that, in the event such an escrow is established, it has been advised by tax counsel that the present Order approving the amended plan may not contain adequate provisions and recitals to satisfy the requirements for tax exemption in Supplement R and Sections 371 and 1808 (f) of the Internal Revenue Code, and Engineers having requested that such provisions and recitals be made and incorporated into our order; and

The Commission finding that such provisions and recitals are appropriate;

IT IS ORDERED that

1. The portion of the Supplemental Findings and Opinion of January 8, 1947, appearing as the second full paragraph at page 6 of Holding Company Act Release No. 7119, is amended to read as follows:

Exhibit 1 to Motion of Securities and Exchange Commission to Supplement Application (Cont'd)

"We do not agree that any such amendment is necessary at this time. There is considerable question whether the eventuality on which the contention is based will occur at all. Should the plan be approved by the District Court, it is conjectural whether further appeals will be undertaken in view of the delay involved and the consequent substantial expense to the company which expense would, of course, ultimately be borne by the common stockholders. We believe that prompt payment of the full amount which we have found due the preferred will most expeditiously accomplish compliance with the Act. However, should the objecting stockholders continue their objections and indicate an intention to appeal any order of approval by the District Court, it is clearly desirable, in order to avoid the possibility of unnecessary delay in carrying out the uncontested portion of the plan until the controversy with respect to the additional payments is determined, that some arrangement should be made to separate the uncontested from the contested issues. In such event, to achieve expeditious compliance with the Act and fairness to the persons affected, it would be appropriate for Engineers to make prompt payment of $100 per share and accrued dividends to the preferred in order to stop the accrual of further dividends, and to set up an escrow arrangement, along the lines suggested in our previous Opinion, to protect the interests of the various groups and to enable the company to go forward with the uncontested portion of the plan. As indicated in our previous Opinion, such an escrow would have to be large enough to assure payment not only of the amount in issue but of an additional amount to provide the preferred 'for the period of the escrow a return on the amount in escrow which is measured by the return which would have been received by it if the stock remained outstanding.' This can be accomplished

through the establishment of an escrow in cash of $4,000,000 as suggested in our former Opinion, and through such incidental changes in the program for carrying out the plan which such an escrow entails.[9] Establishment of such an escrow and the incidental changes which such an escrow arrangement would require, would be fair and equitable to the persons affected by the plan and would be necessary and appropriate to effectuate the provisions of Section 11 (b).

"Accordingly, if it appears during the course of the enforcement proceeding that it is likely that some holder or holders of Engineers common stock will contest the right of the preferred stockholders to receive in respect of their stock any amount in excess of $100 per share and accrued dividends, and Engineers indicates that it, therefore, desires to follow the alternative method of effectuating the plan through the use of an escrow, with such incidental changes which an escrow involves, such alternative shall be deemed the method approved by the Commission for effectuating the plan. We do not believe that it would be necessary to return the case to the Commission in order to set up such an escrow or to make the incidental changes which

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"[9] As stated in our former Opinion under the heading, 'Escrow Provision' (Holding Company Act Release No. 7041, at p. 36), the escrow, if established, should provide for the deposit by Engineers with the Escrow Agent of $4,000,000 in cash for the purpose of (1) providing for payment to the preferred stockholders of an amount equal to the redemption premiums on the shares of their respective series, or such lesser amount as shall finally be determined to be payable to them, with interest thereon for the period of delay at rates determined in respect of each series of preferred stock on the yield basis stated in our former Opinion and (2) providing for the payment of fees and expenses incurred or to be incurred under the plan, which fees and expenses are subject to the approval of the Commission. Briefly stated, the principal incidental changes in the program resulting from the establishing of an escrow are that the preferred stockholders who exchange their shares of preferred stock for Gulf States common stock will be given credit on such exchange to the extent of $100 per share plus accrued dividends and the deposit for the preferred stockholders who do not so exchange will be $100 per share and accrued dividends, with provisions, in both such cases, for the payment in cash of additional amounts equal to the redemption premiums on the shares of their respective series, or such lesser amount, as shall finally be determined to be payable to them, with interest thereon as aforesaid."

the establishment of the escrow involves. Such escrow and such incidental changes would be established in accordance with our order herein, under Court supervision, and our counsel before the Court are authorized to present to the Court the Commission's views concerning whether the form of escrow and the incidental changes conform to the standards set forth herein, in our former Opinion and in our Order.

"We conclude that it is unnecessary to amend the plan further at this time since it is at least questionable whether an escrow will be needed at all and since the matter can be raised and dealt with in Court, if and when the need arises.[9a] However, in view of the possibility that the alternative escrow procedure may be followed in effectuating the plan, our Order approving the plan shall be phrased in the alternative and contain necessary provisions and recitals to satisfy the requirements of the Internal Revenue Code in the event that an escrow is established."

2. Our Order of January 8, 1947, approving the amended plan is amended to read as follows:

(a) The sixth full paragraph of said Order is amended to read:

"The Commission having found that the amended plan of reorganization is necessary to effectuate the provisions of Section 11 (b) and is fair and equitable to the persons affected thereby, and the Commission having further found that said declarations, as amended, should be permitted to become effective, and the Commission having further found that, if there

"[9a] We do not understand that the plan would permit the proposed deposit in trust of the full amount to relieve Engineers of any further responsibilities to the preferred if the payment to the preferred of the amounts deposited were the subject of a stay. Any such provision would obviously be unfair unless there were assurance that the preferred would receive adequate compensation for any delay in payment to them."

Exhibit 1 to Motion of Securities and Exchange Commission to Supplement Application (Cont'd)

appears to be a likelihood of litigation beyond the District Court with regard to the right of the preferred stockholders of Engineers to receive in respect of their stock any amount in excess of $100 per share and accrued dividends, it is advisable, in order to avoid possibility of delay in the carrying out of the whole plan until such controversy is determined, to provide for escrowing such additional amount, plus appropriate compensation for the delay in payment of any additional amount found to be due and payable, to await the outcome of any such litigation and to make the incidental changes in the program for carrying out the amended plan which such an escrow entails, and that in such circumstances such escrow and changes in the program are necessary and appropriate to effectuate the provisions of said Section 11(b) and are fair and equitable to the persons affected thereby;".

(b) The said Order is amended by substituting a semicolon for the period at the end of the sub-paragraph numbered VIII appearing at the end of said Order and adding the following:

"provided, however, that if counsel for Engineers, in the course of the enforcement proceeding and at any time before the approval of the amended plan by the United States District Court, shall state to the District Court that Engineers has determined that it appears likely that some holder or holders of Engineers' common stock will litigate beyond the District Court the payment to the Engineers preferred stockholders of any amount in addition to $100 per share and accrued dividends and that Engineers accordingly desires to follow the alternative method of effectuating the plan through the use of an escrow, then counsel for the Commission shall present to said District Court a form of a proposed decree or order of said Court, setting forth a

proposed escrow agreement and the incidental changes in the program which the establishment of the escrow involves, and in such event (a) all references in this amended Order to the amended plan shall be deemed to be to the amended plan as affected by the establishment of such escrow and the making of such incidental program changes, (b) the references to warrants in sub-paragraphs I through IV above shall be deemed to be to warrants providing for assigning to the Engineers $5 preferred stock, $5.50 preferred stock and $6 preferred stock, a value of $100 per share plus accrued dividends to the expiration date of the warrant and providing that any holder of Engineers preferred stock who surrenders his stock in exchange for Gulf States common stock will, in respect of such surrendered shares, have the right to receive the same amount which holders of such preferred stock not so surrendering their stock will receive in addition to $100 per share plus accrued dividends if any such amount is finally determined to be payable, and (c) sub-paragraphs II and IV above shall be deemed to read as follows:

'II. Pursuant to the provisions of the above mentioned warrants, Engineers will transfer and deliver Gulf States common stock to those persons who exercise said warrants before the expiration date thereof, and upon such exercise the holders of said warrants will either (1) pay Engineers $11.50 for each share of Gulf States common stock so acquired, or (2) deliver to Engineers in exchange for said Gulf States common stock whole shares of Engineers preferred stock on the basis of equivalent values, assigning $11.50 per share for each share of Gulf States common stock, and $100 plus accrued dividends to the expiration date of the warrant for each share of Engineers preferred stock; provided that, on the basis of

Exhibit 1 to Motion of Securities and Exchange Commission to Supplement Application (Cont'd)

the relative values above stated, the value of the whole shares of Engineers preferred stock to be exchanged under the warrants will not exceed the value of the shares of Gulf States common stock which the warrant holder is entitled to and intends to acquire, and to the extent that the value of such shares of Engineers preferred stock exchanged for Gulf States common stock under said warrants is less than the value of such shares of Gulf States common stock to which the warrant holder is entitled and intends to acquire, the difference will be paid by the warrant holder to Engineers in cash. Any holder of Engineers preferred stock who surrenders his stock in exchange for Gulf States common stock will, in respect of such surrendered shares, have the right to receive the same amount which holders of such preferred stock not so surrendering their stock will receive in addition to $100 per share plus accrued dividends if any such amount is finally determined to be payable.

* * * * *

'IV. After completion of the disposition of the Gulf States common stock, Engineers will

'(a) deposit in trust, for the benefit of Engineers preferred stockholders who have not surrendered their preferred stock in exchange for Gulf States common stock, with a solvent bank or trust company an amount equal to $100 per share plus accrued dividends to the date of such deposit, in respect of each such share; and

'(b) deposit with a solvent bank or trust company in escrow the sum of $4,000,000 in cash, pursuant to the provisions of an escrow agreement which provides, among other things,

Exhibit 1 to Motion of Securities and Exchange Commission to Supplement Application (Cont'd)

'(i) for payment to holders of preferred stock of Engineers, in addition to the $100 per share and accrued dividends to be allowed on exchange for Gulf States common stock or to be deposited in trust as above provided in respect of shares not so exchanged, of $5 per share in respect of each share of $5 preferred stock and $10 per share in respect of each share of $5.50 preferred stock and $6 preferred stock, plus in each case an amount equal to simple interest on the amount so paid at a rate per annum equal to 4.76% in the case of $5 preferred stock, 5% in the case of $5.50 preferred stock and 5.45% in the case of $6 preferred stock from the date of said escrow agreement to the date of such payment, upon delivery to the escrow agent of an opinion of independent counsel to the effect (1) that the District Court of the United States for the District of Delaware in Civil Action No. 995 has entered a decree or order approving the amended plan, including the payment to holders of Engineers preferred stock of the amount, above specified, equal to the respective redemption premiums on their shares with interest as aforesaid and directing its enforcement, (2) that no holder of Engineers common stock has made timely appeal from such decree or order, or, in the alternative, that a holder or holders of Engineers common stock has made such a timely appeal but that the appellate court or courts have approved said decree or order approving the amended plan entered by said District Court as aforesaid, and (3) that such decree or order has become final as against the holders of Engineers common stock and is no longer subject to appeal by them;

Exhibit 1 to Motion of Securities and Exchange Commission to Supplement Application (Cont'd)

'(ii) for payment to the Engineers preferred stockholders of the amounts specified in said final order and, upon delivery to the escrow agent of a certified copy of an order of the Commission or an order or decree of the United States District Court or any appellate court directing or permitting the distribution to the holders of preferred stock of some part of the amount deposited in escrow, but less than the amounts specified in subdivision (i) above, together with an opinion of independent counsel that such order or decree has become final and is not subject to appeal;

'(iii) for payment of certain fees, compensation, remuneration and expenses pursuant to order of the Commission and for repayment to Engineers of amounts not payable to preferred stockholders or for fees, compensation, remuneration or expenses.

Such amounts will be deposited in cancellation of all of the Engineers preferred stock. The holders of Engineers preferred stock who have not surrendered the same in exchange for Gulf States common stock will surrender such stock to the trustee above mentioned against payment of the amounts deposited in trust in accordance with subdivision (a) above in respect of their shares, and all holders of Engineers preferred stock will receive so much of the said $4,000,000 as may be determined to be payable to them in accordance with said escrow agreement.'"

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(SEAL)

Notice to Security Holders, et al., of Hearing on Plan.

IN THE

DISTRICT COURT OF UNITED STATES

FOR THE DISTRICT OF DELAWARE

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action No. 995. (Filed Feb. 17, 1947.)

Notice.

TO THE SECURITY HOLDERS OF ENGINEERS PUBLIC SERVICE COMPANY AND TO ALL OTHER PERSONS:

NOTICE IS HEREBY GIVEN, pursuant to an Order of United States District Court for the District of Delaware in the above-entitled cause, dated 9th day of January, 1947, that the Securities and Exchange Commission has filed an Application in said Court to enforce and carry out the terms and provisions of a plan of Engineers Public Service Company under Section 11(e) of the Public Utility Holding Company Act of 1935, approved by the Securities and Exchange Commission by its Order dated January 8, 1947, and that a hearing will be held before the Honorable Paul Leahy, United States District Judge, sitting as Judge of said District Court of the United States at the United States Court House in Wilmington, Delaware, on the 17th day of February, 1947, at 11 A. M., E. S. T., for the purpose of determining whether the Court should enforce and carry out the terms and provisions of such plan, and whether such plan is fair and equitable and appropriate to effectuate the provisions of Section 11(b) of said Act, and for such other purposes as may appear necessary or appropriate in the premises.

Notice to Security Holders, et al., of Hearing on Plan (Cont'd)

Any person who proposes to oppose the enforcement or carrying out of the terms and provisions of said plan or the approval of said plan by the Court, is required by said Order of the Court to serve on or before the 10th day of February, 1947, on Harry G. Slater, Chief Counsel, Public Utilities Division, Securities and Exchange Commission, 18th and Locust Streets, Philadelphia 3, Pennsylvania, and on Mudge, Stern, Williams & Tucker, Counsel for Engineers Public Service Company, 40 Wall Street, New York 5, New York, copies of a written statement of objections and any brief proposed to be filed in support thereof and shall file such statement and brief on or before such date with the Clerk of said District Court of the United States. The Court's Order provides that such statement of objections shall be addressed to the Commission's Application to said Court and to its Findings and Opinion dated December 4, 1946, and to its Supplemental Findings and Opinion dated January 8, 1947, and shall state in detail, and in the manner required for pleadings by the Rules of Civil Procedure for the District Courts of the United States, the extent to which such statement challenges the allegations and findings therein contained, together with any affirmative defense of said Application.

A copy of the plan as approved by the Securities and Exchange Commission will be supplied upon request addressed to Engineers Public Service Company, 90 Broad Street, New York 4, New York.

NOTICE IS FURTHER GIVEN that during the pendency of these proceedings, all security holders of Engineers Public Service Company and all other persons are enjoined and restrained from doing any act or taking any action interfering with, or tending to interfere with these proceedings or with the carrying out of said plan, or compliance with the Order of the Commission approving it, including the commencement or prosecution of any action, suit or proceeding at law or in equity or under any statute in any

court or before any executive or administrative officer, commission or tribunal, other than such proceedings before the Commission or this Court as may be authorized by the Act or Rules and Regulations promulgated thereunder, and such review, if any, in the Circuit Court of Appeals as may be provided by law.

ENGINEERS PUBLIC SERVICE COMPANY

By (s) DONALD C. BARNES
Donald C. Barnes, Pres.

January 13, 1947.

Supplemental Statement of Objections of Thomas W. Streeter et al., to Application filed by Securities and Exchange Commission.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action No. 995.

Supplemental Statement of Objections of Thomas W. Streeter et al. Preferred Stockholders of Engineers Public Service Company to Application Filed by the Securities and Exchange Commission.

(Filed February 17, 1947)

Leave of Court having been first sought and obtained, Thomas W. Streeter, a preferred stockholder and a director

Supplemental Statement of Objections of Thomas W. Streeter et al., to Application Filed by Securities and Exchange Commission (Cont'd)

of Engineers Public Service Company, together with other stockholders holding 10,494 shares of preferred stock of the Company, by their attorney, Lawrence R. Condon, respectfully state:

1. They object to the Commission's Order of Amendment entered February 11, 1947 for the following reasons:

(a) It was entered without notice and an opportunity to be heard in violation of Section 11 of the Act. See Exhibit "A" attached hereto. Moreover, the said order was entered subsequent to the notification by the Company of its stockholders of the proceedings before this Court pursuant to the order of this Court entered January 9, 1947.

(b) It approves an escrow arrangement which is not a part of the plan.

(c) It approves the terms of an escrow agreement proposed by the Company without notice to the persons affected thereby and without an opportunity to be heard thereon.

(d) It approves "changes" to the plan without giving notice to persons affected thereby and without an opportunity to be heard thereon.

(e) It authorizes counsel for the Company to amend the plan in his sole discretion without notice to those affected thereby and an opportunity to be heard thereon.

(f) It requires the preferred stockholders to surrender their stock certificates leaving such stockholders without any indicia of a possible right to receive further sums in cancellation of their stock.

(g) It permits the Company to terminate the preferred stockholders' dividend preference prior to being paid their full redemption preference. Such action by the Company

Supplemental Statement of Objections of Thomas W. Streeter et al., to Application Filed by Securities and Exchange Commission (Cont'd)

was not proposed as part of the plan and was approved by the Commission without notice or an opportunity to be heard.

2. They object to the Commission's finding contained in such Order of Amendment that establishment of the described escrow, and the incidental changes which it would require, would be fair and equitable to the persons affected by the plan and would be necessary and appropriate to effectuate the provisions of Section 11(b) of the Act. Your objectors allege that the establishment of such an escrow without notice and an opportunity to be heard would constitute a denial of due process of law and further allege that if the plan is construed to permit an escrow in terms approved by the Commission, such plan would not be fair and equitable for the reasons set forth in paragraph numbered 5 of their Statement of Objections heretofore filed in this proceeding.

Dated February 17, 1947.

/s/ LAWRENCE R. CONDON,

LAWRENCE R. CONDON,
Attorney for Thomas W. Streeter, *et al.*,
Preferred Stockholders of Engineers Public Service Company,
165 Broadway,
New York 6, New York.

LAWRENCE R. CONDON,
FREDERICK ZAZOVE,
Of Counsel.

Supplemental Statement of Objections of Thomas W. Streeter et al., to Application Filed by Securities and Exchange Commission (Cont'd)

Exhibit "A".

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

LAWRENCE R. CONDON, being first duly sworn on oath states as follows:

1. He is the duly authorized attorney of Thomas W. Streeter *et al.*, preferred stockholders of Engineers Public Service Company and has knowledge of the facts stated herein.

2. Pursuant to permission granted by the Securities and Exchange Commission he has participated on behalf of such preferred stockholders throughout the proceedings before the Commission, except as hereinafter stated.

3. On February 13, 1947, at 10:30 A. M., without prior notice from the Company or the Commission of any application or proceeding with respect thereto, deponent was served by registered mail with a copy of an alleged order entitled "Order of Amendment" entered by the Commission on February 11, 1947 in a proceeding entitled In the Matter of Engineers Public Service Company, File No. 54-132, El Paso Electric Company, File No. 70-1149, Gulf States Utilities Company, File No. 70-1150, Virginia Electric and Power Company, File No. 70-1419, and being Holding Company Act Release 7190.

/s/ LAWRENCE R. CONDON.

Sworn to before me this }
15th day of February, 1947. }

/s/ THOMAS CAPEK, Jr.

THOMAS CAPEK, Jr.

(SEAL)

Affidavit of Lawrence R. Condon in Opposition to Motion of Securities and Exchange Commission to Supplement Application.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY	Affidavit in Opposition to Motion by Securities and Exchange Commission. Civil Action No. 995. (Filed Feby. 17, 1947.)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LAWRENCE R. CONDON, being first duly sworn on oath states as follows:

1. He is the duly authorized attorney of Thomas W. Streeter, et al., preferred stockholders of Engineers Public Service Company and has knowledge of the facts stated herein.

2. Pursuant to permission granted by the Securities and Exchange Commission he has participated on behalf of such preferred stockholders throughout the proceedings before the Commission, except as hereinafter stated.

3. On February 13, 1947, at 10:30 A. M., without prior notice from the Company or the Commission of any application or proceeding with respect thereto, deponent was served by registered mail with a copy of an alleged order entitled "Order of Amendment" entered by the Commission on February 11, 1947 in a proceeding entitled In the Matter of Engineers Public Service Company, File No. 54-132, El Paso Electric Company, File No. 70-1149, Gulf States

Transcript of Hearing on Plan Held February 17, 1947

Utilities Company, File No. 70-1150, Virginia Electric and Power Company, File No. 70-1419, and being Holding Company Act Release 7190.

WHEREFORE, deponent asks that the motion of the Securities and Exchange Commission to supplement its application referred to in Notice of Motion dated February 12, 1947 be denied.

(s) LAWRENCE R. CONDON

Sworn to before me this 15th day of February, 1947.

(s) THOMAS CAPEK, JR.

(NOTARIAL SEAL)

Transcript of Hearing on Plan Held February 17, 1947.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE

IN THE MATTER of ENGINEERS PUBLIC SERVICE COMPANY	Civil Action No. 995.

Wilmington, Delaware
February 17, 1947

Before:

HON. PAUL LEAHY,
U. S. District Court Judge.

Transcript of Hearing on Plan Held February 17, 1947 (Cont'd)

Appearances:

HARRY G. SLATER, Esq., and BERNARD S. KANTON, Esq., for the Securities and Exchange Commission.

WILLIAM E. TUCKER, Esq., and PAUL D. MILLER, Esq., of Mudge, Stern, Williams & Tucker, of New York, for Engineers Public Service Co.

CALEB R. LAYTON, III, Esq., and Francis H. SCHEETZ, Esq., of Philadelphia, Pa., for Home Insurance Co. and other Preferred Stockholders.

EDWIN D. STEEL, JR., Esq., of Morris, Steel, Nichols and Arsht; LAWRENCE R. CONDON, Esq., of New York, and FREDERICK ZAZOVE, Esq., of Illinois, for Thomas W. Streeter, Dissenting Minority Director of Engineers, and Preferred Stockholders.

HERBERT L. COBIN, Esq.; ALFRED BERMAN, Esq., and J. HOWARD ROSSBACH, Esq., of Guggenheimer & Untermyer, of New York, for Central-Illinois Securities Corporation and Christian A. Johnson, holders of Common Stock.

LOUIS BOEHM, Esq., and WILLIAM ESBITT, Esq., of New York, for Common Stockholders.

Mr. Steel: May it please the Court, may I move the admission *pro hac vice* of Mr. Frederick Zazove of the Illinois Bar and Mr. Lawrence R. Condon of the New York Bar who represent Thomas W. Streeter and others, preferred stockholders of Engineers Public Service Company.

The Court: You are admitted, gentlemen.

Mr. Layton: If your Honor please, I move the admission of Mr. Francis H. Scheetz of the Philadelphia Bar, representing Home Insurance Company and other preferred stockholders.

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The Court: You are admitted.

Mr. Cobin: If your Honor please, may I move the admission of Mr. Alfred Berman and Mr. J. Howard Rossbach of New York, representing Central-Illinois Securities Corporation and Christian A. Johnson.

The Court: You are admitted, gentlemen.

Mr. Tucker: I have no member of the Delaware Bar to move my admission. My name is William E. Tucker, and I have associated with me Paul D. Miller. Mr. Miller and I are counsel for Engineers Public Service Company.

The Court: You are admitted, Mr. Tucker.

Mr. Tucker: Mr. Miller too?

The Court: Yes.

Mr. Boehm: I am in the same position as Mr. Tucker. My name is Louis Boehm, and I am a member of the Bar of New York and also of the United States Supreme Court. I represent Lucille White and Frances Boehm, who are common stockholders.

The Court: You are admitted.

Mr. Slater: If the Court please, this hearing this morning is with respect to Engineers Public Service Company pursuant to the applicable provisions of the Public Utility Holding Company Act of 1935 and is being held pursuant to the Court's order of January 9, 1947. It might be well at the very outset for the company to submit its affidavits of compliance with the notice requirements of that order of the Court.

Mr. Tucker: I am pleased to present an affidavit of the mailing of notice of Richard N. Benjamin, who is Secretary of the Engineers Public Service Company, which was directed by the Court's order to give notice to the stockholders and certain notice by publication, and this is the affidavit which shows the mailing and also the affidavits of publication.

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Slater

Mr. Slater: Since the filing of the Commission's application on January 9, your Honor is probably aware that we have filed a motion to supplement the Commission's application so as to reflect therein certain action taken by the Commission after the institution of this enforcement proceeding. The motion to supplement, in brief substance, is a motion to reflect in the proceeding an order of amendment issued by the Commission at the request of Engineers so as to assure to Engineers the benefits of certain provisions of the Internal Revenue Code in the event that an alternative course of consummation of the plan; in the event of a favorable Court order, is followed.

Now, the genesis of that, briefly, is as follows: In its original opinion of December 5, 1946 the Commission indicated that it would be appropriate under the circumstances of this case to create an escrow arrangement whereby there would be deposited in escrow an amount to cover distributions which are involved in the contested portions of the plan so that the uncontested aspects of the plan may be consummated. At that time Engineers had proposed a plan which provided for payment of $100 per share to the preferred stockholders. The Commission held that that was unfair; that the retirement amounts should be amounts equal to the redemption prices. The escrow arrangement was then suggested as an integral part of the plan. However, Engineers amended its plan so as to conform to the Commission's finding, and in the supplemental findings and opinion of January 8 the Commission indicated that an escrow arrangement was not necessary. Engineers was no longer objecting to the conclusions of the Commission. It was not then clear that there would be a contest in the Court or that the escrow arrangement would absolutely be necessary. The Commission further pointed out that if it developed that an escrow arrangement was a practical and feasible thing to do in the event that a contest developed, that one could

be created under the supervision of this Court, since an escrow would be a proper part of the consummation of the plan which this Court would direct in the event it would approve the plan.

The Court: Is there objection to the proposed amendment?

Mr. Slater: I understand that there is, your Honor.

However, upon consideration tax counsel advised Engineers that in the event such an escrow is created under the aegis of the Court, the incidental changes involved in consummating the plan makes it desirable that the Commission set forth certain itemizations and recitals so as to assure to Engineers the tax benefits of the applicable provisions of the Internal Revenue Code in the event that the escrow route is followed.

So the Commission issued this order of amendment, which in no way alters its previous findings and in no way affects the fairness issues which were before the Commission, and simply states what is the fact; that in the event an escrow arrangement is created the actions and transactions incident thereto would be necessary to effectuate the provisions of Section 11.

As I say, the amendment is submitted simply to reflect the action of the Commission since the filing of the application.

Perhaps before I go ahead further your Honor might want to hear from the opposition. I don't know the basis of the opposition except that an affidavit was handed me about two minutes before I got up.

The Court: We will hear from the opposition.

Mr. Zazove: If your Honor please, we were served with a notice of a motion by the Securities and Exchange Commission on the morning of Thursday, February 13, which for the first time called to our attention——

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Zazove

The Court: Does your criticism go to the amendment as such or is it an integral part of your objection as a preferred stockholder? Because I don't want to get into the merits of the other question until it is presented to me.

Mr. Zazove: It has a twofold purpose, your Honor. In the first place, we are objecting to the granting of this motion, which I will state, and I offer an affidavit in opposition to the motion made by the Securities and Exchange Commission.

The Court: Go on.

Mr. Zazove: Our position, as we see it, Judge, procedurally must take this course: A motion is now pending before you and naturally we are not concerned with the merits of the Commission's so-called amending order as we are with the procedural aspects of due process. In the event the motion is granted by the Court then we would ask leave to file a supplemental statement of objections in opposition to the amending order.

Now, I don't want to get into the merits, which that supplemental statement of objections would be, until we get a ruling on the motion. We think there is a sound reason for denying the motion just on the basis of due process.

In order to present the point adequately I must describe a little bit of what happened heretofore. The initial plan, as Mr. Slater told the Court, that was presented by the company to the Commission provided that the preferred stockholders would be paid $100 per share plus accrued dividends with no further payment to be made by the company unless the Court or the Commission ordered that payment. That plan was filed with the Commission and due notice was given by the Commission, as is indicated by the exhibits attached to the Commission's application, and hearings were held thereon. Subsequent to the closing of the record the Commission issued its Findings and Opinion in which it

indicated that it could not approve this plan as fair to the preferred stockholders unless it were further amended, and the Commission indicated in what respects amendments would have to be made. One amendment would be to require that the preferred stockholders be paid their redemption preferences. The second amendment was that the company should file an amendment creating an escrow so as to protect the preferred stockholders and their claims.

Now, the purpose of that particular escrow and that particular amendment which the Commission said was necessary was due to the mechanics of the plan whereby the company was proposing merely to pay $100 and no more and to pass out the assets to the common stockholders; so that in order to protect the preferred the Commission felt that an amendment was necessary to create an escrow.

Instead of amending the plan as the Commission directed, the company abandoned its original proposal of paying $100 per share and filed what is now known as Amendment No. 6, which constituted an entirely different plan. In this plan the company stated that it would pay the preferred stockholders their full redemption preferences as described by the charter. There was no provision in this plan for an escrow. Nothing was said about an escrow. Nothing was indicated in the plan other than the fact that the company was going to pay the preferred stockholders their full redemption preferences, and the company filed this plan, Amended Plan No. 6, with the Commission, and the Commission issued a notice to the public in which it described this plan. There was not a word in there about any escrow; there was not a word in there that would lead anybody to believe, if he were a preferred stockholder, that he would be paid anything other than the full redemption prices as provided by the charter.

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Zazove

The notice of this proceeding was sent to all the stockholders by the company. Notice was given to the public and to the press in the usual manner by the Securities and Exchange Commission, and the hearing was held on this amended plan. As I said before, there was not a word and not a mention in the plan or in the Commission's notice or in the company's notice to its stockholders that there would ever be anything but a proposal by the company to pay the full redemption prices.

The Court: What about the Supplemental Findings and Opinion of the Commission under date of January 9, 1947?

Mr. Zazove: I am coming to that, your Honor. Subsequent to that hearing the record was closed and the Commission in its Supplemental Findings stated, which we believe contrary to the record, that the preferred stockholders were still objecting to the plan because it had no provision for an escrow. Now, if the Court will examine the record of the proceeding before the Commission which is now or will be before the Court, he will find that all the preferred stockholders said was that the Amendment No. 6 to the Plan was not fair and equitable to the preferred stockholders because it failed to comply with the Commission's Findings insofar as the Commission held that the preferred stockholders were entitled to additional compensation in the event they did not receive payment in full and at one time. We didn't ask for an escrow; we merely asked that the plan be further amended so as to provide that if there were any reason for delay that the preferred stockholders would be paid additional compensation.

So we say that the statement in the Supplemental Findings by the Commission constituted nothing but dictum, since there was nothing before the Commission at that time which had anything to do with an escrow or which had anything to do with any proposal of anyone that they were not going to pay the full redemption prices at one time.

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Zazove

Now, notice of the Supplemental Findings that were issued by the Commission was mailed to the stockholders on December 20, 1946, to which there is attached a letter to the stockholders from the company. That is an exhibit in the record. It is Exhibit No. 82. If the Court will examine this letter he will find that unequivocally the plan states and the company's letter states that the company has abandoned any intention of contesting the payment of more than $100 a share to the preferred stockholders, and specifically says that the plan as now amended provides for the payment of the redemption prices in full at one time, in one amount, with no escrow. Not a word said about the escrow.

The Court: Well, what do you want done?

Mr. Zazove: Well, we don't believe that the Commission's motion should be granted for this reason: That it constitutes in effect an amendment to this plan without any notice and opportunity to be heard by anyone. The first time we knew about this thing was on Thursday, February 13, when we were served with a registered copy of the order of amendment that was entered by the Securities and Exchange Commission.

The Court: Setting aside for the moment any procedural impedimenta that may be present here, what do you want done?

Mr. Zazove: We want the motion of the Commission denied.

The Court: You don't want any provision for the escrow at all?

Mr. Zazove: Not if it is done this way. If this constitutes an amendment to the plan, there never was any notice or hearing on it.

The Court: Do you or do you not want an escrow feature?

Mr. Zazove: We don't want an escrow as proposed in this form of amendment.

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Slater

The Court: You want to be heard on it.

Mr. Zazove: If the motion is granted we want to be heard on the merits of it, yes, sir.

The Court: Let us get on with the other feature.

Mr. Slater: I just want to say, your Honor, we are not asking you to approve at this time in the hearing the action taken by the Commission. Your Honor may disagree with it, but the fact is the Commission has taken that action, and it seems proper only to have this proceeding reflect all of the action taken by the Commission in the case.

The Court: Let us get on with the rest of the case. I am reserving the ruling on that.

Mr. Slater: I should like at this point, your Honor, to submit to the Court the record of the proceedings before the Commission consisting of 8 docket volumes of Commission records which are to your Honor's left. For your Honor's convenience may I submit an index of the testimony and exhibits which comprise that record. In submitting the record we don't believe it will be necessary for the Court in this case to examine into it. As we understand it, there is no attack upon the substantiality of the evidence upon which the Commission's subsidiary findings are based.

As your Honor is aware, the objections to the entry of the enforcement order prayed for are confined in scope in relation to the issues raised by the plan as a whole at the administrative level. However, since it is the independent duty of the Court apart from any objections which may have been filed to satisfy itself that the plan meets the statutory tests of necessity as well as fairness, I should like in presenting our affirmative case to state very briefly the more material aspects of the plan which relate to both of those statutory tests.

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Slater.

The plan, in brief substance, is a plan for the liquidation and dissolution of Engineers, and was proposed by the Management and approved by the Commission as affording an appropriate means of resolving the problems of that company and its system under the Holding Company Act. In 1935 when the Act was passed Engineers was one of the larger holding company systems. In terms of the integration provisions of Section 11(b)(1) Engineers did gross violence to the Act. In addition to being engaged in the electric and gas utility business it operated suburban, interurban transportation systems, bus and street railway systems, ice and coal storage plants, telephone, steam, water properties and toll bridges. Geographically it could not have been more scattered, with properties in the Northwest in the State of Washington; Texas, Louisiana, New Mexico, and in the East, Virginia, West Virginia, Maryland and Key West.

In a Section 11(b)(1) proceedings instituted by the Commission, the Commission directed that Engineers limit its operations to the electric utility system of what is now Virginia Electric & Power Company, which operates in the states of Virginia, West Virginia, and North Carolina, and to certain related business. Court litigation ensued over that directive, and the Court of Appeals for the District of Columbia affirmed in part and reversed in part. The United States Supreme Court granted certiorari to both Engineers and to the Commission. The matter was argued in November 1945, but was never decided because Chief Justice Stone's death broke the quorum of the Justices. The case will not be decided, therefore, without re-argument, which has not yet been held.

In the meantime, during the course of this litigation Engineers has proceeded to effect compliance in part with the directive of the Commission, so that today Engineers

owns the common stock of Virginia Electric & Power Company, all but a very few shares; owns all of the common stock of Gulf States Utilities Company, which operates in Louisiana and, I believe, Texas; and all the common stock of El Paso Electric Company, an electric utility company operating in Texas and New Mexico.

It is the position of the Management, without any dissent expressed by any interested person, that upon the disposition of El Paso and Gulf States, which cannot be retained, the Commission has held, in combination with Virginia, the economic usefulness of Engineers would cease. The record clearly indicates that the Virginia properties are large enough to be operated independently of Engineers; that any function which Engineers might perform can be assumed by Virginia's management, and that the expense of Engineers' continued existence as a holding company merely over Virginia is unjustified.

The amended plan as approved by the Commission provides, then, for the disposition by Engineers of its interest in El Paso and Gulf States and Virginia, the retirement of the Engineers' outstanding preferred stocks—Engineers has no debt—and its dissolution. These results are clearly necessary to effectuate the provisions of Section 11(b) in the context in which Engineers finds itself and the Commission made the statutory finding of necessity.

The steps and the transactions proposed to accomplish the statutory objective involved the raising of some 42½ or 43 million dollars of cash to effect the retirement of the 392,000 odd shares of preferred stock which Engineers has outstanding at the amounts fixed by the plan as amended and approved by the Commission. Engineers has a $5 preferred stock, a $5.50 preferred stock, and a $6 preferred stock. The Commission held that the $5 stock should be retired in fairness and equity at an amount equivalent to its redemption price of $105; and the $5.50 and $6 stocks

at amounts equivalent to their redemption prices, in both cases $110.

Now, of the total amount needed to retire the preferred stocks the plan provides that Engineers will raise some $22,000,000 by the sale of its common stock interest in Gulf States to its common stockholders, Engineers' common stockholders pursuant to a warrant program at $11.50 a share. Engineers has on hand some $17,000,000 of cash to be applied, which can be applied to the retirement of the preferred stock. The balance of some $3,800,000 is to be raised by the declaration of special dividends from the subsidiaries.

I might note at this point that the warrant program permits those common stockholders who also own preferred stock to tender their preferred stock in payment of the Gulf States common stock on the basis of $11.50 a share for the Gulf and the retirement amounts fixed by the plan for the preferred stock.

Upon retirement of the preferred stock Engineers, after making provision for its liabilities, will distribute its remaining assets, namely, the common stock of Virginia and the common stock of El Paso to its own common stockholders and dissolve.

The Court: Is that exchange feature optional?

Mr. Slater: Yes, your Honor. I might add that the warrants, the Commission found, would have a value. They are transferable. A common stockholder of Engineers who did not desire to exercise his warrant might sell them to somebody who would. The Commission did not find it necessary to fix a value for the Gulf States common stock, but found a value there of at least $14, so as to provide a margin of $2.50 for each share over the warrant price.

The Commission found that the plan presented suitable means of accomplishing necessary results, that the plan was therefore necessary within the meaning of Section

11(e); and we submit that there is ample warrant for the Court to concur in that conclusion.

As to the fairness of the plan the principal issue presented related to the amounts at which the preferred stocks of Engineers should be retired, and that is the only issue which objectors have raised here, apart from the objection we heard this morning or may expect regarding any creation of an escrow arrangement.

Engineers' charter provides for the payment of $100, and I quote:

"In the event of any liquidation, dissolution, or winding up . . . or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders; plus, in case such liquidation, dissolution, or winding up shall have been voluntary, the fixed redemption premium."

This, of course, before any distribution of assets can be made to the common stockholders.

The charter then goes on to provide that a consolidation or merger in which Engineers is involved shall not be deemed to be a liquidation, dissolution, or winding up within the meaning of that paragraph of the charter.

The plan as originally filed by Engineers provided for the payment to preferred stockholders in retirement of their interests of $100 a share, the amount equal to the involuntary liquidating preference. It was the position of Engineers that the impact of Section 11(b)(1) compelled the retirement of the stock and the dissolution of Engineers; therefore the liquidation and dissolution of Engineers is involuntary within the meaning of the charter and the involuntary liquidation price of $100 should be given controlling weight as against the entire remaining aspects of the bundle of rights of the preferred stockholders. In taking that position, however, Engineers conceded freely, and its president testified, that the investment value of the stock was equal to its redemption prices. That is, absent

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the Section 11 proceedings the preferred stocks would sell in all probability in excess of their call prices, and that the Management would retire the stocks at their call prices.

The Commission did not dispute that Section 11 impelled the discontinuance and elimination of Engineers as a corporate entity and that the proposed dissolution is involuntary in that sense; but the Commission reiterated the principles of the Otis case.

The Court: What is the $5 preferred selling for today?

Mr. Slater: Around $105. I believe they are all around the call prices at the present time.

In reiterating the principles of the Otis case the Commission said that in reorganizations or liquidations under Section 11 liquidation preferences do not mature. They were intended to mature either voluntarily by stockholder action or involuntarily by the action of creditors, and that this was not an involuntary dissolution withing the meaning of the charter.

The Otis case, as the Court knows, held as to a charter drawn in 1929 that the legislative policy now reflected in the Holding Company Act was not then foreseen, and Engineers' charter was drawn in 1925. In any event, the Commission held that the liquidation preferences, whether voluntary or involuntary, are not controlling, but that in evaluating the appropriate amounts to be given to the preferred stocks in retirement of their interests consideration must be given to all of the provisions of the charter, including the dividend rate and call price and the financial position of the company as well as of the preferred stocks. In the latter connection the assets and particularly the earning coverages of the preferreds were carefully considered. The Commission's findings on that score are set forth on pages 27 to 31 of its original Findings of December 5, 1945, and the Court will find them rather comprehensive.

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The Commission found that the entire bundle of rights to be surrendered by the preferred stockholders has an investment value at least equal to the redemption prices. This conclusion was reached independently of the testimony to the same effect by the president of Engineers.

Now, the record abounds overwhelmingly with evidence to support the findings and conclusions of the Commission in regard to the investment value of the stocks. If it develops that we are wrong in our understanding that there is no challenge here, we shall, of course, be glad to submit pertinent record references with which we otherwise hesitate to burden the Court.

The Commission in conclusion, holding as it has in other cases that ordinarily the redemption price sets a ceiling on the investment value, since the redemption price is the maximum price, apart from Section 11, at which the security could be retired, concluded that fairness and equity required that the preferred stockholders receive amounts equal to the redemption prices upon retirement of their securities.

It may be noted, if the Court is not already aware of it, that the result reached here by the Commission is the result of all four commissioners participating, although two concurred in the result. Chairman Caffrey, one of those concurring, indicated clearly, however, in a one-page opinion which is part of the Commission's Findings of January 8, that he joined fully in the rationale of the two Commissioners; namely, that the liquidati preferences of the charter, whether voluntary or involuntary, are not here matured; that the doctrine of the Otis case requires that the preferred stockholders receive as the equivalent of the rights surrendered the present investment values of their securities.

The fourth commissioner, Commissioner Hanrahan, took the view that the dissolution was voluntarily proposed within the meaning of the charter and the provisions of the

charter in respect to voluntary liquidation, which are equal to the redemption prices, are therefore controlling.

An additional argument was presented by the Management in support of the original plan which has been adopted here lock, stock, and barrel by common stockholders objecting, and that is the so-called "share-the-loss" argument. The argument goes as follows: The divestments required by Section 11 thus far accomplished have visited heavy losses on the common stockholders, and equity requires that these losses be shared by the preferred stockholders by restricting the amount paid to them now to their involuntary liquidation price of $100 a share. In our view the argument is wholly without merit, and the Commission, we submit, disposed of it decisively on pages 33 to 34 of its Opinion of December 5. There is, of course, no demonstration whatsoever that the Act caused any of these alleged losses. As a matter of fact, when the plan was filed the market price for Engineers common stock was the highest it had been since 1932, and that price has been rising steadily since 1942 when steps of compliance were commenced to be taken. Further, the common stock reached a low of 1⅛ in 1935, and in 1945, after the asserted losses are supposed to have occurred, that is, losses attributable to the Act, was selling at a high of $37 a share. The loss suffered by Engineers in its investment in Puget Sound Power & Light Company is emphasized in connection with this argument. Engineers there suffered a loss of some 32 or 33 million dollars on its invested cost. As a matter of fact, however, the record clearly shows that that was a loss which was destined from the very day Engineers acquired its investment. In 1928 it paid $34,000,000 for all of the common stock of Puget, which was then yielding a return of some 2½%. In payment it issued in substantial part a large number of shares of its own $5.50 preferred stock, and the return on the Puget

common stock decreased instead of increased in later years; and in the early thirties the company was hard put to it to stave off bankruptcy, and huge arrearages on the preferred stocks distributed in the hands of the public resulted. The situation was such that in a fair and equitable recapitalization of Puget some three or four years Engineers emerged with a 3% common stock interest in the recapitalized company for all of its interest originally acquired in Puget.

In connection with the "share-the-loss" argument it should also be pointed out that any losses which might have occurred, whether attributable to Section 11 or not, they can be or otherwise are, of course, reflected today in the investment values of the preferreds as well as the common stock. In addition, the common, of course, bargained for the equity position which it now has, a position where it must absorb the losses; and for that it received an opportunity for unlimited gain. The preferred, of course, bargained against that position, sought a position of relative safety with the common as an underlying cushion to absorb losses which are now alleged. The preferred, of course, is the senior security, and the common, possessing only the residual interest, receives what is left after the preferred stock receives pursuant to the priority doctrine the equitable equivalent of what the preferred stock is surrendering

As I have stated, Engineers amended its plan to conform to the Commission's Findings and Opinion of December 5, and after notice and opportunity for further hearing as set forth in our application, the Commission issued its Supplemental Findings and Opinion and Order on January 8, in which the Commission approved the plan as amended, and it is that plan which we bring here now for enforcement.

That is all I have at this time, unless the Court has some questions.

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Slater

The Court: Yes. I want you to clear up a matter for me. Does the Commission take the position that the charter contract is at an end between the parties?

Mr. Slater: No, I would not say that it does, your Honor, no. It says simply that the liquidation provisions of the charter are not controlling. They are decisive of the rights of the parties here.

The Court: What if you have a charter which provided that in the event this company has to merge, liquidate, or dissolve in order to comply with the Public Utility Holding Company Act of 1935 the preferred stocks shall be entitled to X, Y and Z? What would happen then?

Mr. Slater: I think the Commission would have given controlling weight to that provision of the charter. It was foreseen, and what was taking place was within the contemplation of the parties. You may recall it was the minority position in the Supreme Court that although the Holding Company Act was not expressly in the charter, that you could read Holding Company Act into the involuntary provisions for liquidation or into the liquidation provisions. That is, the minority held that when you speak of liquidation you don't speak merely of involuntary action by creditors, but involuntary action by something that might come along, such as the Holding Company Act.

I should like to reserve some time for rebuttal, your Honor.

The Court: Oh, certainly.

Does counsel for the Company wish to be heard?

Mr. Tucker: I think, your Honor, under the circumstances we, perhaps, should take a neutral position. We are in the awkward situation of having urged on the Commission that no premium be payable, and when the Commission decided against us on the point, of reversing our field on that and agreeing to pay the premium; and now

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Zazove

that the common stockholders are taking our original position which we urged, it seems to us our position should be neutral and to leave it to them to present that view to the Court.

The Court: Who wishes to be heard next?

Mr. Tucker: I don't want to say that I don't want to be heard on the escrow, because it seems to me vital that we have an escrow here unless the whole plan is to be delayed; but I assume I will do that later.

The Court: Yes.

Mr. Berman: Does your Honor think that the proponents ought to go forward or the objectors?

The Court: Are there any more proponents?

Mr. Zazove: If your Honor please, we are heartily in accord with this plan as it now stands.

The Court: Let us hear from this side of the field first, then. Either you or Mr. Scheetz. It doesn't matter.

Mr. Zazove: I subscribe to everything Mr. Slater told the Court. In fact, before the Commission we on behalf of the preferred stockholders urged that this case was governed by the Otis decision and that the preferred stockholders were entitled to their investment values of their securities; but at this stage of the proceeding we find that objection has been made by the common stockholders to the reasons given by the Commission in supporting the result that the plan, as now proposed reaches, and so we take the further position at this time, if your Honor please, that the Commission's order can be supported for reasons other than the Otis decision. Of course, we say that that only becomes important if your Honor should happen to agree with the common stockholders that the Otis decision does not control here.

We feel that the present plan before the Court is, in effect, a voluntary proposal by the company to accomplish

a result which could have been achieved under the charter. I would like to explain that to you. Under the charter in the event of a call redemption prices are payable. In the event of a voluntary liquidation under State law the redemption prices are payable. In the event of a merger, which was originally proposed as an alternative, the appraisal provisions of the Delaware statutes become operative to dissenting stockholders, and the testimony on this record indicates that the investment values under an appraisal are in excess of the call prices. So that we feel in this particular case if you view this voluntary proposal by the company to pay an amount equivalent to the redemption prices as any one of those alternative methods of procedure which they could have pursued under the charter, that you reach the same result.

As the Supreme Court has pointed out in the Otis case, fairness of the plan is not to be judged by the method that is used to achieve it. What has actually happened here is that the company as a part of the vehicle furnished to them by Section 11(e) of the Holding Company Act has proposed as an initial step the retirement of its preferred stock. The company, as many companies have done, could have called the stock under the charter and would have reached the same result. Now, why they didn't pursue the call provisions of the charter can be explained here, I think. Under the charter they would have to give 30 days' notice to the preferred stockholders, and it would have been necessary under the Holding Company Act to go back to the Commission and secure the Commission's approval. As it turned out under this plan as proposed the company is now suggesting that it wants to pay prices equivalent to the redemption prices, but it is doing it with only five days' notice under an 11(e) plan, and we submit that unless this Court can say that the only method, the only result which will be fair in this situation is the payment of $100, that

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Zazove

the plan must be approved as fair and equitable regardless of the reasons advanced by the Commission.

If you will recall, in the United Light & Power decision, which eventually became the Otis case, the Supreme Court in affirming the result all the way back down the line gave reasons which had not been advanced or used by the Commission nor the Court, for example, and we believe that the same thing would be true here; that if this plan and the result can be found fair on any basis, it does not depend on the investment value theory as long as this company has the inherent right to proceed under its charter; and I would like to recall to your Honor the Standard Gas & Electric case which was before you about a year ago or so. There the company's plan provided that no premium would be paid upon the redemption of the debentures. That case went to the Circuit Court of Appeals, and it was held that a premium was not payable. Because of subsequent developments when it came around to consummating the plan, the company for different reasons which it deemed satisfactory to itself abandoned its original proposal to retire the debentures and came in with a voluntary proposal to call the debentures and pay the premium, and this Court held that was fair. So we have a Circuit Court case here, and the only decision so far has been that they must pay prices equivalent to the——

The Court: I have no recollection that in the Standard case I held that was fair and equitable. I returned the matter to the Commission. It never came back to me.

Isn't that correct, Mr. Slater?

Mr. Slater: I think that is correct, your Honor.

Mr. Zazove: As I understood your Honor's decision, you said the company did not lose its right to proceed under the contract and call the debentures. In other words, the fact that there was a decision that they could retire

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Scheetz

them under Section 11 without paying the premium did not deprive the company of the right to call the stock, which is what we think is happening here. The fact that the Company has the right to propose an 11(e) plan does not deprive the company of the right to proceed under any of these other provisions of the charter, and we think that the result of what is proposed is identical if it had proceeded in that manner.

Of course, I would like to be heard on the other point at a later time.

The Court: Yes, we will reserve that.

Mr. Scheetz: If your Honor please, I am speaking for a group of preferred stockholders which owns approximately 9,000 shares of preferred stock. There is not much that I have to add to the presentation of the case in favor of the plan. Throughout the proceedings before the Commission we opposed the original plan and supported the plan as the Commission indicated the plan should be. Throughout those proceedings we urged that there should be an escrow provision in case the matter was to be litigated; deferred to the Commission's suggestion at the last hearing; but that was not a necessary feature of the plan at the stage as it then existed. But since some opposition has developed, why, obviously, it is an indicated course. Without wishing to prejudice Mr. Condon's position in any way with respect to the procedural approach, I am not making any objection to that.

On the merits I want to make some comments on two features. One is this question of sharing the losses that was expounded before the Commission, and it seems to me that there is a very practical answer that dictates how

inappropriate it is. It means this: That in the course of the compliance with the Act if losses should develop in liquidations which may or may not have arisen since the Act was adopted, which may or may not be the result of the attitude of the market toward the situation under the pressure of the Act, they would have to be measured. In turn, if as a step in compliance with the Act, the company is allowed to go out and buy its securities in the market at discounts, as happened in this case, and happened when the company itself was urging that they were not in liquidation, did not involve liquidation or reduction of capital within the meaning of the charter, that they were not compelled to pay the $100 involuntary liquidating price, the Commission would arrive at a point where it should go back and retroactively try to appraise the pros and cons, the pluses and minuses, in determining what it should do years later in carrying out a simplification program of the system as it was then constituted.

Now, there is one other point: The Commission has indicated, and I think the cases indicate, that the choice of the method of carrying out the provisions of Section 11 is not the important thing. Here the company urged, and I gather the opposition is urging, that the charter provisions should apply, because this is, in substance, a liquidation. Had the company retained the method of merging Virginia Electric & Power Company with Engineers, then the applicable charter provision provides that that should not be deemed a liquidation and dissolution; and, as Mr. Zazove said, presumably the procedures of the Delaware Merger Act would have been invoked, unless perchange the company had said that in the particular type of merger they were going to work out they would have paid some specific price and tried to by-pass both the charter provisions and the Delaware law.

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Boehm

Now, when it comes to giving effect as to what a charter provides, then the security holders would be very much at the mercy of the particular method chosen by which to accomplish the result, and I think that the question here being one of what is the investment position of the preferred stockholders should not be determined by just whatever the charter happens to provide; particularly as it was pointed out in the Otis case that this type of proceeding was not before the parties when the contract was adopted.

The Court: Have all the preferreds been heard from?

All right, Mr. Berman.

Mr. Berman: Between Mr. Boehm and myself it was decided that he should go first, if that is agreeable to your Honor.

The Court: All right.

Mr. Boehm: May it please your Honor, in behalf of Lucille White and Frances Boehm, who own 1,000 shares of the common stock of Engineers, which they have held since 1943, I desire to oppose only that part of the plan of simplification or dissolution which provides that the preferred stockholders shall receive a redemption premium above $100 per share; namely, $105 per share in the case of the $5 preferred, and $110 per share in the case of $5.50 and $6 preferred.

We oppose it on the ground that the Otis case does not make it obligatory upon the Court or the Commission to pay this premium; that it would be grossly unfair to the common stockholders if this premium were paid; and that, as a matter of fact, the investment value of the preferred stock is not and for many years has not been more than $100 per share.

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Boehm

Now, in order to ascertain whether the Otis case is binding upon the Court and upon the Commission on the question of paying the redemption premium to the preferred stock, I think it is important that we go into the facts of the Otis case and the law that was laid down by the Supreme Court in that case. I might add that in the Otis case the Supreme Court itself was very sharply divided. Five Justices voted in favor of the majority opinion and three Justices, headed by Chief Justice Stone and concurred in by Justice Frankfurter and one other judge, whose name I forget for the moment, voted that the charter provision was absolutely controlling and that the question of fairness and equitableness did not enter into the case.

So that the Otis case was decided by a very sharply divided Court, and I think must be confined to the facts of that case alone, and that a case which stands upon different facts must be decided quite apart from the Otis case.

Now, the facts in the Otis case were that the United Light & Power Company was the top holding company of a very extensive utility system. It had beneath it another holding company known as the United Light & Railways Company. The plan of simplification was drawn under the so-called Grandfather clause of the Public Utility Holding Company Act, which provided that a holding company which is the owner of a subsidiary company which itself is a holding company must be dissolved. Pursuant to that provision of the Act this simplification proceeding was brought.

There was no real dissolution of the business as a going enterprise. The system continued on just the same as before. The only question that was involved was whether the top holding company should be succeeded by a subholding company which would receive all of the assets of the top holding company. So that we have here purely a corporate simplification proceeding which in no way affected

the business of the system itself; and the Supreme Court in its opinion laid great stress upon that fact in stating that it was not the intention of Congress that rights under such a liquidation or simplification, the rights of stockholders and security holders, should be destroyed.

The question in the Otis case was the very converse of the question we have in this case, namely, whether the common stock of the United Light & Power Company which had at that time an equity in present earnings of over two and a half million dollars per year, even though there had been large accumulations on account of arrears on the preferred stock, whether that common stock should be completely wiped out because Congress had ordered a simplification of the capital structure; and this is what the Supreme Court in its majority opinion said on that point, and with your Honor's permission I would like to read it, because I think it goes right to the heart of the question:

"Satisfaction of the great-grandfather clause might have been obtained in this or other holding company systems by an order for merger, consolidation or recapitalization between top holding companies or between associate companies in the lower tiers of the corporate hierarchy. Such procedure would avoid the liquidation of Power. The selection by the Commission of one method of system adjustment to accomplish simplification rather than another is an incident which ought not to affect rights."

In other words, the Court said there that merely because you are dissolving one company, one holding company, and giving its assets over to another holding company is no reason why you should destroy the rights of a class of stock completely.

Then the Court went on to say at page 632:

"Upon analysis of the Holding Company System's experience and upon an estimate of future earnings, the Com-

mission assumed earnings of $6,185,000 annually which would be applicable to Railways' common and, as a consequence of the distribution, to Power's preferred and common stockholders. Since the annual preferred dividend requirements were $3,600,000, there appeared a balance of $2,585,000 available for the reduction of preferred stock arrearages of $38,700,000 as of December 31, 1942. The Commission noted that if all the assumed earnings materialized and were applied to liquidating the preferred current and deferred dividends, in approximately fifteen years the arrearages would be paid and the common would be in a position to receive dividends. Furthermore, only by forced liquidation could the common stock be deprived of its possibility for future earnings. Only by means of forced liquidation and the receipt of all Railways' common, could Power's preferred gain a right to prospective earnings above its guaranteed dividends."

In other words, we have the situation in the Otis case of the common stock having a very substantial present interest in the earnings of the company, over two and a half million dollars a year; and we also have the position of the preferred stock, if the common stock had been wiped out, receiving all of the common stock of the sub-holding company and being entitled to receive two and a half million dollars of dividends which it otherwise would not be entitled to; and the Supreme Court said it was not necessary in that case that that should be done; that this was not the only method by which this holding company system could have been liquidated or simplified; that a number of other methods could have been chosen without destroying the interest of the common stockholders; and that because there were these other methods available there was no reason why the common stock with earnings of two and a half million dollars a year should be completely wiped out; and,

accordingly, they sustained the SEC in giving to the common stockholders a small interest, a very small interest in the new company amounting to about 5½% of the common stock of the new company.

In support of its argument that it was not the intention of Congress to wipe stockholders' rights and security holders' rights out in the process of simplifying utility holding companies the Court went on to say at page 637:

"The provision"—that is, the indenture provision—"having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a 'simplification' under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated 'liquidation' within the meaning of Power's charter provision."

Here we have no such situation at all. We have no elimination of one company in a holding company system. We have a complete liquidation and dissolution of Engineers and no other holding company remains. We have not here a distribution of stocks to the preferred stockholders and the common stockholders as we had in the Otis case. We have here the payment in cash of the amount due to the preferred stockholders, so there can't be any question as to the value of what they are receiving.

"Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders."

Now, I submit that that provision is applicable here because what in effect is being done here to give a windfall to the preferred stockholders by giving to them the redemption premium amounting to $3,200,000, which otherwise belongs to the common stockholders, and I will go into that a little later on the question of the investment value, so called, of the preferred stock.

"Nor should common stock values be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the devices of merger or consolidation, which would not run afoul of a charter provision formulated years before adoption of the Act in question."

In other words, they say here you don't have to dissolve this top holding company. You could have merged the sub-holding company with the top holding company and left the positions of the common stockholders and preferred stockholders of United Power just as they were before; and merely because the Commission takes the method of dissolving the top holding company instead of merging the top holding company with the subholding company is no reason why you should destroy the values of the common stockholders having an equity of over two and a half million dollars per year in the earnings of the company.

The Court goes on to say:

"The Commission in its enforcement of the policies of the Act should not be hampered in its determination of the proper type of holding company structure by considerations of avoidance of harsh effects on various stock interests . . ."

In other words, the Court said to have done what was urged there by the preferred stockholders would have been a harsh effect upon the common stockholders and wiping out of their interest.

". . . avoidance of harsh effects on various stock interests which might result from enforcement of charter provisions of doubtful applicability to the procedures undertaken."

So that we have here in the Otis case the situation of whether the Commission in its simplification of a top holding company would be justified in ordering the dissolution

of that company and in wiping out in the process an entire class of stock, the common stock that had a very substantial present equity then existing in the earnings of the company; and the Supreme Court said Congress did not intend that, and further on in their opinion they quote from the message of the President of the United States to the Congress in which he said that it was not the intention of the Act to destroy property rights or the rights of security holders; and the Supreme Court said, by a divided court, it is true, that under that situation where there was another method of simplification open that the Commission was justified in giving some recognition to the common stock that had a very substantial equity in the earnings of the company.

Here we have, however, the very converse of that proposition. Here we have the situation of the preferred stock which is not satisfied with receiving everything the charter gives to it, but wants more than the charter gives to it. Because we have a provision here that in the event of a dissolution of this company, an involuntary dissolution of this company, the preferred stock shall receive——

The Court: Let me see if I can get your point. Is it your argument that the charter provision applies?

Mr. Boehm: It is my argument that in this particular case the charter provision applies, yes, your Honor, and upon the facts of this case, which are distinguishable from the facts of the Otis case.

Here in this case we have the situation of the preferred stock which has had offered to it by Engineers $100 per share in cash, not in stock of another holding company or even in stock of subsidiary operating companies where there might be some question as to the value of the stock and where the value of the stock is determined usually by capitalizing earnings either at ten times or twelve times or fifteen times, and there might be a serious question as to what rate of

capitalization should be employed in evaluating such stock. Here the preferred stock has been offered cash of $100 per share, which is all that upon an involuntary dissolution of the company they are entitled to; and the preferred stockholders come forward and they say, "No, that is not enough. We think the investment value of our stock is more than $100 per share and we want to get everything that we can possibly get in the event that the company had called the stock, voluntarily called the stock, which would be $105 and $110 per share," as I said before.

Now, we say that that position is inequitable, and just as the position of the preferred stock in the case of United Light & Power was harsh to the common stock, therefore we say now here—in that they wanted to wipe out the common stock completely—we say now here that the position of the preferred stock is harsh and inequitable to the common stock, because they want to give something that the Supreme Court said no class of stockholder should receive by reason of the simplification of these companies or dissolution of these companies, and that is a premium which they otherwise would not be entitled to.

The Court: Recess for ten minutes.

(At this point a brief recess was taken.)

Mr. Boehm: Before I come to the question of this investment value of the preferred stock I would like to touch for just a moment on the question as to whether the liquidation of Engineers was voluntary or involuntary. The Commission in its Opinion and Findings said at page 18:

"We find that the presence of Engineers would unduly complicate the structure of the system and that it would, therefore, come within the prohibition of Section 11(b)(2).

Accordingly we find that the proposal to dissolve Engineers is 'necessary' to effectuate the provisions of Section 11(b) of the Act." That is the majority opinion.

Then Commissioner Caffrey in a separate opinion which he subsequently wrote said "However, that is not, in my view, enough to make a case for voluntary liquidation. Our orders under Section 11 (b) (1) do not preclude a careful investigation of the surviving holding company system under Section 11 (b) (2) to determine what action might be necessary (including dissolution of the top company) in order to simplify the system and distribute its voting power equitably. I think that Engineers would have been subject to such a proceeding had it not come forth with a voluntary plan. Engineers' 'voluntary' proposal did no more than forestall the necessity for action by the Commission.

"Further, Engineers' decision to liquidate came as a logical step following the necessity to comply with our Section 11 (b) (1) orders. It is the operation of Section 11 and not mere managerial discretion that has brought about the liquidation.

"Under these circumstances, I do not believe that the liquidation can properly be termed voluntary."

Now, that brings us to the question as to what is the so-called investment value of the company. In connection with that I might state that for a number of years, I think three or four years, the dividend payable on the preferred stock was in default. In other words, no dividends whatever were paid on the preferred stock for a period of years. The preferred stock was originally issued in 1928, I think, or thereabouts, and was sold to the public at par or less. The $5.50 and $6 preferred stocks were sold—the $5 preferred stock was sold at $100 per share; the $5.50 preferred stock was sold at $99.50 per share; and the $6 preferred stock was sold at $100 per share.

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Boehm

Now, in order to get the public to buy these stocks even with a five and five-and-a-half dollar dividend attached, it was necessary, or the company and the bankers apparently thought it was necessary, to sweeten this preferred stock by giving warrants for conversion of the preferred stock into common stock at a time when the conversion price had an actual value; so that we may assume that without those warrants the preferred stock could not have been sold to the public at $100 and at $99.50 per share. So that the investment value of those stocks at the time that they were issued was less than par, and it was only by the device of granting a conversion privilege, which has long since expired, that the public was induced to buy these stocks.

Now, I just want to read a short abstract from a footnote of the brief which was submitted by Engineers to the SEC on the question of the prices of these stocks. At page 16 in the footnote Engineers says:

"Until the year 1944 none of the shares of preferred stock have ever sold in the market above $100 except with respect to the $5.50 stock at intervals for a period of about 13 or 14 months in the years 1929, 1930, and 1931, when due to some action induced by warrants above-referred to the $5.50 stock sold above $100, and in respect of the $5 stock for a period of a few months in 1929 and 1930 it sold above 100 induced by a conversion privilege above referred to."

In other words, because of this conversion privilege that was granted to this stock, this stock for a short period of time sold at par or above.

I am still reading:

"Furthermore, for most of the period since its issue the preferred stock has not only sold above 100, but for very considerable period much below 100. In fact, for example, during the years 1933 and 1934 all the series of preferred stocks sold in the market from around ten or fifteen dollars per share to thirty dollars per share."

Just imagine. Sold between ten and fifteen percent of the par value up to thirty percent of the par value, a stock which they now say has an investment value of more than $110 per share.

"As late as 1942 all three series sold in the forties. The record also shows that the average market price per share on the New York Stock Exchange of the three series of preferred stocks from the date of their issuance to October 31, 1945"—that is less than a year and a half ago—"was as follows: For the $5 stock $67.16 was the average price; for the $5.50 stock $64.52, and for the $6 stock $62.77."

Now, that is the average price of those stocks from the time of the issuance down to less than a year and a half ago, and they say that the investment value of that preferred stock is over $110 per share. How do they arrive at that theory that it is worth over $110 per share? The preferred stockholders put a man named Badger on the witness stand who stated he was an expert on the value of securities, and he took certain other stocks which were selling—this was I think in the spring of 1946 that this testimony was taken——

Mr. Zazove: January 1946.

Mr. Boehm: In the winter or spring of 1946 when, as your Honor may recall, the stock market was at its peak, the very peak of the present stock market, which was in the spring of 1946; and, subsequently, as your Honor may possibly recall, it went down, and in September and October of 1946 we had a very decided crack in the stock market. Stocks which were selling in the spring of 1946 at $100 per share, many of them are selling now at no more than half of what they were selling at at that time. And the only reason that this preferred stock is selling above par today is because this plan now provides, as found by the SEC, that they shall be paid their redemption premium.

Had it not been for that I am quite sure that this stock would not be selling above par today.

This man Badger went on the witness stand and he said that comparing this stock with certain other stocks that he named which were then selling at certain prices at the peak of the market, he concluded in his opinion, and it is purely a matter of opinion, that the investment value of this stock was over $110 per share. I think he went up as high as $119 for some stock and even higher—$129 or $130 for some other stock, and he had the temerity to testify that those would be the prices of the stock and investment value of the stock as far as human foresight could see.

The Court: Well, it wasn't as easy as that. According to page 30 of the Commission's Findings he indulged in the traditional methods of appraising the value of the securities.

Mr. Boehm: That is correct. It may be that at that time if that stock possibly could have sold in the market at that moment when he was testifying that those prices might have been realized or might not; I don't know. It depends on the quantity of the stock that is offered. You may have a few hundred shares or even a few thousand shares of stock selling at a certain price; but when it comes to selling about $39,000,000 worth of stock all at one time, you may not be able to get the prices at which a few hundred or a few thousand shares would sell for in the market. That is quite a different question.

But, at any rate, we know that prices fluctuate. Stock prices fluctuate. They never stand still. They either go up or they go down, and they usually go down much faster than they go up. We all know that. Whoever owned a share of stock in the market knows that.

Now, what was the reason that this stock and the other stock with which he compared it had gone to those prices? Here was this stock that over a period of sixteen or seven-

teen years was selling anywhere from an average of $62 to $67 per share. What was the reason that it suddenly jumped up and other stocks like it to $180 per share? Well, we happened to have a war. We happened to have a war boom. It happened that this company serviced a war boom area. Portsmouth, Virginia, is probably the greatest shipping center of the country, and during the war was serviced by this company. Other war boom areas were serviced by this company. Its earnings during that period were tremendous—of course, phenomenal—but those are not permanent earnings. When the war stopped the shipbuilding activity in Portsmouth dwindled. Today I am told there is very little shipbuilding going on in that area. The war boom is over. Earnings have come more or less back to a normal and will continue in the future to more back to normal than they have in the past, and you can't predict the investment value of the stock on the earnings of one or two years. We have to take a long period of years—ten years at least, I say, to find out what the investment value of the stock really is, what a certain stock will do under good times, under bad times, and under normal times, and you can't just pick up the peak of the war boom and say these earnings are going to continue as long as we can foresee, and therefore the investment value of this stock is so much.

The Court: Before we proceed further I want to read you a sentence from page 31 of the Commission's Findings:

"No additional expert testimony on value was introduced into the record and no serious challenge was made in the proceedings to Badger's conclusion that the fair investment value of the preferred on a going concern basis is in excess of the call price."

At that point did you introduce testimony contra Badger?

Mr. Boehm: I am very glad that your Honor raised the point, because it is something that I had intended to touch upon. The plan of the company provided for $100 per share to the preferred stock. There was no need for common stockholders to appear before the Commission, because Engineers was fighting, so to speak, the fight of the common stockholders. Their plan provided for $100 per share. For common stockholders to have appeared before the Commission under those circumstances would have been a duplication, it seems to me, of the work that the Engineers Company and its counsel were doing before the Commission. There would have been no excuse for common stockholders to appear and urge the same position that the company was already urging, and I am sure that the SEC would have said that that is an unnecessary duplication. The common stockholders therefore had a right to assume that the company was properly presenting its side of the case and that it was doing everything in its power to have the Commission adopt the plan as written by the company.

I don't wish to criticise the company. That is not my purpose. But we had a right to assume that the company would present proof as to the investment value of the stock, and that it was not the amounts that Mr. Badger had testified to. I understand that Mr. Barnes, the president of the company, who may be a very good utility operating man, but who I don't believe qualified before the Commission, and perhaps does not claim to be an expert on security values, he sort of assented to the theory or idea that the investment value of this stock was over $100 per share and was more than the call price of the stock. I think in that assent he was totally in error. I don't think that he is sufficiently qualified to be an expert on that subject, and the common stockholders therefore were left without any

testimony to controvert the testimony of Badger. Therefore I say that inasmuch as the common stockholders were not represented before the Commission, and the company is now assenting to the order of the Commission, that the common stockholders have not had their day in court before the Commission, and that this case should be returned to the Commission with the order that it receive the testimony in behalf of the common stockholders as to the real and true investment value of the stock; and if your Honor will do that we will be prepared to present expert testimony to the Commission as to what the actual investment value of this stock is over a period of years, not in a boom time, not in one or two years, but over a period of years; and in that connection I might say to your Honor that until 1944 for a period of about 15 years or 14 years this preferred stock had not sold at par—had sold at great discounts from par for a period of 14 or 15 years, and it was not until the war brought on this phenomenal business and this phenomenal rise in the stock market that we have had since 1942 that these preferred stocks have reached par. I say that a company whose stock for a period of 14 or 15 years sells at very substantial discounts from par, and the market place is a very good test of what values are, because you have hard-headed businessmen who are paying their own money for securities and determining what they are worth—I say that when in the market place that stock was not worth par and did not sell for par over a period of 14 or 15 years, that it requires a high degree of temerity to have a so-called expert come in and say to the Commission that this stock is worth $119 a share or $129 a share or anything like that.

We are practically willing and we are prepared, if your Honor will give us the opportunity, to present testimony to the Commission of what the real investment value of

this stock is. As I have said before, that value is not based upon the prices of one or two years that these or other stocks have been selling for, but upon the average prices over a period of years that the market place has been actually willing to pay for this stock. In this particular case it happens to be for a period of about 15 years, and it does not require a great expert in security values to understand that the opinion evidence—that is all it is, because Mr. Badger's testimony was merely opinion evidence—that the opinion evidence of the so-called expert hired by one class of security holders to give the highest possible value that he can to certain securities has little value in the face of the actual facts in this case; and I think that even a man who is not an expert can readily see that stock which has an average market price of between $62 and $64 a share over a period of years is not worth $129 per share; and that when its value has gone up because we had a tremendous war boom and a big stock market boom in the last year or two before this testimony was given, that that does not fix the investment value of the stock.

I submit that if these preferred stockholders are given the amount of $3,200,000 which this redemption premium amounts to, that they will be given a windfall at the expense of the common stockholders, and that is the very thing that the Supreme Court said should not result from these simplification or dissolution proceedings.

The Court: I have your point.

Mr. Boehm: We have a very rough draft of a brief. May I have the privilege——

The Court: We will take up the matter of briefs at the end of the argument.

Mr. Boehm: Very well.

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Berman

Mr. Berman: May it please the Court, my associate Mr. Rossbach and myself appear here on behalf of Central-Illinois Securities Corporation and Christian A. Johnson, the owners of 5,000 shares and 1,000 shares, respectively, of Engineers Public Service common stock.

Central-Illinois Securities Corporation is a publicly-owned investment trust incorporated under the laws of Delaware and having more than 2,000 security holders residing in all parts of the United States.

The Court: Was your client a party before the Commission?

Mr. Berman: My client did not appear during the course of the proceedings before the Commission, Judge Leahy, for the reason stated by Mr. Boehm that the position that we espouse here was at that time espoused by the company; but our client did notify the Commission when the Commission issued the notice of the filing of the amended plan, which provided for the payment of the premium, and the Commission asked those who wished to be heard in objections to notify it, our clients addressed a letter to the Commission stating that they opposed the amended plan on the ground that the proposed payment of premiums was unfair to the common stockholders and stated their objections with some particularity. You will find a reference to their objections in the Commission's Supplemental Findings.

Our objections here are directed to two aspects of the plan: One, the proposal to pay the preferred stockholders the premium which we contend renders the plan unfair and inequitable to the common stockholders; and, secondly, the omission from the plan of the mechanics for the establishment of an escrow fund into which such bonus payments could be placed pending final judicial review. We contend the omission of such machinery, unless remedied in the court, as apparently it may be, would render the plan not appropriate to effectuate Section 11(b) for the reason that

it would prevent the going forward of the remaining and non-controversial aspects of the plan, and therefore would not be appropriate.

So that your Honor will understand at the outset what our position is on the merits, I will say first we believe the charter provisions here are applicable, that this is not a voluntary liquidation or reduction of capital, and that under the charter provision, therefore, the prefefred stockholders by contract have agreed to accept $100 per share plus accrued dividends. We say further that even if the charter provision were not present and the charter were silent that the same result would be reached on the basis of applicable Commission decisions as to the meaning of fairness and equity in this type of situation, also on the basis of the judicial decisions as to the applicable legal principles appropriate to situations involving frustration of corporate enterprises and specifically held applicable to a liquidation of this type under Section 11 by many Federal courts, including this one, on a number of occasions; and not less than four Circuit Courts of Appeals, four different Circuit Courts of Appeals.

Thirdly, we go on to contend that quite apart from the charter provisions, the Commission decisions as to what fairness and equity means, and court decisions as to the appropriate legal principles, but as a matter of fairness and equity and justice applied to the facts of this particular case the preferred stockholders are not entitled to this bonus or premium aggregating some $3,200,000, and that to pay it to them would be contrary to the expressed intent of Congress in passing this very statute.

I think from what Mr. Slater said——

The Court: You don't go so far as to contend in connection with the Congressional intent to which you just made reference that there can never be a situation where the preferred should receive its call price?

Berman

Mr. Berman: Oh, I am not prepared to make that statement quite as broad as that, your Honor.

The Court: In other words, it depends upon the particular facts of each case, because in one instance you might have a preferred which in fairness and equity should receive it, and in another instance it should not.

Mr. Berman: I must concede that possibility, although I am frank to say I don't know what the circumstances would be. But given a proper factual setup, that result might arise as a result of fairness and equity.

The Court: I want to be clear that you did not mean that it was the Congressional intent that the preferred would never get its premium.

Mr. Berman: Oh, no. Maybe the charter would provide for it to have a premium on a specific situation, or there might be other factual circumstances; but I say under the circumstances of this case it would violate the intent of Congress if a premium were paid.

As I understand the position of the Commission when Mr. Slater addressed the Court and also based on the Commission's Opinion, I think it is clear that at least three of the four Commissioners concede that this plan is not a voluntary plan in the sense that the word "voluntary" appears in the charter provision in question, and I assume that the Commissioners would concede that it is, in fact, involuntary if the charter language could be held to have its normal import. But, as I understand it, the Commission said, however, that this charter is not to be considered as meaning what it seems to say, because they could not have had in mind the proceedings under the Holding Company Act, and the Commission did not discuss that at all. It said the Otis case so held. Therefore before spending too much additional time on the charter provisions I think we ought to turn to the Otis case to see if the Commission is correct

in its reliance on that decision for its contention that the charter provisions are not applicable here.

At the outset we point out three vital factual distinctions which exist between the plan that was before this Court, the Circuit Court, and finally the Supreme Court in the Otis case, and the plan which is at bar. One is a difference as to the wording of the charter provision itself. In this case the language of the charter provision is much broader that the language with which the Court was dealing there. That language merely provided that in the event of voluntary or involuntary liquidation, preferred stockholders should receive such and such an amount. But here we have a provision which says in the event of liquidation, dissolution, or winding up or any reduction of capital accompanied by a distribution of assets, the preferred stockholders should receive $100 unless these acts be voluntary, and then they get specified premiums. So that this language covers a much broader series of acts, and the word "involuntary" as such is not used here at all. The matter is first put broadly as a blanket provision. Any liquidation, dissolution, winding up, or reduction of capital, $100 a share; unless if they be voluntary, premiums. Clearly under that language the burden is on him who asserts that the act is voluntary to prove that it is. The burden is not on us to prove that the act is not voluntary, although we would have no difficulty in acquitting ourselves of such a burden.

Secondly, we say that provision also has to be construed under the applicable principles of Delaware law to the effect that preferences being in derogation of the common law must be construed strictly against the preference. We cite cases in our brief on that point. I will return to the charter provision shortly. At this time I merely point out that the language here is much broader and that we are not dealing with a single word "involuntary" which the Court

in effect held there was used as a term of art to apply to actions of creditors. The word "involuntary" as such does not appear here. Instead we have this broad blanket provision.

Secondly, we wish to point out in the United Light & Power Company plan dissolution of the system was not taking place. We were dealing there merely with the dissolution of what this Court termed in its Opinion "the apex company of a multi-tiered holding company system." Here we are dealing with the liquidation of the only holding company in the holding company system and with the simultaneous dissolution of the system itself. Here you dissolve the one holding company and the system necessarily falls apart. So that we have here what we didn't have in the United Light case, a liquidation of the system as well as of a particular holding company.

Some years ago when the Commission was first getting into these problems of fairness and equity under dissolutions and recapitalizations it had occasion to stress the importance of the fact that you had a certain rule applied when liquidation was in the air and certain other rules were applicable when liquidation was not in the air. The Commission started out, and I refer now to its Federal Water Service Corporation decision, 8 SEC 893, and it said, "We must, as Mr. Justice Holmes warned, think things, not words. It will not do to argue that a reorganization is a reorganization no matter why begun or under what circumstances."

Now, our contention, your Honor, is that the effect of the Commission's decision here is that the Commission was thinking words and not things. The Commission said that in the Otis decision, the Supreme Court said, "liquidation preferences are not matured. Charter provisions providing liquidation are not applicable to holding company

situations. Therefore we do not have to consider this charter provision." But the Commission did not go so far as to analyze the Otis decision and find out in what context the Supreme Court was saying these things and in what limited way, and pointed at what.

In the same Federal Water Service decision the Commission had occasion to say in the same context, "An appropriate Commission order under Section 11(b) might require liquidation. In such cases a Section 11(e) plan would be a substitute for liquidation, and the words 'fair and equitable' on such facts would yield the same result as if the company were the debtor in a bankruptcy reorganization proceeding. But there are many cases, and this case is one"—that is the Federal case—"where the appropriate order under Section 11(b) would not be to liquidate, but without liquidation would require simplification of the corporate structure."

Then it went on: "To ignore the significant absence of a liquidation atmosphere when construing these words meaning 'fair and equitable' is to do violence to their own history. We are convinced that absent liquidation there is an important difference in the context and legal rights to be recognized, and that that difference and right requires a difference in the legal or the equitable consequences."

Now, it is against that background and that language, to which you will find no reference unfortunately in the Engineers' Findings or Supplemental Findings, that we approach the factual situation here. Your Honor had before him the United Light & Power case before it went to the Supreme Court and before it went to the Circuit Court, and your Honor considered the facts very carefully, and I think your understanding of the facts is very important, if I may take the liberty of referring to them at this time, because they were substantially the same understanding

which the Supreme Court had when the case came before it. Your Honor said:

"A consideration of the basic facts before the Commission supports its special finding of what is fair and equitable under all the circumstances. True, the preferred has a charter claim of $164.50 per share in cash upon dissolution, as the term is ordinarily understood when total corporate assets are either sold privately or on the block and liquidation, in the sense that total corporate purpose ceases, takes place. But the Commission has caught the nuance in the present situation. There is no real finality to this particular situation. There is no real finality to this particular dissolution. Power's shareholders simply transform themselves into holders of common stock of Railways and thus obey the demands of Congress. Power as the head of a holding company system is now declassé by congressional mandate; the interests of all classes of stock are nevertheless still lodged in a continuing enterprise.

* * * * *

"It is neither an exercise in semantics nor a rejection of labels to consider the present plan little more than a reclassification."

Then you went on to say what would happen if it were an actual reclassification how the preferred rights could be interfered with, stripped away, their accrued right to dividends destroyed, and so forth.

We say, your Honor, that in the case before you the Commission has failed to catch the nuance, because what is before us now is a real liquidation, is a dissolution of the enterprise, is a termination of the enterprise in the sense that real corporate purpose ceases. If this is not a liquidation we cannot conceive what a liquidation is. When a charter of a holding company says that this is what happens, in the event of liquidation of the holding company,

can it be taken to be any less complete than a liquidation which means dissolution of the holding company and distribution or sale of every asset in the holding company portfolio? Does it require in order to be a dissolution of a holding company that every dynamo of every operating company be placed separately on the block and sold? Is that what is meant by the dissolution of a holding company or holding company system? Clearly not. It means dissolution of the holding company enterprise in such a way that the system falls apart and ceases to be a holding company system. That was not taking place in the United Light & Power plan, as your Honor pointed out. There you were merely peeling off the top layer of a multi-tiered structure, and the security holders were merely stepping down one step, and the enterprise and the system continued, because there were other holding companies to hold it together, and that it what the Supreme Court meant when it used the terms "in a simplification under the Holding Company Act such as is here present"—and we will revert to the actual language—"liquidation preferences are not matured, were not intended by Congress to be matured." Liquidation preferences were intended not to be matured in that situation, because the Supreme Court and this Court and the Circuit Court and the Commission found that in that case liquidation was not taking place. The system was not being dissolved. There was a pseudo liquidation, a technical liquidation of the top company, but the whole enterprise continued and the interest of the shareholders continued. They merely stepped down one step. That is not what is happening here. Nor can it be said that in this situation merely because the common stockholders are going to receive in that dissolution all of the common stocks of three operating companies that the enterprise is continuing. First of all, we hasten to point out that a holding company sys-

tem is more than simply the common stocks of the individual operating companies which underlie it.

The Supreme Court recently had occasion to hammer at that very point in the North American case, and I think its language there is worthy of attention.

The Court: Let us recess for lunch at this time. Recess until two-fifteen.

(At this point recess was taken until 2:15 o'clock p. m., the same day.)

Two-fifteen o'clock p. m.
The same day.

Present:

As before noted.

Mr. Berman: May I proceed, your Honor?

The Court: Yes.

Mr. Berman: I was pointing out prior to the recess, your Honor, that a genuine liquidation is taking place here, even though the securities of the three remaining underlying companies will be distributed to the common stockholders, because a holding company is something more than the sum total of the securities which it holds.

In the North American decision decided by the Supreme Court last term at 327 U. S. 686, North American had argued that it was not subject to the commerce clause of Congress because, it said, "We are merely a corporate holder of securities; we are not even in the stream of commerce"; and, of course, in their case, as I understand it, they did not even have a service company like Engineers does have; and the Supreme Court said:

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"North American is more than a mere investor in its subsidiaries. * * * (p. 694)

* * * * *

"This argument, however, misconceives not only the power of Congress over interstate commerce, but also the basic nature of public utility holding companies and the effect that stock ownership has upon their activities. The dominant characteristic of a holding company is the ownership of securities by which it is possible to control or substantially to influence the policy and management of one or more operating companies in a particular field of enterprise. To be sure, other devices may be utilized to effectuate control, such as voting trusts, interlocking directors and officers, the control of proxies, management contracts and the like. But the concentrated ownership of voting securities is the prime method of achieving control, constituting a more fundamental part of holding companies than of other devices of business. Public utility holding companies are thereby able to build their gas and electric utility system, often gerrymandered in such way as to bear no relation to economy of operation or to effective regulation. The control arising from this ownership of securities also allows such holding companies to exact unreasonable fees, commissions and other charges from their subsidiaries, to make undue profits from the handling of the issue, sell and exchange of securities for their subsidiaries, to issue unsound securities of their own based upon the inflated value of the subsidiaries and to effect adversely the accounting practices and the rate and dividend policies of the subsidiaries (end of quote)."

The Court went on to point out that Congress had a right to find that those were unwholesome practices from a public point of view and from a social point of view, but what we are here saying is that for many holding companies

that concentrated control represented influence of great importance, because when you dissolve the holding company, even if you distribute out to the security holders everything that the holding company ever had, they still would not have this system. They would then be merely individual stockholders in operating companies in which none of them as individuals would have control of the operating companies. They could not influence the dividend policies of the operating companies; they could not force them into service contracts; they could not even insist that they be well managed, because here you are going to have these stocks scattered among ten thousand or so individual stockholders, although theoretically in the aggregate they still have control; but as a practical matter they have none, and there is no system.

Judge Healy passed on this same point, or I should say Commissioner Healy, in his dissenting opinion in United Light and American Light & Traction case. There too the argument was made by preferred stockholders that in view of the fact that the liquidation of American Light & Traction Company would result in the distribution of some securities to the common stockholders that there was not a genuine liquidation; and Commissioner Healy in his dissenting opinion stated:

"I think the liquidation of American Light is a genuine liquidation. American Light has already sold substantial stock holdings in several companies for cash pursuant to requirements of the Act. American Light proposes to go out of existence. After paying off its preferred in cash its assets are to be distributed in kind to its common stockholders. The largest of these, Railways, (the only other holding company in the picture) is under an order and commitment to dispose immediately of what it thus receives. This is not a case as in the dissolution of The United Light and Power Company where Power ceased to be the top

holding company and its immediate subsidiary, Railways, continued in existence and through dissolution of Power became the top holding company of a system which was almost precisely the same as it had been Power's dissolution. In the Power dissolution the enterprise continued. In the present dissolution the enterpise ends. What is the enterprise heretofore conducted under the name American Light & Traction Company? It is that of a holding company. This includes more than merely owning securities, as the recent Supreme Court decision in the North American case so clearly pointed out. That enterpise ends and no other holding company takes its place. It is true that the stocks left in American Light's portfolio after selling so much as is needed to pay off the preferred will be distributed to American Light's common stockholders. It is true the operating companies in which American Light holds shares will continue to operate, but the enterprise being liquidated is a holding and not an operating company and it is no less a liquidation because certain of its holdings will be distributed to its stockholders rather than sold in the market and the cash avails distributed. One method of liquidation is quite as complete and real as the other and quite as effective in bringing the enterprise to an end. Besides, a considerable portion of the cash to be paid the preferred has already been obtained through the sale of assets as ordered by this Commission, . . ."

Now, in the Engineers case we have all the factors to which Judge Healy adverted in the language I have just quoted, and we have more, because here the holding company system initially consisted of some eight large operating companies and probably a half dozen additional statutory nonutilities, but companies which represented earning power and value. All of those have now been disposed of except these three which remain, and it is the cash realized on the

sale of those other assets which is to be used in part, at least, in paying off the preferred; and even the three which now remain cannot remain, because the company is under 11(b)(1) compulsion to sell all but the Virginia, so that at least two others must go out. Now, in effect, the common stockholders are buying one of these three companies, Gulf States. They are going to put up $22,000,000 through the warrants technique to purchase the stock of Gulf States just as though the management offered it on the block. And the other two companies could of course be sold and the cash used to pay off the preferred, but that would involve perhaps useless underwriting fees, and therefore they are being distributed out directly to the common stockholders, some of whom may sell their shares and others may retain them; but the mere fact that they are receiving the shares of these two remaining companies out of what was once a large holding company system certainly does not make this not a liquidation.

In the United Power & Light case which has come before this Court and the other Courts, we had the situation to which I referred before recess, that there we were liquidating merely the top holding company and the system as such would continue. That was what your Honor referred to as the nuance in that particular situation. In this situation the nuance is that this enterprise is not continuing.

Mr. Boehm read extensively from the Supreme Court's Opinion in the Otis case. I won't take the time to do it again, although I would like to stress somewhat different language. I have set it forth at pages 48 and 49 of our brief. But I do think that the nub of what the Supreme Court found there as it relates to the Engineers case is this:

The Commission referred to the Otis case and said the Supreme Court held in the Otis case that liquidation preferences are not applicable to a situation, a Section 11 pro-

ceeding under the Holding Company Act, and therefore we do not have to apply the liquidation preferences in the Engineers' situation. But here is what the Court actually said after a continued discussion in which it stressed time and again "We are dealing here with a mere simplification of a holding company system. We are dealing here merely with the elimination of a company in a holding company system. The enterprise continues. This is, in effect, a reclassification. The enterprise continues." And then it went on to say, referring to the charter provision:

"We think, however, that the charter preference is inoperative in simplification under Section 11(b)(2). The provision having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a 'simplification' under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated 'liquidation' within the meaning of Power's charter provision."

I agree with that language just as your Honor agreed with it and the Circuit Court did. That was technically a liquidation, but it was not the kind of liquidation that stockholders have in mind when they refer to the liquidation of the company and the rights that usually accrue to the stockholders at the time. It was merely a peeling off of a layer. It is true that stockholders could not have had in mind that type of thing when they drew the charter; but what we are now confronted with in this case is the liquidation of the enterprise, precisely the type of thing that stockholders have in mind when they talk about liquidation, because, as I pointed out earlier, it is inconceivable that there could be a more complete type of liquidation than the one taking place. How do you liquidate a holding company more thoroughly than to dissolve the holding company, sell off enough assets to get the money to retire the senior pre-

ferreds, and then sell the balance of the assets or distribute them pro rata to the stockholders? There is no other way. You don't take the machinery of the operating companies, and put it on the block. A holding company is the operating companies plus the service company plus the concentrated control that permits dominance of the operating companies. Those things all go.

I will not dwell further on that. I say in the Commission's Findings and Supplemental Findings we find no discussion of that, but merely a reference to the Otis decision, and that is why I said earlier that the Commission's findings were thinking words and not things, because it did not get the picture before it.

Now, allied to the point we have just been discussing that a real liquidation is taking place is the fact that here the security holders and preferred stockholders are being paid off in cash instead of being given securities of the underlying company as occurred in the United Light & Power case. Now, that distinction is very important, because the Commission having found that the Otis case interdicted the reliance upon the charter provision, then went on to say, "How do we determine the rights of the stockholders if the charter provision does not apply?" They said, quoting the Otis decision, which in turn quoted the Chicago Milwaukee reorganization decision in the Supreme Court:

"It is settled that in a Section 11 reorganization a security holder must receive, in the order of his priority * * * the equitable equivalent of the rights surrendered."

Then it went off to determine the equitable equivalent of the rights being surrendered by the preferred. But the basic fallacy is that the language I have just read has reference only to a situation where a reorganization is occurring, not a liquidation. The stockholders in United

Light & Power and in the Milwaukee cases the senior security holders were being forced to take securities in a reorganized company, and the Court said, "Under those circumstances, since we are not giving them cash, we have to try to equate, measure the rights of what they are giving up, compare it with what they are getting." That is made perfectly plain by reference to the Otis decision where this equitable equivalent of rights doctrine comes in, comes in near the end of the majority opinion, where it is clear the Court is talking there merely about the allocation as between the preferred stockholders and the common stockholders; and the Court says:

"As indicated earlier in this opinion, we have not undertaken to review the facts to determine whether the allocation of stock between the preferred and common is in proper proportion. That issue is not made. It was vigorously discussed by Commissioner Healy in the dissenting opinion. * * * The allocation properly may be made without dollar valuation so long as 'each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered'."

Then it cites three cases, the Milwaukee case, Group of Investors *v.* Chicago, Milwaukee, St. Paul, et cetera, the Consolidated Rock Products case, and the Ecker *v.* Western Pacific, and a fourth case, Kansas City Terminal Company. They are railroad reorganizations.

Now, the significant thing about it is that the railroad reorganizations come up under Section 77 of the Bankruptcy Act, and the Consolidated Rock Products case came up under Section 77B, the predecessor of Chapter X of the Bankruptcy Act, and both of those statutes expressly provide that where payment is made in cash to senior security holders, those security holders are not concerned with the

reorganization. They don't even have a vote in the reorganization. They are paid out, and therefore when you find a discussion in these decisions of the rights of senior security holders, it is talking about senior security holders who cannot receive cash, who are not being paid out, but who are being forced to take new securities which the Court says must then be measured to see whether they are the equitable equivalent of the rights being surrendered in the old securities.

Now, any doubt about that is removed by a reference to the Milwaukee decision where this equitable rights doctrine was evolved in its fullest flower, where the Court says:

"A requirement that dollar values be placed on what each security holder surrenders and on what he receives would create an illusion of certainty where none exists and would place an impracticable burden on the whole reorganization process. * * * It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered. That requires a comparison of the new securities allotted to him with the old securities which he exchanges to determine whether the new are the equitable equivalent of the old."

What could be clearer than the fact that that language of equitable equivalent of rights is applicable solely and specifically to reorganizations where the senior securities cannot be given cash, but are being given new securities? We say that the Commission, therefore, misapplied that doctrine to the situation such as we have here where the security holders are being paid off in cash according to the charter rights.

Now, lest there be any question about it, let us bear in mind that the Supreme Court in the Otis case never for a minute suggested, either the majority or the minority, that

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the charter rights are not applicable if intended to cover the situation. The majority said:

"There is an argument that if the charter provision applies to this situation, it cannot be disregarded and that in such a liquidation 'fair and equitable' would require the distribution of assets only to the preferred. We do not reach that position. The point at issue is whether this charter provision applies."

The minority, however, went on to reach the question, and they said:

"We cannot assent to the proposition advanced by the Commission that even though the priority stipulation was intended to be applicable to any kind of an involuntary liquidation, including one such as the present, the Commission can nevertheless override it. Such provisions for priority in a corporate charter constitute a contract among the stockholders which is entitled to constitutional protection, 194-6 impairment of which is not lightly to be attributed to Congress. No constitutional issue is raised here."

The Court went on to say, "But it is clear to us that there would be a very grave constitutional problem."

So that neither the majority nor the minority were saying in the Otis case that if the charter provision was intended to apply to the situation then before the Court that it would not be controlling. They went on to say, the majority at any rate, that it was not intended to apply to that type of a system simplification that was involved in the United Light plan, the peeling off of merely one layer; but had it been a liquidation in the real sense of liquidation, the type of liquidation that your Honor spoke of when the case was before him in his Opinion, then the Supreme Court majority certainly did not intend to say and the Commission is in error in thinking that it intended to say, if that is its view, that those charter rights would nevertheless not be con-

trolling; and, as the Chief Justice said in his dissent, should the Commission undertake to apply Section 11(e) in such a way as to vitiate charter rights which were intended to apply, a very serious constitutional problem is raised, and, of course, we raise it here.

Now, it is against that context and that background of non-liquidation that we come to this expression which is to be found in so many opinions of the Commission since the Otis case: that liquidation rights are not matured in reorganizations or liquidations under the Holding Company Act. That is not what the Otis decision stands for. The Otis decision stands for the proposition that liquidation rights are not matured where there is no liquidation but merely simplification or a reclassification, but where there is a genuine liquidation, where liquidation is in the atmosphere, as the Commission said in the Federal case, then we have the type of liquidation envisaged by the charter provisions of this company and so many others. We must not lose sight of the fact that what was at stake in the United Light & Power, in the Otis case, was the fact that preferred stockholders were claiming that the liquidation of the top holding company there accelerated the right of the preferred stockholders to determine their liquidating preferences, and the Supreme Court was saying, "Oh, no, this is not the type of situation which was intended to give you the right to accelerate that way"; but that is a very different thing from saying that if in that case, even, the preferred stockholders had been tendered their liquidating claims in cash—that is, $162.50 in cash, that they would have had the right to reject it and demand a premium. There is not the slightest basis for such a contention based on that case; and to apply that language wrenched out of its context to this situation to say that the preferred stockholders who are tendered their liquidating rights have the

right to reject it and insist on a premium for going value, for present investment value, so called, well, that doctrine at least finds no support in the Otis decision if it finds any anywhere else.

While we are on the Otis decision I think we should take a moment to point out to your Honor that if the Otis decision were applicable, if the Otis doctrine or rationale were applicable to this situation, that instead of the preferred stockholders being entitled to demand their liquidating claims in cash and getting them as they are here, were you to apply the United Light & Power formula, the preferred stockholders would emerge with much less than $100 in present cash value. We have worked that out and pointed it out in our brief on page 55, where we show that if you use the United Light & Power formula, that is, you measure the right of the preferred as represented by their claim to dividends against the residual earnings remaining for the common stock, and if we make all sorts of liberal assumptions here as to earning power and everything else, that actually the preferred stockholders on such basis would get common stock in this liquidation which would have a present market value of not more than $70.

Then we go on to show if we took the $17,000,000 of cash in the treasury and made an immediate pro rata distribution to the stockholders, that would only bring them up to about $83. So that it should not be thought by our argument here that the United Light doctrine is not applicable that we would not stand to gain if it were. We would gain financially, and the preferred, which has apparently been hammering at the Otis decision is applicable, if we apply that doctrine would emerge considerably worse than they will when it is determined that the doctrine is inapplicable. But honesty and consistency requires us to take the position that we do: that this is the type of liquidation which the United Light & Power plan was not; that this is

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a genuine liquidation to which your Honor referred and to which the other Courts referred, which does mature liquidating claims of preferred stockholders.

If the Otis decision does not stand for the proposition that liquidating claims are inapplicable here, we return again to the language of the charter and we point out once more that this charter provision is phrased in such a way as to make it plain that in any type of liquidation, dissolution, winding up, or capital reduction the preferreds get $100 a share plus accrued dividends, unless same be voluntary; and we say that that requires a showing on the part of those who contend for the benefit of the exception to prove that the exception exists; and, of course, I don't think we need lose much time here to argue that this is not a voluntary liquidation, because, first of all, we have a formal finding by the Commission that the dissolution of Engineers is necessary, is compelled by Section 11(b)(2) of the Act, and is necessary to effectuate that section. The Commission has held to like effect many times, and it has been universally upheld by the Courts. The latest such decision is the decision of the Supreme Court in American Power & Light and Electric Power & Light Corporation where the Commission had ordered the dissolution of two useless holding companies. They had objected, and the Court said that certainly the Commission could do that; and we collate and cite those cases in the brief.

But even if the Commission had not found that the total liquidation of Engineers is required to effectuate Section 11(b)(2), it would not make any difference in the final result here because clearly a partial liquidation of so radical a nature has taken place under the mandate of Section 11(b)(1) as a result of the divestment orders that on applicable principles of law and Commission decision the retirement of the senior securities is made necessary in any event.

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The Commission more than three years ago pointed out in the Western Public Service case, which was then a subsidiary of Engineers, that Engineers had more than the problem of an 11(b)(1) to cope with. They said, "In addition to making the divestments which we have ordered, Engineers has the further duty of contracting its capital structure to conform with its shrunken system"; and Judge Healy went further, Commissioner Healy, in his concurring opinion in that case, and pointing to the provisions of the certificate of incorporation with respect to reduction of capital stock said, "Even if this is not a total liquidation, what is certainly taking place here is a partial reduction of capitalization, which brings into play the charter provisions applicable to the liquidation price in the event of reduction of capital stock." Certainly that is taking place here in this very proceeding.

In the Findings of December 5 in the Engineers' case the Commission went on to say, "In any event, the shrinkage in the Engineers' system is such that its capital structure must be shrunk and the senior securities must be eliminated."

Now, as your Honor knows from having handled any number of such proceedings that where the Commission has found that a shrinkage in the system must occur, even though the holding company may still remain alive and a part of the system may remain alive, that because it is placed under the compulsion of paring down its capital structure to conform to that pared-down geographical system, the retirement of the senior securities is held to be involuntary and no call premiums are held payable. A long series of Commission opinions attest to that.

Your Honor had the question before you and considered it very extensively in the Consolidated Electric & Gas case where the argument was being made that we were dealing

here with a Section 11(e) plan, which is voluntary, and that there was no outstanding 11(b)(2) order requiring the retirement of the preferred stock; and you said, "It is clear that this company has to contract itself to comply with the Commission's 11(b)(1) order, and that something has to be done with that capital structure. They can't have this preferred stock outstanding, and under those circumstances the doctrines applicable to frustration of corporate enterprise are applicable"; the same doctrine which the Circuit Court of Appeals in the Second Circuit applied in the New York Trust against SEC case, where the retirement of the debentures was held necessary; and therefore no premiums payable, and so forth.

So that even if we did not have a complete liquidation of the system such as we do in fact have, but merely had a *pro tanto,* a partial liquidation which rendered this preferred stock in appropriate to the size of the system, a long line of Commission and Court decisions uniformly hold that the senior security holders under such circumstances have no right to demand premiums.

Now, the question was squarely presented to the Commission in its Cities Service decision, Holding Company Act Release No. 4944, which we quote at pages 26 to 28 of our brief. There the Cities Service Company had filed an 11(e) plan to retire debentures, $7 preferred stock having a call premium of $10, $5 preferred stock, and $6 preferred stock. The Commission had issued no order to the company to retire those securities, but it had found that under 11(b)(1) the company would be shrunken to about 55% of its initial size, and the Commission started by reviewing its past decisions and citing a number of them and said, "We held that satisfaction of the securities there involved, without payment of redemption premium, was fair and equitable, and in both cases our decision was affirmed on appeal.

"In each of the cases cited above we had entered an order that the issuer of the securities involved must be liquidated and dissolved by reason of the requirements of Section 11 (b). No such order, however, had been entered in Consolidated Electric and Gas Company. In prior findings in that proceeding we had found that disposition by Consolidated of its interest in a major subsidiary thereof was necessary to effectuate the provisions of Section 11; that compliance with Section 11 (b) would involve substantially complete liquidation of that portion of the enterprise on which the Federated bonds (theretofore assumed and presently proposed to be paid by Consolidated) had a lien; that application of the proceeds of such sale to the requirement of bonds was a necessary consequence of the sale; and that simplification of the security structure of Consolidated by elimination of the Federated bonds was necessary to effectuate the provisions of Section 11 (b) (2). In these circumstances, we concluded that payment of the Federated bonds at their principal amount and accrued interest, as provided in the plan of Consolidated, was fair and equitable to the investors affected thereby.

"In the instant case, we have heretofore found, pursuant to Section 11 (b) (1), that Power & Light must dispose of its interest in subsidiaries which then constituted over 55% of the consolidated assets of the Power & Light system. Originally controlling a widely scattered empire, Power & Light will be limited by the compulsory provisions of Section 11 to its Ohio properties. As stated above, elimination of all senior securities from the corporate structure of Power & Light is a necessary consequence of such partial liquidation, and is compelled by the provisions of Section 11 (b) (2)."

And the Commission held that no premiums were payable either on those debentures, the 7% preferred or the 6%

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Berman

preferred, and so forth, and that despite the fact, one, that Cities Service had not been ordered to liquidate, but was to remain alive; and, two, that Cities Service did not have the money in its treasury to pay off the preferred stock, nor were the common stockholders willing to furnish that money, but Cities Service went out and borrowed that money from a bank. In other words, it replaced them with new capital, new senior capital, bearing an interest rate of only some 2%, but retired its senior securities bearing interest rates of 5, 6 and 7 percent; and the Commission found that no premiums were payable not only under the contract—the contract was silent on that, they said—but on principles of fairness and equity there was no basis on which they could receive a premium.

Now, here we do have a total liquidation of the enterprise and here we have no replacement of the senior capital with other senior capital. We have the dissolution of the entire enterprise and the money being put up in large part by the common stockholders to pay off the preferred at their liquidating claims, and the Commission has found now that it would not be consonant with the principles of fairness and equity that the preferred stockholders should not receive a bonus or premium on the basis of this now present investment value doctrine.

There must be a dozen courts that have passed on the question of the non-payment of premium in these other cases. Every one of them has concurred in the Commission's view that no premium was payable because the retirement of the securities was being made under the impact of Section 11(b)(2), and as I stated, four Circuit Courts of Appeals, four different ones, have found that those were the applicable principles. We have collated those cases and cited them in our brief. Now the Court is being asked, in effect, to reverse all that and to find that on the facts in this case premiums are payable.

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Berman

We take the position that even if there were nothing, no agreement in the charter here providing for the payment of $100 per share, that on general principles of equity these preferred stockholders are not entitled to $100 per share first of all.

The charter provision that the preferred stockholders or debenture holders should receive a redemption premium of course rests upon the assumption that when the common stockholders exercise their redemption right they are exercising a valuable right which will permit them to pay off the present senior money and replace it with senior money having a lower cost to them and that they will continue to have in the capital structure this senior money, only it will be senior money at a lower price; and therefore they pay a premium to the former senior money people to step out of the picture and let themselves be replaced by those who are willing to take a lower rate of return. But, of course, in a situation where you are liquidating you can't pay a redemption premium to your senior money people to step out, because you are losing the advantages of the senior money in not retaining it.

The Second Circuit Court of Appeals in its New York Trust Company case, to which I have referred, clearly made that point. In that case, which was one phase of the United Light & Power case, the debenture holders argued that the stockholders could pay them a premium nevertheless, in money, giving them the equivalent of their rights; and the Court said, "Why, no, these people have no reason to pay you a redemption premium, because it has been made illegal for you to stay in this enterprise and, in fact, for this enterprise to stay alive. Those are not the circumstances under which the right to a premium arises. Your rights are cut off and theirs are cut off. They can't pay you to stay here and furnish leverage. They have been ordered to go out of

business or they have been ordered not to have senior securities. Those are not the circumstances under which the right to premium arises."

What is this present investment value doctrine that we are dealing with? We contend that in essence it is nothing more than the right of the preferred stockholders or the value to the preferred stockholders to continue to receive in the future an excessive rate of return. That is, in essence, what the preferred investment value doctrine is. The preferred stockholders say, "If you pay us $100 now, our liquidating claim, so called, considering the going rates of money, if we take that hundred dollars and go out and invest it in a good safe security, a security of comparable caliber; we can only get 4½ or 5 percent on it, whatever the figure be, instead of 6 percent and 5½ percent which we are now getting. Therefore you are forcing us now to lose the excess that our present preferred stocks enjoy over the going value, the going money rate. That is a valuable right for which we ought to be compensated."

Now, we agree, your Honor, that when the preferred stockholders are forced to relinquish the right to receive the excessive dividend rate that they are now getting, that they are giving up something which they would rather not give up; they are giving up something which has value definitely. But we are not getting the benefit of their relinquishment. We common stockholders are also being forced to relinquish our right to the future profit possibilities inherent in this enterprise. The Government has stepped in and said, "This type of enterprise is now illegal. It must come to an end. Go out of business."

Mr. Slater referred earlier to the contentions, he said, of the company that the preferred stockholders should be made in equity to share the losses. That is not our position here. We are not asking these preferred stockholders

to bear any losses. We have indemnified them against every loss this system has had since its formation and all the hardships that it has gone through under the Act. The preferred stockholders have received the full and punctual payment of their dividends, with the exception of several years, which were speedily thereafter compensated for. We are now ready to pay them 100 cents on the dollar for their liquidating claim. Whatever losses we have borne as a result of the forced divestments—and there have been losses and very substantial ones—the common stockholders will bear exclusively. They do not ask the preferred to bear a penny of it. But we say, "Don't ask us also to be the indemnifiers of the preferred for the future profit possibilities that they are being forced to give up by the enactment of Congress."

Now, it is a well-recognized doctrine in our courts that when Congress exercises its rights, its powers to regulate commerce or to take property, it pays for the property; but many losses incident to the exercise of those rights are lost. In the recent Powelson case, which we set forth in our brief, the Supreme Court had occasion to review that subject, at page 39 of our brief, and speaking of loss of future opportunities it says:

"The public project, to be sure, has frustrated respondents' plan for the exploitation of its power of eminent domain. We may assume that that privilege was a thing of value and that this frustration of the plan means a loss to respondent. But our denial of compensation for that loss does not make this an exceptional case in the law of eminent domain. There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. * * * It is well settled in this Court that, 'Frustration and appropriation are essentially different things.' Thus in Mitchell *v.* United

States, 267 U. S. 341, the owner was denied compensation for the destruction of his business which resulted from the taking of his land for a public project even though the business could not be reestablished elsewhere. This Court, after noting that 'settled rules of law' precluded a consideration of 'consequential damages' for losses of a business or its destruction, stated: 'No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land.' "

Well, whatever loss the preferred stockholders are going to suffer in the sense of deprivation of their future right to this excessive rate of dividend, this future attractive business opportunity, that is a loss just as the loss of the owner of the land in the TVA case and Powelson case of his right to build a huge hydroelectric site there. He had that possibility and it was taken away, but he got no compensation for that. That was consequential to the exercise of the overriding government powers.

Here the right is being taken away from this corporation to continue as a going enterprise, a holding company system with all the values that inhere in that kind of an enterprise—the control of all these operating companies, the rendition of services, the making of all kinds of profits, the recoupment of past losses—and that is all being taken away from the corporation and the common stockholders. Who compensates us for those losses? No one, of course. Those are consequential to the exercise of government powers.

As a matter of fact, in the American Power & Light and Electric Power & Light cases before the Supreme Court it was argued that the statute was unconstitutional because

valuable rights were being taken away from the stockholders for which no compensation was being given by the Government; and the Court said, "Of course, we brush that aside. It is your loss, if any there be. They may very well be substantial. Those are consequential to the exercise of the powers of Congress to regulate commerce. There is no recovery for you and there need not be." So the common stockholders have nobody to look to to recoup their past losses or to pay them for the loss of their future profit possibilities. Why then is it equitable require them to indemnify the preferred for the loss of their future profit possibility, and that is all that this present investment value is. We don't ask them to share past losses.

When Puget Sound was sold Engineers wrote some $37,000,000 off its books as a dead loss. It realized $700,000 on an investment of $34,000,000. That was a loss that the preferred stockholders have not felt one iota, nor are we asking them to, and there were other such losses when Engineers had to dispose of an extremely valuable option it had which would have given it control of the El Paso Natural Gas Company, which has become one of the leading natural gas pipeline companies in the country. That was a profit opportunity which was taken away from the common stockholders. Measured by market values alone, that was a $4,000,000 loss, I believe Engineers has said, and actually they would have had control of the system and been permitted to participate in its growth possibilities, which are enormous. Nobody has asked the preferred stockholders to compensate the common for that loss or to share in that loss.

We are ready to indemnify them and pay them every dollar that is coming to them, but they ask more. They say, "Pay us for the highly excessive dividend rate that we are not going to get when this enterprise comes to an end."

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Berman

Now, it should be noted the corporation does not have in its treasury the cash to pay off these preferred stockholders. It has only about 40% of that amount, and the balance of that money is coming from the common stockholders who are now getting together through the rights technique and putting up $22,000,000 of fresh capital in order to acquit themselves of their obligation to pay the preferred and the full liquidating right. And they are doing more: They are mortgaging the future earning power of two of the additional subsidiaries by paying up advance dividends of some $3,700,000 covering a period of some two years, to pay off the preferred stock. All that they are doing, and yet the preferred stock is not satisfied.

Now, Mr. Boehm has referred to the issue price and market history of the preferred stocks and to the fact that it sold at ten and fifteen dollars a share and so forth. That is true. I don't have to go over it.

We have referred to the fact that the common has met its obligations punctiliously, and in another context Commissioner Healy had occasion to point out in his American Light & Traction decision that the common stockholders or the stockholders in that case by their very sacrifices of retaining earnings in the enterprise had managed to give the preferred stock the present investment value which it has, that high investment value, and he said, "To whatever extent the present strong position of the debt is attributable to earnings and asset coverages that exist because of past sacrifices on the part of the stockholders, it seems to me wholly unfair and unequitable now to penalize them further for this conservatism by requiring them to pay a premium to the debtholders whose contracts have been punctually observed at all times." And he quotes from the Scriptures and says, "From him that hath not shall be taken away even that which he hath."

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Slater

The fact is that the common stockholders here have received no dividends from this enterprise since 1931, and in the prior years they received a total of some $3.70 over the past years. This is true, notwithstanding the fact, as the Commission points out in its Findings, that earnings have been available for the payment of dividends on the common stock ever since 1938; that therefore cash and surplus was available to make possible a payment of these dividends to the common; and not one penny was paid, because the Management was pursuing a conservative policy of husbanding resources with a view to the partial or complete liquidation of this enterprise, and now it has piled up this huge surplus, to which the preferred stockholders now point as further proof of the value of their preferred stock.

I think the other points are adequately covered in my brief. Thank you, your Honor.

The Court: Do you want to have a short reply, Mr. Slater?

Mr. Slater: Yes, your Honor.

If the Court please, while it is perfectly true that Congress left it in the first instance to the management of these companies to propose the method by which they shall resolve their problems under the Act, it is also perfectly true that Congress did not intend to leave to these managements the measure of participation to be accorded security holders; and if you adopt the arguments of objectors that is precisely what you are doing. You are saying that the claims of preferred stockholders are elastic; they are so big if the management proposes one method of compliance with the statute; they shrink to a smaller size if they propose another, or perhaps expand again to an even larger size if

they propose a third method. That, of course, is not what Congress intended. It doesn't make sense.

Congress said not one penny of investor interest, of investment value, shall be sacrificed, and the National Power Policy Committee said so and the President said so.

In the last analysis, that is what we are doing here, measuring claims and nothing more. How you satisfy that claim once you measure it is the second question. That depends on what the management proposes. They may propose a plan where cash is available to satisfy the measure of the claim. In that event the security holder takes the cash, perhaps, and buys securities to restore himself to his investment position in that going concern. Perhaps the management may propose a method where securities are available to satisfy that measure of participation, that measure of claim which is in any event constant.

The Court: Did I understand you correctly this morning, Mr. Slater, in that you said the charter provisions are not operative, but you look to the charter simply as a point of reference to see what the rights were that the party theretofore enjoyed, and you used them as an integral part of determining what is fair and equitable with relation to him?

Mr. Slater: I think your Honor has got it, but let me restate it and make sure. What I said was this: The Commission pays and the Otis doctrine requires that consideration be given to all the rights of the security holders as set forth in the charter, but not conclusive controlling weight to the liquidation provision. That is, the charter also contains specifications as to dividend rates. That is an important charter right which must be considered. The objectors would have you forget that, ignore it, and give controlling weight only to the single charter provision which speaks of liquidation.

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Slater

The charter also has provisions for redemption. That is a valuable right which, absent Section 11, must be accorded weight in evaluating the investment position of the preferred stock. The preferred stock has a position of safety in the going concern. It has a risk position; it has asset coverage; it has earnings coverage—all of which it must be compensated for.

As I pointed out this morning, the Engineers' charter provides that in the event of a merger or consolidation this talk of a hundred dollars on liquidation, whether voluntary or involuntary, is off. It just doesn't apply. Therefore if Engineers had proposed a merger plan we would not be wrestling with the language of the liquidation provisions of the charter as Mr. Berman has tried to do. We look at the appraisal provisions of the Delaware statute, perhaps, and there is no reason then that an appropriate appraisal would not result in the investment value which the Commission has found. Simply because Engineers proposes the dissolution route is no reason why the preferred stockholders should be short-changed that way; and, as a matter of fact, this plan today contains provision for the merger, and a merger was originally proposed as an alternative. There is leave to Engineers to amend the plan today, and that merger is a possibility if the tax consequences of this dissolution plan turn out for one reason or another to make the plan unfeasible. Do we then go back to the Commission and come back to this Court to re-measure the claim of the preferred stock in the event that the merger is then selected by the Management as the route to be pursued? It just would not make any sense. There would be hopeless confusion. The Commission's job would never be done.

Now, it is perfectly clear that involuntary liquidation within the meaning of the charter did not contemplate what is here happening. The Otis case holding was as to a charter drawn in 1929. This was drawn ir 1925. So when

the objector Johnson devotes many pages of his brief to convince the Court that what the draftsmen of the charter had in mind was the Holding Company Act, it is just speculation, just pure conjecture. But fortunately in this case we don't have to speculate at all, because we have with us and we have had in this proceeding a gentleman whom I understand is the draftsman of the charter, Mr. Tucker, counsel for Engineers; and Mr. Tucker has stated and it is in the record of these proceedings as follows:

"When you act under the bankruptcy laws of Chapter X on account of a financial failure, the stockholders must be deemed to have had the financial failure of this organization in mind when they acquired their investment. Section 11 is not a situation where the company is in financial difficulty in the ordinary sense, and it certainly would be so in our case, because we have no bonds, we have no bank debt, we just have preferred stock. It is an arbitrarily and forced statutory termination of the enterprise, and it has no relation whatsoever to any factors which the parties could have had in mind when they entered the enterprise."

Now, unless the common stockholders think for one moment that their rights in this proceeding were not zealously represented by the Management when the original plan was proposed, I hasten to add that this statement was made to the Commission several years ago in connection with a proposal by Engineers to buy its preferred stock in at the then current market prices of some $60 to $70 a share. This is, the shoe was on the other foot at that time.

The Court: Let us get to the other point, the escrow arrangement. I would like to hear argument on that.

Mr. Slater: All right, your Honor.

I just can't refrain, your Honor, if I may, from making one more statement. There has been so much recitation of "from the Otis case" it is remarkable the agility with which they succeeded in skirting around a single sentence

which disposes of the entire contention. They have read all around it.' That sentence follows what Mr. Berman has quoted in his brief and in the oral argument and what Mr. Boehm has quoted. It says, "The reason does not lie in the fact that the business of Power continues in another form."

That is, whatever might have been said by Judge Healy, whatever might have been said by the Chief Justice, whatever might have been said in any other tribunal, the Supreme Court did not render its decision on the basis of the fact that there was a peeling off or liquidation or recapitalization. There was just action required by the Holding Company Act.

As to the escrow, if the Court please, it makes sense from the point of view of the statute, from the point of view of security holders to proceed as expeditiously as we can with those aspects of the plan which are not the subject of controversy. The warrant program and its success is dependent, of course, in large measure on market conditions at the time it is undertaken, and it is very desirous to give the Management a free hand as soon as possible to get that program under way.

As I stated earlier, originally the Management and the Commission were not in agreement on the pay-off to the preferred stockholders. The Commission then urged an escrow arrangement as part of the plan. When Engineers amended the plan so that Engineers was not going to contest the fairness to the preferred stockholders with the Commission, the Commission said, "There is no need, so far as we can see now, for an escrow. If it develops that one is appropriate and one is necessary in order to make progress with the uncontested portions of the plan, it can be done under the supervision of and in the court when it becomes clear that it is desirable to make such an arrange-

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Slater

ment." The Commission said that counsel could then under the aegis of the Court enter into an appropriate escrow. But the plan was never amended. It was just a statement by the Commission made in its Opinion in saying, in connection with a request, I believe, by Mr. Condon at the time, that there should be an escrow.

Subsequently tax counsel advised Engineers that in the event it developed in the court that the escrow should be created, the incidental changes in the plan would create questions as to whether they were entitled to certain tax benefits under the Revenue Code unless they got an order from the Commission which recites that those transactions involved in the changes are necessary to effectuate the provisions of Section 11. So the Commission did not amend the plan, but amended the Findings to merely recite what would be the situation as far as Section 11 is concerned if the escrow were created and were approved by the Court.

Now, in spelling out the recitals, in spelling out the details and the itemizations which the Revenue Code requires in order for that order to be effective so as to give the tax benefit, the Commission assumed that the escrow arrangement which the Court would approve and which counsel would agree upon would be the precise escrow arrangement which the Commission proposed in its original opinion and to which there was no objection whatsoever. Mr. Condon concurred in it. He urged it. In fact, he took a position before the Commission which in our view precludes the position he now takes before this Court.

The Court: Give me the details of the arrangement. What actually happened?

Mr. Slater: Well, Engineers will deposit with a bank in escrow the sum of $4,000,000. We have a proposed form of escrow agreement, your Honor, which we have distributed to counsel. The escrow provides that there will be de-

posited with the Chase National Bank of the City of New York—that is, this proposed form of escrow—the sum of $4,000,000. Of that amount $3,204,795 is the total which the preferred stockholders are entitled to in excess of $100 per share in the event that the Commission's determination proves to be correct. In addition, the escrow proposes that $484,325 shall be included as an amount to compensate the preferred stockholders for three years—that is, there is an assumption here that litigation will ensue for three years—for the delay in getting their full payment. The sum of $310,880 is to provide for the payment of fees and expenses in connection with all aspects of the plan.

The escrow agreement then goes on to spell out the obligations of the depository in certain events, depending in each case on how the litigation goes.

Now, as I understand it, counsel for the preferred stockholders Streeter and so forth, represented by Mr. Condon and Mr. Zazove, are dissatisfied, in effect, with what is set forth in paragraph B of paragraph 1 of the escrow. That is, they want to be compensated in full as though the preferred stock had not been retired at all or as though they did not receive any payment, but continue to receive, as though they still held the certificate and did not receive $100, the contract dividend rate specified in the security, an arrangement which in our view would be wholly inequitable and an arrangement which Mr. Condon before the Commission denounced.

He stated at page 1832 of the record, and I am just picking one which is typical of many statements made by him:

"The plan should provide that in the event that payment of the full amount due to the preferred stockholders is delayed, the company will pay an amount equal to the yield of each series of preferred on the basis of its dividend rate at the price ultimately deemed payable."

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Slater

"In this manner," as the Commission said on page 36 of its Opinion, its December 5 Opinion when an escrow was first recommended by the Commission, "The preferred will receive for the period of any litigation a return on the amount withheld which is measured by the return which would have been received by it if the stock remained outstanding."

Finally at page 1844 of the record Mr. Condon states, "I would like to correct one impression that I am sure Mr. Tucker gave to the Commission inadvertently that I have ever contended that at any time the preferred stockholders were entitled to receive $100 in cash and to get dividends on the $100 during the course of the litigation. I am quite sure that his better judgment will indicate that that has never been my position."

I would just like to point out to your Honor that if these dividend rates continue in effect, notwithstanding the fact that they get their $100, it will cost the common stockholder some $2,119,000 a year to litigate this matter; and if it takes three years, as it well might, it will cost them about six and a half million dollars to litigate over a fund totalling $3,200,000.

The Court: I think we will take a recess at this time.

(A brief recess was taken at this point.)

Mr. Slater: If your Honor please, I learned during the recess that I perhaps owe the Court an explanation and apology to Mr. Condon. I read quotations from the record which bore on a position he took at one time, but I understand that in the course of the administrative proceeding he took the other position, too.

The Court: Mr. Tucker, do you want to be heard now or do you want Mr. Zazove to be heard?

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Zazove

Mr. Tucker: It is immaterial to me. I should like to be heard on the escrow.

The Court: I think I will hear from Mr. Zazove now.

Mr. Zazove: If your Honor please, before I get into this controversial matter about what we did or didn't do before the Commission——

The Court: I am not particularly interested in that, Mr. Zazove.

Mr. Zazove: I would like to get back to the initial observation I made in the earlier part of this hearing to this effect: The notice which was sent to all the stockholders by the company which was embodied in a letter dated December 20, 1946, together with Supplemental Findings of the Commission which passed upon an approved plan as now amended and as now before the Court, together with the notice and order that was entered by this Court on January 9, 1947, which was mailed to all the stockholders, had no word and no provision about an escrow agreement or an escrow arrangement. The pl n as it now stands before the Court permits the following to happen:

It permits the common stockholders who own preferred stock to tender their preferred stock in exchange for Gulf States common stock at a price equivalent to the redemption prices. There is no word in the plan that says they can only tender it on the basis of $100 and retain an interest in a lawsuit for the balance. In addition to that, the notice and the order which this Court entered on January 9, 1947, which was mailed to all the stockholders contained no provision whatsoever and no mention that a stockholder out in California or any other place might wind up here instead of getting his redemption price with getting $100 plus an interest in a lawsuit.

The Court's order directed that all objectors file statements of objection on or before the 10th of this month, and

that order that you entered was directed to three things: It was directed to the Commission's original Findings; it was directed to the Commission's Supplemental Findings; and it was directed to the plan as amended and as now before the Court; and it was perfectly logical for any stockholder receiving that notice to assume that on the basis of the plan then before the Court the proposal was presented to pay out the redemption prices. There was not a word in there about an escrow.

Now, this so-called order of amendment that the Commission entered was entered without notice to anyone.

The Court: Just a minute. At that point let me see if I can clearly follow you. Assuming the Court in the present proceedings decides that he does not think the preferred stock is entitled to its premium, then the escrow business is out; is that true?

Mr. Zazove: The plan is out then.

The Court: Assuming the plan is approved, can't these things be taken care of in the order of approval, these things you are objecting to at the moment?

Mr. Zazove: Only, I think, your Honor, if the stockholders had notice that an alternative method of carrying this plan out was going to be adopted. We filed a statement of objections here and we made no mention of the escrow arrangement. We never saw it. The first time we ever knew there was an escrow thing here was on last Thursday morning when we were served with a copy of the Commission's order, and I think your Honor's order did not contemplate any escrow. There is not a word in there, and that is why at this time I am asking leave of the Court to file a supplemental statement of objections in which we direct ourselves to the merits of this escrow arrangement, and we explain to the Court why we think if it is adopted the plan would not be fair.

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Zazove

In other words, we are perfectly content with the plan as it was sent to the stockholders and as it was approved by the Commission.

Everybody talks about this amending order as being necessary to enable the company to get these tax exemptions under Supplement R. Of course we have no objections to that whatever. We are in favor of it.

The Court: Your objection really goes to this point: If the Commission wanted to amend the plan you should have had an opportunity to appear before the Commission and voice your objection to the escrow.

Mr. Zazove: That is absolutely the case, and I think if this Court wants to amend it that we and all the other stockholders are entitled to an opportunity to be heard on the basis of an alternative proposal. They call these incidental changes. They are not changes. It puts back the original plan that was before the Commission. The original plan proposed a payment of $100 and that is all. It proposed this stock would be exchanged for Gulf States stock on the basis of $100. The Commission's order goes further than Mr. Slater indicated to you. I will read it. I am quoting from the Order approving the amended plan, which is known as the Supplemental Findings and the Order attached to it:

The Commission specifically "directs" the adoption of these changes "that are necessary"—they say—"to get the tax advantages" and it "directs" the creation of an escrow.

We saw this escrow agreement this morning when it was handed to me. I haven't even read it yet. Certainly on behalf of the preferred stockholders we are entitled at least to look at the escrow arrangement and urge our objections to it.

Mr. Tucker stated in his brief that before an escrow would be promulgated he would discuss its terms with all

counsel. He discussed it with the Commission, but we never heard about it.

The Court: Is it your position that you will contend that you are entitled to your interest or to your dividends while the plan is in the Courts awaiting ultimate approval?

Mr. Zazove: Yes, sir, that is our position, and I will explain it to you. I would like to have leave to file this supplemental statement so it will be before the Court.

The Court: You may file it.

Mr. Zazove: At this time I would like to have the record show I gave Mr. Slater a copy and I am giving Mr. Tucker a copy.

The Court's order also directed that briefs in support of such statement of objection should be filed at the same time the statement was filed. Of course, we did not file it because we had nothing to object to. I am asking leave of the Court at this time to file a brief in support of our supplemental statement of objections.

The Court: You want to file a brief, you say?

Mr. Zazove: In accordance with your order we were directed to file a brief. This brief deals with the amending order and the question of continuation of dividends. Do I have leave to file it, sir?

The Court: Oh, certainly.

Mr. Zazove: I am also giving copies to opposing counsel.

Mr. Berman: May we also have a copy?

Mr. Zazove: The order requires us to serve Mr. Tucker and Mr. Slater. If I have enough copies I will be glad to distribute them.

I want to get back to what our position is regarding this dividend proposition. In the Otis case the Supreme Court held, and the Commission agrees, that liquidation provisions were inoperative; but Otis never said that the redemption provisions of the charter were inoperative; and

in this very case the Commission applied the redemption provisions as against the preferred stockholders, because the only testimony in this record, and it is uncontroverted, is by Dr. Badger, who testified the investment values of these preferred stocks were greatly in excess of the call prices. He testified the $6 preferred was $133 in value.

The Commission said, "We don't have to go above the call prices, because we can apply the redemption provisions of the charter, since the common stock has the right to call the stock at any time." So they say, "You are limited to the redemption prices."

We say the Commission has applied as against us a provision in the charter, but when it comes to giving us the benefits of that charter it has refused to apply them; that the only way that the common stockholders have a right to terminate our dividends under this charter is by paying us in full, not by giving us $100 and an interest in a lawsuit. These common stockholders are going to get the immediate benefits of the assets and the earnings of this company as soon as they make a deposit here according to this escrow arrangement, but they are not willing to suffer the detriments for which they are responsible in the event they get the benefit.

The Court: Have you argued this point before the Commission?

Mr. Zazove: We never had an opportunity to, Judge. All we had an opportunity to argue was the original plan which provided for retirement (redemption) prices to be paid of $100. We stated the plan was unfair, and one of the reasons we gave for it being unfair was that the company itself with all the assets and all the attorneys they had was contemplating fighting one class of stockholders; namely, the preferred stockholders, while terminating their interest in the company; and so we said that was unfair, and it was

under those circumstances that we asked for an escrow, because we didn't want the money and the assets paid out to the common stockholders without saving something for us in the event we litigated the question of the redemption feature in this case. The statement of what transpired at the reconvened hearings completely overlooked the statement which Mr. Condon made and which I think makes this thing entirely clear. He said that the amended plan as filed did not give us the minimum which the Commission said we were entitled to, and that minimum was this: That if there was delay in paying us the full redemption prices we are entitled to additional compensation on (of) the amount withheld. All Mr. Condon did was to say that the amended plan made no provision for paying this additional compensation, but it provided that any claims to dividends or any interest were to be terminated upon the deposit of the full redemption prices; and so Mr. Condon in the light of those circumstances said the plan was not fair. But he specifically said in answer to Mr. Tucker, and I am quoting now from page 1839 of the record. Mr. Tucker said to Mr. Condon that he, Mr. Condon "would be unhappy with it unless the plan provided for a continuation of full dividends on the preferred stock of Engineers until the full amount, $100 plus the premium plus dividends were deposited. Wasn't that your position in your brief, Mr. Condon?"

"Mr. Condon: It was, Mr. Tucker, and it still is and I will still urge that in the District Court."

It has been our position here that it was very unfair to have the provision in the charter applied as against us by holding us to the call prices where the investment values exceeded that amount, and not applying it to the common stockholders who are trying to take advantage of it. They want to discontinue paying us dividends. We say the only time they have the right to do that is by paying us our

Transcript of Hearing on Plan Held February 17, 1947 (Cont'd)

Scheetz

redemption prices which the Commission found was due to us.

It turns out now with this amendment the Commission has adopted without notice to anybody, and if the Court approves it without notice to stockholders, that it is going to be done as an alternative. You are going to do exactly what we said is unfair. You are going to give the common stockholders the benefits of the redemption provisions of the charter and deny the preferred stockholders the benefits at the same time.

The Court: I don't understand what you mean by "deprive the preferred stockholders of their benefits under the charter."

Mr. Zazove: We say that under the charter that the redemption provisions are still operative, and the Commission says so too.

The Court: You say they are operative until actually, in fact, you get the cash.

Mr. Zazove: That is right; until you have a call, a strict compliance with the charter. The Delaware statutes say the preferred stockholders are just as well the owners of the company as the common stockholders, and if they want to terminate the preferred stockholders' rights they should not give them $100 and an interest in a lawsuit while the common stockholders get the benefits of the thing, but they should give them the redemption price as the charter provides. That is our position.

The Court: I have it.

Mr. Scheetz: If your Honor please, since I represented preferred stockholders before the Commission I think in fairness to you I should say what our position had been there, because it is at variance with the position you just heard.

Transcript of Hearing on Plan Held February 17, 1947 (Cont'd)

Scheetz

When Engineers filed its original plan proposing to pay $100 only, and divided the plan into two parts, the first part that they would pay $100 and the second part that they would pay no more than $100, that second part was really a design for a lawsuit. But at that time I took the position before the Commission that any plan which did not provide for an escrow of the amount in litigation was unfair. My approach to it was irrespective of the theory on which the preferred stock would be valued, whether it was a voluntary redemption or whether it was an application of the fair investment value rule.

Having taken that position before the Commission throughout the proceedings, I adhere to it I say—I hope without prejudice to the position that has just been presented to you; but it seems to me that since there could be a controversy here that that was a statesmanlike way to dispose of the thing, although my client, of course, would like to enjoy the dividend during that period.

So far as the procedure is concerned, had that question arisen here for the first time I would be disposed to take a look at the escrow agreement, and if it is a satisfactory agreement, to agree that such an escrow arrangement was fair under those particular circumstances.

The Court: Was this a matter of discussion and determination before the Commission?

Mr. Scheetz: Well, certainly to this extent, and I trust other counsel will correct me if I don't state it fully: The proposal was urged early in the proceedings, and when Engineers came in with an amended plan proposing to pay the full amount without any reservations whatsoever, at first there appeared to be no need for an escrow arrangement. At the last hearing the question was raised as to what would be the situation in the event opposition developed, because as the plan was worded Engineers could put up the money and stop the dividend, and the preferred stockholders would

not be compensated in any way for the delay in receiving the amount in litigation.

I first objected and joined Mr. Condon's objection to the absence of an escrow agreement. Mr. Kanton spoke for the Staff and urged if such a situation developed it could be dealt with here before the Court, and in view of the statements made in the hearing I withdrew any objection that I had to the absence of an escrow agreement in the plan at that time. Now that the opposition has developed, of course the problem is acute and needs to be dealt with. I think that is a correct statement of what happened.

The Court: Mr. Tucker.

Mr. Tucker: Your Honor will find in the Supplemental Findings and Opinion of the Commission, which until this past week was the final word from the Commission in connection with this plan, a warning to everybody connected with this case that what has happened here was likely to happen. I refer to the next to the last division of the Supplemental Findings and Opinion of the Commission under the heading of "Objections to the Amended Plan"; and on page 6 of that Release, which is Release No. 7119, if your Honor has it there, you will find that the possibility that an escrow arrangement would be entered into in this situation was approached there directly. The difficulty, I think, with what the Commission there said was that they assumed that we could wait until an appeal had been taken in this case, and at that stage introduced the escrow.

Obviously, I think that, as a matter of law, is not so. After this Court has entered its opinion approving this plan, assuming that that is what the Court is going to do. As the Judge pointed out, if you are going to disapprove this plan, why, that ends it anyway. But if the Court should

approve the plan and final order of this Court should be entered directing its enforcement, and an appeal should be taken, my conception of the law is that at that stage an escrow arrangement could not be set up, that this Court would have lost jurisdiction over the case.

Now, the difficulty that developed in connection with the situation as the Commission left it in this Supplemental Findings and Opinion was that under Supplement R and Section 1808-F of the Internal Revenue Code, the exemptions which are allowed to transactions which take place under a Section 11 plan look for their exemptions not to the order of the District Court, but to the Commission. Now, it is perfectly obvious that unless the exemptions are described in the Commission's order and the transactions are described in the Commission's order in the exact form in which they are carried out, they do not get the benefit of the Supplement R exemption, because Supplement R says that they must have taken place under an order of the Commission which shall describe them, and such order of the Commission shall be or become a final order.

Our Tax Department of my office studied this statement of the Commission with respect to an escrow and pointed out that if the escrow arrangement were gone into, since it was not contemplated by the original Commission order approving the plan as amended to Amendment No. 6, the various transactions which necessarily have to be changed under the plan if an escrow is provided would not have been described in that order and we would not get the benefit of the protection afforded, and that would become an extremely serious matter to all these stockholders.

I then took the matter up with the Commission and they said, "Well, what you are objecting to is the form of our order."

I said, "That is right."

Transcript of Hearing on Plan Held February 17, 1947 (Cont'd)

Tucker

They said, "You want us to specify in the order the various transactions which shall take place in the event an escrow shall be set up."

I said, "That is right." So I said, "It is my idea that I will send down to the Commission a communication and point out this tax difficulty to you, and ask you at that level to put such provisions in the plan so that if on hearing before the District Court it shall become evident that the question of the payment to the preferred stockholders of something in excess of $100 per share is going to be contested beyond the level of the District Court, the escrow arrangement can be provided."

So I did send such a letter, and just for the completion of the record in this case I would like to submit a copy of the communication which I sent to the Commission.

(The letter referred to was filed with the Clerk.)

Mr. Tucker: Your Honor will discover that the final order which the Commission adopted in its Order of Amendment adopts the language set forth in that communication. You will see what this escrow does is purely a procedural matter. It is nothing more. I think the Commission so viewed it. I think we so view it, and I am in hopes the Court will so view it.

It says here you have a plan, and perhaps it would be advisable for me to point out what the plan did provide prior to the time that this amendatory order was filed and the changes in procedure which obviously become necessary if the escrow is to be adopted.

The plan was filed as amendment to Amendment No. 6, provided, one, the offering by Engineers of all of the outstanding common stock of Gulf States as reclassified to equal the number of shares of outstanding common stock of Engineers on a share-for-share basis under warrants for subscription in cash at $11.50 per share, or in the alter-

native in shares of Engineers preferred stock at the redemption prices—that is, to have the $5 stock taken at a value of $105 and to have the $5.50 and $6 stock taken at a value of $110. Then it provided for the distribution to the Engineers' common stock of all of the stocks of El Paso and a part of the stock of Virginia. Then it provided for the benefit of Engineers' preferred stockholders for the deposit to those who shall not exchange their stock of $105 with respect to the $5 stock and $110 with respect to the $5.50 and $6 stock. Then it provided for the dissolution of Engineers and the distribution of the remaining assets after the debts and liabilities of Engineers should finally be disposed of.

Now, as I have said, the Opinion of the Securities and Exchange Commission approving this plan intimated this possibility, that the allowance of the above, $105 per share for the $5 stock and $110 for the $5.50 and $6 preferred stocks in respect of shares both exchanged for Gulf States stock and not so exchanged might be contested on the theory that the shares of the Engineers' preferred stock should not be allowed more than $100 per share and accrued dividends; and, as I have pointed out, it indicated that if such contest should develop this contested issue might have to be segregated from the rest of the plan by the establishment of an escrow providing for such additional payments over and above $100 per share and accrued dividends to the preferred stock; or, in the event such additional payments should finally be determined to be payable in the courts, or such lesser amount, if any, as the Courts and the Commission might find to be payable on final determination.

Now, it is obvious that if we are going to segregate out the issue as to the amount to be payable to the preferred stock, two things have to be done to the program. We can't allow the preferred stockholders who exchange for Gulf States stock to exchange their stock on the basis of $105 for the $5 stock and $110 for the $5.50 and $6 stock. We

Transcript of Hearing on Plan Held February 17, 1947 (Cont'd)

Tucker

must cut that back to $100. Also we can't deposit for the benefit of the preferred stockholders who do not exchange their preferred stock $105 for the $5 stock and $110 for the $5.50 and $6 stocks. We have to cut that back to $100. And we have got to set up in an escrow agreement an arrangement which will provide for the additional payments to be made to these stockholders if and when the Courts shall determine that the additional amount is payable.

The Court: Will that additional amount include more than the premium?

Mr. Tucker: Yes, because the Commission in its original Opinion in this case discusses this escrow arrangement and it says that it thinks that what should be deposited in escrow should be the amount of $4,000,000. Of this amount $3,200,000 approximately would be the premium payments; but they said the preferred stockholders, unless they get their money immediately, for a delay in getting the balance of the money they should be entitled, the Commission said in its original Opinion, to be compensated on the basis of the yield which they would have had had the stock continued out. So that in addition to the amount of the premium itself, this escrow does provide for escrowing $484,325, which is an amount equal to simple interest for a period of three years. Not that we think that the litigation is going to take three years. Not at all. We are hopeful it will take very much less than three years. But it was conceived that this was the maximum time that the litigation of this premium question would take, and this amount of $484,325 is for simple interest for three years at the rate per annum of $4.76 in the case of the Engineers $5 preferred, $5.00 in the case of the $5.50 preferred, and $5.45 in the case of the Engineers $6 preferred on the amount set forth in A above. I was reading that from the escrow. And those were the yield bases that the Commission itself said they believed should be applied if an escrow were set up.

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Tucker

The Court: So that Mr. Zazove's quarrel with you is the difference in the first stock dividend rate, $4.76 and 24 cents?

Mr. Tucker: No. Mr. Zazove is saying, as I understand from what he said here, you must deposit $100 plus accrued dividends after you sell the Gulf States stock, and you may deposit also $4,000,000 in escrow; and in explanation of the four million I might say parenthetically that the balance of the sum—the two amounts I mentioned do not equal four million, and the balance of the sum, $310,880, is to cover expenses.

Mr. Zazove says, as I understand it, "If we get $100 and accrued dividends and at the same time we get the premiums; that is, $5.00 on the $5 stock and $10.00 on the other two series of stocks, then all right; we are satisfied that the preferred stock should be cancelled; but if we don't get it, if we don't get it all at once, even though we can go get a hundred dollars now and just as soon as this litigation is settled we get the balance mailed to us plus interest on this yield basis, we are not satisfied that our claim is fulfilled and we are claiming the dividends up to the time that the litigation shall be settled."

In other words, the whole validity of an escrow arrangement, segregating out this issue—perhaps he should explain that himself, but as I understand it, the whole validity of a segregation of this issue and cutting off of the dividends in respect of $100, the deposit, and then giving the interest on the delayed payment isn't enough. He thinks he should be entitled, as I get it, to dividends on the full amount until he gets his pound of flesh.

The Court: You mean he would not credit the interest that he would receive on the dividend that he claims?

Mr. Tucker: All I know——

The Court: You can answer that, Mr. Zazove.

Mr. Zazove: Before I reach the question that your Honor asked, you first have to decide whether it is due process of law to have an escrow arrangement imposed upon you be-

fore you had a chance to argue that that would make it unfair. After that point is settled we say that under the circumstances where you are giving the common stockholders the benefits of the call provisions of the charter by restricting us to the call prices that it would be unfair and inequitable to terminate our dividends. The only way they are entitled to terminate our dividends is to pay us the full amount at one time and not give us an interest in a lawsuit. That is exactly our position.

The Court: Proceed, Mr. Tucker.

Mr. Tucker: Regardless of the extremity of that position, we regarded this arrangement as a procedural matter. We recognized that if this were to be contested and an escrow were not set up then the whole plan would have to be delayed pending this outcome.

Now, I call your attention to the fact, if your Honor please, that a part of this plan involves in every sense of the word a market operation. The validity of the warrant offering in the sense of whether it will be successful or whether it will not be successful turns on there being some value to the market. Various estimates of the value of the Gulf States stock has been made, but it is apparent, and I think everybody agrees, and nobody has denied, that under present market conditions there is a value to the warrants. In other words, that the stock has a value somewhat greater than $11.50 per share—maybe $2 or something. But enough to make the operation successful.

Now, if the whole plan has got to be delayed until this issue as to the question whether the premium is payable or as to whether it is not payable is decided, maybe for a year or eighteen months or some time, whether the plan is at all practicable under those conditions will be a very serious question. The market has only to slip a few points and the sale of the Gulf States stock as set up in the plan would be impossible. Therefore it is of vital importance, as it

seems to me, both to the preferred stockholders and to the common stockholders that the operation of offering the Gulf States stock under the warrants be not delayed. Nobody knows with a market operation when a thing is delayed whether at the time it is attempted to be carried out it can be carried out or whether it cannot be carried out.

Now, there is another reason why it becomes extremely important that this transaction so far as the preferred stock is concerned in making these deposits and making this escrow and cutting off the preferred stock dividends is important, and that is because this company has in its treasury from the sale of various assets and from the accumulations of dividends, as was pointed out by the common stockholders here, which could have been paid to the common stock and which were not paid to the common stock because of the uncertainties involved in the enforcement of this Act, the sum total of about $17,000,000, and it is incurring right today and has incurred for a considerable period of time a loss of $2,600 a day, just figuring the average dividend rate of these various classes of preferred stock. Unless the persons involved in this litigation want to see the assets of this company wasted in that kind of way, it seems to me they ought to cooperate in some kind of way to separate out this issue.

Drawing attention to the technicalities that have been raised and which I haven't had any opportunity to really study, except to glance at the objections which were made there, if in substance it seemed to the Commission and it seemed to me a procedural matter, these people are here in court and they are having their opportunity to object here, and it is procedural; and, after all, if it is procedural I don't see any substance in it at all. They are in court here. The conception which the Commission had in mind was that this escrow would be settled so far as its terms are concerned by a presentation to this Court at the time

that your Honor should indicate that he was going to approve this plan, if he is, and we have no question if your Honor is not going to approve this plan that there would be presented to the Court a form of order which should embrace a form of escrow.

Now, we have made a form of escrow agreement that we have here which has been worked out with the Commission's staff and Engineers and myself, and it follows along the lines which I think the Commission said precisely was the fair thing to do in this case in order to separate out this issue; and, in any event, its actual terms, as we concede, could be settled before this Court on the application for settlement of the order itself separating this issue and providing for the incidental program changes which the escrow necessarily entails that I have already pointed out to your Honor.

Now, to make the serious claim, as seems to be made here, that that is an infringement of a basic right to be heard I think has little substance. They are here in court. They will have the opportunity in the setting up of this escrow arrangement and in the making of these incidental changes in the program, which obviously have to be made if the program is to be carried out along escrow lines, before your Honor; and it surprises me a little that counsel should take the position under those circumstances that their basic constitutional right has been infringed.

It could have been handled, presumably, by Engineers filing an amendment with the Commission asking this Court to send it back and serving notice and wh[illegible] have you; but if it is, as it seems to me, purely a procedural matter, it seems to me that the method that was followed in our calling attention to the fact that our tax rights would be seriously embarrassed if the order were left the way it was, that their order should have gone on and provided for this contingency, as they pointed out in their original Opinion,

and as they pointed out in the Supplemental Findings. My brother can't say, it seems to me, with fairness that he is taken by surprise by this picture. In the original Opinion when the plan was disapproved an escrow was discussed. In the Supplemental Findings and Opinion the escrow possibility was discussed. It was not included in the original Order as it should have been, but all that this Order that has now been entered does is to provide for the setting up of the escrow and for other changes in the plan which obviously are necessary or in the program which are obviously necessary. One is that instead of depositing $105 and $110 for the preferred stock that do not exchange, you deposit $100 and cover the additional payment under the escrow; and instead of permitting the exchange of preferred stock for Gulf States common stock on the basis of $105 and $110 respectively, you now provide for them on the basis of $100. You can't have an escrow if you don't do that.

So it seems to me that your Honor should grant the motion which Engineers has made, and in the event that it should be granted, it is so obvious that we have opposition to the payment of these additional amounts, that I would like to say now formally as counsel for Engineers, pursuant to the terms and provisions of the order of amendment that Engineers has made a determination that it appears likely that some holder or holders of Engineers' common stock will litigate beyond the District Court the payment to Engineers' preferred stockholders of any amount in addition to $100 per share and accrued dividends; and Engineers accordingly desires to follow the alternate method of effectuating the plan through the use of the escrow and the other incidental changes in the program which the escrow enforces.

I thank you.

Transcript of Hearing on Plan Held February 17, 1947 (Cont'd)

Mr. Slater: Your Hono , may I have a moment to clear up——

The Court: I don't want to hear any more argument.

Mr. Berman: I am somewhat baffled about one aspect of the situation as it now stands. I certainly share in Mr. Tucker's views that the parties ought to cooperate here to segregate out the controversial and non-controversial aspects of this proceeding, and I thought this escrow arrangement was going to do it in that it would, in effect, establish two funds: one for $100 plus accrued dividends and the other for this $4,000,000, which is premiums plus interest on the premiums if the preferred is entitled to them.

So that if your Honor were to accept the view which we have contended for here that the preferred stockholders are not entitled to premiums, I was of the opinion that the first portion of the plan would nevertheless be approved and carried out, the non-controversial portion. The $4,000,000 would still be in escrow so that the preferred stockholders and/or the Commission, if they saw fit to appeal could do so, and ultimately we would have a final determination.

On the other hand, if your Honor were to reject our contentions and approve the payment of the premiums, then we of course or any other common stockholders would have the right to appeal and the escrow fund would contain that money.

But as I understood Mr. Tucker, the escrow fund would apply only to the second contingency; namely, that in the event your H nor approved the payment of the premium and we appeal, then there will be an escrow.

I certainly hope I misunderstood. Actually, in effect, there will be a fund so that your Honor, even if he accepts our point of view, can approve the first portion of the program and it can go through; and then either party can appeal as to the other side.

Transcript of Hearing on Plan Held February 17, 1947 (Cont'd)

Mr. Tucker: If I may just say to the Court I think perhaps I did mislead my brother. The escrow, so far as we are concerned, is an irrevocable escrow. We deposit $4,000,000. If there shall be no appeal from the finding of this Court that the plan is fair and equitable, if that shall be its finding, then the money is to be paid forthwith. If there is an appeal, then the premiums are to be paid if on final determination the premiums are determined to be payable. On the other hand, under paragraph 3, if some lesser amount shall be determined to be payable, that shall be paid out of the escrow; and it is only on the condition that no escrow is to be paid that the money comes back to the Engineers.

Mr. Berman: If I am correct, Mr. Tucker, in my understanding of what you now said, is it not the fact, then, that Judge Leahy must disapprove the whole plan if he finds the premiums are not payable? He could approve the plan so far as it provides for the immediate payment of the $100 and disapprove the payment of the premiums, that amount then remaining in escrow subject to the right of the preferred stockholders to appeal. Is that correct?

Mr. Tucker: No, I don't think so. I think I am dealing here with a question that I am sure Judge Leahy is much more capable of answering than I am. I conceive the power of the Court to be merely to approve or disapprove a plan of the Commission. I take it that under the provisions of Section 11(e) this Court has no authority to amend the plan in the sense that it changes the basic principle applied in the plan. I think the plan as filed and in order to provide this escrow must be either approved or disapproved by this Court and it has no other authority. Then I take it if this Court shall disapprove the plan the whole matter goes back to the Commission for consideration of the basis of the disapproval and for presentation by the company of another voluntary plan consistent with the provisions of the Court's finding. But I take it that under Section 11(e) no plan can

be presented which does not have the approval of the company. It is a voluntary plan.

I think if the plan is disapproved it goes back to the Commission, and the Commission has to and the company itself has to rearrange the plan and again submit something to the Court after we have agreed on a plan that has been approved by the Commission. That is my position.

Mr. Slater: If your Honor please, I hesitate to do so, but we must disagree with the statement just made by Mr. Tucker. As we view this escrow, it is a two-way escrow. The Commission or the preferred stockholders might appeal in the event that this Court should determine only one hundred dollars is payable. The common stockholders have indicated they would appeal if the Court agreed with the determination of the Commission. But certainly the reorganization process and equity powers of this Court can't be so inflexible that this Court can't by appropriate order approve those portions of a plan which are clearly separable and in no way impinge on the controverted portions of a plan. That is all we are doing in handing up this escrow agreement. We are telling the Court now that in connection with the order of consummation or the order of approval or the order of disapproval as to certain aspects and approval of other aspects which your Honor might enter, take into account this provision for an escrow, and after we know what the Court determination is, one side or the other will then present an appropriate form of order which will make provision for the escrow. It is just silly to upset ten-elevenths of this plan, at least that, if not ninety-nine-one hundredths, simply because there is a disagreement as to a segregated small portion in relation to the whole of what we are doing here.

Procedurally Mr. Zazove, it seems to me, is very much confused. What the Commission issued by way of amendment has nothing to do with what we are doing here. We could vacate that order tomorrow. The sole consequence would be that Engineers today would not be assured of tax

relief under Supplement R. Of what avail that would be to Mr. Zazove or the preferred stockholders I don't know. The Commission could reinstate the order a month or two months or three years from now, and perhaps Engineers would get the benefit of the tax relief then; but if we had not issued that order we would be here today asking your Honor to consider with counsel, as the Commission told these stockholders might happen, a fair and equitable way of consummating what everybody wants consummated and yet preserving for future litigation the rights of all the interested parties.

The Court: There was some mention made of briefs.

Mr. Boehm: I would like to file a brief, and I would ask about a week's time within which to submit it.

Mr. Slater: Two weeks for us, if your Honor please.

Mr. Zazove: We should like the same, your Honor.

Mr. Berman: I have already filed a brief. Most of the parties have had copies of it. In a sense, therefore, I think they will be replying to my brief, and I ask your Honor that I have five days after they serve their brief on me to answer.

The Court: Make it a week.

Mr. Berman: Thank you.

Mr. Boehm: May I make just one observation in connection with something that my friend Mr. Berman had said that I did not agree with myself.

The Court: Why don't you make it in a footnote in your memorandum?

Mr. Boehm: Thank you, your Honor.

(At this point the hearing was concluded.)

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

HARRY J. BLAM
Official Court Reporter
U. S. District Court

Opinion Re Plan.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY	Civil Action No. 995. (Filed Feb. 17, 1947.)

* * * * *

Roger S. Foster, Solicitor, Sidney H. Willner, Assistant Solicitor, Harry G. Slater, Chief Counsel, Utilities Division, Bernard Kanton, Jerome S. Katzin and Myer Feldman, Attorneys, for the Securities and Exchange Commission, Philadelphia, Pa.

William E. Tucker and Paul D. Miller (of Mudge, Stern, Williams & Tucker), of New York, N. Y. for Engineers Public Service Co.

Francis H. Scheetz, of Philadelphia, Pa. and Caleb R. Layton, III of Wilmington, Del., for Home Insurance Co. and other Preferred Stockholders.

Lawrence R. Condon, of New York, N. Y., Frederick Zazove, of Chicago, Ill., and Edwin D. Steel, Jr. (of Morris, Steel, Nichols & Arsht), of Wilmington, Del., for Thomas W. Streeter, Dissenting Minority Director of Engineers, and Preferred Stockholders.

Alfred Berman and J. Howard Rossbach (of Guggenheimer & Untermyer), of New York, N. Y., and Herbert L. Cobin, of Wilmington, Del., for Central-Illinois Securities Corporation and Christian A. Johnson, Common Stockholders.

Louis Boehm and William Esbitt, of New York, N. Y. for Common Stockholders.

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Opinion Re Plan (Cont'd)

A preliminary statement of the facts show Engineers Public Service Company has no debt. Its stock structure consists of 143,951 shares of preferred $5 cumulative dividend convertible; 183,406 shares of preferred $5.50 cumulative dividend; 65,098 shares of preferred $6 cumulative; and 1,909,968 shares of $1 par common. All three series of preferred have a stated value of $100 per share. In the event of involuntary liquidation the preferred stocks are entitled to receive $100 per share plus accrued dividends. On redemption or voluntary liquidation the $5 preferred is entitled to $105 per share and the $5.50 and $6 are entitled to $110 per share, plus accrued dividends for both series.

The Securities and Exchange Commission found that Engineers' holdings were in violation of the Public Utility Holding Company Act of 1935 (15 U. S. C. A. §79 *et seq.*) In the Matter of Engineers Public Service Co., 9 S. E. C. 764; 10 S. E. C. 904. Orders for compliance were issued; *ibid.*, 12 S. E. C. 41 and 268; which directed disposal of all companies except Virginia Electric and Power Company or Gulf States Utility Company with fifteen days to choose whether Virginia or Gulf should remain as the principal system; and if Engineers failed to make a choice, Virginia was to be designated. Review proceedings were taken and the court sustained portions of the orders and reversed on others. Engineers Public Service Co. *v.* S. E. C., 138 F. 2d 936. Certiorari was granted. *Ibid.*, 322 U. S. 723. The matter is awaiting reargument in the Supreme Court.

A description of Engineers Public Service Company and its holding company system may be found in 12 S. E. C. 41 and at 268, Holding Company Act Releases Nos. 7041, 7119 and 7190. There will be no extended discussion of background.

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* The charter provisions with which we are concerned provide:

"III. Preference on liquidation, etc. In the event of liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, the holders of the preferred stock of each series shall be entitled to receive, for each share thereof, an amount equal to $100, together with all divi-

Opinion Re Plan (Cont'd)

The plan before the court provides:

1. Engineers will dispose of Gulf States by issuing warrants to its common stockholders entitling them to purchase one share of Gulf States common for each share of Engineers' common at a subscription rate of $11.50 per share which will be payable in cash or by exchanging shares of Engineers' preferred which any common stockholder might have.

2. From treasury and other cash and the proceeds from the Gulf States warrants, Engineers will retire its outstanding preferred stock by payment of $105 plus accrued dividends on the $5 preferred, and $110 per share plus accrued dividends for each share of the $5.50 and $6 preferred.

3. Engineers will dissolve.

4. Engineers will distribute as a partial liquidating dividend its holdings of the common stock of El Paso Electric Company to Engineers common stockholders.

5. A like distribution of all but 5.4% of the common stock of Virginia (99.8%) to Engineers common stockholders. The undistributed balance—estimated value $3,600,000—in trust to be used in winding up Engineers' affairs. Any balance finally left to go to Engineers' common stockholders.

6. EPSCO, Inc., a mutual service company, will cancel its service contracts and dissolve.

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dends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premium for such series, if any, before any distribution of its assets shall be made to the holders of the common stock; but the holders of the preferred stock shall be entitled to no further participation in such distribution. * * * A consolidation or merger of this Corporation with any other corporation or corporations shall not be regarded as a liquidation, dissolution or winding up of this Corporation within the meaning of this Paragraph III, provided such consolidation or merger does not substantially impair the rights and preferences of the preferred stock."

Opinion Re Plan (Cont'd)

By amendatory proceedings believed necessary to satisfy certain tax problems, in the event litigation arose over the fairness of treatment to the preferred stocks under the plan, an escrow was established for the amounts in dispute. The necessity or appropriateness of the plan has not been questioned. There are two main objections.

Objections

1. A group of common stockholders claim unfairness if any amount in excess of the involuntary liquidation price of $100, plus accrued dividends, as specified in the charter, is paid to the preferred stocks.

2. A group of preferred stockholders object to the escrow for the difference between the amount payable under the plan and the involuntary liquidation price. By the terms of the escrow all three series of preferred would receive $100 per share plus accrued dividends; further dividends would cease; and the uncontested portions of the plan may move forward.

(In original opinion names of counsel appear here)

LEAHY, District Judge

/s/ Leahy

A § 11(e) court has the affirmative and independent duty to consider and find whether a proposed plan, which has been approved by the Securities and Exchange Commission, is fair and equitable. In the Matter of Interstate Power Company, D. C. Del., ... F. Supp. ..... The first question is whether the various series of preferreds are entitled to amounts in excess of $100 per share plus accrued and unpaid dividends. When a company is subject to the Act, the quantum of participation of the various

security holders is determined by the application of fair and equitable standards to particular fact situations. In re United Light & Power Co., D. C. Del., 51 F. Supp. 217; In re Consolidated Electric & Gas Co., D. C. Del., 55 F. Supp. 211; In the Matter of Community Gas and Power Company, D. C. Del. ..... F. Supp. .....; In the Matter of Interstate Power Company, D. C. Del., ... F. Supp. ..... The application of those principles convinces me that to pay the premium here would result in a failure to satisfy those standards by a wide margin.

Certain common stockholders argue that this plan involves a true liquidation as distinguished from the fictitious liquidation involved In re United Light & Power Co., D. C. Del., 51 F. Supp. 217, aff'd 3 Cir., 142 F. 2d 413, aff'd sub. nom. Otis & Co. *v.* Securities and Exchange Commission, 323 U. S. 624, and that consequently the stock rights of the various security holders are not to be treated as though in a continuing enterprise. Since this is a true liquidation, the parties argue, the charter provisions do apply and therefore the preferreds are not entitled to a premium. The charter in this case provides that the preferreds shall be entitled to a premium only in the event that the winding up is voluntary; and this and other courts have held that where a company must change its capital structure because of the impact of the Act, the winding up or reorganization is not voluntary.[1] See in re Consolidated Electric & Gas Co., D. C. Del., 55 F. Supp. 211; In re North Continent Utilities Corp., D. C., Del., 54 F. Supp. 527; City National Bank & Trust Co. of Chicago *v.* S. E. C. and North

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[1] It is interesting to note that in the Matter of Consolidated Electric & Gas Co., *supra*, the Commission argued that a liquidation made necessary by the impact of the Act is not voluntary. See page 3 of the memorandum of the Commission, where it said: "* * * and (2) that the present proposal for the retirement of Federated bonds is not the voluntary act of Consolidated but is the result of the impact of Section 11 of the Act." Now independently of the previous argument of the Commission and the prior holdings on the matter, it seems obvious that a plan, whether submitted by the company or the Commission, is not a voluntary plan. Congress has ordained certain action and when the company takes such action it can be said to be voluntary only in a Pickwickian sense.

American Light & Power Co., 7 Cir., 134 F. 2d 65; New York Trust Co., et al. *v.* S. E. C., 2 Cir., 131 F. 2d 274. This is ingenious argument and, if accepted, would of course be dispositive of the holding that payment of the premiums would not be fair and equitable. I prefer not to definitely decide this particular point but to consider the charter provisions of the company as but one of several factors in determining the relative rights of the various security holders.[2] In most of the cases which have arisen involving the payment of premiums, In re United Light & Power Co., D. C. Del., 51 F. Supp. 217; In re North Continent Utilities Corp., D. C. Del., 54 F. Supp. 527; In re Consolidated Electric & Gas Co., D. C. Del., 55 F. Supp. 211; In re Standard Gas & Electric Co., D. C. Del., 59 F. Supp. 274, the charter has called for the payment of premiums in cases of liquidation and redemption, but notwithstanding this fact both the SEC[3] and the courts have held that under the particular fact situations the payment of premiums was not warranted on considerations of all the facts involved. As stated, the charter provisions, then, are but one circumstance looking toward non-payment of premiums.

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[2] Although I have an entirely open mind on the question, my present thought is that the rule of Otis & Co., applies also to a situation in which there is a true liquidation rather than a nominal or formal liquidation mainly because this is not a change in corporate form contemplated by the charter. But counsel argue forcefully that Otis & Co. by its stress that the court was there concerned with a continuing enterprise impliedly holds that a different result would obtain in a true liquidation. I think that perhaps Otis & Co. was not intended to go that far. When a novel question is before a court, it frequently grabs any and all reasons in support of its conclusion. It does not follow, however, that any one of those facts is the *sine qua non* for the decision.

It is, of course, true that once the charter is not accepted as controlling, there is no reason why 100 is the necessary figure for a senior security holder to receive. It may be more or it may be less. But, in this case, after consideration of all factors involved, I conclude that $100 would be fair and equitable, but that the payment of premiums would not be fair and equitable.

Moreover, there is respectable opinion that a contractual obligation may be overriden in any case where necessary to achieve an otherwise constitutional purpose. Norman *v.* Baltimore & Ohio Railroad, 294 U. S. 240 (Gold Clause Case).

[3] The Commission has taken the position that ordinarily, but not necessarily, the redemption price should fix the ceiling as to the amount which a preferred or debenture may receive.

Opinion Re Plan (Cont'd)

The facts in this case indicate that the issuing price and market history also look toward non-payment of the premium. None of the three series of preferred stocks was initially sold to the public for more than $100 per share. In order to sell the preferreds at these prices it was deemed expedient to attach a "convertible" feature to the $5 series and warrants to the $5.50 series. It is unnecessary to consider what the value of these privileges was; it is sufficient that even with these privileges the stock did not command a premium. Moreover, there is no showing that the company received the amounts which the public paid for the various issues of preferred. There must have been various underwriting fees and the underwriting spreads in vogue at the time were quite large. When the inquiry is as to the relative rights of the preferreds vis-a-vis the common, the important consideration is not what the preferred security holders paid, but how much the company received for their stock. Since it is practically certain, then, that the company did not receive as much as $98 per share for any of the three series of preferreds and since none of the three series was initially sold to the public for more than $100 per share, clearly, with respect to this factor, there is no consideration of colloquial equity why the preferreds should be paid a premium.

The market history ex the conversion and warrant privileges has shown an average price much below $100 per share. The importance of the conversion and warrant features is demonstrated, for example, by the lower average price of the $6 preferred since issue than the other two series of preferreds. Another circumstance to be considered, although not strictly one of market history, is that dividends were omitted from preferreds from July 1, 1933 to July 31, 1936, but such arrearages which accumulated in this period were paid off in 1936 and 1937. The market history accordingly not only fails to support the preferred's claim to a premium, but affords affirmative support to the non-payment of the premium.

The preferreds[4] argue for a different conclusion largely on the basis of uncontradicted expert testimony of Dr. R. A. Badger, i.e., on the basis of items "all charges and preferred dividends earned", "proportion of prior obligations to total capitalization", "book value of equity per share of preferred", "percent of quick net assets to prior obligations" and "times parent company dividends were earned", a present value for these preferreds substantially in excess of the charter liquidating preferences would be indicated. I accept Dr. Badger's values and, in the absence of a showing of changed circumstances, I shall assume that those values are applicable at the present time. It must be conceded, however, that these values are not controlling because the plan itself does not propose to give these amounts to the preferreds. Further, it is unnecessary to decide whether these values would more than offset the other factors previously considered and consequently justify the payment of a premium, for in this case this factor is neutralized and rendered impotent by several other considerations. What the plan overlooks is that this is not a one-way argument but a two-way argument. The necessity and impact of the plan which makes the preferreds give up this present enhanced value also works to the detriment of the common. In order to comply with the divestment orders, many of the assets of Engineers were sold for less than the carrying value on Engineers' books, and many of such securities thus disposed of subsequently increased in market value or capitalized earning power greatly in excess of the amounts realized by Engineers upon their sale. In short, the forced divestment orders have worked a hardship on both the common as well as the preferred stocks.

[4] It is interesting to note that the Commission not only did not recognize "present investment value" as the appropriate standard for measuring the rights of Engineers' preferred stocks, but actually *prohibited* Engineers from liquidating 35,000 shares of such stock at a time when the market appraised their "present investment value" at $61–$74 per share, and despite the fact that Engineers' charter granted it the unqualified right to make such repurchases so long as the price paid was *less* than the redemption price.

Moreover, and what is probably more important, a significant reason why the present preferreds are able to be evaluated at more than their redemption prices is because of retained earnings over a period of years not paid as dividends to the common stockholders. The past sacrifices and contributions of the common[5] contributed significantly to the present value of the preferreds.

The preferred stockholders will receive every dollar which the common contracted to pay them, with the result that the preferred will have gotten back approximately $190 for every $100 which they, or their predecessors, initially invested in the enterprise. But fairness and equity do not require that the preferred stockholders be paid an additional $3,200,000 for the theoretical future deprivation of their present excessive dividend rate, for in each case the inquiry is one of relative rights based on colloquial equity. In short, there is no reason why the preferreds should get additional compensation for the termination of the lucrative dividend rate which the preferreds have received, when this termination results wholly and directly from frustration of the enterprise by governmental edict. The argument for payment of the premium is comparable to dealing cards off the top of a deck. When full hands (based on theoretical "investment value") have been dealt to all the senior security holders, the common would merely get whatever happens to remain. Under the Act the interest of all investors must be considered. An emphasis on a preferred's rights must not slight the interests of a common stockholder. For if this occurs this is the direct opposite of the arguments utilized in United Light & Power, D. C. Del., 51 F. Supp. 217, aff'd 3 Cir., 142 F. 2d 413, aff'd sub. nom. Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, where participation was accorded the various security holders in accordance with the standard of colloquial equity.

[5] "The impact of the Otis decision was that the security device of preferred shareholders should not result in a windfall to preferred at the expense of common in a situation where Congress had prescribed that surgery be applied but with as little shock to investors as possible." 59 Har. L. Rev. 1159.

Opinion Re Plan (Cont'd)

I do not consider the argument advanced as to what these series of preferreds would be worth if there were no Public Utility Holding Company Act. I do not think it profitable to consider an argument based on unreality *for there is a Public Utility Holding Company Act.* Unless one subscribes completely to the doctrine of foreordination, things might always be different from what they are.

Not only, therefore, is there no reason on the basis of fairness and equity why the preferreds should get their redemption feature, but also there are numerous and satisfactory reasons, discussed above, why the payment of the premium should be denied. In the cases of In re United Light & Power Co., In re North Continent Utilities Corp., In re Consolidated Electric & Gas Co., *supra*, and especially in In re Standard Gas & Electric Co., D. C. Del., 59 F. Supp 274, refusal to pay the premium was upheld as being fair and equitable. I am not unmindful of the rule that there may be more than one fair and equitable plan; and because the premium payment was refused in one case does not necessarily mean that the payment of that premium in the particular case would have been held unfair;[6] but in view of all the factors which have usually been considered in these cases, I conclude that because of the provision for payment of premium, the plan does not meet the requirements of fairness and equity.

With the exception of the payment of redemption premiums, the plan is approved including the Escrow Agreement. The arguments which contend that the Escrow Agreement is not fair to the preferred stockholders have been considered, but I think they have no merit.

A form of order may be submitted.

[6] But see In re Standard Gas & Electric Co., 3 Cir., 151 F. 2d 326, where the court indicated affirmatively that the premium should not be paid in these cases. It said: "All the debenture holders appearing before us insist that if the debentures are to be liquidated the holders are entitled to the call premiums specified in the contract between the company and the holders thereof. Neither the Commission nor the District Court agreed with the view and we do not either. There is good authority supporting the position that retirement of the obligation under these circumstances is not the kind of voluntary calling by the company which brings the terms into operation. * * *

"The debenture holders obliquely attack the holdings of these decisions and say in addition that they present a different problem from the one in this case. We think the decisions are right and that the reasons they give are applicable."

Dated: May 15, 1947

Findings of Fact and Conclusions of Law.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY.	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action No. 995.

Findings of Fact and Conclusions of Law With Respect to Proposed Payments to Preferred Stockholders of Amounts in Excess of $100 per Share and Accrued Dividends.

(Filed May 29, 1947.)

The Court having on May 15, 1947 filed its Opinion in these proceedings finding fair and equitable and appropriate to effectuate the provisions of Section 11 of the Public Utility Act of 1935 the proposed plan, as amended, of Engineers Public Service Company pursuant to Section 11(e) of said Act, in all respects except with respect to the proposed payment to the preferred stockholders of amounts in excess of $100 per share plus accrued dividends (such excess amounts being hereinafter sometimes termed "premium"), which proposed premiums the Court found to be not fair and equitable; and the Court by Order to be entered simultaneously with the making and filing of these findings, having adopted the Findings and Opinion of the Securities and Exchange Commission dated December 5, 1946 and January 8, 1947 as its findings of fact and conclusions of law except insofar as such findings and conclusions of the Commission relate to or bear upon the payments of the

premiums or are inconsistent with the Opinion dated May 15, 1947 or with the findings and conclusions of law filed with said Order;

The Court now makes and enters the findings of fact and conclusions of law set forth below:

FINDINGS OF FACT.

1. This Court has jurisdiction of this proceeding by virtue of the provisions of Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935.

2. All persons whose rights are affected by the amended plan have had due notice and opportunity for hearing as provided by law.

Background.

3. Engineers Public Service Company (hereinafter referred to as "Engineers") is a corporation organized under the laws of Delaware on or about June 23, 1925, and is registered with the Securities and Exchange Commission (hereinafter referred to as "the Commission") as a registered public utility holding company under the Public Utility Holding Company Act of 1935 (hereinafter referred to as "the Act").

4. From its inception, Engineers functioned as a holding company, and not as a mere investment company. Primary emphasis was placed on exercising centralized control of its operating company subsidiaries, and on obtaining the advantages of broad geographic and economic diversity. The published report of Engineers for 1926 (the first full year of operations) stated these purposes as follows:

> "Your Company is a public utility holding company. Its purposes are twofold: first, as to the public served, to improve and develop the service in the territories occupied by its subsidiaries; and second,

as to the investing public, to offer the opportunity, through purchases of its securities, to participate in an investment which, through *diversification*, has greater stability than the same investment in a single property. *Common control* through a holding company makes possible the raising of new capital in adequate amounts when needed for the development of the public service, and through breadth of view and experience, makes for sound engineering and economical operation and the bringing of good service to many communities which without the holding company's backing would have inferior service." (Emphasis added.)

Substantially the same statement of purposes appears in each of the published annual reports of the Company through the year 1932.

5. Centralized control was achieved not only through selection of the local managements of the operating companies, but through centralized "servicing" arrangements. Initially, these services were rendered by Stone & Webster, Inc., but in 1930 Engineers formed its own central service company (presently called "Epsco"), the stock of which was owned by the various operating companies, and which thereafter rendered all services to the operating companies on a mutual basis and at cost.

6. Economic and geographic diversification were achieved by acquiring control of operating companies in various sections of the country. At the time the Act was passed, Engineers controlled more than 15 electric, gas and other utility companies operating in approximately 15 diverse States throughout the United States. In addition, there were comparatively minor operations in Mexico, Canada and Porto Rico.

Findings of Fact and Conclusions of Law (Cont'd)

7. The Commission found that the widely scattered holding company system of Engineers violated Section 11(b)(1) of the Act, and in a series of Orders directed Engineers to dispose of all its subsidiaries except Virginia Electric and Power Company, or alternatively Gulf States Utilities Company; and if Engineers failed to make a choice within 15 days, Virginia was to be designated as the retained system. One of the Commission's Orders was appealed by the Company to the Circuit Court of Appeals, which sustained portions of the Order and reversed on others. The Supreme Court granted certiorari and heard argument, but after the death of the former Chief Justice ordered reargument, which has not been heard.

8. In compliance with the various divestment Orders of the Commission, Engineers had disposed over the past eight years of the ownership of stock in all of its subsidiaries except three: Virginia Electric and Power Company, Gulf States Utilities Company and El Paso Electric Company. A contract had been entered into by Engineers in 1943 for the sale of El Paso Electric Company to the City of El Paso, but the sale was not completed due to the inability of the City to obtain requisite voter approval.

9. Although the Commission did not actually institute proceedings against Engineers under Section 11(b)(2) of the Act, it formally admonished Engineers that the Company must take action to file a comprehensive plan under Section 11(e) designed not merely to comply with its Section 11(b)(1) divestment Orders, but also to comply with the requirements of Section 11(b)(2) by readjusting the capital structure of Engineers to meet the drastically reduced scope of its operations resulting from the 11(b)(1) Orders.

10. The dissolution of Engineers embodied in its Section 11(e) plan (which, as amended, is the subject of the

present proceeding) was proposed by Engineers in order to comply with the requirements of both Sections 11(b)(1) and 11(b)(2) of the Act. The continued existence of Engineers as a holding company over the single operating company subsidiary allowed it under the Commission's 11(b)(1) Order would be devoid of function or purpose, as well as uneconomical, and would therefore violate Section 11(b)(2). In its Findings and Opinion of December 5, 1946 the Commission stated: "We find that the presence of Engineers would unduly complicate the structure of the system and that it would, therefore, come within the prohibition of Section 11(b)(2). Accordingly, we find that the proposal to dissolve Engineers is 'necessary' to effectuate the provisions of Section 11(b) of the Act." This finding fully accords with the Commission's decisions in the American Power & Light and Electric Power & Light cases, recently affirmed by the Supreme Court, 329 U. S. 90.

11. In its Findings and Opinion of December 5, 1946 the Commission refused to approve a provision of Engineers' plan as initially proposed, which would have established a trusteeship for a period of 3 years to hold the common stock of one of its remaining three subsidiaries, Virginia Electric & Power Company, on the ground that such provision would "continue the holding company in another form", in contravention of the Commission's finding that dissolution of the holding company is required by Section 11. In compliance with the Commission's holding, the plan was thereafter amended to eliminate this aforementioned trusteeship provision of the plan and to provide for the prompt distribution of all the remaining assets.

12. Under Engineers' Section 11(e) plan, all the outstanding preferred stocks will be retired; the common stock of Gulf States Utilities Company, one of Engineers' three remaining subsidiaries, will be sold through the issuance of "rights" to the common stockholders of Engineers for

$22,000,000 (which will be used together with treasury cash in the retirement of the preferred stocks); the common stocks of Engineers' other two subsidiaries (Virginia and El Paso Electric) will be distributed as a liquidating dividend to the common stockholders of Engineers; Engineers itself and the mutual service company, Epsco, will be dissolved.

13. Since Engineers has no subholding companies (such as were present in the case of United Light & Power Company) the liquidation and dissolution of Engineers will effect the liquidation and dissolution of the entire holding company system of Engineers. Upon consummation of the plan, the holding company enterprise of Engineers will be completely terminated.

14. There are more than 13,000 common stockholders of Engineers, all of whom will participate ratably in the distribution of Engineers' remaining assets, including the stocks of the operating companies. The concentrated control of the holding company will be completely dissipated, and the three operating companies will thus become wholly independent and unrelated, and will be unconnected with one another either physically, by effective common control, or otherwise.

15. The holding company system of Engineers, as well as Engineers as a corporate entity, have been frustrated by the provisions of the Act and the Orders issued thereunder. The proposed liquidation and dissolution embodied in the plan, and the retirement of the preferred stocks therein provided, are directly and wholly the consequence of such frustration.

16. Engineers' plan as initially submitted to the Commission proposed that the preferred stocks would be retired by cash payment of $100 per share plus accrued divi-

dends. In the hearings before the Commission the Company contended that the proposed payment was fair and equitable to the preferred stockholders, and payment of any greater amount would be unfair and inequitable to the common stockholders. Preferred stockholders contended they should receive a greater amount approximately equivalent to the call prices of the respective preferred stocks. The Commission in its Findings and Opinion of December 5, 1946 found that the preferred stocks have an "investment value" at least equal to the respective call prices of such preferred stocks, and stated that it would not approve the plan unless it were amended to provide for the payment to the preferred stockholders of an amount equal to the call prices plus accrued dividends. The Company thereafter amended the plan to provide for such call prices. Over the objections of two groups of common stockholders, the Commission approved the amended plan and applied to this Court for approval and enforcement. The Commission gave its advance approval to any arrangement that might be made in the District Court to establish an escrow fund for the premium payments, and to permit the main body of the plan to be consummated pending final litigation of the premium question.

Charter Provisions

17. The Certificate of Incorporation of Engineers provides that in the event of "liquidation, dissolution or winding up" of the corporation the holders of the preferred stock of each series shall be entitled to receive an amount equal to $100 per share, together with all dividends accrued or in arrears thereon before any distribution of assets is made to the holders of the common stock. The charter also provides that in case such liquidation, dissolution or winding up shall have been *voluntary*, the preferred stockholders should further be entitled to receive "the fixed redemption premium for such series, if any." The fixed redemption

premium is $5 for the $5 Cumulative Dividend Convertible Preferred, and $10 for the $5.50 and $6 Cumulative Dividend Preferred Stocks. There are not now, and for many years have not been, any dividends in arrears on any of the preferred stocks.

18. The Certificate of Incorporation makes identical provision with that stated in the preceding paragraph, for payments to the preferred stockholders in the event of "*any reduction of its capital stock,* resulting in any distribution of its assets to its stockholders."

19. The Certificate of Incorporation also provides (i) that the corporation may, at its option at any time redeem the whole or any part of the preferred stock or any series thereof, at a price for each share equal to $100 plus the fixed redemption premium therefor, if any, together with the amount of any dividends accrued or in arrears thereon; (ii) that the corporation may also, from time to time, repurchase shares of its preferred stock at *not exceeding* the price or prices at which the same may be redeemed.

20. Engineers has not called and redeemed, and does not propose to call and redeem, its preferred stocks. The payment proposed to be made to the preferred stockholders in the Engineers' plan are *not* payments incident to, or by reason of, a voluntary "liquidation, dissolution or winding up" of the corporation, or a voluntary "reduction of its capital stock".

21. The liquidation and dissolution of Engineers proposed in the plan, and the retirement of the preferred stocks, are incidents to and result from the mandatory provisions of Section 11 of the Act and the Commission's Orders issued thereunder, which have resulted in governmental frustration of the Engineers enterprise.

Findings of Fact and Conclusions of Law (Cont'd)

Issuance and Sale of the Preferred Stocks and Market History thereof.

22. The $5 Cumulative Dividend Convertible Preferred Stock was sold to the public by underwriters in March 1928 at $100 per share; it carried the privilege of conversion into common (at the option of the holder any time up to and including June 30, 1938) on the basis of 15 shares of common for each 10 shares of such preferred. The Company actually received only $95 per share for this stock. A substantial amount of this preferred stock was thereafter converted by the holders into common stock, at an average cost of approximately $52 per share of common.

The $5.50 Cumulative Preferred Stock was issued in October 1928, and sold to the public in part by underwriters at $99.50 per share; the remaining portion was issued to holders of junior preferred and common stock of Puget Sound Power & Light Company in exchange for their stock as a result of which Engineers obtained control of that company. Each $5.50 preferred share was issued with a warrant entitling the holder at any time between November 1, 1929 and November 1, 1938 to purchase the share of common stock at $68 per share.

The $6 Cumulative Preferred Stock was sold by underwriters to the public in September 1930 at $100 per share.

23. Until 1928 Engineers carried the preferred stocks on its balance sheet and in its preferred stock account at the aggregate amount actually received by it for such stocks, which was substantially less than $100 per share. In 1938 it transferred to preferred stock account $1,925,767, representing the difference between $100 per share and the aggregate consideration actually received therefor, indicating an average discount of approximately $4.00 for each share of preferred stock outstanding. Since 1938, all shares of preferred have been carried on Engineers' balance sheet and capital stock account at $100 per share.

Findings of Fact and Conclusions of Law (Cont'd)

24. The market history of the three series of preferred stocks may be summarized as follows: The $5 series reached a high of $123 in 1929 and a low of $10⅛ in 1935; its average price with the conversion privilege was $60.94, and since the expiration of that privilege $80.50; its overall average since issuance was $67.16.

The $5.50 series reached a high of $109 in 1929, and a low of $11 in 1933 and 1934; its average over the period that its warrant right existed was $53.98, and since the expiration of the warrants $85.23; its overall average since issuance is $64.54.

The $6 preferred reached its highest market of $109 in 1945, and sold at a low of $12 in 1933; its overall average since issuance is $62.77.

As of February 13, 1946, the $5 series was selling at $105⅛, the $5.50 series at $105¾ and the $6 series at $109. The comparable prices on February 17, 1947, the date of the hearing before this Court, were $104½, $108¼, and $109½, respectively.

25. The market prices of the preferred stocks in the earlier years must be considered in the light of the warrants and conversion features operative in that period, and in the light of the fact that Engineers common sold as high as $79⅝ per share in 1929. The market prices in recent years must be considered in the light of the extensive market purchases made by Engineers, referred to below, and other extrinsic factors such as the Commission's American Power & Light debenture decision (Holding Company Act Release No. 6176) wherein premiums were awarded senior security holders for the first time.

26. Dividends have always been regularly maintained on all three issues of preferred stocks since their issuance, except during the period from July 1, 1933 to July 31, 1936. The arrearages which accumulated in this period were paid off in 1936 and 1937. As of December 31, 1946, the follow-

ing aggregate amount of dividends had been paid by Engineers on the preferred stocks; $5 series, $86.25 per share; $5.50 series, $93.50 per share; $6 series, $90 per share.

Market Purchases by Engineers of Preferred Stocks and Commission's Restrictions With Respect Thereto.

27. In 1939 and 1941 Engineers, with the authorization of the Commission, utilized a portion of the funds realized by it from the sale of various of its assets pursuant to the Commission's divestment Orders to make purchases in the open market (after giving notice to all security holders) of approximately 12,000 shares of the various series of preferred stocks. These purchases were made at prices ranging from $69 to $87¾ per share. However, in 1943, the Commission refused to permit Engineers to make contemplated purchases of approximately 35,000 additional shares of preferred stock at a time when the preferred stocks were selling at $61-$74 per share, notwithstanding the provisions of Engineers' charter giving it the unqualified right to make such repurchases so long as the prices paid were *less* than the redemption prices. The reason stated by the Commission for its refusal was the necessity for Engineers to file "a comprehensive plan" designed to satisfy the requirements of Sections 11(b)(1) and 11(b)(2) of the Act. In a special concurring opinion, one of the Commissioners pointed out that the company was required to effect a partial liquidation compelled by the Act, and that consequently a reduction of capital was taking place within the intendment of the charter provision for involuntary reduction of capital. It was clearly inferred that the preferred stockholders were entitled to the amount specified in the charter with respect to involuntary liquidation or reduction of capital, namely, $100 per share plus accrued dividends. However, the principal Commission opinion warned that preferred stockholders who elected to hold their stock might not

actually realize ultimately as much as $100 per share, stating:

> "Of course, the treatment to be accorded to the preferred stocks under a comprehensive plan depends upon the conditions existing at the time such plan is approved. The mere fact that the holders of shares of preferred stock are entitled to a preference of $100 a share on *involuntary liquidation* does not mean that they will actually realize that amount if they elect to retain their holdings. . . ." (Emphasis added.)

28. In 1944, at a time when the preferred stocks were selling in the 90s, the Commission granted to Engineers authorization to utilize $4,000,000 in the purchase of preferred stocks at prices not exceeding $100 per share, stating:

> "As noted above, the current market prices of the three series of preferred stocks which Engineers now proposes to reacquire are close to the *involuntary liquidation prices.* And under the circumstances we are satisfied that the proposed reacquisition is not unfair to the security holders of Engineers." (Emphasis added.)

Pursuant to this authorization Engineers purchased 25,560 shares of the various series of preferred stocks at an average price of $99. It did not make additional purchases because the prices of the stocks advanced above $100 per share in the course of this concentrated purchasing.

29. The market purchases of preferred stocks which were actually made benefited not only the common stockholders but also the remaining preferred stockholders, since the retirement of a substantial number of shares of preferred at less than $100 per share served to strengthen and enhance the position of the remaining shares. The substantial purchases made by Engineers necessarily furnished

support to the market prices of Engineers preferred, and enabled those preferred stockholders who elected to sell to obtain higher prices than might otherwise have prevailed.

Market and Dividend History of the Common Stock

30. There are 1,909,968 shares of Engineers' common stock outstanding, owned by more than 13,000 common stockholders. These shares were all issued during the years 1925 to 1930, inclusive, except for several hundred shares issued subsequent to 1930 in conversion of scrip. The aggregate consideration received for such shares as shown by the Company's books was $58,059,512.85, or an average of $30.40 per share. In 1936, the common stock was changed from no par to $1 per value, and written down to the sum of $1,909,968, at which amount it is presently carried.

31. The common stock sold at a high of $79⅝ in 1929 and a low of $1⅛ in 1935. On February 13, 1946 the common was selling at $36; on February 17, 1947, the date of the hearing before this Court, at $32½ per share; on May 14, 1947, the day before the issuance of the Court's opinion herein, at $25⅞.

32. In 1928-1930, inclusive, 294,880 shares of common stock were issued to holders of $5 preferred stock who exercised their conversion privilege at an estimated average cost of $52.16 per share of common. In 1929, 197,911 shares of common were issued at a price of $42.50 per share pursuant to rights issued to the holders of the preferred and common stocks of Engineers.

33. From the date of Engineers' organization until the present time, the common stock received the following cash dividends: In 1929, $1 per share; in 1930, $1.70 per share; in 1931 and 1932, $1 per share, total $4.70. Fractional stock dividends in common stock were also issued during certain of those years. No dividends of any kind have been paid on

the common stock since 1932, although, as the Commission found, earnings have been available for such dividends since 1938.

34. From September 1935 to the end of 1945, earnings accruing in the Engineers' system to the interest of the common stockholders and not distributed during the period aggregated approximately $24,500,000. Since that time this amount has necessarily become even greater. Although not all these earnings could have been distributed because of various restrictions on dividend payments, the accumulation of these funds within the system has added materially to the value of the preferred stocks by reason of the facts that these funds, together with funds derived from the sale of properties pursuant to Commission divestment Orders, have been used in part to finance improvements and additions of the operating companies which have increased the earning power of the subsidiaries, and in part to retire an aggregate of 60,346 shares of preferred stock of Engineers and of El Paso of Delaware, at an aggregate cost of $5,894,227. The asset value, dividend coverage and quality of the presently outstanding preferred stocks have thereby been improved.

35. As of June 30, 1945, subsidiaries of Engineers had $2,773,000 of free earned surplus, and Engineers, the parent company itself had $7,095,000 of free earned surplus, or a system total of $9,868,000 which could have been declared out in dividends to the common stockholders. Since June 30, 1945 these amounts available for dividends have necessarily substantially increased. If such common stock dividends had actually been paid, the ratio of consolidated common stock and surplus to total capital structure would have been sharply reduced. The ratio of "Net quick assets to prior obligations", as well as total amount of liquid assets, upon which the expert witness for the preferred stockholders placed considerable emphasis, would also have been sharply reduced.

Findings of Fact and Conclusions of Law (Cont'd)

36. The deprivation of all dividends to the common stockholders since 1938, resulted from the policy of Engineers' management to withhold such dividends until the company has made all the adjustments that will be required of it under the Act, including the necessary reduction of its capital. This deprivation on the part of the common stockholders has obviously been of substantial benefit to the preferred stockholders.

Losses Sustained by Engineers in Making Divestments.

37. Engineers sustained substantial losses on many of the properties sold by it in compliance with the requirements of Section 11(b)(1) of the Act and the Commission's divestment Orders thereunder. The largest of such losses was with respect to its investment in Puget Sound Power & Light Company which, after being drastically reduced in a Section 11(e) reorganization under the Holding Company Act, was disposed of in compliance with the Commission's divestment Orders, for a total consideration of $774,475, as compared with a cost to Engineers of $34,000,000. The book loss on this investment was thus more than $33,000,000. A formal offer of proof was made during the proceedings before the Court to establish that the equity owned by Engineers in Puget Sound prior to the recapitalization would presently have a cash value of $10,000,000. It is not necessary for present purposes to determine this amount with exactitude. The subsequent increases in the earnings of Puget Sound, concerning which the Court takes judicial notice (Moody's Public Utility Manual [1946] p. 1081), over the amount estimated by the Commission for reorganization purposes (13 S. E. C. 226, 243), and the increase in market prices for utility common stocks which occurred subsequent to 1944 (to which the Securities and Exchange Commission makes reference in its Twelfth Annual Report to Congress, at p. 46) make

plain that Engineers' investment in Puget Sound came to have a realizable cash value substantially higher than the amount realized by Engineers under the circumstances referred to above. Substantial book losses were also sustained by Engineers on the sale of its investments in Western Public Service Company of Maryland, of Missouri Service Company and Northern Kansas Power Company, of Savannah Electric & Power Company, and others.

In the case of El Paso Natural Gas Company, with which Engineers also was ordered by the Commission to sever its relationship, Engineers held a valuable option on which it managed to realize a book profit; but subsequent to compliance with the Commission's divestment Order the market price of the El Paso Natural Gas Stock divested by Engineers rose by more than $4,000,000.

38. Although it is argued that the foregoing divestment losses affected the investment value found for the preferred stocks (discussed below), this contention is conceded only theoretical validity in view of the fact that Dr. Badger (the evaluation expert on behalf of the preferred stockholders, whose testimony is discussed below) found that the preferreds' redemption provision places a fixed ceiling on such values. Since the preferred stockholders have received their dividends over the entire period since issuance at the full rate contracted for and are now to receive the full principal amount to which they are entitled, it is clear that the brunt of the losses and deprivations caused by the Act have fallen, and necessarily must fall, upon the residual claimants, the common stockholders.

Additional Contributions to be made by Common Stockholders in order to carry out the Plan.

39. Engineers has on hand approximately $17,000,000 in cash representing retained earnings not paid as dividends to the common stockholders, and proceeds of prop-

erty sales. To retire the outstanding 392,455 shares of the various issues of preferred stock at $100 per share will require $39,245,500. To pay the premiums on the preferred stocks would require $3,200,000 additional; and under the provisions of the escrow arrangement approved by the Commission and this Court $4,000,000 cash must be deposited in order to assure payment to the preferred stockholders, if successful on appeal, not only of the premiums but of interest thereon during the period of litigation, and of fees and expenses in connection therewith. Engineers is thus short about $26,000,000 cash needed to carry out the plan. The plan requires that this deficiency shall be made up by the common stockholders of Engineers, in the following manner:

(a) $22,000,000 will be paid to Engineers through the exercise of warrants to purchase the common stock of one of Engineers three remaining subsidiaries, Gulf States;

(b) $3,800,000 will be received by Engineers in the form of "advance dividends" to be paid by Engineers' remaining subsidiaries, on condition that no further dividends may be paid by such companies for specified future periods of time extending until June 15, 1948.

40. In order to retire the preferred stocks, the common stockholders are required in accordance with the foregoing, to contribute $22,000,000 of additional cash and to undergo the risks of possible declining markets; and in addition they are required in effect to "mortgage" the remaining assets by advance payments of dividends, which will result in a partial continuance for additional periods of time of the deprivation of dividends already sustained by the common stockholders during many years past. If this Court's determination that the premiums are not payable to the preferred stockholders is sustained on appeal, the common

stockholders will ultimately receive the return of the escrow fund without, however, any interest for the withheld period, and *less* all fees and expenses incurred in the establishment of the escrow and in the litigation.

Evidence as to "Present Investment Value of the Preferred Stock".

41. An expert witness for certain preferred stockholders, Dr. R. E. Badger, testified in the proceedings before the Commission that in his opinion on a "going concern basis", or "exclusive of the impact of the Public Utility Holding Company Act of 1935", the Engineers preferred stocks would at the time of his testimony have sold on a 4.6% yield basis (or $108.70, $119.57, and $130.33, respecively, for the $5, $5.50 and $6 series), if the preferred stocks were not subject to call and redemption at the option of the Company. In view of the redemption provision, he concluded that "the present fair investment values are represented by their call price, plus a slight premium to account for the time required to effect a call."

42. "Fair investment value" was defined by Badger as "the price or value at which the shares of the several classes of stock would exchange hands between willing buyers and willing sellers, neither under compulsion to buy or sell and both thoroughly informed of all of the various elements of value." It is thus primarily a market value criterion, and is subject to all the problems inherent in predicting future market values.

43. Badger's valuation involved in large measure the determination of the yield basis (that is, dividend rate as a ratio to market price) at which utility preferred stocks regarded by him as comparable with the Engineers preferreds were selling at the time his study was made. In comparing the preferred stocks of Engineers with the other companies he compared such factors as "times all charges

and preferred dividends earned", "proportion of prior obligations to capital", "book value of equity per share of preferred" and "% of net quick assets to prior obligations". The preferred stocks on which he based his comparison, were for the most part those of utility holding companies and operating companies, which, like Engineers, have been subject to the impact of the Act.

44. Badger did not express the judgment that the preferred stocks of Engineers are "high grade" preferreds; on the contrary, he termed them "medium grade" preferreds. He compared them with a group of five other utility preferreds which he termed "medium grade", and reached the conclusion that "Engineers might be said to rest in a median or average position as far as the preferred stocks of these five companies are concerned", thus indicating that the Engineers preferreds may be classed as only medium "medium grade" preferreds. The president of the Company who also qualified as a financial expert, expressed the judgment that on the basis of the criteria customarily employed by financial experts, the Engineers preferreds are "closer to a low grade preferred stock than to a high grade preferred stock", and the evidence supports this view.

45. Although stating that his conclusions were "exclusive of the impact of the Public Utility Holding Company Act", Badger made plain that he excluded only the impact of Section 11 in requiring the dissolution of Engineers, and that he made no attempt to allow for or exclude the far-reaching effect since 1935 of the entire Act and the Commission's Orders thereunder, on Engineers, its subsidiaries, or on the other utility holding and operating companies used by him for purposes of comparison.

46. Analysis of the value of the Engineers preferreds on a "going concern" basis is largely an exercise in seman-

tics, since the Act dictates the dissolution of Engineers and of the entire holding company enterprise, and thus makes impossible the "going concern" in which the preferred and common stockholders engaged to invest. If not for the requirements of the Act, Engineers as a "going concern" would have been free to take advantage of the present low money markets by calling and redeeming its preferred stocks and replacing them with preferred stocks carrying a lower dividend rate than those now outstanding; it would thus continue to enjoy the leverage advantages of senior capital, but at a substantially lower cost. Under these circumstances, payment of the premiums to the preferred stockholders would have been consonant with the purposes and intent of the charter redemption provision. But the Act has made it impossible for the Company and the common stockholders to avail themselves of these benefits contemplated by the contract, along with the many other advantages which would have accrued to them as a "going concern, exclusive of the impact of Section 11."

47. The favorable effect upon the values estimated by Badger for the Engineers' preferred stocks, of the large amounts of earnings which have accrued to the equity of the common stockholders of Engineers and have been retained within the system under the circumstances referred to above (Paragraphs 34 and 35) is clearly evident in the importance attributed by Badger to the large amount of liquid assets and cash in the Engineers' system, and to the high ratio of "net quick assets to prior obligations".

48. Assuming the correctness of Badger's estimates of the investment values of the Engineers' preferred stocks "on a going-concern basis", subject to all the infirmities above referred to, the question still is: "investment values" for how long? The record amply establishes that the values found by Badger have not been the investment values of these stocks during most of their past history; certainly not

in 1935 when the Act was passed, at which time the preferreds sold within a range of $14-55 per share, with two years' accumulation of dividends in arrears (having sold the previous year as low as $10-$12 for all issues); certainly not as recently as 1943, when the Commission refused to permit Engineers to make market purchases at the then current prices of $61 to $74, and warned that preferred stockholders might not ultimately realize as much as $100 per share.

49. Badger's valuations rest heavily on the extremely low current yield rates of bonds and preferred stocks and his belief in the "permanence" of such low yields. He recognized that the current low money and yield rates in large measure reflect the effect of government financing of World War II, and the measures employed by the government to assure low interest rates on the vast amount of securities necessarily issued in recent years by the government.

50. Badger initially testified that the values he proposed to place on the preferred stocks are "values of a permanent nature and are not values of a temporary or speculative nature." Under cross examination he defined this to mean "they are permanent values one can reasonably predict into the future, values that will probably be maintained for a period possibly of *three to five years*, and in the absence of some possible worldwide event that we cannot predict at the present time. . . ." Later he testified he thought it possible to predict "between *2 and 3 years*, up to 5 years, barring something of an entirely unpredictable nature, such as a World War".

51. The record establishes that the values attributed by Badger to the Engineers preferred stocks, largely depend not only on market and economic conditions, but also on continuance of current money rates which were at the time of Badger's study concededly the lowest in the country's history; that such money rates in turn largely depend on

continuance of governmental financial policies including "pegging" of the market on government securities; and that there is and can be no assurance that such policies will not be modified; nor can it be foretold how soon such modifications may take place. The extremely low money rates which resulted in Badger's finding that the preferred stocks of Engineers have an "investment value" greater than $100 per share, largely reflect artificial factors which are clearly subject to changes at any time and may well be of purely transitory character.

52. It is well-known that within the last twelve months there have been rather sharp declines in the market prices of many securities, and a concomitant trend toward somewhat higher money rates. The Federal Reserve Bulletin for April 1947 (pages 431 and 432) shows that common stocks had dropped from 142 (Fed. Res. index) in March 1946 to 124 in March 1947; public utility common stocks had dropped from 123 in March 1946 to 107 in March 1947; yields on long term government bonds had risen from 2.09% in March to 2.19% in March 1947; "high grade" corporate bond yields had risen from 2.35% in March 1946 to 2.49% by the end of March 1947. On high grade preferred stocks the average yield has risen from 3.42% in April 1946 to 3.75% as of April 1947 (Standard & Poors, Trade & Securities, Current Statistics Section, May 1947, p. 27). The increase in yields on low to medium grade preferreds must necessarily be even greater than the increase on high grade preferreds and high grade bonds. These changes occurring within approximately a year of Badger's testimony do not bear out his views as to the asserted stability and "permanance" of the low money rates, even if "permanent" be defined as "two to three years". A continuance for two or three years of the trend indicated over the past year could substantially reduce or wholly eliminate the differential in the current yield rate over dividend rate in the case of preferred stocks of the type of Engineers.

Findings of Fact and Conclusions of Law (Cont'd)

53. The record indicates that there are other imponderables and variables, aside from the trend of money rates alone, which might affect the future "investment value" of the Engineers preferreds, measured on the theoretical "going-concern" basis. If a period of sharp inflation develops, the earnings of the public utility subsidiaries of Engineers could decline sharply due to inability to obtain authorization for rate increases rapidly enough to offset increased operating costs. Adverse earnings resulting from future government competition is another possibility which is claimed to be present. Expert witnesses for the Company stressed that what might occur to the "investment values" of the Engineers preferred stocks in the event of a prolonged economic recession or a real depression is at least to some extent indicated by the past history of these stocks, which, as has been pointed out, sold in the last depression as low as $10-$12 per share.

54. The record establishes that the investment values of the Engineers preferred stocks found by Badger at the time of his testimony do not represent the investment value of these stocks in the past, and are by no means determinative of the investment value of these stocks for any considerable period of time in the future. Because the preferreds' redemption provision acts as a "stopper", the future investment value cannot become greater than the call price, but on the other hand may very well become much less. The record further establishes that there are present many factors of a potentially adverse character, and that the extent to which the investment value of preferred stocks of this character can decline under adverse conditions is indeed very great.

CONCLUSIONS OF LAW

1. The proposed liquidation and dissolution of Engineers provided in the plan is not voluntary, but is instead an involuntary liquidation and dissolution required by the Act.

Findings of Fact and Conclusions of Law (Cont'd)

2. The proposed retirement of the Engineers preferred stocks provided in the plan is not a call and redemption within the meaning of the charter, but is an involuntary reduction of capital required by the Act, and is also incident to the involuntary liquidation and dissolution of Engineers, required by the Act.

3. The proposed liquidation and dissolution of Engineers and of Epsco as provided in the plan, will effect the complete liquidation and termination of Engineers as a corporate entity and of the Engineers holding company system. Termination of the entire holding company enterprise will take place.

4. The enterprise in which the preferred and common stockholders of Engineers invested and with respect to which they contracted, has been frustrated, and its termination made necessary, by an Act of Congress passed to "effectuate an overriding public policy".

5. Retirement of the preferred stocks by payment to the holders thereof of $100 per share, the maximum amount contributed by them or their predecessors, plus accrued dividends, and without deduction for underwriting expenses and discount sustained by the Company, is fair and equitable to such holders.

6. Nothing contained in the certificate of incorporation of Engineers or any other corporate document entitles the preferred stockholders to more than $100 per share plus accrued dividends.

7. No special facts or circumstances in connection with the issuance of the preferred stocks or their subsequent history, or the relationships of the preferred and common stockholders, create any equitable considerations warranting the payment to the preferred stockholders of amounts

in excess of $100 per share plus accrued dividends; and careful examination of all the relevant factors impels the conclusion that payment to the preferred stockholders of such excess amounts would not be warranted or justified.

8. Payments to the holders of the preferred stocks of Engineers of any amounts in excess of $100 per share plus accrued dividends, would be unfair and inequitable to the holders of Engineers' common stock, and would contravene the "fair and equitable" standards of Section 11(e) of the Act.

9. No conclusion is reached as to whether the charter provisions of Engineers limiting the preferred stockholders to $100 per share plus accrued dividends in the event of involuntary liquidation, dissolution, winding up or reduction of capital, forecloses the preferred stockholders from receiving under the plan at bar amounts in excess thereof, since the conclusion is reached that the preferred stockholders are in any event not entitled to receive any such excess amounts on the basis of all the relevant considerations, even if the charter provision is not itself controlling. Said charter provision, however, if taken into account, constitutes an additional factor supporting the conclusions reached, as above stated.

ENTER

(s) PAUL LEAHY
District Judge

May 29, 1947.

Order Approving and Enforcing Plan.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY.	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action No. 995. (Filed May 29, 1947.)

A certain plan to effectuate the provisions of Section 11(b) of the Public Utility Holding Company Act of 1935 (hereinafter called the "Act") having been filed with the Securities and Exchange Commission (hereinafter called the "Commission") by Engineers Public Service Company, a registered holding company under the Act (hereinafter called "Engineers"); said plan being dated as of September 10, 1945, and thereafter amended to and including Amendment No. 6 thereto, dated December 30, 1946, being in the form set forth in Exhibit C annexed to the application herein; and the Commission, after notice and opportunity for hearing, having found in its Supplemental Findings and Opinion and Order entered January 8, 1947, said plan as so amended necessary to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby and approved the plan as so amended; and the Commission by its Order of Amendment, dated February 11, 1947, a copy of which was attached as Exhibit F to "Exhibit 1" to the Motion to Amend Application to Enforce Plan, filed in this Court on February 13, 1947, having found that if, in the course of securing court approval and enforcement of said plan, it should appear that protracted litigation might ensue over the question of the amount payable to the preferred stockholders of Engineers and thereby impede expeditious

Order Approving and Enforcing Plan (Cont'd)

enforcement of the plan and compliance with the Act, it would be in conformity with said Act and the Commission's Findings and Opinion to separate the contested issue from the uncontested issues and consummate the uncontested portion of the plan; and counsel for Engineers in the course of this proceeding having stated to this Court that Engineers has determined that it desires to follow the alternative method of effectuating the plan through the use of an escrow; and counsel for the Commission having presented to this Court a form of proposed decree or order of this Court setting forth a proposed form of escrow agreement and such incidental changes in the carrying out of the plan which the establishment of the escrow involves, substantially as described in said Order of Amendment, said plan as amended by amendments to and including Amendment No. 6 thereto dated December 30, 1946, and supplemented to include an escrow agreement and certain incidental changes, being hereinafter called "Plan"; and Engineers having requested the Commission to apply to a Court to enforce and carry out the terms and provisions of the Plan; and the Commission having on January 9, 1947, filed with this Court an Application, amended as aforesaid, to enforce and carry out the terms and provisions of the Plan; and this Court by Order dated January 9, 1947, having fixed February 17, 1947, as the date for hearing upon the Plan and having prescribed the notice to be given of such hearing, the time within which any objections might be made to the Plan and the manner of making such objections; and it appearing from the affidavit of the Secretary of Engineers that due and sufficient notice of said hearing was given substantially in accordance with the provisions of said Order of January 9, 1947; and objections having been filed by certain stockholders of Engineers to the Plan; a hearing on the Plan having been duly held by this Court in accordance with the provisions of said Order of January 9, 1947; and the Commission, Engineers and certain common and preferred stockholders of Engineers having appeared by their counsel and having

Order Approving and Enforcing Plan (Cont'd)

been heard; and this Court having duly considered the Plan, the objections and the evidence, the Court being fully advised in the premises;

IT IS HEREBY FOUND, ORDERED, ADJUDGED AND DECREED:

1. The Court hereby adopts as its findings of fact and conclusions of law the findings of fact and conclusions set forth in the Findings and Opinions of the Commission dated December 5, 1946 and January 8, 1947, being Exhibits B and E to the Commission's application herein, except insofar as said findings and conclusions of the Commission relate to or bear upon the allowance or payment to the preferred stockholders of any amounts in excess of $100 per share and accrued dividends and are inconsistent with the opinion of this Court issued May 15, 1947 or with any of the findings of fact or conclusions of law filed herewith.

2. Subject to the terms and conditions of the Commission's Order of January 8, 1947, as amended by its said Order of Amendment of February 11, 1947, the Plan is approved as fair and equitable and as necessary or appropriate to effectuate the provisions of Section 11 of the Act except that it is not intended to approve the allowance or payment to Engineers preferred stockholders of any amounts in excess of $100 per share and accrued dividends, any such excess allowance or payment to the Engineers preferred stockholders being expressly disapproved. It is directed, however, that allowance or payments to Engineers preferred stockholders shall be made as provided in and subject to the provisions of paragraph 6 below, and preferred stockholders shall have the right to receive under the provisions of the Escrow Agreement provided for in said paragraph 6 such additional amounts, if any, as may ultimately be determined to be payable to them as provided therein; said Escrow Agreement is approved as fair and equitable and as necessary or appropriate to effectuate the provisions of Section 11 of the Act and as a means of protecting the

respective interests of all classes of stockholders of Engineers pending disposition of any appeals from this order which may raise the question of the rights of preferred stockholders of Engineers to receive any amounts in excess of $100 per share and accrued dividends.

3. Subject to the terms and conditions of the Commission's Order of January 8, 1947 and its Order of Amendment of February 11, 1947, this Court, for the purposes of carrying out the terms and provisions of said Plan, hereby takes exclusive jurisdiction of Engineers and its assets wherever located.

4. Engineers shall retain possession of its assets for the purpose of carrying out the terms and provisions of the Plan and of this Order, or any subsequent order herein; and Engineers may enter into any transactions not inconsistent with the Plan, including the filing of any appropriate application or declaration with the Commission in conformity with the Act and the rules, regulations and orders promulgated and issued by the Commission thereunder, in all cases where such filing and the entry of appropriate orders with respect thereto would be required if this Court had not taken such jurisdiction.

5. Engineers, acting by or through its officers and directors, is hereby authorized, ordered and directed to take and to cause to be taken as soon as practicable all action necessary to carry into effect and fully to consummate the steps and transactions provided in the Plan, except the allowance or payment to Engineers preferred stockholders of any amount in excess of $100 per share and accrued dividends, to comply with all orders of this Court and the Commission relative thereto, except as aforesaid and subject to the provisions of paragraph 6 below.

6. Engineers shall consummate those provisions of the Plan dealing with the retirement of its outstanding preferred stocks in the following manner:

Order Approving and Enforcing Plan (Cont'd)

(a) By exchanging with holders of warrants to acquire shares of common stock of Gulf States Utilities Company (a subsidiary of Engineers, hereinafter called "Gulf States") said shares of Gulf States common stock for whole shares of Engineers preferred stock, assigning to each share of Gulf States common stock the value of $11.50 per share and to each share of Engineers preferred stock the value of $100 per share plus accrued dividends to the expiration date of the warrant, provided that, on the basis of the relative values above stated, the value of the whole shares of Engineers preferred stock surrendered in exchange shall not exceed the value of the shares of Gulf States common stock which the warrant holder is entitled to and intends to acquire, but to the extent that the value of such shares of Engineers preferred stock surrendered in exchange is less than the value of such shares of Gulf States common stock to which the warrant holder is entitled and intends to acquire, the difference shall be paid by the warrant holder to Engineers; and provided, however, that any holder of Engineers preferred stock who surrenders his stock in exchange for Gulf States common stock will, in respect of such surrendered shares, have the right to receive the same amount which the holders of such preferred stock not so surrendering their stock will receive in addition to $100 per share plus accrued dividends;

(b) By depositing in trust for the benefit of Engineers preferred stockholders who shall not have surrendered their preferred stock in exchange for Gulf States common stock with The Chase National Bank of the City of New York an amount equal to $100 per share, plus accrued dividends to the date of such deposit in respect of each such share to be paid to them upon surrender of their certificates for

Order Approving and Enforcing Plan (Cont'd)

preferred stock, five days' notice of intention to make such deposit having been given;

(c) By depositing with The Chase National Bank of the City of New York in escrow the sum of $4,000,000 in cash pursuant to the provisions of the Escrow Agreement attached hereto as Exhibit 1 and made a part hereof.

Upon deposit of the amounts specified in (b) and (c) above, the rights and claims of the holders of shares of Engineers preferred stock shall cease and determine except their rights and claims in respect of said deposited amounts.

7. All creditors and security holders of Engineers and all other persons be and they hereby are enjoined and restrained from doing any act or taking any action, interfering with, or tending to interfere with these proceedings or with the carrying out of this order or any part thereof, including the commencement or prosecution of any action, suit or proceeding at law or in equity or under any statute in any court or before any executive or administrative officer, commission or tribunal, other than proceedings before the Commission, or this Court or the Circuit Court of Appeals or other appellate court as may be appropriate under the Act or the rules and regulations promulgated thereunder.

8. The Court reserves jurisdiction to enter such supplemental orders or decrees and to give such other and further relief as may be necessary or appropriate to enforce and carry out the provisions of the Plan, including approval of any alternative methods of meeting the cash requirements of the Plan that may be proposed by Engineers and approved by the Commission.

By the Court

(s) PAUL LEAHY
United States District Judge

Dated May 29, 1947.

Escrow Agreement, Exhibit 1 to Order.

EXHIBIT 1

Escrow Agreement.

....., 1947.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
11 Broad Street,
New York 15, N. Y.

Dear Sirs:

1. The undersigned, Engineers Public Service Company (Incorporated) (Engineers) herewith hands you as Escrow Agent hereunder, its check in the amount of $4,000,000, which is the amount required to be deposited in escrow by the Engineers' "Plan Pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters", as amended by amendments to and including Amendment No. 6, dated December 30, 1946, as changed to include this Escrow Agreement and certain program changes incidental thereto (which amended Plan, with such changes, is hereinafter referred to as "the Plan", a copy of which Plan has been delivered to you. Said sum of $4,000,000 is made up of the following amounts:

(a) The sum of $3,204,795, being an amount equal to $5 per share in respect of 143,951 outstanding shares of the $5 Dividend Convertible Preferred Stock ($5 Preferred) of Engineers; $10 per share in respect of the outstanding 183,406 shares of $5.50 Cumulative Dividend Preferred Stock ($5.50 Preferred) of Engineers; and $10 per share in respect of the 65,098 outstanding shares of $6 Cumulative Dividend Preferred Stock ($6 Preferred) of Engineers.

(b) The sum of $484,325, being an amount equal to simple interest for three years at a rate per annum of 4.76% in the case of the Engineers $5 Preferred, 5% in the case of the Engineers $5.50 Preferred, and 5.45% in the case of the Engineers $6

Escrow Agreement, Exhibit 1 to Order (Cont'd)

Preferred on the amounts set forth in (a) above in respect of each of said series.

(c) The sum of $310,880, to provide for the payment of all fees and other compensation and all remuneration or expenses claimed or hereafter claimed by any persons in connection with the Plan, the transactions incident thereto and the consummation thereof, approved by the Securities and Exchange Commission (hereinafter called the Commission).

2. Upon delivery to you of an opinion of independent counsel (as defined in paragraph 6 hereof), accompanied by a certified copy of the order or decree involved,

(A) to the effect (1) that the District Court of the United States for the District of Delaware in Civil Action No. 995 has entered a decree or order approving the Plan, including the payment to holders of Engineers preferred stock of the amounts, below specified, equal to the respective redemption premiums on their shares, with interest thereon, and directing its enforcement, (2) that no holder of common stock of Engineers has made timely appeal from such decree or order or, in the alternative, that a holder or holders of common stock of Engineers has made such a timely appeal but that the appellate court or courts have approved said decree or order approving the Plan entered by said District Court as aforesaid, and (3) that such decree or order has become final as against the holders of common stock of Engineers and is no longer subject to appeal by them; or

(B) to the effect (1) that said District Court in said Civil Action has entered a decree or order approving the Plan in all respects other than the payment to holders of Engineers preferred stock of the

Escrow Agreement, Exhibit 1 to Order (Cont'd)

amounts below specified and directing its enforcement to the extent so approved but disapproving or failing to approve the payment of such amounts; (2) that timely appeal has been made from such decree or order in so far as its disapproves or fails to approve the payment of such amounts, and that an appellate court has reversed such decree or order in so far as it disapproves or fails to approve the payment of such amounts and the District Court on mandate of such appellate court has entered a decree or order approving such payment to the holders of Engineers preferred stock; and (3) that such decree or order directing such payment to holders of the preferred stock has become final as against the holders of preferred and common stock of Engineers and is no longer subject to appeal by them; or

(C) to the effect that an order of the Commission in the proceedings now pending before it in file No. 53-132 or in consolidated proceedings including file No. 53-132, file No. 70-1149, file No. 70-1150 and file No. 70-1419 or in any other proceedings under section 11(b), section 11(d) or section 11(e) of the Public Utility Holding Company Act of 1935, or an order or decree of any court having jurisdiction, has been entered, has become final and is no longer subject to appeal, which Commission order or court order or decree either approves an amended plan providing for, or otherwise provides for or directs, the payment to the holders of Engineers preferred stock of at least the amounts below specified;

then you shall release and pay over to the holders of Preferred Stock out of the amounts deposited with you pursuant to clauses (a) and (b) of paragraph 1 hereof, the amount of $5 per share in respect of each share of $5 Preferred, the amount of $10 per share in respect of each share of $5.50

Escrow Agreement, Exhibit 1 to Order (Cont'd)

Preferred and the amount of $10 per share in respect of each share of $6 Preferred, plus in each case an amount equal to simple interest, computed on the basis of 360 days per year, on the amount so paid at a rate per annum equal to 4.76% in the case of the Engineers $5 Preferred, 5% in the case of the Engineers $5.50 Preferred, and 5.45% in the case of the Engineers $6 Preferred from the date hereof to the date of such payment. Such payment is to be made by mailing the same to the persons who were the registered holders or assignees of registered holders of such Preferred Stock at the time their certificates for such stock were surrendered, either in exchange for Common Stock of Gulf States Utilities Company or upon payment to them of $100 per share and accrued dividends, all as provided in the Plan. You shall be entitled to rely upon a list or lists furnished you by The Chase National Bank of the City of New York and Stone & Webster Service Corporation, Transfer Agents for the Preferred Stock, or either of them, as to the names of such registered holders or their assignees at the time of such surrender and their mailing addresses. Any balance of the sum deposited with you pursuant to clause (b) of paragraph 1 hereof shall be paid over to Engineers.

3. Upon delivery to you of an opinion of independent counsel (as defined in paragraph 6 hereof), accompanied by a certified copy of the order or decree involved, to the effect that an order of the Commission in the above mentioned proceedings now pending before it or in any other proceedings under section 11(b), section 11(d) or section 11(e) of the Public Utility Holding Company Act of 1935, or an order or decree of any court having jurisdiction, has been entered, has become final and is no longer subject to appeal, which Commission order or court order or decree directs or permits the distribution to holders of Preferred Stock of some part of the amount deposited pursuant to clauses (a) and (b) of paragraph 1 hereof, but less than the amounts specified in paragraph 2 hereof, you shall release and pay over to

Escrow Agreement, Exhibit 1 to Order (Cont'd)

the holders of Preferred Stock entitled thereto, pursuant to the terms of such order or decree, in the manner provided in paragraph 2 hereof, the respective amounts to which such holders shall be entitled pursuant to such order or decree, and you shall release and pay over to Engineers the balance of said sum deposited pursuant to clauses (a) and (b) of paragraph 1 hereof.

4. Upon delivery to you of an opinion of independent counsel (as defined in paragraph 6 hereof), accompanied by a certified copy of the order or decree involved, to the effect that an order of the Commission in the above mentioned proceedings now pending before it or in any other proceedings under section 11(b), section 11(d) or section 11(e) of the Public Utility Holding Company Act of 1935, or an order or decree of any court having jurisdiction, has been entered, has become final and is no longer subject to appeal, which Commission order or court order or decree determines or finds that the holders of Preferred Stock are not entitled to receive any amounts in addition to the amount of $100 per share plus accrued dividends to be allowed to Preferred Stockholders on exchange of shares of Preferred Stock for shares of Gulf States Common Stock or to be deposited in trust for Preferred Stockholders who shall not have so exchanged their shares of Preferred Stock, all as provided in the Plan, you shall release and pay over to Engineers all sums deposited with you pursuant to clauses (a) and (b) of paragraph 1 hereof.

5. Upon delivery to you of (a) a certified copy of the order of the Commission in the above mentioned proceedings approving payment to specified persons of fees and other compensation, remuneration and expenses, and (b) an opinion of independent counsel to the effect that such order has become final and not subject to appeal; you shall release and pay over to the persons designated in said order out of the amounts deposited pursuant to clause (c) of para-

graph 1, the respective amounts specified in said order, and after deducting the amount of your fees and expenses and the compensation of your counsel in accordance with the provisions of paragraph 8 hereof, you shall pay over to Engineers any balance of said sum.

6. The term "independent counsel" as used herein shall mean counsel selected by you who shall not have entered their appearance in the above mentioned proceedings before the Commission or in the above mentioned court proceedings as counsel for any party or participant, but who may be counsel regularly retained by you.

7. You shall not be liable for any action taken or omitted to be taken by you hereunder in good faith, or for any act, mistake or omission of any agent employed by you. You shall be fully protected in any action taken or omitted to be taken pursuant to advice of counsel.

8. You shall be entitled, subject to the approval of the Commission, to reasonable compensation for your services hereunder and reimbursement of your reasonable expenses, including fees and disbursements of your counsel and any independent counsel selected by you for the purposes of paragraphs 2, 3 or 4 hereof, and for the payment of such compensation or reimbursement, you shall have a lien upon any amounts deposited with you pursuant to clause (c) of paragraph 1 hereof.

9. You may, at any time, resign by giving 30 days' notice in writing to Engineers of your intention so to do. In case of any such resignation, or in case you shall become unable to act hereunder, Engineers will promptly appoint a successor Escrow Agent, which shall be a trust company or bank with trust powers having its principal office in the Borough of Manhattan, City and State of New York and having a capital and surplus of more than $1,000,000. Upon

Escrow Agreement, Exhibit 1 to Order (Cont'd)

payment of any sums held by you hereunder to any such successor Escrow Agent, you shall be discharged from all further liability hereunder, and the successor Escrow Agent shall become the Escrow Agent hereunder with like effect as if originally designated Escrow Agent hereunder. Any successor to your business shall forthwith become successor Escrow Agent hereunder without further action on the part of Engineers.

10. Any disputes as to the duties of the Escrow Agent hereunder shall be submitted to the United States District Court for the District of Delaware pursuant to the jurisdiction reserved by it in its order enforcing the Plan.

The signature of your duly authorized officer in the space provided below will evidence your acceptance of your appointment as Escrow Agent hereunder, and your acknowledgment of receipt of Engineers' check for $4,000,000 referred to in paragraph 1 hereof, the proceeds of such check to be held and disposed of by you in accordance with the provisions hereof.

Very truly yours,

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

By .....
President

The undersigned hereby accepts its appointment as Escrow Agent hereunder and acknowledges receipt of the above mentioned check for $4,000,000.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK

By .....

Notice of Petition and Petition for Stay of Order Filed by Streeter, et al.; Court's Order Denying Petition.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action No. 995.

Notice of Petition for Stay.

(Filed May 29, 1947)

SIRS:

PLEASE TAKE NOTICE THAT on the 29th day of May, 1947, at 3:00 o'clock in the afternoon (E. D. S. T.), or as soon thereafter as counsel can be heard, the annexed petition of Thomas W. Streeter will be presented to the Honorable Paul Leahy, United States District Judge, at the United States Court House, Wilmington, Delaware.

Dated: New York, New York
May 27, 1947

Yours, etc.,
/s/ LAWRENCE R. CONDON
F. S.

LAWRENCE R. CONDON
Attorney for petitioner and preferred stockholders of Engineers Public Service Company
165 Broadway
New York 6, New York

Notice, Petition and Order Re Stay (Cont'd)

To:

HARRY G. SLATER, Esq.
Chief Counsel, Public Utilities Division
Securities and Exchange Commission
18th and Locust Streets
Philadelphia 3, Pennsylvania

ALFRED BERMAN, Esq.
Guggenheimer & Untermyer
30 Pine Street
New York 5, New York

LOUIS BOEHM, Esq.
60 Broad Street
New York 4, New York

FRANCIS H. SCHEETZ, Esq.
Evans, Bayard & Frick
Land Title Building
Philadelphia, Pa.

CALEB R. LAYTON, III, Esq.
Layton and Layton
811 Industrial Trust Building
Wilmington, Delaware

WILLIAM E. TUCKER, Esq.
Mudge, Stern Williams & Tucker
40 Wall Street
New York 5, New York

Notice, Petition and Order Re Stay (Cont'd)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action No. 995.

Petition for Stay or Order.

TO THE HONORABLE PAUL LEAHY:

This Honorable Court, having indicated at the hearing on May 26, 1947 that an order in accordance with the proposed order submitted by counsel for the Securities and Exchange Commission will be granted on May 29, 1947, your petitioner, Thomas W. Streeter, a director and preferred stockholder of Engineers Public Service Company, by his attorney, Lawrence R. Condon, hereby applies for a stay, pending appeal, of such order and as grounds for such stay states as follows:

1. The said order is erroneous in that it permits and directs the consummation of the plan, although the Court has disapproved that portion dealing with the treatment to be accorded the preferred stockholders.

2. The said order is inconsistent with the Court's opinion of May 15, 1947, in that the order directs consummation of the plan, whereas, in the opinion the Court concludes that the plan is not fair and equitable.

3. The said order adopts and approves, without notice or an opportunity for hearing, an escrow which does not

adequately protect the interests of the preferred stockholders.

4. The said order approves and adopts substantial changes to the plan which were not part of the plan submitted to and approved by the Securities and Exchange Commission.

5. The said order approves and adopts the findings of the Securities and Exchange Commission contained in its so-called Order of Amendment which was entered without notice to the preferred stockholders and an opportunity to be heard thereon.

6. On information and belief, the Board of Directors of Engineers Public Service Company, on May 22, 1947, authorized and directed the officers to proceed immediately with the consummation of the plan in accordance with the said order.

7. The Company, on information and belief, has been authorized by the directors to immediately carry out the provisions of paragraph 6 of said order and intends to terminate dividend payments to the preferred stockholders.

8. The Company, on information and belief, contemplates the early distribution of substantially all its assets.

9. Your petitioner intends to promptly perfect and prosecute an appeal to the Circuit Court of Appeals from the order of May 29, 1947.

10. If a stay of the order of May 29, 1947 is not granted, your petitioner and the other preferred stockholders will be irreparably injured through the distribution of substantially all the Company's assets, and your petitioner's right of appeal from the order permitting the consumma-

tion of the plan, changing the terms of such plan, and approving an inadequate escrow may be defeated, in effect, by a consummation of the plan before the hearing and decision on appeal.

WHEREFORE, your petitioner respectfully prays that, pending the determination of an appeal herein, consummation of the plan and creation of the escrow authorized, approved, and directed by the order of May 29, 1947, be stayed and that your petitioner have such other and further relief as is just and proper.

Dated: New York, N. Y.,
May 27, 1947

(s) THOMAS W. STREETER
Petitioner.

(s) LAWRENCE R. CONDON
LAWRENCE R. CONDON
Attorney for petitioner and preferred stockholders of Engineers Public Service Company
165 Broadway
New York 6, New York

Prayers of the petition be and the same are hereby denied.

(s) PAUL LEAHY
J.

Dated: May 29, 1947

Notice, Petition and Order Re Stay (Cont'd)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

THOMAS W. STREETER, being duly sworn, deposes and says:

That he is the petitioner herein, that he has read the foregoing petition, and knows the contents thereof, and that the same is true to his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters, he believes them to be true.

(s) THOMAS W. STREETER

Sworn to before me this
27th day of May, 1947

(s) ELLEN E. O'NEIL
Attorney and Counsellor-at-Law

(Notarial Seal)

Notice of Appeal of Streeter, et al.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action No. 995.

Notice of Appeal.

(Filed May 29, 1947)

Notice is hereby given that Thomas W. Streeter, a director and preferred stockholder of Engineers Public Service Company, hereby appeals, on his own behalf and on behalf of all the preferred stockholders of the company, to the Circuit Court of Appeals for the Third Circuit from the order entered in this proceeding on May 29, 1947.

Dated: Wilmington, Delaware
May 29, 1947

(s) LAWRENCE R. CONDON
LAWRENCE R. CONDON
Attorney for Appellants, Thomas W. Streeter, et al., preferred stockholders of Engineers Public Service Company,
165 Broadway,
New York 6, New York.

Notice of Appeal of Streeter, et al. (Cont'd)

To:

HARRY G. SLATER, Esq.
Chief Counsel, Public Utilities Division
Securities and Exchange Commission
18th and Locust Streets
Philadelphia 3, Pennsylvania

WILLIAM E. TUCKER, Esq.
Mudge, Stern, Williams & Tucker
40 Wall Street,
New York 5, New York

ALFRED BERMAN, Esq.
Guggenheimer & Untermyer
30 Pine Street
New York 5, New York

LOUIS BOEHM, Esq.
60 Broad Street
New York 4, New York

FRANCIS H. SCHEETZ, Esq.
Evans, Bayard & Frick
Land Title Building
Philadelphia, Pa.

EDWIN D. STEEL, JR., Esq.
Morris, Steel, Nichols and Arsht
3018 du Pont Building
Wilmington, Delaware

CALEB R. LAYTON, III, Esq.
Layton and Layton
811 Industrial Trust Building
Wilmington, Delaware

Notice of Appeal of Securities and Exchange Commission.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF DELAWARE.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY.	Civil Action No. 995.

Notice of Appeal.

(Filed June 5, 1947)

NOTICE IS HEREBY GIVEN that the Securities and Exchange Commission, one of the parties to the aforesaid action, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from that portion of the order entered by the District Court of the United States for the District of Delaware in said action on May 29, 1947, denying enforcement to that portion of the application by the Securities and Exchange Commission to said Court, pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935, which relates to the payment to the preferred stockholders of any amounts in excess of $100 per share and accrued dividends under the terms and provisions of a plan submitted by the Engineers Public Service Company to said Securities and Exchange Commission for the purpose of enabling said Engineers Public Service Company to comply with the provisions of Section 11(b) of said Act.

Dated June 3, 1947.

/s/ ROGER S. FOSTER
Roger S. Foster,
Solicitor,
Securities and Exchange Commission,
18th and Locust Streets,
Philadelphia 3, Pa.

Notice of Appeal of The Home Insurance Company, et al.

Notice of Appeal.

(Filed June 5, 1947)

Notice is hereby given that The Home Insurance Company, City of New York Insurance Company, National Liberty Insurance Company of America, The New Brunswick Fire Insurance Company, The Homestead Fire Insurance Company, The Georgia Home Insurance Company, and Tradesmens National Bank and Trust Company, Trustee of Tradesmens National Bank and Trust Company Discretionary Common Trust Fund, respectively, preferred stockholders of Engineers Public Service Company, hereby appeal to the Circuit Court of Appeals for the Third Circuit from the Order entered in this proceeding on May 29, 1947.

Dated at Wilmington, Delaware, June 5, 1947.

(S) FRANCIS H. SCHEETZ
Francis H. Scheetz
Attorney for Appellants, The Home Insurance Company, et al.
1335 Land Title Building,
Philadelphia 10, Pennsylvania.

Notice of Appeal of The Home Insurance Company, et al. (Cont'd)

To:

HARRY G. SLATER, Esq.,
Chief Counsel, Public Utilities Division,
Securities and Exchange Commission,
18th and Locust Streets,
Philadelphia 3, Pennsylvania.

WILLIAM E. TUCKER, Esq.,
Mudge, Stern, Williams & Tucker,
40 Wall Street,
New York 5, New York.

ALFRED BERMAN, Esq.,
Guggenheimer & Untermyer,
30 Pine Street,
New York 5, New York.

LOUIS BOEHM, Esq.,
60 Broad Street,
New York 4, New York.

LAWRENCE R. CONDON, Esq.,
165 Broadway,
New York 6, New York.

EDWIN D. STEEL, JR., Esq.,
Norris, Steel, Nichols and Arsht,
3018 DuPont Building,
Wilmington, Delaware.

Order Re Transmittal of Original Record of Proceedings Before Securities and Exchange Commission to Circuit Court of Appeals.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE CO.	Civil Action No. 995.

Order.

(Filed June 12, 1947.)

This 12 day of June, 1947, upon consideration of the attached petition of the appellant, Securities and Exchange Commission, that the original of the record of proceedings before it, which has been filed herein as Exhibit 1, be sent to the United States Court of Appeals for the Third Circuit in lieu of copies thereof, it is

ORDERED that the original of the record of proceedings before the Securities and Exchange Commission, filed herein as Exhibit 1 be transmitted to the United States Circuit Court of Appeals to the Third Circuit, in lieu of copies thereof, and it is further

ORDERED that said exhibit be entrusted to the attorneys for the Securities and Exchange Commission for filing in the United States Circuit Court of Appeals for the Third Circuit.

By the Court

(S) PAUL LEAHY
United States District Judge.

Petition of Securities and Exchange Commission For Transmittal of Original Record of Proceedings Before Securities and Exchange Commission to Circuit Court of Appeals.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE CO.	Civil Action No. 995.

Petition for Order Permitting Original Exhibit to be Sent to Appellate Court.

To The Honorable Judge of The United States District Court for The District of Delaware:

The petition of the Securities and Exchange Commission respectfully shows:

(1) That petitioner has filed a notice of appeal from the order of this Court entered May 29, 1947.

(2) That petitioner has designated on appeal herein the complete record, proceedings and evidence herein.

(3) That included in the record before this Court as Exhibit 1 is the original record in these proceedings before the Securities and Exchange Commission.

(4) That the said record in these proceedings before the Securities and Exchange Commission consists of some 8

Petition of Securities and Exchange Commission For Transmittal of Original Record of Proceedings Before Securities and Exchange Commission to Circuit Court of Appeals (Cont'd)

volumes of typewritten and printed matter and if copies thereof are required to be filed in the Circuit Court of Appeals for the Third Circuit, unnecessary delay and expense will be caused.

WHEREFORE, your petitioner prays that an order be entered pursuant to Rule 75(i) of the Rules of Civil Procedure, requiring that the original of the record in these proceedings before the Securities and Exchange Commission be sent to the Circuit Court of Appeals for the Third Circuit in lieu of copies thereof, and for such other and further relief as the Court may deem proper.

/s/ SIDNEY H. WILLNER,
Sidney H. Willner,
Assistant Solicitor,
Securities and Exchange Commission,
18th and Locust Streets,
Philadelphia 3, Pa.

June 12, 1947.

Designation of Contents of Record on Appeal of Securities and Exchange Commission.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER of ENGINEERS PUBLIC SERVICE CO.	Civil Action No. 995

Designation of Contents of Record on Appeal.

(Filed June 12, 1947)

The Securities and Exchange Commission, appellant herein, designates as the record on appeal the complete record, proceedings and evidence herein, consisting of:

(1) Application of the Securities and Exchange Commission filed January 9, 1947, together with exhibits thereto as follows:

Exhibit A—Notice and order for hearing before the Securities and Exchange Commission, dated October 15, 1945.

Exhibit B—Findings and opinion of the Securities and Exchange Commission, dated December 4, 1946.

Exhibit C—Amended plan filed by Engineers Public Service Co., dated September 10, 1945, as amended by Amendment No. 6, dated December 30, 1946.

Designation of Contents of Record on Appeal of Securities and Exchange Commission (Cont'd.)

Exhibit D—Notice of filing of amendment and order for argument and hearing on plan, as amended, and order reopening record, dated December 19, 1946.

Exhibit E—Supplemental findings and opinion, dated January 8, 1947.

(2) Motion to Supplement Application to Enforce Plan, filed February 13, 1947, and Order of Judge Leahy dated February 17, 1947, including:

Exhibit 1—Additional paragraph to Application, including Exhibit F, an Order of Amendment dated February 11, 1947.

(3) Notice to the Security Holders of Engineers Public Service Company and to All Other Persons of Hearing on Application of the Securities and Exchange Commission for Enforcement of the Plan.

(4) Order for Hearing entered by Judge Leahy January 9, 1947.

(5) Statement of Objections of Thomas W. Streeter et al., preferred stockholders, dated February 6, 1947.

(6) Statement of Objections of Lucille White and Frances Boehm, common stockholders.

(7) Statement of Objections of Central-Illinois Securities Corporation and Christian A. Johnson, common stockholders, dated February 7, 1947.

(8) Affidavit of Lawrence R. Condon, attorney for Thomas W. Streeter et al., preferred stockholders, in opposition to Motion of the Securities and Exchange Commission to Supplement Application to Enforce Plan, dated February 15, 1947.

Designation of Contents of Record on Appeal of Securities and Exchange Commission (Cont'd)

(9) Transcript of hearing of February 17, 1947.

(10) Opinion of Judge Leahy, dated May 15, 1947.

(11) Findings of fact and conclusions of law entered by Judge Leahy May 29, 1947.

(12) Decree entered by Judge Leahy May 29, 1947.

(13) Notice of appeal filed June 5, 1947.

(14) Notice and Petition for Stay of Order, dated May 27, 1947.

(15) Denial of Petition for Stay Order by Judge Leahy dated May 29, 1947.

(16) This designation.

(17) Exhibit 1, original record before the Securities and Exchange Commission.

(s) SIDNEY H. WILLNER
Sidney H. Willner,
Assistant Solicitor
Securities and Exchange Commission
18th and Locust Streets
Philadelphia 3, Pennsylvania

June 12, 1947

Designation of Contents of Record on Appeal of Securities and Exchange Commission (Cont'd)

To:

Caleb R. Layton, III, Esq.
Industrial Trust Building
Wilmington, Delaware

Francis H. Scheetz, Esq.
Evans, Bayard & Frick
Land Title Building
Philadelphia, Pa.

Edwin D. Steel, Jr., Esq.
Morris, Steel, Nichols and Arsht
DuPont Building
Wilmington, Delaware

Lawrence R. Condon, Esq.
165 Broadway
New York, New York

William E. Tucker, Esq.
Mudge, Stern, Williams & Tucker
40 Wall Street
New York, New York

Alfred Berman, Esq.
Guggenheimer & Untermyer
30 Pine Street
New York, New York

Louis Boehm, Esq.
60 Broad Street
New York, New York

Designation of Contents of Record on Appeal of Streeter, et al.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY.	Civil Action No. 995.

Designation of Contents of Record on Appeal.

(Filed June 13, 1947)

Thomas W. Streeter, appellant herein, designates as the record on appeal those items contained in the designation filed by the Securities and Exchange Commission, and in addition thereto, the following:

1. Order dated June 12, 1947 of Judge Leahy permitting the original record of the proceedings before the Securities and Exchange Commission to be transmitted to the United States Circuit Court of Appeals for the Third Circuit.

2. Supplemental Statement of objections dated February 17, 1947 of Thomas W. Streeter, et al., and Exhibit A attached thereto.

3. Letter dated February 7, 1947 from Engineers Public Service Company to the Securities and Exchange Commission and attachment thereto including proposed amendments to the order of the Securities and Exchange

Designation of Contents of Record on Appeal of Streeter, et al. (Cont'd)

Commission of January 8, 1947 and a draft of an Escrow Agreement.

4. Escrow Agreement filed February 17, 1947.

5. Notice of Presentment of Order for Settlement and Signature dated May 19, 1947 and annexed proposed Order.

6. Notice of Appeal by Thomas W. Streeter dated and filed May 29, 1947.

7. This designation.

(s) LAWRENCE R. CONDON
Lawrence R. Condon, Attorney for
Thomas W. Streeter, Appellant,
165 Broadway,
New York, N. Y.

June 12, 1947.

Designation of Contents of Record on Appeal of Streeter, et al. (Cont'd)

To:

SIDNEY H. WILLNER, Esq.
Securities and Exchange Commission
18th and Locust Streets
Philadelphia 3, Pa.

CALEB R. LAYTON, III, Esq.
Industrial Trust Building
Wilmington, Delaware

FRANCIS H. SCHEETZ, Esq.
Evans, Bayard & Frick
Land Title Building
Philadelphia, Pa.

ALFRED BERMAN, Esq.
Guggenheimer & Untermyer
30 Pine Street
New York, New York

WILLIAM E. TUCKER, Esq.
Mudge, Stern, Williams & Tucker
40 Wall Street
New York, New York

LOUIS BOEHM, Esq.
60 Broad Street
New York, New York

Designation of Contents of Record on Appeal of Streeter, et al. (Cont'd)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

EVELYN VRABEC, being first duly sworn, deposes and says:

That she served a copy of the foregoing Designation of Contents of Record on Appeal on the abovenamed persons by enclosing a copy thereof in a sealed envelope properly addressed and with proper postage affixed thereto and by depositing the same in a United States mailbox in New York, New York this 12th day of June, 1947.

EVELYN VRABEC

Sworn to before me this
12th day of June, 1947

EGBERT W. DOUGHTY
Egbert W. Doughty

(Notary Public)

(SEAL)

Designation of Contents of Record on Appeal of The Home Insurance Company, *et al.*

Designation of Contents of Record on Appeal.

(Filed June 13, 1947.)

The Home Insurance Company, City of New York Insurance Company, National Liberty Insurance Company of America, The New Brunswick Fire Insurance Company, The Homestead Fire Insurance Company, The Georgia Home Insurance Company, and Tradesmens National Bank and Trust Company, Trustee of Tradesmens National Bank and Trust Company Discretionary Common Trust Fund, appellants herein, designate as the record on appeal the complete record, proceedings and evidence herein, as specified in the Designation of Contents of Record on Appeal filed, or about to be filed, by the Securities and Exchange Commission, appellant herein, and in addition thereto the Notice of Appeal filed by the aforenamed appellants on June 5, 1947.

Appellants concur in the request of the Securities and Exchange Commission as set forth in the Commission's Petition filed, or about to be filed, in these proceedings that the original record in these proceedings before the Securities and Exchange Commission be sent to the Circuit Court of Appeals for the Third Circuit in lieu of copies thereof pursuant to Rule 75(i) of the Rules of Civil Procedure and join in the prayer of the Commission's Petition.

(S) Francis H. Scheetz
Francis H. Scheetz
Attorney for Appellants, The Home Insurance Company, City of New York Insurance Company, National Liberty Insurance Company of America, The New Brunswick Fire Insurance Company, The Homestead Fire Insurance Company, The Georgia Home Insurance Company, and Tradesmens National Bank and Trust Company, Trustee, etc.,
1335 Land Title Building,
Philadelphia 10, Pennsylvania.

June 13, 1947.

Designation of Contents of Record on Appeal of Central-Illinois, *et al.*

Designation by Appellees, Central-Illinois Securities Corporation and Christian A. Johnson, of Additional Portions of the Record, Proceedings and Evidence to be Included in the Record on Appeal from the Order of the District Court Dated May 29, 1947.

(Filed June 18, 1947)

To the Clerk of the Above Named Court:

You are hereby requested, pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, to include in the record on appeal from the order of the District Court dated May 29, 1947 in the above-entitled proceeding, the following additional portions of the record, proceedings and evidence, in addition to the portions of such record, proceedings and evidence heretofore designed by the appellants:

1. Transcript of hearing before the Dstrict Court held May 26, 1947.
2. Transcript of hearing before the District Court held May 29, 1947.
3. A copy of this additional designation.

Dated, June 17, 1947.

Guggenheimer & Untermyer,
30 Pine Street,
New York 5, N. Y.

Herbert L. Cobin,
4028 DuPont Building,
Wilmington 41, Delaware.
Attorneys for Central-Illinois Securities Corporation and Christian A. Johnson.

Designation of Contents of Record on Appeal of Central-Illinois (Cont'd)

To:

CALEB R. LAYTON, III, Esq.
Industrial Trust Building
Wilmington, Delaware

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Transcript of Hearing on Plan Held May 26, 1947.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY.	Civil Action No. 995.

Wilmington, Delaware,
May 26, 1947.

BEFORE:

Hon. PAUL LEAHY, U. S. District Court Judge.

APPEARANCES:

HARRY G. SLATER, Esq., and BERNARD S. KANTON, Esq., for the Securities and Exchange Commission.

WILLIAM E. TUCKER, Esq. and PAUL D. MILLER, Esq., of Mudge, Stern, Williams & Tucker, of New York, for Engineers Public Service Co.

CALEB R. LAYTON, III, Esq., and FRANCIS H. SCHEETZ, Esq., of Philadelphia, Pa., for Home Insurance Co. and other Preferred Stockholders.

FREDERICK ZAZOVE, Esq., of New York, for Thomas W. Stre[illegible]er, Dissenting Minority Director of Engineers, and Preferred Stockholders.

Slater

ALFRED BERMAN, Esq., of Guggenheimer & Untermyer, of New York, for Central-Illinois Securities Corporation and Christian A. Johnson, holders of Common Stock.

WILLIAM ESBITT, Esq., of New York, for Common Stockholders.

Mr. Slater: If your Honor please, we have for presentation and signature this morning a form of decree in the Engineers Public Service case. Copies have been furnished to all counsel of record and notice given of the hearing on the entry of the order this morning.

The order attempts to accomplish what your Honor is aware we have tried to work out here from the very beginning; namely, the preservation of the litigation position of all parties with respect to the only portion of the plan which was ever in dispute, and yet allowing the company to go forward with those portions of the plan which this Court has found meets the tests of the statute and which no persons in interest have disputed.

There are two changes in the order which have been suggested by Mr. Scheetz, counsel for the preferred stockholders. I don't have the precise language here. I believe Mr. Tucker is in the process of writing it out, but I would like to call your Honor's attention to it.

The first is in the paragraph numbered one on page 3, where it has been suggested that that "except" clause be cross-referenced with appropriate language to paragraph 8, the very last paragraph on page 6, where in clause No. 2 the Court, it is proposed, will reserve jurisdiction to enter its findings of fact and conclusions of law with respect to the disputed aspect of the case.

Slater

The Court: The only reason I suggested that that be included in the order was that if an appeal is taken under Rule 52 I am required to make those findings. If no appeal is taken I have no desire to file findings of fact and conclusions of law.

Mr. Slater: I think I can state that appeals will be taken.

The Court: Yes.

Mr. Slater: The other change in the——

The Court: That is not a matter of substance; that is only a matter of draftsmanship to cure ambiguity.

Mr. Slater: That is all, your Honor.

The other is not a matter of substance either. It is at the end of paragraph 6 on page 5, paragraph (b) of paragraph 6, which talks about the rights of the preferred stockholders. In respect of the deposit of the amounts the plan provides not only for the deposit, but notice to the preferred stockholders of the intention to make the deposit. We want to include in there also language of the giving of the notice. I think the plan provides for five days prior notice to the preferred stockholders of making of the deposit.

There has been filed in this Court—at least we have received copies of a suggestion in a memorandum in support thereof regarding the placing of the escrow funds, $4,000,000, I believe, by Mr. Boehm, counsel for common stockholders, a suggestion that the escrow funds be invested by the escrow agent in short term Governments, which would earn a return of seven-eighths of one percent or one percent, thereby accruing to the fund some $40,000 a year and to the ultimate beneficiaries of the fund. While we have no objection in principle to putting idle funds to work, we do not urge that the objections of the company to subjecting these funds to any possible risk whatsoever be disregarded and that this Court should require the company to work the escrow out in that manner. I know that Mr. Tucker has given consideration to that

suggestion. I don't think the company goes along with it. If your Honor has some doubts as to whether it should be required, I believe Mr. Tucker is prepared to address the Court on that point.

The Court: Is Mr. Boehm here in support of his suggestion?

Mr. Esbitt: I am here representing Mr. Boehm.

Mr. Slater: There has been one minor change in the printed form of the escrow itself which is annexed to the form of the order which I should like to call to the Court's attention. On page 2 of the printed form of the escrow, paragraph (b) at the top, clause No. 2 originally read as presented at the time of the hearing that timely appeal has been made by a holder or holders of preferred stock of Engineers. That has been changed to read that timely appeal has been made. The reason for that change is that the Commission, if it is an appellant, should be included in what that clause intends to accomplish, and the same results should follow in the event of a Commission appeal from an order such as here will be entered as will follow if the holders of preferred stock appeal.

The Court: Is that change made in the copy sent me, Mr. Tucker, after the hearing?

Mr. Tucker: Yes, that change has already been made in the printed copies that are being presented here this morning.

Mr. Slater: The change is included in the copy attached to the Exhibit 1 to the order. On the last page, if your Honor please, there is a new paragraph No. 10 which was not in the original draft. No. 10 reads, "Any dispute as to the duties of the escrow agent hereunder shall be submitted to this Court," and so forth, all pursuant to the jurisdiction reserved in the plan. We think that is inherent in the situation anyway. The setting up of the escrow is a device which this Court is employing. The usual injunc-

tive provision of the Court's order makes this Court the exclusive forum for any disputes which might arise in connection with the confirmation of the plan, so we put it in there out of an excess of caution.

The Court: I would like to place a question mark on those remarks, Mr. Slater. While appeals are pending and once the record leaves this Court I have serious doubt as to whether I can do anything with respect to the escrow agreement, because that is an essential part of what is going to be reviewed.

Mr. Slater: That is correct, your Honor. We did not have in mind that situation, however. We had in mind this situation: Suppose appeals are taken and decided one way or the other and then the escrow agent begins to perform his function in accordance with that appeal. Disputes may arise as to just what the obligations of the escrow agent are, and we think they ought to be settled in this Court. That is all we have in mind. Perhaps No. 10 ought to be clarified so as to be confined to that situation, but we certainly agree with what your Honor has said.

The Court: My interpretation of the language as suggested would be it could only include what you just referred to, so I don't see any point unless you want to.

Mr. Slater: I believe that is all I have unless your Honor has some suggestions.

The Court: No, I haven't any.

Mr. Slater: Since there will be an appeal or appeals and therefore proposed findings of fact and conclusions of law by the Court are necessary I should like to raise while all counsel are here the precise manner in which your Honor desires that that be done. For instance, I don't know that your Honor intends to hear counsel on each other's proposed findings of fact and conclusions of law or whether your Honor desires, indeed, for all counsel to submit proposed findings, whichever side of the Court's decision they

happen to be on. We thought that that might be settled this morning.

Mr. Zazove: If your Honor please, before you get to the question of findings I would like permission to be heard on this order.

The Court: Come forward, Mr. Zazove.

Mr. Zazove: By telephone I communicated to Mr. Slater the fact that the preferred stockholders and the Director of Engineers, Thomas W. Streeter, whom we represent, had objections to this order.

The Court: Before you proceed I want to eliminate matters that are not in controversy. As I understand, there is no objection to the proposed amendment to paragraph 1 on page 3?

Mr. Slater: I haven't heard of any, your Honor, other than Mr. Zazove's objections that I haven't heard of at all except they go to the whole order.

The Court: I see. Then as to the matter to be added to (b) on page 5 there will be a controversy concerning that?

Mr. Slater: Not that I know of, your Honor, no.

The Court: You may proceed, Mr. Zazove.

Mr. Zazove: My objections go to the entire order rather than any particular portions of it. I have prepared here a short memorandum which I hope will be helpful to the Court. It is our position, your Honor, that under the scheme of the Public Utility Holding Company Act that in view of the Court's decision and the opinion in this case that the proper form of order that should be entered would be one denying enforcing of the plan. We have other reasons for asserting that this order should not be entered.

The second one is if the Court adopts and approves this escrow which apparently this draft of order purports to do, that the effect of that will be to have this Court rewrite the plan that was approved by the Commission and

submitted to you. In your opinion you stated that the plan had been amended by supplementary proceedings to include an escrow. It is our position that that is not what happened. The theory of the Commission and the company was that the Commission was merely making anticipatory findings in order to give the company tax relief under Supplement R of the Internal Revenue Code in the event that this Court saw fit to impose an escrow in this situation. We have always contended that the plan has no provision for an escrow; therefore the order is what is putting it into the plan and we think that constitutes a rewriting of the plan. In effect, that is a different method of consummating the plan than was proposed and approved by the Commission.

In the recent Alton case in the Seventh Circuit a similar situation arose where a plan provided for its consummation by the managers following the approval of the plan by the Interstate Commerce Commission and the security holders and the Court in the interest of speed substituted "trustees" for "managers."

The Court: Refresh my recollection on the present record. Didn't the Commission take action with respect to the escrow?

Mr. Zazove: Only insofar as making anticipatory tax claims are concerned. It did not purport to approve or adopt a plan. They specifically said in their findings that this plan does not have to be amended to include the escrow, but the Court has the inherent equitable powers to do that; so it is obviously their theory that the plan contains an escrow. It is our conclusion that we have been deprived, therefore, of an opportunity to be heard on it both before the Commission and before the Court. We were never consulted about the terms of the escrow. If your Honor remembers, an escrow was submitted to you after the hearing in the form of a letter from Mr. Tucker. We did not

think the escrow adequate to protect our rights and we have never been heard on it, and we think if the Court adopts this thing now at this time with the changes that that is a substantial amendment to the plan and does not comply with the Act.

I can detail some of these changes to you. The way the plan was presented to the Commission it was proposed to retire the preferred stock at the call prices. This was to be done in two ways; one by an exchange of the preferred stock at the call price value for Gulf States stock or, two, by payment in cash therefor. There wasn't a word in the plan and there still isn't about an escrow or about an alternative method of effectuating the plan. That all came about subsequent to the Commission's order approving the plan when it appeared that the common stockholders for the first time might contest this thing, and the whole purpose of what the Commission had done and said in its supplemental findings was that in the event that the common stockholders wanted to appeal from an order, the escrow was supposed to take care of their rights. It was not until we got into Court and the Court's opinion came out that we came to the point where the plan in its terms was being rewritten.

Now, a preferred stockholder instead of getting a hundred dollars and his call price in cash or instead of being able to turn in his stock at the call price, he is being given a hundred dollars, or he can only turn his stock in for a hundred dollars and he gets a lawsuit for the balance. We think that is a substantial change; if it is going to be made it should have been made before the Commission in the first place.

It is our view that under the Public Utility Holding Company Act this Court is a reviewing body, that your jurisdiction is to approve or disapprove what happened before the Commission. The plan the Commission approved required the company to pay the call prices. The Court in its findings and its proposed order disapproved

that part of the plan; so you can't say that you have got both the Commission and the Court approving it.

There are several decisions that we have cited in this memorandum indicating that the Court's power is to approve or disapprove, and what this order purports to do is to approve in part and disapprove in part.

The second objection we have to it is we don't think the Court has the power to enter an order terminating the rights of the preferred stockholders without making findings. If you will read that order carefully you will find it says in there that all the rights of the preferred stockholders are terminated when this order is entered except as specified in the order; and those paragraphs which are included in the order constituting an amendment to this plan were never submitted to the Commission; there was never a hearing on them; we never had an opportunity to be heard about it. We think under those circumstances that the Court is limited to entering an order denying enforcement because it has failed to approve this plan, and the statute requires that action for enforcement.

Another reason we think makes this order defective is Rule 52(a) of the Rules of Civil Procedure requires that the Court make findings of fact and conclusions of law before entering an order.

We don't think that this plan can be divided up into two parts the way they are attempting to do it. For example, suppose somebody objected to issuing warrants, which is just another part of the plan. I don't think that the Court would say he could substitute his own judgment for what this plan ought to do and say, "I don't like warrants; I want you to sell the stuff at competitive bidding or pass it out as dividends in kind." If you were attempting to change that part of it you would have a different plan, and under those circumstances it would not be the same plan as approved by the Commission.

Slater

If this order is entered, reserving jurisdiction over findings of fact and conclusions of law, the preferred stockholder is placed in a position where we may have an interlocutory order. We can't tell whether the company proposes to go ahead with it at all, except that portion of it which specifically provides that the preferred is to be retired. Without findings of fact and conclusions of law we don't know what the Court of Appeals is supposed to be asked to review. Specifically this order says that the opinion is to be deemed as findings of fact and conclusions of law. We cite some cases in our memorandum where it has been held to be ambiguous and doubtful whether the opinion could be used for that purpose.

We think also that this talk about reserving the problem of writing findings of fact and conclusions of law makes the whole thing too uncertain and so indefinite, and that together with the other reasons I have stated that the chances of this order being sustained on an appeal, without regard to the substance of it but merely as to the procedural mechanics, is highly doubtful; and we are asking that the proper order be entered, which we feel is an order denying enforcement because the Court failed to approve the plan. From such an order which is final and reviewable all parties can be heard and their relative rights determined.

Mr. Slater: Does your Honor want to hear me in reply?

The Court: Yes. We will have full discussion, so whoever wants to speak can speak.

What about the precise language of Rule 52(a) as suggested by Mr. Zazove?

Mr. Slater. It is quoted on page 12 of Mr. Zazove's memorandum.

The Court: "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." I gives me difficulty.

Slater

Mr. Slater: You mean you have some difficulty as to whether you should enter an order in advance of——.

The Court: Of signing findings and conclusions.

Mr. Slater: Well, we certainly would not insist on this procedure if it gives your Honor difficulty. We think that every means ought to be devised by counsel——.

The Court: I will be quite frank with you. That is the question that bothers me. Now, if I could sign findings then I would enter this order. I am not certain that I can go along with Mr. Zazove that the order to be entered should be an order of disapproval, because I think this plan is separable; and while it may be a truncated order, nevertheless I still think it would be good.

Mr. Slater: We think so too, your Honor. We think that what your Honor is asked to do here is to resort to an equitable device which is inherent in the powers of an equity court, and it is a situation which we now have which the Commission said would be all right with it; namely, that the escrow arrangement should be set up here under the aegis of the Court if, as, and when it appears that it is necessary; and, of course, nobody had a hearing on it before the Commission because there was no escrow set up before the Commission. Mr. Zazove had a hearing here on February 17 and on the terms of the escrow. Your Honor passed on those arguments which he advanced in your opinion, and he has opportunity further to be heard today on the terms of the escrow. He could go on and argue further on the points which he has raised, but if your Honor wants to hear further argument on the 52(a) point I see no express language there which talks about the conclusions of law having to come prior to the entry of the decree. They certainly must be stated separately. You see, your Honor, 52(a) also would seem to be directed to a situation where the Court sits as a fact-finding tribunal in the sense that a jury sits.

Slater

The Court: Yes, I have no doubts as to whether I should find any at all. The same problem has arisen in those cases where three judges sit in the District Court reviewing an Interstate Commerce Commission decision. All we do is look at the record which comes up from the Commission. In the last case in this court Judge Biggs, Judge Maris, and I sat, and we discussed that among ourselves, the necessity of making findings, and we could not arrive at any conclusion; so we said, "Well, the thing to do is to file them anyhow." We then asked the prevailing party to prepare the findings and we accepted them and signed them. But there is doubt in the minds of some judges as to whether 52(a) would apply to a Section 11 proceeding.

Mr. Slater: We would suggest if the prevailing party could get up proposed findings in a day or so that perhaps that course might be pursued; but if we are to have an opportunity to be heard whether the findings proposed by the prevailing party ought to be the findings that your Honor ought to adopt, I am afraid there will be interminable delay in terms of the program that is confronting this company. If your Honor is not convinced that 52(a) is applicable, and it certainly does not appear to be applicable to this situation by its terms, I should think the same equitable result in terms of causing further delay and the jeopardy to the entire program in terms of the current market conditions ought to prevail here, especially since your Honor has an opinion——

The Court: It is my observation whenever you are in doubt as to a procedural matter like that, if you decide to go ahead and not wait, sometimes you are reversed; and it takes longer to review the situation than if you had done it in such a way as to clear any ambiguity in the first place.

The point is I have no strong feeling about these matters one way or the other. It would seem to me it would be the litigants who would want to see that they are pro-

tecting themselves. I don't see why the prevailing party could not submit to me proposed findings and if I think they are acceptable sign them, because I have been through this. A trial has been had.

Have you any thought on the matter, Mr. Berman?

Mr. Berman: No, your Honor. I was going to suggest that on the matter of submission of the proposed findings I would think if all counsel are going to have the right to be heard, as Mr. Slater indicated would be one of the possible procedures, it would be a rehearing of the entire case, and that doesn't make sense.

We already have in preparation proposed findings since it was communicated to us that they might be wanted, and our method of procedure is to annotate every finding to the record in such a way that your Honor would be able to check with facility the support in the record for every statement made, and we thought that we would not serve them on any parties. Your Honor would examine those, satisfy himself that the findings are supported by the record and that they agreed with his opinion, and I would think we could get our proposed findings in here by the end of this week. I would think by Friday if all goes well.

But on this question of 52(a), if your Honor will permit me to say a word on that, I would like to suggest that after all the proposed order which is now before the Court does—in that order the Court does make findings of fact. It is true it does not specially state separately conclusions of law thereon, but what the Court does here is to adopt the findings of the Commission as its own in all respects except as the Commission's findings related to and bore upon the question of premiums.

As I envisage what occurred here is that actually the plan has been split into two portions. We have this portion with respect to the payment of a hundred dollars a share and the carrying out of the remaining portions of

the plan and the establishment of the escrow. That is what your Honor is entering his order on now. The proposed order does not say that the premiums are specifically disapproved. It merely says that they are not approved and the remaining portion of the plan is approved. On that portion it seems to me that your Honor has made findings of fact and conclusions of law in adopting those of the Commission.

Now, upon submission of the proposed findings on the premium question, if your Honor adopts those and signs them, then he would enter his decree, we would suggest, specifically disapproving the payment of the premiums, and that would be the decree on that portion. I had thought that that is what we were doing, splitting the plan into those two portions so that they could stand up on their own feet, and that, as I understand it, was the scheme of the Electric Bond & Share plan which was approved by the District Court in New York. That is, you had the initial plan providing for the payment of $100 per share. That was approved. The plan provided for termination of the dividends on that amount. You had the issuance of the stub to the preferred stockholders giving them a right to any additional amount found fair and equitable at some later point, and the first portion went ahead. The Court found it was fair and equitable. Dividends were terminated on the hundred dollars a share. I thought we were essentially amending this plan to adopt the same essential outline.

Now, I do feel that perhaps just to keep the record clear, and since Mr. Zazove has raised the point, that counsel for the company might very well file with this Court either as part of the record the specific amendment to the plan specifically stating that the plan is hereby amended to include this escrow provision. It is true that some of that amending process took place by statements in court, by

letters of counsel, and it would seem to me so there would be no doubt about it that the specific written amendment should be filed.

I would also like to suggest, if your Honor will permit me, Mr. Zazove indicates at this time that the establishment of the escrow fund is something which is very troublesome to him, yet as I read the Commission's supplemental findings of January 9, 1947 it states, "The preferred stockholders of the Streeter group"—that was counsel for the Streeter group, Mr. Condon and Mr. Zazove—"have expressed the fear that the amended plan does not afford adequate protection of their interests in view of the opposition now expressed to the treatment of the preferred and the possibility that some objecting common stockholders may elect to litigate the matter. They have accordingly urged that the plan be further amended to include an escrow provision similar to that outlined in our previous opinion to protect the preferred in the event of litigation."

So, as I understand it, if the Commission's supplemental findings correctly state the course of events before the Commission, it was Mr. Zazove and his associate who urged that an escrow fund be established.

Then the Commission goes on to say it makes a specific finding of fairness with respect to the establishment of that escrow fund, saying, "Only at this stage, and in such event, is there any need to consider the necessity of an escrow arrangement. In such event, to achieve expeditious compliance with the Act and fairness to the persons affected, it would be appropriate for Engineers to make prompt payment of $100 per share and accrued dividends in order to stop the accrual of further dividends, and set up an escrow arrangement, along the lines suggested in our previous opinion, to protect the interests of the various groups."

Zazove

So that you have a specific finding of fairness by the Commission with respect to the establishment of the escrow fund if it is set up, and therefore I don't think Mr. Zazove is accurate in saying that all that the Commission was to make findings as to tax consequences. It made an anticipatory finding of fairness of this plan to include an escrow provision and the termination of all dividends on the hundred dollars principal amount on payment of that amount; and it seems to me the escrow provision and the escrow fund provided is consummate with the Commission's opinion "along the lines suggested in our previous opinion" to use the Commission's words.

As Mr. Slater said, copies of the escrow arrangement were distributed to counsel at the time of the previous hearing. We all had an opportunity to examine them. The amendment made since that time has been slight. The amended escrow arrangement was in the hands of counsel prior to the submission of their briefs to your Honor; so that Mr. Zazove had an opportunity to be heard in his brief at that time and has the further opportunity now.

It seems to me that Mr. Zazove is standing on a highly technical position which is not supported on the merits, and I urge again on the question of the findings that your Honor consider the feasibility of regarding the Commission's findings as compliance with 52(a) with respect to the entire portion of the order save as to the payment of premiums.

The Court: I so intend to accept those findings. This order so provides.

Mr. Slater: Paragraph 1 so recites.

The Court: That is right.

Mr. Zazove: Mr. Berman came into this case after it left the Commission. He apparently did not read our brief that we filed with this Court. That statement in the Commission's supplemental findings is entire inaccurate and is pointed out in our brief that we filed with this Court.

Zazove

The situation which actually occurred was as follows: Following the Commission's order or findings in which it disapproved the payment of the hundred dollars the company filed an amended plan in which it provided that it would pay the call prices, but the Commission had also indicated in its first findings that in the event there was any delay in paying the full amount that the preferred stockholders were to be paid additional compensation for the delay. Under the terms of the plan the company proposed to deposit the call prices with a bank and to immediately pass out practically all of its assets to the common stockholders. It was for that reason that Mr. Condon went down to the Commission and pointed out that the plan did not comply with the Commission's findings, because there was no provision for additional compensation in the event of delay. That was the escrow that Mr. Condon was talking about, and Mr. Berman misleads the Court when he tells you that is this escrow.

The Electric Bond & Share case up in New York has nothing to do with this case. That was a plan filed with the Commission proposing to pay $30 on the preferred stock, and the Commission approved it and they went to court to enforce it, and months later when the company acquired some more money they came in and asked for permission to pay another $70, and the Commission approved that and they went back to court to enforce it, and in that case they gave the preferred stockholders some stubs to indicate their interest in the proceedings, and those stubs can be sold; they have a value. This plan does not give the preferred stockholders any indicia of ownership whatsoever. It is just an indication of the fact that we have never been heard on this escrow. It was submitted to the judge after the hearing. There was no notice sent to the stockholders about it. The escrow is supposed to take care of fees and expenses. The amounts that were included in

that escrow was at a time back before the Commission before we had five other lawyers in the case.

Those are just indications that the preferred stockholders have never been given an opportunity to be heard as to the adequacy of the escrow arrangement.

In addition to that there has always been the issue in this case as to whether the common stockholders had the right to separate this plan so as to terminate the dividends of the preferred stockholders. Originally the plan was written in two parts. It said Part I and it said Part II. The company made a motion to the Commission two years ago asking the Commission to separate the plan so they could stop the dividends. The Commission turned them down. The company filed a new plan in which it took out parts I and II. It was no longer separable but was a single piece of yarn. This is all a last-minute occurrence, this separability stuff.

The Court: Did you wish to be heard, Mr. Esbitt?

Mr. Esbitt: Yes. With respect to the proposed findings of fact and conclusions of law I think rather than burden the Court with two sets, one from Mr. Boehm's office and one from Mr. Berman's office, I was going to suggest that we get together and submit joint findings of fact and conclusions of law from both offices.

The other point Mr. Boehm wished me to make to the Court was with respect to the deposit of $4,000,000. We submit it would be a waste of the funds of the entire corporation to have this amount in cash deposited with the Chase Bank, and we suggest rather than that being done that the $4,000,000 be invested in short term Government securities. While they don't have a large rate of interest, somewhere about seven-eighths of a percent, still it would be better than idle funds. We don't know how long this litigation may continue. It might be a year or two years. The interest rate of one percent or even a little less would

result in $40,000 per year for the benefit of the corporation. It has been suggested that there is a slight risk. I submit to the Court that the risk of these short-term Government securities is so slight that it could not possibly under any circumstances wipe out the interest that would be earned by this $4,000,000, and we think it to the benefit of the corporation and all the parties concerned that the money be invested in the short-term Government securities.

May I submit a short memorandum with respect to that and a proposed order which modifies the submitted order only to the extent that the money be invested rather than deposited in cash.

Mr. Tucker: It is undoubtedly to the interest of the company to get an order entered here which will at least survive the stay period. If there is any point of substance to be raised in the Appellate Court or procedure which would lead to a setting aside of the order or a stay of the order so that we could not go forward with the distribution of the Gulf States stock that would be a serious matter. As I told the Court on the original hearing, this is a market operation. This company is selling the Gulf States common stock and has fixed a price on it of $11.50, and in order for it to be a successful operation the rights which are issued, the so-called warrants, must have some value of sufficient basis so that people will want to buy or sell the warrants if they don't care to exercise them themselves. It is vitally important that that operation be carried out at the earliest possible moment.

On the assumption that an order was to be entered last Thursday or Friday, whenever the time was that the hearing was originally set for, we had assumed that we would take a record for the distribution of the warrants as of June 4 and they would be mailed on the 5th, and that within sixteen days they would expire or have been exercised, and that the operation would have been completed. The com-

pany has been terribly concerned with the weakness of the market and views with a great deal of mental disturbance the possibility of any further delay for fear that the market may get so much worse as to make the operation impossible.

The Court: Well, we have to make a choice, Mr. Tucker. What is it to be?

Mr. Tucker: I realize that fact, and in view of your Honor's apparent doubt about the situation as to whether it is necessary to make findings of fact and conclusions of law prior to the entry of this order I was going to suggest that we do that, but that all possible speed be made in connection with them.

Somebody suggested that they might be ready with them on Friday. Of course, Friday is a holiday. I presume it is a holiday in Delaware, although I don't know. So Friday is not the day, and by naming a day of that kind I had hoped that they meant they could bring them in and your Honor could see them and we could get them settled and back of us.

The Court: I am in this position, Mr. Tucker: I would not hesitate to sign the order as it is today with the amendment suggested by Mr. Slater, and then after Mr. Berman and his associates for the common stockholders, namely, Mr. Boehm and Mr. Esbitt, submit their findings, I would sign an order on them. I am quite willing to do that, but I put the question as to whether, if my action is undone by the Circuit Court, it is going to mean more real injury to the company and all the stockholders if we do that. It is a choice that has to be made by someone.

Mr. Tucker: All right. I was attempting to tell the Court I thought we ought not to take the risk involved, but I was urging on the Court at the same time that speed be exercised and that we don't further delay this market operation in the face of a critical market condition, and

Scheetz

I was wondering whether it would not be possible—I know that Mr. Berman has been working on those findings, because he came to the company office to get some material in connection with them, and it may be that they are in better shape than he has perhaps intimated, and perhaps on Thursday at some time he would be able to get together with Mr. Boehm's representative here and present them and we will all be here.

The Court: Well, Friday is not a Federal holiday. It is a State holiday.

Mr. Scheetz: It has been our purpose here, representing the Home Insurance Company and other groups of preferred stockholders to expedite this all we can and not take any procedural position whatever which would interfere with that. I haven't done anything on request for findings of fact, because, frankly, I expected that this order would be signed and we would have a little more leisure to do that. I think it is correct to say that your Honor's opinion has some rather expansive statements in it and the way the order is worded it says "Jurisdiction is reserved as to matters which are inconsistent"; and while I had not reached any final conclusion it seemed to me that put the burden on us of putting a rather detailed request for findings of fact.

The Court: This Circuit has held, Mr. Scheetz, that you don't have to put everything in the findings; it is only the ultimate facts.

Mr. Scheetz: That is true. It has been my further thought that assuming that the Commission were going to appeal, they could standardize those findings of fact and save time of the Court by not multiplying them or duplicating them. Under the commitments I have made for this week I don't see how I could meet a date of Thursday or Friday.

Scheetz

The Court: Mr. Berman and Mr. Boehm are going to submit me findings, and those are the only findings that I am going to be interested in. They support my view that the premium is not to be paid in this case. That is as far as I am going.

Mr. Slater: I suppose under that arrangement, your Honor, appellants would be free to urge, for example, that a finding that your Honor made had no basis in the record.

The Court: That is right.

Mr. Slater: We would not be bound by those findings because we did not have a chance to be heard.

The Court: That will be your target.

Mr. Slater: Yes.

The Court: I don't understand your suggestion, Mr. Scheetz.

Mr. Scheetz: For example, there are some affirmative findings in your opinion which go to the support of the preferred's position.

The Court: Wouldn't you attack those on appeal?

Mr. Scheetz: No. On the other hand you disregard everything which is inconsistent with that finding. That goes pretty far. I don't know whether the findings as presented by the common stockholders will cover every specific point, so that there may be some major points which when we go up will have a finding by the Commission but no finding whatever by the Court except insofar as they are inconsistent with your opinion, and that is what made we think it needed some study and possibly the presentation of points by the preferred stockholders; but if your Honor does not propose to rule on any submissions by the preferred stockholders then, of course, we would not do it.

The Court: In other words, you want to take a draft of the proposed findings as submitted by the common stockholders and you want to examine them and say as to finding of fact No. 7, for instance, you think there is no basis in the record and you want to argue about that?

Tucker

Mr. Scheetz: No, I don't. There may be some facts which are not referred to in the opinion and not covered in the findings as presented by the common stockholders, and then the only thing that we have to go on is the present opinion which says, in effect, that you negative everything that is inconsistent with your opinion.

The Court: But on appeal can't you point to the record that is before the Commission and say "This is where the fact is and the Court disregarded it"?

Mr. Scheetz: Yes, I suppose so, but certainly I am not going to take any position which would interfere with advancing it, and under those circumstances I think even if I presented any at all it would only be one or two major points.

The Court: As far as the time schedule is concerned you are out for this week?

Mr. Scheetz: I can't touch it until Wednesday, and I probably could get something down here on Thursday, but I am not going to be happy about it.

The Court: Well, suppose we take a five-minute recess and you gentlemen can decide.

(At this point a brief recess was taken.)

Mr. Tucker: If your Honor please, perhaps it would be just as well if Mr. Berman would state the kind of program he thinks he can meet. As I understand it—he can correct me if I am wrong—I guess I am speaking for Mr. Esbitt also—Mr. Berman feels that he can get the findings, as he said, documented for ready reference and checking either mailed on Wednesday or delivered to the Court Thursday morning. I think the problem that we face then is how long the Court is likely to want to check them.

The Court: I will give them my immediate attention. I think I can do it in a day.

Mr. Tucker: You think you can hear counsel within a day, say either on Thursday or some time Friday morning?

The Court: I find now whatever the law is generally, this Circuit has made Memorial Day a holiday. We have a letter from the Judicial Council to that effect.

Mr. Tucker: Would it be asking to much to hear us late on Thursday?

The Court: I will do that, yes.

Mr. Tucker: At the same time, of course, this order should be put in final form and signed after the findings of fact.

The Court: I think before we arrive at a tentative conclusion we better get rid of the short terms under the escrow.

Mr. Tucker: Yes, I think so, too, and I would like to speak to that subject now, if I may. If we are going to change the form of the order substantively I think it ought to be done and gotten in good shape and have some copies available.

This thought of investing the escrow funds is not a new one with Mr. Boehm. The company thought of it——

The Court: What do you mean by "short term"? Six months, a year, two years?

Mr. Tucker: What Mr. Boehm practically has suggested is governments having a maturity not more than three years from the date of purchase. I have some suggestion, but that is what he means, and it is specifically so stated in his amendatory order which he handed to the Clerk.

To give you the background on this thing, we had suggested a secured fund in the first instance and had suggested a pledge of a very considerable amount, whatever amount the Commission might fix, of the stock of Virginia Electric & Power Company, which is one of the subsidiaries, on the theory that we would delay distribution of that stock until the end of the dissolution and liquidation of Engineers; so that any amount of that stock, which had a value of some-

where in the neighborhood of $45,000,000, which is a very large amount of money, it would have been we were offering security of a very considerable amount for $4,000,000 and saying to the Commission "How much of it shall we pledge here to pay?" The Commission said "No, this is a cash fund. Its requirements may become necessary at any time. When they become necessary we have to have the cash right now and we don't want that kind of thing. We don't want the fund invested. We want it deposited in cash."

Now comes along the suggestion that we put it into governments. Now, as a matter of fact, the interest rate is very small. There is some risk of fluctuation; there is some risk of loss. As this thing works, so the bond people tell us, you can put in your subscription for these short-term governments, and they are over-subscribed perhaps fifty or sixty percent, and that means they immediately go to a premium. The escrow agent is not in a position to speculate with this fund. It can only subscribe for what it has to actually invest or reinvest and it can't over-subscribe the way the others do. It will have to, when it gets to maturity of some of these short-terms pay the premiums and it may be you are going to a certain extent, not seriously, perhaps, impair the fund.

The company's position is that there is not a sufficient amount to be gained the way the market on those things operates, and considering the character of the fund we think that it ought to be deposited in cash and ought to be forever ready immediately to be turned loose for the purposes for which it is set up.

In any event, if we are to invest in governments the company has to suggest that we don't take the three-year maturities, but we take the one-year maturities, on the theory that you have much less risk in the one-year maturities than you have in the three—that is, not longer than one year from the date of purchase.

Slater

Now, another point, as Mr. Boehm suggested changing this, he suggested that we buy the bonds in the first instance and deposit them. If we are going to do it at all we ought not to do it that way. We ought to deposit the money and let the escrow agent do it, so that there will be no question but what we have deposited the cash. We ought to deposit the cash and let the escrow agent buy the bonds.

Now, I hate to be technical about it, but I am not sure that in view of the fact that the Commission has specifically considered an invested fund as contrasted with a cash fund and has decided on a cash fund that we ought not to stick to a cash fund, and I don't think there is a sufficient amount to be gained in interest to compensate for the possibility of some loss in the administration of the fund, and I would hope the Court would leave it on the basis of a cash deposit.

The Court: I don't recollect you said what your position was, Mr. Slater.

Mr. Slater: It is our position that we don't object in principle to investing this money in short-term governments, but we don't think the Court ought to require that this be done over the objection of the company who, to a certain extent, is acting as a stakeholder here.

The Court: I don't mind being the judge to review this plan, but I hate to be the company's investment counsel.

Mr. Slater: That is our position.

I would like to take very slight issue with Mr. Tucker on what the Commission had to say about a stock escrow fund. The Commission turned down the proposal that, I believe, then fifty-five or sixty million dollars of Virginia stock be escrowed, not only because that was wholly unreasonable to the relation to the ultimate obligation here, but it would impede what everybody wanted to get here, and that was the speedy dissolution of Engineers and distribution of the assets to its stockholders. It did not seem feasible to the Commission to tie up that major asset

having a value of that amount because of the need or desirability of an escrow fund. So our position is, in effect, similar to the company's in result. We don't think that the Court ought to insist upon it while we don't feel too strongly about doing it that way.

The Court: Well, I have some hesitancy in telling the company to do it when the company itself says that it prefers not to do it, and certainly those who have been with the company I think have more expert knowledge on a matter like that than I. So when you come down on Thursday I think your order should contain the amendments that you referred to this morning, Mr. Slater.

Mr. Slater: Yes, paragraphs 1 and 6.

The Court: I don't think I would approve a provision directing the company to invest in short-terms. If I am wrong in that the Circuit Court will quickly remedy it.

The common stockholders will present their findings to me by sending them in the mail and I will go to work on Thursday morning and I don't see why I could not be in a position to meet with all counsel at three o'clock Thursday afternoon.

Mr. Berman: Your Honor, I am somewhat disturbed about the fact that despite all the hearings we have had and the briefs submitted Mr. Zazove is still here arguing that he has not had a hearing on the merits of the escrow fund. He talks about procedure and then he refers to his objections to the escrow fund on what I would think were the merits and then he concludes by saying that what he has been talking about after all is just procedure and he has not had a hearing on the merits. We think he has, but to eliminate any question of doubt on that and so that Mr. Zazove is not going to be able to come to the Circuit Court and say "Although I pleaded with the judge to give me a hearing on the merits and told him we never have had an opportunity to be heard, he would not do it" I would suggest that your Honor grant Mr. Zazove an oppor-

tunity right here and now once again to further state his objections not on procedural grounds, but on the merits to that fund.

The Court: I don't see how he can improve on the articulation as found in his brief.

Mr. Berman: I would have thought so, but since he said that is merely procedural and still says he has not been heard on the merits I think we ought to knock that prop out from under him and say, "Let us hear you on the merits." I think we ought to give him that opportunity and he should be required to take advantage of it here or forever after hold his peace.

The Court: I think between the time we had our hearing on February 17 and the time that he filed his brief he certainly marshaled every argument at his disposal. I so consider it.

Mr. Berman: That is my impression, your Honor.

The Court: I have nothing before me. The program as announced will follow through. I will see you gentlemen at three o'clock on Thursday.

Mr. Berman: Would it be of any assistance to your Honor if I were to bring the findings down Thursday morning and be available in case your Honor wanted me?

The Court: Yes, I think that is a good suggestion.

(At this point the hearing was adjourned to May 29, 1947, at 3:00 o'clock p. m., Eastern Daylight Saving Time.)

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

HARRY J. BLAN
Official Court Reporter
U. S. District Court

Transcript of Hearing on Plan Held May 29, 1947.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY.	Civil Action No. 995.

Wilmington, Delaware
May 29, 1947
Three o'clock p. m.

BEFORE:

HON. PAUL LEAHY, U. S. District Court Judge.

APPEARANCES:

HARRY G. SLATER, ESQ., for the Securities and Exchange Commission.

WILLIAM E. TUCKER, ESQ., of Mudge, Stern, Williams & Tucker, of New York, for Engineers Public Service Company.

CALEB R. LAYTON, III, ESQ., and FRANCIS H. SCHEETZ, ESQ., of Philadelphia, Pa., for Home Insurance Co. and other Preferred Stockholders.

FREDERICK ZAZOVE, ESQ., of New York, for Thomas W. Streeter, Dissenting Minority Director of Engineers, and Preferred Stockholders.

Transcript of Hearing on Plan Held May 29, 1947 (Cont'd)

ALFRED BERMAN, ESQ., of Guggenheimer & Untermyer, of New York, for Central-Illinois Securities Corporation and Christian A. Johnson, holders of Common Stock.

Mr. Berman: May it please your Honor, pursuant to your direction I have exhibited to all counsel copies of the original findings which your Honor instructed that they be shown.

The Court: Mr. Slater, you were about to rise to say something?

Mr. Slater: I was going to address myself to the order, your Honor.

The Court: To the order or to the findings?

Mr. Slater: As to the findings, if your Honor wants to hear counsel on that.

The Court: Why can't we take advantage of Rule 52(b)? Within the next ten days if you want to suggest any amendment to the findings you are at liberty to do so. I can sign the findings as they are today, and if there are any further amendments you want to make on them, tell me in advance so I can fix a day for you next week.

Mr. Slater: You mean we would have to study them and study the record, I suppose, to make any intelligent suggestions.

The Court: Rule 52(b) says, "Upon motion of a party made not later than ten days after entry of the judgment the court may amend its findings or make additional findings." So I don't think we are under any particular pressure this afternoon so far as the findings are concerned. After you go through them if you think there is something that should not be there or something that should be added, we will fix a date and have a hearing on them.

Mr. Slater: All right.

The Court: Does anyone else have anything to say with respect to the findings at this time?

Mr. Slater: I don't know, your Honor, how that program might work out in connection with the Appellate aspects of this proceeding. I understand that we are to be in the Circuit Court of Appeals on Monday in connection with an application for stay, if stay is denied in this Court. So that an appeal will have been taken, and it might be a little incongruous to go up there and argue the stay on the case as docketed.

The Court: How are you going to perfect an appeal by Monday? Simply appearing before the Circuit Court to ask for a stay does not mean that your appeal is perfected.

Mr. Slater: No.

The Court: You first have to file notice of appeal here, and your appeal is not an appeal as such until your record is docketed in the Appellate Court. So I don't think that would have any effect.

Mr. Slater: That may be correct, your Honor. I was just concerned with the possible question of the appellate jurisdiction having vested in how the ten-day rule would then operate. It would strike me offhand that the ten days is to be taken advantage of in advance of taking the appeal. Once an appeal was taken perhaps the privilege of 52(b) may have been waived. I don't know.

The Court: My point is that an application for stay is not taking an appeal.

Mr. Slater: Well, there will be a notice of appeal filed previously. I suppose there must be in order to get anything before the Circuit Court in connection with a stay petition. I understand that is Mr. Condon's program.

The Court: All right. I don't have a copy of the order.

Mr. Slater: I have one right here, your Honor.

The Court: There have been three drafts. I want to be certain this is the correct one.

Mr. Slater: I would like to point out the changes to which I understand there is no objection at least as to

form. The first is at the end of the paragraph numbered one on page 3. That has been revised to conform to what is now the fact; namely, the simultaneous filing of findings of fact and conclusions of law. The last clause after the date has been added after May 15.

The Court: Yes.

Mr. Slater: The next change is in paragraph 2. There has been added at the end of the first sentence the words "in such cases allowance or payment to the Engineers preferred stockholders being expressly disapproved."

The Court: Yes.

Mr. Slater: The next change is on page 5 in the paragraph lettered (b) at the end thereof, where there has been added "five days notice of intention to make such deposit having been given."

The Court: What was the purpose of that?

Mr. Tucker: Because the plan required five days notice to the stockholders so they would have an opportunity of having their stock in promptly. It was made at the suggestion of the preferred stockholders.

Mr. Slater: It is a provision in the plan.

The Court: Yes.

Mr. Slater: Paragraph 8 is the next and last one, your Honor, on page 6. The second half of the paragraph has been deleted. Originally that half of the paragraph reserved to the Court jurisdiction to enter the findings of fact and conclusions of law which it is now entering.

The Court: What did you have in mind by using the words "including the approval and any alternative methods meeting the cash requirements of the plan"?

Mr. Slater: Perhaps Mr. Tucker might speak on that. It has relation, as I understand it, to the current market and, of course, changes that might occur which might require some amendment. I suppose there would be further proceedings of an amendatory nature before the Commission and then we would be back here for a supplemental order.

I think paragraph 8 states simply what is the situation, anyway. I think the Court would have inherent jurisdiction to consider any suggested changes in the program or the plan.

Mr. Tucker: The exact suggestion was made by Roger Foster of the Commission's staff in view of the critical condition of the market and the fact that the company might be forced to go back to the Commission and, so-called, sweeten the warrant situation by the addition of some additional stock which might be included in the $11.50 per share.

The Court: Anything further?

Mr. Slater: May I make two very brief comments with respect to the findings, your Honor?

Of course, I have not attempted to check in reading this in the last thirty or forty minutes, but it occurred to me that it might be helpful to all of the parties in presenting this case in the Circuit Court of Appeals to have it clearly stated what your Honor has already stated in the original opinion; namely, that the present investment value of the stock is conceded to be $110.

Mr. Tucker: Well, with respect to two series——

Mr. Slater: Yes, with respect to the other one it is callable at $110 and with respect to the stock it is callable at $105.

On page 6, for example, of the findings in paragraph 16 you state, "In the hearings before the Commission the company contended that the proposed payment was fair and equitable." That was the payment of $100 as originally proposed. It was conceded by the company, however, that the investment value of the stock was equivalent to the call price. While making the contention that the hundred dollars was payable, they nevertheless conceded that the investment value was $100, and that was the testimony of Mr. Barnes, as I recall it. There never was any dispute before the Commission.

The Court: My understanding is simply because that fact is not noted in paragraph 16, that doesn't mean that you can't tell the Circuit Court that that is a fact.

Mr. Slater: That is correct, your Honor, but since you state it yourself in your opinion I was just suggesting, and not arguing for it or insisting on it, that it might make for clarity and convenience both if it were also in here.

The Court: You stated you had another comment?

Mr. Slater: Yes, it is at the end of No. 16, too, on page 7, the last sentence. It is stated there that the Commission gave its advance approval to any amendment. Now, used very loosely I have no objection to "amendment", but what did not occur and what has not occurred is that the plan has been amended. The Commission expressly refused to amend the plan and said if an escrow turns out to be necessary it can be done under the aegis of the Court, and we have viewed the escrow device simply as a device in connection with the mechanics of consummation.

The Court: In other words, you say that is not an amendment in the sense that Mr. Zazove uses.

Mr. Slater: Correct. I don't think it is our contention, at least, that Mr. Zazove has any legal argument to make, because he has no facts to predicate an argument on, because the plan has not been amended.

The Court: What is your suggestion?

Mr. Slater: "The Commission gave its advance approval to any arrangement which might be made in the District Court looking toward the establishment of an escrow fund," and so forth.

The Court: I am inserting the following: "The Commission gave its advance approval to any arrangement that might be made in the District Court to establish an escrow fund," et cetera.

Mr. Slater: Thank you, your Honor. That is all I have.

Mr. Zazove: With respect to the findings I just have one comment. I am not dissenting in these or agreeing in them, but I am making one comment with respect to inaccuracy which maybe the Court will be interested in: I think it is in paragraph 25, page 11, the second full paragraph on that page. It states there that as of February 13, 1946 "the

latest date covered by the hearing before the Commission." I believe that is an inaccurate statement because the Commission reopened the case in 1947 and reopened the record for the purposes of testimony, so that is not really an accurate statement. I don't care whether it is corrected or not, but I am just pointing it out.

The Court: What about it, Mr. Berman?

Mr. Berman: Well, that statement was taken from the Commission's Findings and Opinion of December 5.

Mr. Zazove: But the record was opened subsequently.

Mr. Berman: It may be that there was a subsequent hearing after the issuance of those findings.

The Court: Let us be accurate. "As of February 13, 1946" then strike out the "latest date covered by the hearing before the Commission."

Mr. Zazove: It is also in paragraph 32, your Honor.

The Court: The same deletion will take place in paragraph 32, line 2, where the word "the" will come out and on line 3 the words "latest date covered by the hearings before the Commission."

Mr. Zazove: On that same paragraph it says, "On February 17, 1947, the date preceding the hearing before this Court." That is not accurate because I think the hearing took place before the Court on that date.

The Court: That is right. I remember the date. Take out the word "preceding", leaving it "the date of the hearing."

Mr. Berman: That same revision, your Honor, should be made back on page 11 where the price of the preferred stocks is discussed.

The Court: The word "preceding" will be taken out after the word "date" and the word "of" will be inserted.

Mr. Zazove: Those are all the inaccuracies that I discovered. That is all I have to say about the findings. I take it that the Court has signed the order?

The Court: No, I haven't signed the order.

Transcript of Hearing on Plan Held May 29, 1947 (Cont'd)

Mr. Zazove: I am not ready to be heard in that phase of it except to renew our objections to the entry of the order. I don't want the record to indicate that we are concurring in this.

I would like to be heard after the order is entered or signed.

The Court: Today?

Mr. Zazove: Yes.

The Court: What is the purpose of that?

Mr. Zazove: I want to file a petition of Mr. Streeter for stay of the consummation.

The Court: You understand, gentlemen, when I sign these findings it is in the form where words are crossed out and paragraphs have been deleted. While I am signing this to make it legally effective as of today, I will have my secretary retype it on Monday and send you each a copy.

I am signing the findings right now. I am signing the order now, too.

Mr. Zazove: If your Honor please, I would like to present a petition for a stay of the order and consummation of the plan. There is attached an affidavit of Thomas W. Streeter, who is Director of Engineers Public Service Company and a Preferred Stockholder. I would also like to present to you a very short memorandum in support of the petition, and I am going to distribute copies to the other counsel.

The Court: This is Mr. Condon's. Are you both together?

Mr. Zazove: That is right. I am in Mr. Condon's office.

If your Honor please, I have served all parties with copies of the petition and in the interest of saving time I prefer, if the Court pleases, that he read the petition and the memorandum.

The Court: To get a stay you would have to put up a supersedeas bond.

Mr. Zazove: To get a stay automatically——

The Court: Yes.

Mr. Zazove: There is no judgment, and as far as I can see from the Rules of Civil Procedure——

The Court: But you deprive persons from that which the decree says is theirs.

Mr. Zazove: We have some decisions in our memorandum which indicate that it is within the inherent powers of a court of equity to stay the effect of an order which changes the status quo.

The Court: I never heard of a stay without a supersedeas bond.

Mr. Zazove: It is within the Court's discretion, your Honor, to waive a bond. This is the type of proceeding where it would be impossible for the preferred stockholders to post a bond. They are unorganized and scattered throughout the country. We are asking leave to maintain the status quo, because otherwise if we are right our appeal will have been futile, because the plan will have been consummated.

The Court: This first paragraph on page 2 of the memorandum says, "The Court's order permits, and the Company intends, the distribution of substantially all of the Company's assets prior to the time when an appeal can be heard and determined. In the event the Circuit Court of Appeals decides that the Court's order was improper and/or the escrow was inadequate, the preferred stockholders will have suffered irreparable damage and their appeal would be futile, since the plan would already be consummated."

You don't have to complete your appeal to ask for a stay. You can find any appellate judge and ask for a stay if you can get him tonight.

Mr. Zazove: That is absolutely correct, your Honor, and the rules of the Third Circuit require that we make prior application to the District Court.

The Court: Mr. Zazove, I can't think of a situation where after I have ordered that something can be done, then

to turn around and negative my jural facts and issue a stay. While you have the power and it may be exercised in some instances where acts are ordered to be done or found in the decree or judgment, you would simply negative what you have already found to be the jural fact; so under those circumstances I have said I will let my elder brother grant the stay, and they have done it.

Mr. Zazove: I think Mr. Slater will bear me out that this is the first instance that I know of where a plan was approved by the Securities and Exchange Commission and there were further appeals beyond the District Court where there was an attempt to consummate the plan before the hearing in the Court of Appeals.

The Court: I know; but if you have merit to your contention you have six separate Court judges in the Third Circuit who can listen to it.

The prayer in the petition for stay is hereby denied. I wish you would prepare an order to that effect.

Mr. Zazove: Could you write it right on the petition, your Honor, to save trouble?

The Court: Yes.

Mr. Zazove: I have one further request and I am through, and that is this: We intend to perfect an appeal as promptly as possible, and I would like to know from the Court if it would be possible to have the Court's order which you have just signed entered now so that we can perfect an appeal?

The Court: As soon as we are through will you enter it on the docket, Mr. Clerk?

The Clerk: I will be glad to, sir.

The Court: Anything further?

Mr. Slater: I just want to thank your Honor for your courtesies in helping us work out our schedule here and for the time given the Commission this week.

(At this point the hearing was adjourned.)

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

HARRY J BLUM
Official Court Reporter
U. S. District Court

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement.

February 7, 1947

SECURITIES AND EXCHANGE COMMISSION
18th and Locust Streets
Philadelphia 3, Pa.

Dear Sirs:

The Supplemental Findings and Opinion of the Commission made and filed January 8, 1947, in consolidated cause entitled In the Matter of Engineers Public Service Company, et al, (SEC File No. 54-132, File No. 70-1149, File No. 70-1150 and File No. 70-1419) make reference to the possibility that provision may hereafter be made for the establishment of an escrow and for incidental program changes in the event of a contest respecting the issue whether the holders of Preferred Stock of Engineers should receive for such shares more than $100 and accrued dividends.

However, an examination of the Order Approving Amended Plan in said consolidated cause entered the 8th

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

day of January, 1947, reveals that no provision is made therein for some of the steps which will be necessary in order to carry out the Amended Plan in the event that such escrow shall be established and changes in the program made which are incidental thereto. Our tax counsel points out that such failure might leave such transactions outside the protection afforded by Supplement R and Section 1808(f) of the Internal Revenue Code, since such steps will, under such circumstances, not have been specified and itemized in an order of the Commission which has become or becomes final in accordance with law as required by the tax statute.

Accordingly, we hereby request that the Commission enter an order of amendment in said consolidated cause which shall correct that failure by specifying the transactions which will take place if such escrow is established and the incidental changes consequent thereon made. For your information as to the form which we believe said order of amendment should take if the protection afforded by said Supplement R and Section 1808(f) is to be clearly applicable to the program changes incident to the establishment of such escrow (as well as to the steps not affected by said escrow), we are attaching hereto suggested provisions for inclusion in such order of amendment, and we respectfully request the adoption by the Commission of such an order of amendment.

Respectfully submitted,

ENGINEERS PUBLIC SERVICE COMPANY

By D. C. BARNES
President

[Proposed Order of Amendment, as enclosed]

Our order of January 8, 1947, approving the amended plan is amended to read as follows:

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

(a) The sixth full paragraph of said order is amended to read:

"The Commission having found that the amended plan of reorganization is necessary to effectuate the provisions of Section 11(b) and is fair and equitable to the persons affected thereby, and the Commission having further found that said declarations, as amended, should be permitted to become effective, and the Commission having further found that, if there appears to be a likelihood of litigation beyond the District Court with regard to the right of the preferred stockholders of Engineers to receive in respect to their stock any amount in excess of $100 per share and accrued dividends, it is advisable, in order to avoid possibility of delay in the carrying out of the whole plan until such controversy is determined, to provide for escrowing such additional amount, plus appropriate compensation for the delay in payment of any additional amount found to be due and payable, to await the outcome of any such litigation and to make the incidental changes in the program for carrying out the amended plan which such an escrow entails, and that in such circumstances such escrow and changes in the program are necessary and appropriate to effectuate the provisions of said Section 11(b) and are fair and equitable to the persons affected thereby;".

(b) The said order is amended by substituting a semi-colon for the period at the end of the sub-paragraph numbered VIII appearing at the end of said order and adding the following:

"provided, however, that if counsel for Engineers, in the course of the enforcement proceeding and at

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

anytime before the approval of the amended plan by the United States District Court, shall state to the District Court that Engineers has determined that it appears likely that some holder or holders of Engineers' common stock will litigate beyond the District Court the payment to the Engineers preferred stockholders of any amount in addition to $100 per share and accrued dividends and that Engineers accordingly desires to follow the alternative method of effectuating the plan through the use of an escrow, then counsel for the Commission shall present to said District Court a form of a proposed decree or order of said Court, setting forth a proposed escrow agreement and the incidental changes in the program which the establishment of the escrow involves and in such event (a) all references in this amended order to the amended plan shall be deemed to be to the amended plan as affected by the establishment of such escrow and the making of such incidental program changes, (b) the references to warrants in subparagraphs I through IV above shall be deemed to be to warrants providing for assigning to the Engineers $5 preferred stock, $5.50 preferred stock and $6 preferred stock, a value of $100 per share plus accrued dividends to the expiration date of the warrant and providing that any holder of Engineers preferred stock who surrenders his stock in exchange for Gulf States common stock will, in respect of such surrendered shares, have the right to receive the same amount which holders of such preferred stock not so surrendering their stock will receive in addition to $100 per share plus accrued dividends if any such amount is finally determined to be payable, and (c) sub-paragraphs II and IV above shall be deemed to read as follows:

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

'II. Pursuant to the provisions of the above mentioned warrants, Engineers will transfer and deliver Gulf States common stock to those persons who exercise said warrants before the expiration date thereof, and upon such exercise the holders of said warrants will either (1) pay Engineers $11.50 for each share of Gulf States common stock so acquired, or (2) deliver to Engineers in exchange for said Gulf States common stock whole shares of Engineers preferred stock on the basis of equivalent values, assigning $11.50 per share for each share of Gulf States common stock, and $100 plus accrued dividends to the expiration date of the warrant for each share of Engineers preferred stock; provided that, on the basis of the relative values above stated, the value of the whole shares of Engineers preferred stock to be exchanged under the warrants will not exceed the value of the shares of Gulf States common stock which the warrant holder is entitled to and intends to acquire, and to the extent that the value of such shares of Engineers preferred stock exchanged for Gulf States common stock under said warrants is less than the value of such shares of Gulf States common stock to which the warrant holder is entitled and intends to acquire, the difference will be paid by the warrant holder to Engineers in cash. Any holder of Engineers preferred stock who surrenders his stock in exchange for Gulf States common stock will, in respect of such surrendered shares, have the right to receive the same amount which holders of such preferred stock not so surrendering their stock will receive in addition to

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

$100 per share plus accrued dividends if any such amount is finally determined to be payable.

* * * * * *

'IV. After completion of the disposition of the Gulf States common stock, Engineers will

(a) deposit in trust, for the benefit of Engineers preferred stockholders who have not surrendered their preferred stock in exchange for Gulf States common stock, with a solvent bank or trust company an amount equal to $100 per share plus accrued dividends to the date of such deposit, in respect of each such share; and

(b) deposit with a solvent bank or trust company in escrow the sum of $4,000,000 in cash, pursuant to the provisions of an escrow agreement which provides, among other things,

'(i) for payment to holders of preferred stock of Engineers, in addition to the $100 per share and accrued dividends to be allowed on exchange for Gulf States common stock or to be deposited in trust as above provided in respect of shares not so exchanged of $5 per share in respect of each share of $5 preferred stock and $10 per share in respect of each share of $5.50 preferred stock and $6 preferred stock, plus in each case an amount equal to simple interest on the amount so paid at a rate per annum equal to 4.76% in the case of $5 preferred stock, 5% in the case of $5.50 preferred stock and 5.45% in the case of $6 preferred stock from the date of said

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

escrow agreement to the date of such payment, upon delivery to the escrow agent of an opinion of independent counsel to the effect (1) that the District Court of the United States for the District of Delaware in Civil Action No. 995 has entered a decree or order approving the amended plan, including the payment to holders of Engineers preferred stock of the amount, above specified, equal to the respective redemption premiums on their shares with interest as aforesaid, and directing its enforcement, (2) that no holder of Engineers common stock has made timely appeal from such decree or order, or, in the alternative, that a holder or holders of Engineers common stock has made such a timely appeal but that the appellate court or courts have approved said decree or order approving the amended plan entered by said District Court as aforesaid, and (3) that such decree or order has become final as against the holders of Engineers common stock and is no longer subject to appeal by them;

(ii) for payment to the Engineers preferred stockholders, of the amounts specified in said final order upon delivery to the escrow agent of a certified copy of an order of the Commission or an order or decree of the United States District Court or any appellate court directing or permitting the distribution to the holders of preferred stock of some part of the amount deposited in escrow, but less than the amounts specified in subdi-

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

vision (i) above, together with an opinion of independent counsel that such order or decree has become final and is not subject to appeal; and

(iii) for payment of certain fees, compensation, remuneration and expenses pursuant to order of the Commission and for repayment to Engineers of amounts not payable to preferred stockholders or for fees, compensation, remuneration or expenses.

Such amounts will be deposited in cancellation of all of the Engineers preferred stock. The holders of Engineers preferred stock who have not surrendered the same in exchange for Gulf States common stock will surrender such stock to the trustee above mentioned against payment of the amounts deposited in trust in accordance with subdivision (a) above in respect of their shares, and all holders of Engineers preferred stock will receive so much of the said $4,000,000 as may be determined to be payable to them in accordance with said escrow agreement.' "

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

Exhibit 1

Escrow Agreement.

February ....., 1947.

.....

.....

New York, N. Y.

Dear Sirs:

1. The undersigned, Engineers Public Service Company (Incorporated) (Engineers) herewith hands you as Escrow Agent hereunder, its check in the amount of $4,000,000, which is the amount required to be deposited in escrow by the Engineers' "Plan Pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters", as amended by amendments to and including Amendment No. 6, dated December 30, 1946, as changed to include this Escrow Agreement and certain program changes incidental thereto (which amended Plan, with such changes, is hereinafter referred to as "the Plan"), a copy of which Plan has been delivered to you. Said sum of $4,000,000 is made up of the following amounts:

(a) The sum of $3,204,795, being an amount equal to $5 per share in respect of 143,951 outstanding shares of the $5 Dividend Convertible Preferred Stock ($5 Preferred) of Engineers; $10 per share in respect of the outstanding 183,406 shares of $5.50 Cumulative Dividend Preferred Stock ($5.50 Preferred) of Engineers; and $10 per share in respect of the 65,098 outstanding shares of $6 Cumulative

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

Dividend Preferred Stock ($6 Preferred) of Engineers.

(b) The sum of $484,325, being an amount equal to simple interest for three years at a rate per annum of 4.76% in the case of the Engineers $5 Preferred, 5% in the case of the Engineers $5.50 Preferred, and 5.45% in the case of the Engineers $6 Preferred on the amounts set forth in (a) above in respect of each of said series.

(c) The sum of $310,880, to provide for the payment of all fees and other compensation and all remuneration or expenses claimed or hereafter claimed by any persons in connection with the Plan, the transactions incident thereto and the consummation thereof, approved by the Securities and Exchange Commission (hereinafter called the Commission).

2. Upon delivery to you of an opinion of independent counsel (as defined in paragraph 6 hereof), to the effect (1) that the District Court of the United States for the District of Delaware in Civil Action No. 995 has entered a decree or order approving the Plan, including the payment to holders of Engineers preferred stock of the amount, below specified, equal to the respective redemption premiums on their shares, and directing its enforcement, (2) that no holder of Common Stock of Engineers has made timely appeal from such decree or order or, in the alternative, that a holder or holders of Common Stock of Engineers has made such a timely appeal but that the appellate court or courts have approved said decree or order approving the Plan entered by said District Court as aforesaid and (3) that such decree or order has become final as against the

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

holders of Common Stock of Engineers and is no longer subject to appeal by them, you shall release and pay over to the holders of Preferred Stock out of the amounts deposited with you pursuant to clauses (a) and (b) of paragraph 1 hereof, the amount of $5 per share in respect of each share of $5 Preferred, the amount of $10 per share in respect of each share of $5.50 Preferred and the amount of $10 per share in respect of each share of $6 Preferred, plus in each case an amount equal to simple interest on the amount so paid at a rate per annum equal to 4.76% in the case of the Engineers $5 Preferred, 5% in the case of the Engineers $5.50 Preferred, and 5.45% in the case of the Engineers $6 Preferred from the date hereof to the date of such payment. Such payment is to be made by mailing the same to the holders of Preferred Stock of record at the date hereof (or in the case of shares of Preferred Stock which shall have been surrendered in exchange for Common Stock of Gulf States Utilities Company pursuant to the provisions of (b) of paragraph 1 of Division C of the Plan, at the date of such surrender), and you shall be entitled to rely upon a list or lists furnished you by The Chase National Bank of the City of New York and Stone & Webster Service Corporation, Transfer Agents for the Preferred Stock, or either of them, as to the names of such registered holders and their mailing addresses. Any balance of the sum deposited with you pursuant to clause (b) of paragraph 1 hereof shall be paid over to Engineers.

3. Upon delivery to you of (a) a certified copy of an order of the Commission in the proceedings now pending before it in File No. 53-132 or in consolidated proceedings including File No. 53-132, File No. 70-1149, File No. 70-1150, and File No. 70-1419, or a certified copy of an order or decree of the District Court of the United States for the District of Delaware or any appellate court, directing or

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

permitting the distribution to the holders of Preferred Stock of some part of the amount deposited pursuant to clauses (a) and (b) of paragraph 1 hereof; but less than the amounts specified in paragraph 2 hereof, and (b) an opinion of independent counsel to the effect that such order of the Commission or such court order or decree has become final and is not subject to appeal, you shall release and pay over to the holders of Preferred Stock entitled thereto, pursuant to the terms of such order, in the manner provided in paragraph 2 hereof, the respective amounts to which such holders shall be entitled pursuant to such order, and you shall release and pay over to Engineers the balance of said sum deposited pursuant to clauses (a) and (b) of paragraph 1 hereof.

4. Upon delivery to you of (a) a certified copy of an order of the Commission in the above mentioned proceedings or a certified copy of the order or decree of the above mentioned District Court or any appellate court, determining or finding that the holders of the Preferred Stock are not entitled to receive any amounts in addition to the amount of $100 per share plus accrued dividends to be allowed to Preferred Stockholders on exchange of shares of Preferred Stock for Gulf States Common Stock or to be deposited in trust for Preferred Stockholders who shall not have so exchanged their shares of Preferred Stock, all as provided in paragraph 3 of Division C of the Plan, and (b) an opinion of independent counsel to the effect that such order or decree has become final and not subject to appeal, you shall release and pay over to Engineers all sums deposited with you pursuant to clauses (a) and (b) of paragraph 1 hereof.

5. Upon delivery to you of (a) a certified copy of the order of the Commission in the above mentioned proceed-

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

ings approving payment to specified persons of fees and other compensation, remuneration and expenses, and (b) an opinion of independent counsel to the effect that such order has become final and not subject to appeal, you shall release and pay over to the persons designated in said order out of the amounts deposited pursuant to clause (c) of paragraph 1, the respective amounts specified in said order, and after deducting the amount of your fees and expenses and the compensation of your counsel in accordance with the provisions of paragraph 8 hereof, you shall pay over to Engineers any balance of said sum.

6. The term "independent counsel" as used herein shall mean counsel selected by you who shall not have entered their appearance in the above mentioned proceedings before the Commission or in the above mentioned court proceedings as counsel for any party or participant, but who may be counsel regularly retained by you.

7. You shall not be liable for any action taken or omitted to be taken by you hereunder in good faith, or for any act, mistake or omission of any agent employed by you. You shall be fully protected in any action taken or omitted to be taken pursuant to advice of counsel.

8. You shall be entitled, subject to the approval of the Commission, to reasonable compensation for your services hereunder and reimbursement of your reasonable expenses, including fees and disbursements of your counsel and any independent counsel selected by you for the purposes of paragraphs 2, 3 or 4 hereof, and for the payment of such compensation or reimbursement, you shall have a lien upon any amounts deposited with you pursuant to clause (c) of paragraph 1 hereof.

9. You may, at any time, resign by giving 30 days' notice in writing to Engineers of your intention so to do.

Letter of Engineers to Securities and Exchange Commission, Dated February 7, 1947, Enclosing Proposed Order of Amendment and Draft of Escrow Agreement (Cont'd)

In case of any such resignation, or in case you shall become unable to act hereunder, Engineers will promptly appoint a successor Escrow Agent, which shall be a trust company or bank with trust powers having its principal office in the Borough of Manhattan, City and State of New York and having a capital and surplus of more than $1,000,000. Upon payment of any sums held by you hereunder to any such successor Escrow Agent, you shall be discharged from all further liability hereunder. Any successor to your business shall forthwith become successor Escrow Agent hereunder without further action on the part of Engineers.

The signature of your duly authorized officer in the space provided below will evidence your acceptance of your appointment as Escrow Agent hereunder and your acknowledgement of receipt of Engineers' check for $4,000,000 referred to in paragraph 1 hereof, the proceeds of such check to be held and disposed of by you in accordance with the provisions hereof.

Very truly yours,

ENGINEERS PUBLIC SERVICE COMPANY
(INCORPORATED)

By.....
President

The undersigned hereby accepts its appointment as Escrow Agent hereunder and acknowledges receipt of the above mentioned check for $4,000,000.

.....

By.....

Escrow Agreement.

....., 1947.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
11 Broad Street,
New York 15, N. Y.

Dear Sirs:

1. The undersigned, Engineers Public Service Company (Incorporated) (Engineers) herewith hands you as Escrow Agent hereunder, its check in the amount of $4,000,000, which is the amount required to be deposited in escrow by the Engineers' "Plan Pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters", as amended by amendments to and including Amendment No. 6, dated December 30, 1946, as changed to include this Escrow Agreement and certain program changes incidental thereto (which amended Plan, with such changes, is hereinafter referred to as "the Plan"), a copy of which Plan has been delivered to you. Said sum of $4,000,000 is made up of the following amounts:

(a) The sum of $3,204,795, being an amount equal to $5 per share in respect of 143,951 outstanding shares of the $5 Dividend Convertible Preferred Stock ($5 Preferred) of Engineers; $10 per share in respect of the outstanding 183,406 shares of $5.50 Cumulative Dividend Preferred Stock ($5.50 Preferred) of Engineers; and $10 per share in respect of the 65,098 outstanding shares of $6 Cumulative Dividend Preferred Stock ($6 Preferred) of Engineers.

(b) The sum of $484,325, being an amount equal to simple interest for three years at a rate per annum of 4.76% in the case of the Engineers $5 Preferred, 5% in the case of the Engineers $5.50 Preferred, and

Escrow Agreement (Cont'd)

5.45% in the case of the Engineers $6 Preferred on the amounts set forth in (a) above in respect of each of said series.

(c) The sum of $310,880, to provide for the payment of all fees and other compensation and all remuneration or expenses claimed or hereafter claimed by any persons, in connection with the Plan, the transactions incident thereto and the consummation thereof, approved by the Securities and Exchange Commission (hereinafter called the Commission).

2. Upon delivery to you of an opinion of independent counsel (as defined in paragraph 6 hereof), to the effect (1) that the District Court of the United States for the District of Delaware in Civil Action No. 995 has entered a decree or order approving the Plan, including the payment to holders of Engineers preferred stock of the amount, below specified, equal to the respective redemption premiums on their shares, with interest thereon, and directing its enforcement, (2) that no holder of Common Stock of Engineers has made timely appeal from such decree or order or, in the alternative, that a holder or holders of Common Stock of Engineers has made such a timely appeal but that the appellate court or courts have approved said decree or order approving the Plan entered by said District Court as aforesaid and (3) that such decree or order has become final as against the holders of Common Stock of Engineers and is no longer subject to appeal by them, you shall release and pay over to the holders of Preferred Stock out of the amounts deposited with you pursuant to clauses (a) and (b) of paragraph 1 hereof, the amount of $5 per share in respect of each share of $5 Preferred, the amount of $10 per share in respect of each share of $5.50 Preferred and the amount of $10 per share in respect of each share of $6 Preferred, plus in each case an amount equal to simple interest, computed on the basis of 360

days per year, on the amount so paid at a rate per annum equal to 4.76% in the case of the Engineers $5 Preferred, 5% in the case of the Engineers $5.50, and 5.45% in the case of the Engineers $6 Preferred from the date hereof to the date of such payment. Such payment is to be made by mailing the same to the persons who were the registered holders or assignees of registered holders of such Preferred Stock at the time their certificates for such stock were surrendered, either in exchange for Common Stock of Gulf States Utilities Company or upon payment to them of $100 per share and accrued dividends, all as provided in the Plan. You shall be entitled to rely upon a list or lists furnished you by The Chase National Bank of the City of New York and Stone & Webster Service Corporation, Transfer Agents for the Preferred Stock, or either of them, as to the names of such registered holders or their assignees at the time of such surrender and their mailing addresses. Any balance of the sum deposited with you pursuant to clause (b) of paragraph 1 hereof shall be paid over to Engineers.

3. Upon delivery to you of (a) a certified copy of an order of the Commission in the proceedings now pending before it in File No. 53-132 or in consolidated proceedings including File No. 53-132, File No. 70-1149, File No. 70-1150, and File No. 70-1419, or a certified copy of an order or decree of the District Court of the United States for the District of Delaware or any appellate court, directing or permitting the distribution to the holders of Preferred Stock of some part of the amount deposited pursuant to clauses (a) and (b) of paragraph 1 hereof, but less than the amounts specified in paragraph 2 hereof, and (b) an opinion of independent counsel to the effect that such order of the Commission or such court order or decree has become final and is not subject to appeal, you shall release and pay over to the holders of Preferred Stock entitled thereto, pursuant to the terms of such order, in the manner provided

Escrow Agreement (Cont'd)

in paragraph 2 hereof, the respective amounts to which such holders shall be entitled pursuant to such order, and you shall release and pay over to Engineers the balance of said sum deposited pursuant to clauses (a) and (b) of paragraph 1 hereof.

4. Upon delivery to you of (a) a certified copy of an order of the Commission in the above mentioned proceedings or a certified copy of the order or decree of the above mentioned District Court or any appellate court, determining or finding that the holders of the Preferred Stock are not entitled to receive any amounts in addition to the amount of $100 per share plus accrued dividends to be allowed to Preferred Stockholders on exchange of shares of Preferred Stock for Gulf States Common Stock or to be deposited in trust for Preferred Stockholders who shall not have so exchanged their shares of Preferred Stock, all as provided in the Plan, and (b) an opinion of independent counsel to the effect that such order or decree has become final and not subject to appeal, you shall release and pay over to Engineers all sums deposited with you pursuant to clauses (a) and (b) of paragraph 1 hereof.

5. Upon delivery to you of (a) a certified copy of the order of the Commission in the above mentioned proceedings approving payment to specified persons of fees and other compensation, remuneration and expenses, and (b) an opinion of independent counsel to the effect that such order has become final and not subject to appeal, you shall release and pay over to the persons designated in said order out of the amounts deposited pursuant to clause (c) of paragraph 1, the respective amounts specified in said order, and after deducting the amount of your fees and expenses and the compensation of your counsel in accordance with the provisions of paragraph 8 hereof, you shall pay over to Engineers any balance of said sum.

Escrow Agreement (Cont'd)

6. The term "independent counsel" as used herein shall mean counsel selected by you who shall not have entered their appearance in the above mentioned proceedings before the Commission or in the above mentioned court proceedings as counsel for any party or participant, but who may be counsel regularly retained by you.

7. You shall not be liable for any action taken or omitted to be taken by you hereunder in good faith, or for any act, mistake or omission of any agent employed by you. You shall be fully protected in any action taken or omitted to be taken pursuant to advice of counsel.

8. You shall be entitled, subject to the approval of the Commission, to reasonable compensation for your services hereunder and reimbursement of your reasonable expenses, including fees and disbursements of your counsel and any independent counsel selected by you for the purposes of paragraphs 2, 3 or 4, hereof, and for the payment of such compensation or reimbursement, you shall have a lien upon any amounts deposited with you pursuant to clause (c) of paragraph 1 hereof.

9. You may, at any time, resign by giving 30 days' notice in writing to Engineers of your intention so to do. In case of any such resignation, or in case you shall become unable to act hereunder, Engineers will promptly appoint a successor Escrow Agent, which shall be a trust company or bank with trust powers having its principal office in the Borough of Manhattan, City and State of New York and having a capital and surplus of more than $1,000,000. Upon payment of any sums held by you hereunder to any such successor Escrow Agent, you shall be discharged from all further liability hereunder, and the successor Escrow Agent shall become the Escrow Agent hereunder with like effect as if originally designated Escrow Agent hereunder. Any successor to your business shall forthwith become successor

Escrow Agreement (Cont'd)

Escrow Agent hereunder without further action on the part of Engineers.

The signature of your duly authorized officer in the space provided below will evidence your acceptance of your appointment as Escrow Agent hereunder, and your acknowledgement of receipt of Engineers' check for $4,000,000 referred to in paragraph 1 hereof, the proceeds of such check to be held and disposed of by you in accordance with the provisions hereof.

Very truly yours,

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

By.....
President

The undersigned hereby accepts its appointment as Escrow Agent hereunder and acknowledges receipt of the above mentioned check for $4,000,000.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK

By.....

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY.	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action No. 995.

Notice of Presentment of Order for Settlement and Signature.

SIRS:

PLEASE TAKE NOTICE that on the 23rd day of May, 1947, at 11:30 o'clock in the forenoon (E. D. S. T.), or as soon thereafter as counsel can be heard, the annexed proposed order, upon the application of the Securities and Exchange Commission, will be presented to the Honorable Paul Leahy, United States District Judge, at the United States Court House, Wilmington, Delaware, for settlement and signature.

Dated: Philadelphia, Pennsylvania
May 19, 1947

Yours, etc.,

s/ Harry G. Slater

HARRY G. SLATER
Chief Counsel, Public Utilities Division
Securities and Exchange Commission
18th and Locust Streets
Philadelphia 3, Pennsylvania.

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

To:

William E. Tucker, Esq.
Mudge, Stern, Williams & Tucker
40 Wall Street
New York 5, New York

Alfred Berman, Esq.
Guggenheimer & Untermyer
30 Pine Street
New York 5, New York

Louis Boehm, Esq.
60 Broad Street
New York 4, New York

Lawrence R. Condon, Esq.
Frederick Zazove, Esq.
165 Broadway
New York 6, New York

Francis H. Scheetz, Esq.
Evans, Bayard & Frick
Land Title Building
Philadelphia, Pa.

Edwin D. Steel, Jr., Esq.
Morris, Steel, Nichols and Arsht
3018 du Pont Building
Wilmington, Delaware

Caleb R. Layton, III, Esq.
Layton and Layton
811 Industrial Trust Building
Wilmington, Delaware

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY.	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action No. 995.

A certain plan to effectuate the provisions of Section 11(b) of the Public Utility Holding Company Act of 1935 (hereinafter called the "Act") having been filed with the Securities and Exchange Commission (hereinafter called the "Commission") by Engineers Public Service Company, a registered holding company under the Act (hereinafter called "Engineers"); said plan being dated as of September 10, 1945, and thereafter amended to and including Amendment No. 6 thereto, dated December 30, 1946, being in the form set forth in Exhibit C annexed to the application herein; and the Commission, after notice and opportunity for hearing, having found in its Supplemental Findings and Opinion and Order entered January 8, 1947, said plan as so amended necessary to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby and approved the plan as so amended; and the Commission by its Order of Amendment, dated February 11, 1947, a copy of which was attached as Exhibit F to "Exhibit 1" to the Motion to Amend Application to Enforce Plan, filed in this Court on February 13, 1947, having found that if, in the course of securing court approval and enforcement of said plan, it should appear that protracted litigation might ensue

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

over the question of the amount payable to the preferred stockholders of Engineers and thereby impede expeditious enforcement of the plan and compliance with the Act, it would be in conformity with said Act and the Commission's Findings and Opinion to separate the contested issue from the uncontested issues and consummate the uncontested portion of the plan; and counsel for Engineers in the course of this proceeding having stated to this Court that Engineers has determined that it desires to follow the alternative method of effectuating the plan through the use of an escrow; and counsel for the Commission having presented to this Court a form of proposed decree or order of this Court setting forth a proposed form of escrow agreement and such incidental changes in the carrying out of the plan which the establishment of the escrow involves, substantially as described in said Order of Amendment, said plan as amended by amendments to and including Amendment No. 6 thereto dated December 30, 1946, and supplemented to include an escrow agreement and certain incidental changes, being hereinafter called "Plan"; and Engineers having requested the Commission to apply to a Court to enforce and carry out the terms and provisions of the Plan; and the Commission having on January 9, 1947, filed with this Court an Application, amended as aforesaid, to enforce and carry out the terms and provisions of the Plan; and this Court by Order dated January 9, 1947, having fixed February 17, 1947, as the date for hearing upon the Plan and having prescribed the notice to be given of such hearing, the time within which any objections might be made to the Plan and the manner of making such objections; and it appearing from the affidavit of the Secretary of Engineers that due and sufficient notice of said hearing was given substantially in accordance with the provisions of said Order of January 9, 1947; and objections having been filed by certain stockholders of Engineers to the Plan; a hearing

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

on the Plan having been duly held by this Court in accordance with the provisions of said Order of January 9, 1947; and the Commission, Engineers and certain common and preferred stockholders of Engineers having appeared by their counsel and having been heard; and this Court having duly considered the Plan, the objections and the evidence, the Court being fully advised in the premises:

IT IS HEREBY FOUND, ORDERED, ADJUDGED AND DECREED:

1. The Court hereby adopts as its findings of fact and conclusions of law the findings of fact and conclusions set forth in the Findings and Opinions of the Commission dated December 5, 1946 and January 8, 1947, being Exhibits B and E to the Commission's application herein, except insofar as said findings and conclusions of the Commission relate to the payment to the preferred stockholders of any amounts in excess of $100 per share and accrued dividends and are inconsistent with the opinion of this Court issued May 15, 1947.

2. Subject to the terms and conditions of the Commission's Order of January 8, 1947, as amended by its said Order of Amendment of February 11, 1947, the Plan is approved as fair and equitable and as necessary or appropriate to effectuate the provisions of Section 11 of the Act except that it is not intended to approve the allowance or payment to Engineers preferred stockholders of any amounts in excess of $100 per share and accrued dividends. It is directed, however, that allowance or payments to Engineers preferred stockholders shall be made as provided in and subject to the provisions of paragraph 6 below, and preferred stockholders shall have the right to receive under the provisions of the Escrow Agreement provided for in said paragraph 6 such additional amounts, if any, as may ultimately be determined to be payable to them as provided therein, said Escrow Agreement is approved as fair and

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

equitable and as necessary or appropriate to effectuate the provisions of Section 11 of the Act and as a means of protecting the respective interests of all classes of stockholders of Engineers pending disposition of any appeals from this order which may raise the question of the rights of preferred stockholders of Engineers to receive any amounts in excess of $100 per share and accrued dividends.

3. Subject to the terms and conditions of the Commission's Order of January 8, 1947 and its Order of Amendment of February 11, 1947, this Court, for the purposes of carrying out the terms and provisions of said Plan, hereby takes exclusive jurisdiction of Engineers and its assets wherever located.

4. Engineers shall retain possession of its assets for the purpose of carrying out the terms and provisions of the Plan and of this Order, or any subsequent order herein; and Engineers may enter into any transactions not inconsistent with the Plan, including the filing of any appropriate application or declaration with the Commission in conformity with the Act and the rules, regulations and orders promulgated and issued by the Commission thereunder, in all cases where such filing and the entry of appropriate orders with respect thereto would be required if this Court had not taken such jurisdiction.

5. Engineers, acting by or through its officers and directors, is hereby authorized, ordered and directed to take and to cause to be taken as soon as practicable all action necessary to carry into effect and fully to consummate the steps and transactions provided in the Plan, except the allowance or payment to Engineers preferred stockholders of any amount in excess of $100 per share and accrued dividends, to comply with all orders of this Court and the Commission relative thereto, except as aforesaid and subject to the provisions of paragraph 6 below.

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

6. Engineers shall consummate those provisions of the Plan dealing with the retirement of its outstanding preferred stocks in the following manner:

(a) By exchanging with holders of warrants to acquire shares of common stock of Gulf States Utilities Company (a subsidiary of Engineers, hereinafter called "Gulf States") said shares of Gulf States common stock for whole shares of Engineers preferred stock, assigning to each share of Gulf States common stock the value of $11.50 per share and to each share of Engineers preferred stock the value of $100 per share plus accrued dividends to the expiration date of the warrant, provided that, on the basis of the relative values above stated, the value of the whole shares of Engineers preferred stock surrendered in exchange shall not exceed the value of the shares of Gulf States common stock which the warrant holder is entitled to and intends to acquire, but to the extent that the value of such shares of Engineers preferred stock surrendered in exchange is less than the value of such shares of Gulf States common stock to which the warrant holder is entitled and intends to acquire, the difference shall be paid by the warrant holder to Engineers; and provided, however, that any holder of Engineers preferred stock who surrenders his stock in exchange for Gulf States common stock will, in respect of such surrendered shares, have the right to receive the same amount which the holders of such preferred stock not so surrendering their stock will receive in addition to $100 per share plus accrued dividends;

(b) By depositing in trust for the benefit of Engineers preferred stockholders who shall not have surrendered their preferred stock in exchange for Gulf

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

States common stock with The Chase National Bank of the City of New York an amount equal to $100 per share, plus accrued dividends to the date of such deposit in respect of each such share to be paid to them upon surrender of their certificates for preferred stock;

(c) By depositing with said The Chase National Bank of the City of New York in escrow the sum of $4,000,000 in cash pursuant to the provisions of the Escrow Agreement attached hereto as Exhibit 1 and made a part hereof.

Upon deposit of the amounts specified in (b) and (c) above, the rights and claims of the holders of shares of Engineers preferred stock shall cease and determine except their rights and claims in respect of said deposited amounts.

7. All creditors and security holders of Engineers and all other persons be and they hereby are enjoined and restrained from doing any act or taking any action, interfering with, or tending to interfere with these proceedings or with the carrying out of this order or any part thereof, including the commencement or prosecution of any action, suit or proceeding at law or in equity or under any statute in any court or before any executive or administrative officer, commission or tribunal, other than proceedings before the Commission, or this Court or the Circuit Court of Appeals or other appellate court as may be appropriate under the Act or the rules and regulations promulgated thereunder.

8. The Court reserves jurisdiction (1) to enter such supplemental orders or decrees and to give such other and further relief as may be necessary or appropriate to enforce and carry out the provisions of the Plan, including approval of any alternative methods of meeting the cash

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

requirements of the Plan that may be proposed by Engineers and approved by the Commission and (2) to enter findings of fact and conclusions of law with respect to the disputed issue as to whether the fair and equitable standard of Section 11(e) requires or permits payment to preferred stockholders of any amounts in excess of $100 per share and accrued dividends.

BY THE COURT

.....

United States District Judge

Dated, ..., 1947

Exhibit 1

Escrow Agreement.

....., 1947.

THE CHASE NATIONAL BANK OF
THE CITY OF NEW YORK,
11 Broad Street,
New York 15, N. Y.

Dear Sirs:

1. The undersigned, Engineers Public Service Company (Incorporated) (Engineers) herewith hands you as Escrow Agent hereunder, its check in the amount of $4,000,000, which is the amount required to be deposited in escrow by the Engineers' "Plan Pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters", as amended

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

by amendments to and including Amendment No. 6, dated December 30, 1946, as changed to include this Escrow Agreement and certain program changes incidental thereto (which amended Plan, with such changes, is hereinafter referred to as "the Plan"), a copy of which Plan has been delivered to you. Said sum of $4,000,000 is made up of the following amounts:

(a) The sum of $3,204,795, being an amount equal to $5 per share in respect of 143,951 outstanding shares of the $5 Dividend Convertible Preferred Stock ($5 Preferred) of Engineers; $10 per share in respect of the outstanding 183,406 shares of $5.50 Cumulative Dividend Preferred Stock ($5.50 Preferred) of Engineers; and $10 per share in respect of the 65,098 outstanding shares of $6 Cumulative Dividend Preferred Stock ($6 Preferred) of Engineers.

(b) The sum of $484,325, being an amount equal to simple interest for three years at a rate per annum of 4.76% in the case of the Engineers $5 Preferred, 5% in the case of the Engineers $5.50 Preferred, and 5.45% in the case of the Engineers $6 Preferred on the amounts set forth in (a) above in respect of each of said series.

(c) The sum of $310,880, to provide for the payment of all fees and other compensation and all remuneration or expenses claimed or hereafter claimed by any persons in connection with the Plan, the transactions incident thereto and the consummation thereof approved by the Securities and Exchange Commission (hereinafter called the Commission).

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

2. Upon delivery to you of an opinion of independent counsel (as defined in paragraph 6 hereof), accompanied by a certified copy of the order or decree involved,

(A) to the effect (1) that the District Court of the United States for the District of Delaware in Civil Action No. 995 has entered a decree or order approving the Plan, including the payment to holders of Engineers preferred stock of the amounts, below specified, equal to the respective redemption premiums on their shares, with interest thereon, and directing its enforcement, (2) that no holder of common stock of Engineers has made timely appeal from such decree or order or, in the alternative, that a holder or holders of common stock of Engineers has made such a timely appeal but that the appellate court or courts have approved said decree or order approving the Plan entered by said District Court as aforesaid, and (3) that such decree or order has become final as against the holders of common stock of Engineers and is no longer subject to appeal by them; or

(B) to the effect (1) that said District Court in said Civil Action has entered a decree or order approving the Plan in all respects other than the payment to holders of Engineers preferred stock of the amounts below specified and directing its enforcement to the extent so approved but disapproving or failing to approve the payment of such amounts; (2) that timely appeal has been made from such decree or order in so far as it disapproves or fails to approve the payment of such amounts, and that an appellate court has reversed such decree or order in so far as it disapproves or fails to approve the payment of such amounts and the District Court

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

on mandate of such appellate court has entered a decree or order approving such payment to the holders of Engineers preferred stock; and (3) that such decree or order directing such payment to holders of the preferred stock has become final as against the holders of preferred and common stock of Engineers and is no longer subject to appeal by them; or

(C) to the effect that an order of the Commission in the proceedings now pending before it in file No. 53-132 or in consolidated proceedings including file No. 53-132, file No. 70-1149, file No. 70-1150 and file No. 70-1419 or in any other proceedings under section 11(b), section 11(d) or section 11(e) of the Public Utility Holding Company Act of 1935, or an order or decree of any court having jurisdiction, has been entered, has become final and is no longer subject to appeal, which Commission order or court order or decree either approves an amended plan providing for, or otherwise provides for or directs, the payment to the holders of Engineers preferred stock of at least the amounts below specified;

then you shall release and pay over to the holders of Preferred Stock out of the amounts deposited with you pursuant to clauses (a) and (b) of paragraph 1 hereof, the amount of $5 per share in respect of each share of $5 Preferred, the amount of $10 per share in respect of each share of $5.50 Preferred and the amount of $10 per share in respect of each share of $6 Preferred, plus in each case an amount equal to simple interest, computed on the basis of 360 days per year, on the amount so paid at a rate per annum equal to 4.76% in the case of the Engineers $5 Preferred, 5% in the case of the Engineers $5.50 Preferred, and 5.45% in the case of the Engineers $6 Preferred from the date hereof to the date

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

of such payment. Such payment is to be made by mailing the same to the persons who were the registered holders or assignees of registered holders of such Preferred Stock at the time their certificates for such stock were surrendered, either in exchange for Common Stock of Gulf States Utilities Company or upon payment to them of $100 per share and accrued dividends, all as provided in the Plan. You shall be entitled to rely upon a list or lists furnished you by The Chase National Bank of the City of New York and Stone & Webster Service Corporation, Transfer Agents for the Preferred Stock, or either of them, as to the names of such registered holders or their assignees at the time of such surrender and their mailing addresses. Any balance of the sum deposited with you pursuant to clause (b) of paragraph 1 hereof shall be paid over to Engineers.

3. Upon delivery to you of an opinion of independent counsel (as defined in paragraph 6 hereof), accompanied by a certified copy of the order or decree involved, to the effect that an order of the Commission in the above mentioned proceedings now pending before it or in any other proceedings under section 11(b), section 11(d) or section 11(e) of the Public Utility Holding Company Act of 1935, or an order or decree of any court having jurisdiction, has been entered, has become final and is no longer subject to appeal, which Commission order or court order or decree directs or permits the distribution to holders of Preferred Stock of some part of the amount deposited pursuant to clauses (a) and (b) of paragraph 1 hereof, but less than the amounts specified in paragraph 2 hereof, you shall release and pay over to the holders of Preferred Stock entitled thereto, pursuant to the terms of such order or decree, in the manner provided in paragraph 2 hereof, the respective amounts to which such holders shall be entitled pursuant to such order or decree, and you shall release and pay

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

over to Engineers the balance of said sum deposited pursuant to clauses (a) and (b) of paragraph 1 hereof.

4. Upon delivery to you of an opinion of independent counsel (as defined in paragraph 6 hereof), accompanied by a certified copy of the order or decree involved, to the effect that an order of the Commission in the above mentioned proceedings now pending before it or in any other proceedings under section 11(b), section 11(d) or section 11(e) of the Public Utility Holding Company Act of 1935, or an order or decree of any court having jurisdiction, has been entered, has become final and is no longer subject to appeal, which Commission order or court order or decree determines or finds that the holders of Preferred Stock are not entitled to receive any amounts in addition to the amount of $100 per share plus accrued dividends to be allowed to Preferred Stockholders on exchange of shares of Preferred Stock for shares of Gulf States Common Stock or to be deposited in trust for Preferred Stockholders who shall not have so exchanged their shares of Preferred Stock, all as provided in the Plan, you shall release and pay over to Engineers all sums deposited with you pursuant to clauses (a) and (b) of paragraph 1 hereof.

5. Upon delivery to you of (a) a certified copy of the order of the Commission in the above mentioned proceedings approving payment to specified persons of fees and other compensation, remuneration and expenses, and (b) an opinion of independent counsel to the effect that such order has become final and not subject to appeal, you shall release and pay over to the persons designated in said order out of the amounts deposited pursuant to clause (c) of paragraph 1, the respective amounts specified in said order, and after deducting the amount of your fees and expenses and the compensation of your counsel in accordance with the provisions of paragraph 8 hereof, you shall pay over to Engineers any balance of said sum.

Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd)

6. The term "independent counsel" as used herein shall mean counsel selected by you who shall not have entered their appearance in the above mentioned proceedings before the Commission or in the above mentioned court proceedings as counsel for any party or participant, but who may be counsel regularly retained by you.

7. You shall not be liable for any action taken or omitted to be taken by you hereunder in good faith, or for any act, mistake or omission of any agent employed by you. You shall be fully protected in any action taken or omitted to be taken pursuant to advice of counsel.

8. You shall be entitled, subject to the approval of the Commission, to reasonable compensation for your services hereunder and reimbursement of your reasonable expenses, including fees and disbursements of your counsel and any independent counsel selected by you for the purposes of paragraphs 2, 3 or 4 hereof, and for the payment of such compensation or reimbursement, you shall have a lien upon any amounts deposited with you pursuant to clause (c) of paragraph 1 hereof.

9. You may, at any time, resign by giving 30 days' notice in writing to Engineers of your intention so to do. In case of any such resignation, or in case you shall become unable to act hereunder, Engineers will promptly appoint a successor Escrow Agent, which shall be a trust company or bank with trust powers having its principal office in the Borough of Manhattan, City and State of New York and having a capital and surplus of more than $1,000,000. Upon payment of any sums held by you hereunder to any such successor Escrow Agent, you shall be discharged from all further liability hereunder, and the successor Escrow Agent shall become the Escrow Agent hereunder with like effect as if orginally designated Escrow Agent hereunder. Any

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Notice by Securities and Exchange Commission of Presentment of Order and Proposed Order (Cont'd):

successor to your business shall forthwith become successor Escrow Agent hereunder without further action on the part of Engineers.

10. Any disputes as to the duties of the Escrow Agent hereunder shall be submitted to the United States District Court for the District of Delaware pursuant to the jurisdiction reserved by it in its order enforcing the Plan.

The signature of your duly authorized officer in the space provided below will evidence your acceptance of your appointment as Escrow Agent hereunder, and your acknowledgment of receipt of Engineers' check for $4,000,000 referred to in paragraph 1 hereof, the proceeds of such check to be held and disposed of by you in accordance with the provisions hereof.

Very truly yours,

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

By.....
President

The undersigned hereby accepts its appointment as Escrow Agent hereunder and acknowledges receipt of the above mentioned check for $4,000,000.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK

By.....

Clerk's Certificate.

UNITED STATES OF AMERICA,
DISTRICT OF DELAWARE, } ss.:

I, EDWARD G. POLLARD, Clerk of the United States District Court in and for the District of Delaware, do hereby certify that the annexed and foregoing is a true and full copy of the original Pleadings, etc., designated by the parties as the record on appeal in the case of In the Matter of Engineers Public Service Company, Civil Action No. 995, (The transcripts of testimony which bear the certification of the official reporter for this district have not been compared by this office) now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Wilmington this 27th day of June, A. D. 1947.

EDWARD G. POLLARD,
Clerk.

LIBRARY
SUPREME COURT, U.S.

Vol. II

TRANSCRIPT OF RECORD

(Pages 431a to 857a)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 226

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 227

THOMAS W. STREETER, ET AL., PETITIONERS,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 243

THE HOME INSURANCE COMPANY AND TRADESMENS NATIONAL BANK AND TRUST COMPANY, PETITIONERS,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 266

CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, PETITIONERS,

vs.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR CERTIORARI FILED — AUGUST 16, 1948 (Nos. 226 and 227). AUGUST 24, 1948 (No. 243). SEPTEMBER 8, 1948 (No. 266).

CERTIORARI GRANTED OCTOBER 25, 1948.

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

Nos. 9429, 9435, 9440.

IN THE MATTER

of

ENGINEERS PUBLIC SERVICE COMPANY

ON APPEAL FROM ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE, DATED MAY 26, 1943.

JOINT APPENDIX.

THOMAS W. STREETER, *et al.*,
THE HOME INSURANCE COMPANY, *et al.*,
SECURITIES AND EXCHANGE COMMISSION,
Appellants.

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Pages 634a to 861a, Inclusive.

Printed Privately for [illegible] Printing & Stationery Co., [illegible]

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Volumes II and III of the Joint Appendix contain excerpts from the Transcript of Hearings before the Trial Commissioner of the Securities and Exchange Commission held pusuant to that Commission's order under Section 11(e) of the Public Utility Holding Company Act of 1935. The numbers in brackets indicate the paging of the certified transcript which is the same as that of the original reporters' transcript. Corrections in the Transcript of Hearings have been made in these excerpts in accordance with the stipulation of counsel in such connection, dated April 10, 1946.

Hearing on November 20, 1945.

[R. p. 2]

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

IN THE MATTERS OF:	
ENGINEERS PUBLIC SERVICE COMPANY	File No. 54-132
EL PASO ELECTRIC COMPANY	File No. 70-1149
GULF STATES UTILITIES COMPANY	File No. 70-1150

Hearing Rooms A and B,
Securities and Exchange Commission Building,
Philadelphia, Pennsylvania.
Tuesday, November 20, 1945.

Met, pursuant to notice, at 10 a.m.

Before:

ALLEN MAC CULLEN, Trial Examiner.

Appearances:

BERNARD S. KANTON and HARLOW B. LESTER, on behalf of the Securities and Exchange Commission.

MUDGE, STERN, WILLIAMS & TUCKER, by WILLIAM E. TUCKER, 20 Pine Street, New York City, on behalf of the Applicant.

LAWRENCE R. CONDON, Attorney for Thomas W. Streeter, Columbian National Life Insurance Company, and others.

FRANCES H. SCHEETZ, Evans, Bayard & Frick, 1335 Land Title Building, Philadelphia, Pa., on behalf of Home Insurance Company, City of New York Insurance Company, National Liberty Insurance Company of America, The New Brunswick Fire Insurance Company, The Homestead Fire Insurance Company, and The Georgia Home Insurance Company.

PROCEEDINGS

The Examiner: Gentlemen, if you are ready we will proceed.

This is a hearing under order of the Commission dated October 15, 1945, and supplemental order dated October 26, 1945, postponing the hearing to this date, upon an application filed by Engineers Public Service Company, a registered holding company, pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935, for divestment of its interest in El Paso Electric Company and Gulf States Utilities Company, subsidiaries of Engineers; and upon declarations filed pursuant to Section 7 of said Act by El Paso and Gulf for the purpose of facilitating the effectuation of the plan proposed in the application filed by Engineers, the Commission having by its order consolidated the proceedings on the application filed by Engineers and upon the declarations filed by El Paso and Gulf.

Copy of the order of Commission dated October 15, 1945, when presented by counsel to the Commission will be incorporated in the record as Commission's Exhibit No. 1-A, and copy of the supplemental order dated October 26, 1945, will be received as Commission's Exhibit No. 1-B.

I have before me an application filed by Thomas W. Streeter by his attorney, Lawrence R. Condon, requesting a limited appearance in this case. Mr. Lester, do you have any questions to ask Mr. Condon?

Mr. Lester: I believe Mr. Kanton has some questions.

Mr. Kanton: Mr. Streeter is a director of Engineers, is he not, Mr. Condon?

Mr. Condon: He is, Mr. Kanton, and he owns, as the application states, 50 shares of the $5.50 preferred and 150 shares of the $6 preferred stock. I am advised and believe he owns no common stock.

Mr. Kanton: Do you represent any other preferred stockholders, sir?

Mr. Condon: I do.

Mr. Kanton: Could you give us the list, please?

Mr. Condon: Lillian C. Streeter, the owner of 200 shares of $5 preferred, Mrs. Ruth C. Streeter, the owner of 300 shares of $5.50 preferred, Frank Streeter, Henry Streeter, Thomas W. Streeter, Jr., the owners of 100, 200, and 200 shares respectively of the $5.50 preferred, Henry Streeter, Frank Streeter, and Thomas W. Streeter, Jr., the owners of 100, 100 and 100 shares respectively of the $6 preferred stock, the Columbian National Life Insurance Company of Massachusetts, the owner of 100 shares of $6 preferred stock, 200 shares of $5.50 preferred, and 450 shares of $5 preferred.

Those are the only ones that I represent at this time, but I anticipate that there will be others, and I would request leave to make a further statement with respect thereto at a subsequent date.

Mr. Kanton: Mr. Condon, have you entered into any arrangements with Mr. Streeter, with respect to the fee that you are to receive in this proceeding?

Mr. Condon: The only arrangements, Mr. Kanton, have not been formalized, but have been discussed along these lines—that I am to receive a fee of not to exceed 75 cents per share for the shares represented and not to exceed 25 cents per share for expenses, costs and disbursements, from those clients that I act for. In addition, Mr. Streeter, the dissenting director, discussed with the Board, as I am told, the Board of Engineers, the matter of a contribution, if I may use that term, by the Engineers Company to Mr. Streeter and his group of stockholders in a sum of $5,000, which was the subject of resolution by the Engineers Board. The resolution in its original form was not satisfactory, and I have not seen the resolution that was adopted yesterday, although Mr. Streeter advised me with respect to it orally. Because of the doubt of a number of stockholders that I would represent I have not committed myself to continue indefinitely as counsel for the preferred stockholders, and the statement which I made concerning the number of stockholders for whom I am acting of necessity suggests that these arrangements are still in their formative state. The provision with regard to the $5,000 payment to Mr. Streeter and his group of preferred stockholders was born, as I am told and believe, of a contention made by Mr. Streeter that he felt it unfair and inequitable, in light of the problems that existed concerning the rights of the preferred stockholders here, to have the company have the benefit and the services of most eminent counsel acting on behalf of the common stockholders and have the preferred shareholders, who have a very substantial stake in this proceeding, have no representation. I have acted for Mr. Streeter before, and he consulted me some time early in September with respect to the problem, and I have discussed it with him on a number of occasions. My principal concern was never to have the Engineers Company in a position to fairly say that the $5,000 which was apparently appropriated for a contribution to Mr. Streeter's group of preferred stockholders would ever be considered as the limit of the Engineers' liability for counsel fees and expenses should this Commission

and/or a court of competent jurisdiction decide that the services of counsel either in contributing to the solution of the problems here or in the achievement of objectives favorable to the preferred stock, should warrant a higher fee. I believe that that condition was met at least in part by an amendment to the proposed resolution adopted at the Board meeting yesterday. I am delighted to answer any further questions, Mr. Kanton.

Mr. Kanton: I only have one more question, Mr. Condon. Would Mr. Streeter be available to testify at this proceeding if he were requested to do so?

Mr. Condon: At any time, on any reasonable notice, we will be very glad to produce him without any subpoena or just on your request or the request of any other counsel here.

Mr. Kanton: Thank you, Mr. Condon.

The only other question I would have is of Mr. Scheetz. I think it would be helpful if he would state for the record the exact holding that he represents at this time.

The Examiner: I will question him further. We will finish with Mr. Condon first. Have you any further questions you want to ask Mr. Condon?

Mr. Kanton: No.

The Examiner: Mr. Tucker?

Mr. Tucker: No.

The Examiner: Mr. Condon, representing Mr. Streeter and the others represented by you, we will grant you limited participation in these proceedings in accordance with Rule 17 of our Rules of Practice.

I also have an application for leave to be heard by Mr. Francis H. Scheetz, of the firm of Evans, Bayard & Frick, representing Home Insurance Company, City of New York Insurance Company, National Liberty Insurance Company of America, The New Brunswick Fire Insurance Company, The Homestead Fire Insurance Company, and The Georgia Home Insurance Company. Have you any questions you want to ask Mr. Scheetz, Mr. Kanton?

Mr. Kanton: The one I just asked, and I thought it would be helpful, Mr. Scheetz, if you would just state the

holdings of these particular insurance companies for the record.

Mr. Scheetz: Mr. Examiner, the group of insurance companies which I represent are in what is known as the Home Insurance group. Collectively they own 7300 shares of preferred, divided as follows:

Home Insurance Company, 2,000 shares of 6 per cent preferred and 2,000 shares of 5½ per cent preferred;

City of New York Insurance Company, 500 shares of 5½ per cent preferred;

National Liberty Insurance Company of America, 1,000 shares of 6 per cent preferred;

The New Brunswick Fire Insurance Company, 1,000 shares of 5½ per cent preferred;

The Homestead Fire Insurance Company, 500 shares of 5½ per cent preferred;

The Georgia Home Insurance Company, 300 shares of 6 per cent preferred.

I might add that our firm is also counsel for Tradesman's National Bank & Trust Company of Philadelphia, which holds approximately 2500 shares of preferred in sundry trust accounts. They have not filed a request for leave to be heard, but I am authorized to speak for them and it may be that they will request leave to be heard later on.

The Examiner: Any further questions, Mr. Kanton?

Mr. Kanton: No.

The Examiner: Mr. Tucker?

Mr. Tucker: No.

The Examiner: Mr. Scheetz, we will grant you limited participation in accordance with Rule 17 of our Rules of Practice to represent the stockholders mentioned by you.

I also have a letter signed by Julian D. Anthony, vice-president of Columbian National Insurance Company, asking leave to be heard. Is Mr. Anthony present?

Mr. Condon: Mr. Anthony has sent me authorization in writing which I have here and will be very glad to exhibit to your Honor and counsel, retaining me to act for

the Columbian National Life Insurance Company, and I stated that among the stockholders that I represented.

The Examiner: Mr. Condon, we have already granted you limited participation in the proceedings.

You have no further questions you want to ask Mr. Condon in connection with that, have you, Mr. Kanton?

Mr. Kanton: No, sir.

The Examiner: You may proceed, Mr. Kanton.

Mr. Kanton: Mr. Examiner, I would like to have marked for identification and offer in evidence as Commission's Exhibit No. 1-A, the notice of filing of plan under Section 11(e) of the Act and declarations to effect related transactions, report of consolidating proceedings, and the order for hearing on consolidated matters, issued by the Commission on the 15th day of October, 1945, and contained in Commission Docket No. 54-132-1.

(Commission's Exhibit 1-A is received in evidence.)

Mr. Kanton: A copy of this order was published in the Federal Register on Friday, October 19, 1945, in Volume 10, No. 206, on page 13034, as Federal Register Document 45-19136. Copies of this order, bearing the title, "Holding Company Act Release No. 6131," was issued to the press on October 16, 1945, and given out to the Commission's mailing list on the same date. I now offer it in evidence as Commission's Exhibit No. 2-A.

The Examiner: The exhibit will be received and marked Commission's Exhibit 2-A.

(Commission's Exhibit 2-A is received in evidence.)

Mr. Kanton: Mr. Examiner, I would like to have marked for identification and to offer in evidence as Commission's Exhibit 1-B the order postponing this hearing, which was originally set for November 13, 1945, and was postponed to this date, November 20, 1945, by order of the Commission of October 26, 1945.

The Examiner: That will be marked Commission's Exhibit 1-B and received in evidence as such.

(Commission's Exhibit 1-B is received in evidence.)

Mr. Kanton: This order, postponing the hearing, is contained in Commission Docket No. 54-132-1. A copy of this order postponing the hearing was published in the Federal Register on Wednesday, October 31, 1945, Volume 10, No. 214, on page 13,484; as Federal Register Document No. 45-20,003. Copies of this order postponing the hearing were released to the press on Monday, October 29, 1945, and given to the Commission's mailing list on the same date. This copy bears the title of Holding Company Act Release No. 6168. I now offer this in evidence as Commission's Exhibit No. 2-B.

The Examiner: It will be received as Commission's Exhibit No. 2-B.

(Commission's Exhibit 2-B is received in evidence.)

Mr. Kanton: That is all I have at this time, Mr. Examiner. I take it the applicant companies have the burden of going forward at this time, so, Mr. Tucker, will you take over.

The Examiner: You may proceed, Mr. Tucker.

Mr. Tucker: I will ask Mr. Benjamin to take the stand and be sworn.

Whereupon,

RICHARD N. BENJAMIN

was called as a witness on behalf of the Applicants and, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tucker:

Q. What is your full name?

A. Richard N. Benjamin.

Q. And in what capacity are you connected with Engineers Public Service Company?

Richard N. Benjamin—Direct Examination (Cont'd)

A. I am secretary of Engineers Public Service Company, 90 Broad Street, New York, New York. I am also secretary of three of the subsidiaries of Engineers Public Service Company, namely, Virginia Electric & Power Company, Gulf States Utilities Company, and El Paso Electric Company. I am also secretary of Epsco, Incorporated, the mutual service company of the system.

Q. I show you the documents entitled, "Plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for divestment of assets and related matters," which was filed by Engineers Public Service Company with the Securities and Exchange Commission on September 10, 1945; amendment No. 1 thereto, filed on September 13, 1945; amendment No. 2, filed on October 17, 1945; amendment No. 3, filed on November 10, 1945; declaration of Gulf States Utilities Company on Form U-1, filed September 14, 1945; amendment No. 1 on Form U-1A, filed November 10, 1945; declaration of El Paso Electric Company on Form U-1, filed September 14, 1945; and amendment No. 1 on Form U-A, filed November 10, 1945; and I ask you if these were prepared under your direction and if you believe the statements therein to be correct?

A. They were prepared under my direction and I believe the statements contained therein are correct.

Mr. Kanton: Mr. Tucker, I don't know what form of procedure you are following, but do you intend to qualify Mr. Benjamin as an expert in any capacity?

Mr. Tucker: No, I didn't intend to; I don't think his testimony involves any expert testimony. I am not asking him for his opinions on any subject. You may object to any questions if they involve expert testimony if I do not qualify him.

Mr. Kanton: In other words, you do not expect to ask him any questions of a financial nature which would necessitate the opinion of an expert on accounting matters.

Mr. Tucker: I don't think so. I think he is testifying from facts. That is certainly true in substance.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. You speak of competitive bidding. Have you made a comparison of the total expenses of issuing the warrants as against the expenses that would be entailed if the Gulf States common stock were sold by public offering or by competitive bidding, and checking that against what you would receive possibly through the warrants as against what you would receive if this Gulf States common stock were sold to the public?

A. We have not made a comparison of the expenses, no.

Q. So it is possible then that more money may be realized by the sale of the Gulf States common stock less the expenses that may go with the underwriting than could be realized through the issuance of the warrants to the Engineers' common stockholders?

A. Yes, I think it is posible that the company itself would receive more cash, but, as I pointed out, you are taking away from the common stockholder the opportunity to participate in this Gulf States common stock.

Q. Couldn't he, if there was a public offering or an underwriting, repurchase?

A. Yes.

Q. If we use that word?

A. Yes, and pay the underwriting discount in so doing.

Q. And also, as you put it, get the preferred stock out of the picture? and perhaps get all the other expenses needed in the present proposal?

A. I think it would raise more cash.

Q. In other words, these things have to be weighed one against the other to see which would benefit the Engineers' stockholders?

A. That is right.

Q. Isn't it possible under present market conditions for Engineers to get at least $28,000,000 to $30,000,000 for the sale of the Gulf States common stock? This is your opinion based on your personal analysis and from looking at other analyses by people competent and qualified to make such analyses?

Richard N. Benjamin—Cross Examination (Cont'd)

A. I wouldn't want to put a figure on what we could get by competitive bidding now.

Q. You could get more than $21,000,000?

A. Yes, I think so.

Q. Have any efforts been made to sell the property of Gulf States to any of the surrounding utility companies down in that area?

A. Not to my knowledge.

Q. Were any offers made by the utilities companies which surround the Gulf States properties?

A. I don't know of any.

* * * * * *

[R. p. 266] By Mr. Kanton:

Q. Have your estimates shown that the present earnings and dividend declaration policy of Virginia will continue?

A. Based on the estimate for 1946 that was referred to this afternoon, it appears likely that the dividend policy could be continued through 1946.

Q. What about the present level of earnings?

A. In speaking of that I had in mind the present level for common stock and surplus.

Q. Could you tell me at this time whether it will be higher or the same as the present levels?

A. Well, I would like to see completed the 1945 actual statement of earnings before I answer that question. There has been considerable discussion about what items are properly includable, and there are a good many questions regarding taxes that are not yet settled.

Q. Do you have any opinion of your own at this time? I mean, you stated that you believed the dividend declaration policy will continue, but you have no opinion as to the present level of earnings being continued or being higher or lower?

A. I would rather not say at this point whether it would be higher or lower.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Do you have any opinion or any reason to believe that the present level of earnings of Gulf and El Paso will be the same in 1946 as they are at present?

A. Well again, based on the estimate for 1946, I think it likely that the dividend policy of Gulf States would be maintained.

Q. What percentage is that, approximately, of earnings, Mr. Benjamin?

A. I was just going to check the freeze on that Gulf States. Based on our estimate for 1946 I think that Gulf States can maintain the same dividend policy during 1946.

Q. What percentage is that of earnings? Is it 80 per cent approximately, the same as Virginia, or is it more or less?

A. We are limited to 75 per cent by that dividend freeze. I would say it was slightly under 75 per cent during 1945.

Q. Do you think that will be the same in 1946?

A. I think it would be a slightly less percentage in 1946.

Q. Why is that?

A. Based on the estimate, in the earnings for 1945 there are some non-recurring earnings due to this amortization of emergency plant facilities, and I think that the percentage will be approximately the same in 1946.

Q. Could you do the same for El Paso, Mr. Benjamin?

A. Based on the estimate for 1946, I think that the same dividend policy in El Paso can be maintained.

Q. What percentage is that?

A. In speaking of the same dividend policy, I have referred to the one set forth in the accompanying letter to the Plan where it was stated that Gulf States is presently paying common dividends at an annual rate approximating 80 cents per new share and El Paso at an annual rate approximating $1 per new share, which translated into Engineers common stock is 20 cents a share because the El Paso new stock is to be distributed on the basis of one-fifth of a share of El Paso for each share of Engineers common stock.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Yes, I recall it, Mr. Benjamin, but I was just wondering, in line with our testimony with reference to Virginia and Gulf, if you could give me your estimate or your opinion as to how the present dividend declaration policy and level of earnings for El Paso in 1946 will compare with those of 1945.

A. In 1945 the actual dividends paid by El Paso, Texas, on the common stock were at a rate higher than the 20 cents per new share that I just referred to. There was a dividend of $6 per share paid on March 15th, 1945; 62½ cents on June 15th, 1945; 62½ cents on September 14th, 1945; and 62½ cents on December 14th, 1945. That is on the old shares of stock.

Q. What percentage of earnings for 1945 is that?

A. I will have to figure it out if you will give me a few minutes.

Q. All right, sir.

A. Applicants' Exhibit No. 50 shows the balance for common stock and surplus in El Paso Electric Company for 1945, with the last two months estimated, of $525,600. I would like to check this figure of dividends paid. According to my pencil figures here El Paso Electric Company paid out in dividends on its common stock during 1945 $1,180,250.

Q. Was that more than the earnings?

A. That is more than the estimated earnings for 1945 available for the common stock.

Q. Is that the usual practice of Engineers with El Paso?

A. It is not the usual practice of Engineers' subsidiaries. This dividend paid in March of 1945 was due in part to the fact that there was only one dividend paid in 1944, namely, 62½ cents, and in part to the fact that the transportation property had been sold the previous year.

Q. What would you say is the usual or the average dividend policy for El Paso, if we consider this to be an unusual dividend payment during the year of 1945?

A. Well, I believe that a dividend at a rate specified in this letter to the common stockholders would be a normal dividend rate for El Paso.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Would that be about 80 per cent of the current earnings of the company?

A. Well, if we apply that rate to the 1945 estimate, $1 per new share of El Paso common stock would be equivalent to $381,994 and the estimated earnings available for the common stock for 1945 were $525,600, so that is approximately 75 per cent.

Q. Assuming the 75 per cent figure, do you think that that would be the estimated dividend declaration policy of El Paso during 1946?

A. I would expect, if our estimate is correct, that the dividend rate would be approximately the same as this so-called normal rate of dividends that I just referred to during 1946.

By Mr. Tucker:

Q. 20 cents on the new stock?

A. 20 cents on the new Engineers stock.

By Mr. Kanton:

Q. How do you estimate the level of earnings for 1946 for El Paso, the same or higher than in 1945?

A. Based on the estimate we made for 1946, the level of earnings would be slightly higher than in 1945.

Q. Is it possible that the dividends would be slightly higher, correspondingly? I say possible.

A. It is possible. I was just going to look at the construction requirements but I think it is safe to say it is possible that they might be higher.

Q. Would you say, since the time you have been with the company, it has been the policy of the company—and I am speaking now generally and I just want a rough estimate from you—for Engineers to take up 80 per cent in dividends from its operating companies based on the then current level of earnings for each one of its operating companies?

A. I just couldn't guess at a percentage, Mr. Kanton.

Richard N. Benjamin—Cross Examination (Cont'd)

I think it has been the policy of the Engineers' companies as a rule not to declare out all of the earnings.

Q. In a particular year?

A. That is right, except for an extraordinary situation.

Q. In other words, not 100 per cent?

A. Except in an extraordinary situation like the El Paso one that I just referred to.

* * * * *

[R. p. 274] By Mr. Kanton:

Q. Have you consulted with any preferred stockholders or common stockholders about any of the elements of this Plan?

A. I have talked with a good many stockholders and representatives of brokerage firms who have called up and asked questions about it. I have gotten quite a few phone calls at the office asking me to explain various parts of the plan, how it worked, and things of that sort.

Q. That is after the plan was filed?

A. That is right.

Q. I am speaking of before the plan was filed. Did you consult with any preferred or common stockholders to see if what you had in mind for the plan would meet with their approval?

A. No, I did not.

* * * * *

[R. p. 281] By Mr. Kanton:

Q. You testified that a recent check shows 1,069 individual common stockholders hold an aggregate of 139,315 shares of preferred stock of all classes and that you assume that this option will interest a substantial number of the stockholders?

A. That is correct, I did.

Q. Is it also true, because of the assignment feature of the warrants, many preferred stockholders may find it advantageous to acquire such warrants on the market and to exercise those warrants through the exchange option?

A. I think so.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. You testified that the original plan contemplated offering the Gulf States warrants at $10 a share, which would have necessitated a bank loan of $6,000,000.

A. That is correct.

Q. And you further testified that you were anxious, or, rather, the Board of Engineers was anxious, to keep the subscription price to your stockholders as low as possible because of the "burden" which it imposes on them in order "to maintain their interest in the properties which now constitute the Engineers system." How do you distinguish the payment of $10 a share and $11.50 a share any more of a burden on the Engineers common stockholders?

The Witness: Would you read the last part of that question, please?

(The record is read.)

The Witness: I don't know what you mean, Mr. Kanton.

By Mr. Kanton:

Q. Well, you considered the payment of $10—let me put it this way. Do you consider the payment of $10 by the common stockholder to be a burden?

A. Well, certainly any amount that they put up is a burden.

Q. If they had to put up $1, is it a burden?

A. Well, I guess it would be to some of them.

Q. In other words, any payment is a burden to a common stockholder?

A. I think so.

Q. Why is this payment being made by the common stockholders?

A. The payment is being made to provide funds to carry out this plan.

Q. Who will that benefit eventually?

A. I think it is a matter of necessity that funds be provided in order to carry out this liquidation plan. Now, the liquidation plan was filed because of the Public Utility Hold-

ing Company Act and this is one means of working out the liquidation of Engineers which is made necessary because of the Public Utility Holding Company Act.

Q. My question was: Whose benefit will—

Mr. Condon: May I ask that the answer be stricken as not responsive, and let's have the question re-read to the witness, please.

Mr. Kanton: Excuse me. Off the record.

(Discussion off the record.)

The Examiner: The motion is granted. Strike it from the record.

Mr. Kanton: Read the question.

(The question was read, as follows:)

"Q. Who will that benefit eventually?"

A. The exercise of these warrants—I am just trying to think out the answer to your question—will provide sufficient cash which, together with the bank loan, will pay the preferred stockholders $100 a share and accrued dividends. Therefore—you speak of benefit. I don't quite follow you.

Q. I distinguish it as you used it, as a burden.

A. Well, I think if the common stockholder had his choice he would not put up any money at all, but would prefer to have the Engineers with all three subsidiaries continuing in operation.

The Examiner: Off the record.

(Discussion off the record.)

The Witness: Let me try to answer the question again.

Mr. Kanton: Go right ahead.

The Witness: To the extent that the Engineers common stockholder gets the Gulf States common stock, which he does get by exercising these warrants, he gets a security. However, he has to put up cash in order to get the security.

The Examiner: To retire the preferred stock?

The Witness: To retire the preferred stock, but I do not believe that it is to be considered of benefit to the com-

mon stockholder to have to put up this money. Now, he does put it up in order to protect his interests in the whole situation.

By Mr. Kanton:

Q. What do you mean "the whole situation"?

A. In the Gulf States stock. In other words, if he wants to participate in the future growth of Gulf States Utilities Company, the only way he can do it is to put up $11.50 per share. If he doesn't want to participate in the growth of that particular company, he sells his warrant and lets somebody else put up the money.

Q. Then if he is considering that—and you are speaking for all of the common stockholders—then it is not a burden; it is a benefit to him?

A. It is something he has to do in order to protect his interests, I think.

Q. In other words, if Engineers, or the common stockholders, doesn't want to distribute the common shares of one of its utilities in order to pay off the preferred stockholders, no matter what the price is, $100, or whatever the fair value is, instead of paying cash they would have to issue the common stock of one of their utilities, or sell it, is that correct?

A. When this stockholder bought his common stock when the company was first formed, he bought it with the idea that he would not have to pay off this preferred stock until it suited him to pay off the preferred stock. Now, we have a Public Utility Holding Company Act and the Act says that you can not retain certain companies, in fact you can't retain more than one integrated system.

Q. Correct.

A. And I believe that, as I have testified, when you get down to one system there is no economic justification for keeping Engineers. Now, in order to protect his interests you ask the stockholder to put up $11.50 per share. It is

true he gets his Gulf States common stock, but the only reason he gets it is because he puts up the money to get it. Now, if that is a benefit to require him to pay off the preferred stock ahead of him, I just don't see it.

Q. Well, if he had the cash in the treasury he wouldn't have to put it up, would he?

A. If Engineers had $39,000,000 in cash in the treasury, no, he wouldn't have to put it up.

Q. And if they didn't have $39,000,000 in cash, and conditions weren't as good, you would have to distribute the common stock of one of the utility companies, or perhaps two of the utility companies' common stocks, is that correct, in order to comply with the Act?

A. I don't know what you mean by "distribute". You mean if Gulf States common stock were worth, say, $10 a share, you would have then to add El Paso Electric Company, perhaps, or Virginia to it?

Q. I didn't mean the worth of the preferred or the common, I wasn't referring to that. In order to satisfy the claim, no matter what it is, if you didn't have the cash and you couldn't raise the cash by sale, you would have to distribute the common stock equity that Engineers now has in the utility companies, is that correct?

A. Well, the only assets we have are those common stock equities and we would have to pay off the preferred stock.

Q. Therefore, in order to protect that common stock equity, not having sufficient cash, the common stockholder is called upon to put up a sufficient amount of cash in order to protect that equity?

A. That is right, to protect himself, that is right.

Q. That is right. Is that a burden on him to protect himself?

A. I think it is a burden.

The Examiner: I think that is more or less argumentative. I think the whole thing here is perfectly obvious as to what the answer is. Mr. Benjamin's idea of it is that

the common stockholder has to assume a burden to derive a benefit.

The Witness: That is right.

The Examiner: Now, whether the words used are right or not, I don't know that it make any difference. I think the record is perfectly clear, whether you want to call it a burden or a benefit. I think that is his idea of it. The common stockholder assumes the burden to derive the benefit. I think we don't want any more on that, do we?

By Mr. Kanton:

Q. Is it not possible for the common stockholders to sell their warrants at a price above $11.50 if they care to?

A. Yes. I think that there will be a market in these rights and undoubtedly some of them will sell.

Q. Isn't that the reason the price of $11.50 was set?

A. It is always advisable to have a margin between the price at which the warrant can be exercised and the expected market value of the underlying security in order that the warrants will be traded in and exercised.

Q. Now, just back on this one point, if you have the common stockholder of Engineers here with a warrant in his hand and he considers this possibility: If I put up $11.50 and I pay for this warrant and I get a share of Gulf States common stock, it is because I believe that that is a sound company and that whatever investment I have in there and put in addition will become better as the years go on. If he feels that, in his estimate, the converse is true, he won't put up the $11.50 and will sell it for whatever additional amount he can get over $11.50, is that correct?

A. I think that is the line of reasoning he would follow.

Q. But the underlying reason of the whole thing is to get $11.50 in order to pay off the preferred stock?

A. That is the reason we are issuing the warrants.

Q. Now, when you speak of this burden what stockholders do you have in mind particularly that this would work

a burden to? Do you mean the small stockholders or the large stockholders?

A. Well, I think it is a relative matter. I think even a small stockholder may find it a burden and perhaps to him, relatively speaking, it will be just as much of a burden as to a large stockholder. I don't think you can generalize too much. Certainly the people who own very large blocks of stock will have to undertake a major financing operation to raise the funds. On the other hand, a man who owns 100 shares of stock still has to put up $11.50 and that may be a burden on him.

Q. Have you spoken to any stockholders with reference to this so-called burden?

A. No, I haven't.

Q. Why do you assume, then, that it is a burden? Are you assuming how you would feel in the matter?

A. Yes. I own a few shares and even that amount will be a burden.

Q. Do you know of any of the other members of the Board of Directors who have spoken to common stockholders of Engineers about this Plan to have warrants for the distribution of the Gulf States common stock?

A. There again I think Mr. Barnes may have spoken to some of them, but I don't know of any others.

Q. Well, in other words, you don't know, or I think you have testified that the Board of Directors doesn't know, which of the stockholders would want to retain their interests in Gulf, El Paso or Virginia, that it is a matter entirely with the stockholders, that some may want to retain in all and some may want to retain in some or some may not want to retain in any, is that correct?

A. That is correct. I assume that is the case. I have no basis for knowing how they are going to react. I assume, because of the large number of stockholders, that some of them are bound to act one way and some another, but that is the only basis I have.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. But the basis of your feeling here is based on your own reaction, apparently?

A. No. I just know that the amounts involved, where we have some large stockholders, will be substantial, Mr. Kanton, and I would think that even with the small stockholders that to raise money is not easy, and in the case of every one of our stockholders I just assume that as a general proposition.

Q. Do you think it would be difficult for an Engineers common stockholder who purchased his stock at 1¼ or 2—would he have any difficulty in raising money with the common stock now selling around $35?

A. Well, unless he sells some of his Engineers common stock to get the money I don't know why he wouldn't be in the same position as somebody else, except that the stock is worth more on the market.

Q. At the present market don't you think that if the warrants were issued at $13 a share they would still have a ready market?

A. I think that is possible.

Q. Well, isn't it true that as long as the price of the Gulf States common stock may exceed the option price within the time limit of the warrants some of them will pay something for it, especially since we can agree that the Gulf States common stock will be selling above the option price? Is that a fair statement, Mr. Benjamin?

A. Well, I don't know that I agreed that it would sell above $13 option price, but assuming for the moment that it does sell above that, I think, so long as there is a reasonable value to the warrants themselves, that the bulk of the warrants will be exercised, and the only reason I can see why anybody would not exercise their warrant or sell their warrant would be because they either didn't pay any attention to the offering or were away, or something of that sort.

Q. Well, in these situations I think it is correct to state that the warrants fluctuate more than the price of the stock involved, isn't that correct, depending on the time limits and other factors?

Richard N. Benjamin—Cross Examination (Cont'd)

A. You say the value of the warrants fluctuate more than the value of the stock?

Q. The price of the warrants fluctuates more than the stock involved?

A. Well, I don't know that that is a fact.

Q. Well, isn't it true, based on your analysis and the recent Paine Webber report, if you consider that to be reliable, that if these Gulf States common stocks have a market price ranging anywhere from, say, $16.50 to $20, it would be very easy to dispose of the warrants at around $13?

A. Well, I think if the Gulf States common stock sold $2 or $3 or $4 above the subscription price, that the warrants would have a definite market va[illegible] and I think the bulk of them probably would be exercise[illegible]

I don't take any responsibility for Paine Webber's valuation. I don't know that you want to go into that.

Q. How did you arrive at the magic figure of $11.50?

A. I don't know anything magic about it, Mr. Kanton. We started out with $10 and put up the proposition of a $6,000,000 bank loan and after discussion with the staff cut that bank loan in half and thereby raised the $10 figure to $11.50.

Q. Well, let's use the other magic figure. How did you get $10 to start with? Why not $5?

A. Because we wanted to have a bank loan that would liquidate out in a relatively short period of time.

Q. Well, considering this fact, supposing you felt you didn't want a bank loan, would you raise the price to $13 if you could get it?

A. I don't know what you mean by supposing we didn't want a bank loan.

Q. Well, do you want a bank loan?

A. We want a bank loan for $3,000,000.

Q. Why?

A. Because any lesser amount would require increasing the subscription price from $11.50 to some higher figure.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Well, let's start all over again. We are chasing ourselves.

Mr. Tucker: Do we have to do that?

Mr. Kanton: Yes. I think it is quite important. I am trying to find out what is going on here, or what was going on in the mind of the Board of Directors with reference to this bank loan.

By Mr. Kanton:

Q. It seems when you arrived at the price of $10 it was because of the bank note, and because of the bank note you got the price of $10. Now, where did you start?

A. We started with a bank loan of $6,000,000, which we thought could be paid off in a relatively short period of time, and the net result was that we needed the balance, which figured out to be $10 a share.

Q. Well, supposing you didn't want a bank note, how would you start in?

Mr. Tucker: If he can make that supposition.

Mr. Kanton: Yes, I think he can.

Strike that from the record. Let me ask you this.

By Mr. Kanton:

Q. Why do you consider it necessary to have a bank note of $6,000,000 or $3,000,000?

A. The bank note is only necessary because we need that additional money if the subscription price is $11.50, and we have testified before that we did not want to impose any greater financial burden on the common stockholder than $11.50 per share. We started out with $10 and we increased it to $11.50 because we thought that to cut the bank loan in half would be helpful.

Q. How did you get the $10 again? Because of the bank note of $6,000,000?

A. That is right.

Q. You figured a bank note of $6,000,000. You dropped the bank note to $3,000,000, you get $11.50?

A. That is right.

Q. If the bank note disappears you get $13?

A. Yes.

Q. Now, I can't see the difference in how you acquire cash from your common stockholders. If you need, say, $13 a share or $14.50 a share, can't you distribute Virginia or Gulf and El Paso together, because the money so received will be used to discharge the claims of the Engineers' preferred stockholders, in any event?

A. You can raise enough money to pay off the preferred stock by selling Gulf and El Paso, certainly, at $13.

Q. If you distributed Virginia, Gulf States and El Paso for $14.50 a share, based on warrants, rather, would you consider that a burden to the Engineers' stockholders?

A. Yes.

Q. Why? Just because of the $14.50 compared with the $11.50?

A. That is right.

Q. And compared with the $10.00?

A. That is right—it is $3.00 more than $11.50—$14.50.

Q. In other words, when you get down to the basis of this, you feel it is to the advantage of the Engineers' common stockholders to keep the corporate entity alive for three years, by having a note outstanding, either for $3,000,000 or an additional amount, at the rate of 1½ percent, plus the expenses that will be entailed in keeping Engineers alive in the sense of section 42 of the Delaware corporation law? Is that correct?

Mr. Tucker: In the early part of that, you have "keeping it alive" without any reference to Section 42, and I think that is confusing to the witness.

The Witness: I think it is to the advantage of the common stockholder to have Engineers liquidate by borrowing the $3,000,000 on the bank loan, and any additional amount that may be necessary, rather than calling on the common stockholder to put up that cash at this time.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Kanton:

Q. Now, what is the advantage?

A. He doesn't have to put up any money at this time.

Q. You mean the additional money over $11.50?

A. That is right.

Q. That is the advantage, because you assume any money put up is a burden?

A. That is right.

Q. And that is the only one?

A. Yes. I think we get this collateral tax advantage that we talked about before, but that is the primary reason.

Q. The collateral tax advantage from Virginia?

A. From the fact that he doesn't get dividends from Virginia, that is right.

Q. Are there any other tax advantages? How about the sale of the Puget stock? Is that carried over? Could that be used, possibly, the loss arising from the sale of Puget?

A. I don't think that that is required, but I would much prefer you asked Mr. Ratcliffe about the tax questions, because he knows about them.

Mr. Tucker: Mr. Ratcliffe will be here tomorrow.

Mr. Kanton: Thank you, Mr. Tucker.

* * * * *

[R. p. 302] By Mr. Kanton:

Q. In setting the price at $11.50 for the Gulf States warrants, you said you considered as an important factor that "many of our stockholders prefer, during this period of high personal income taxes, to have an investment which would yield capital appreciation rather than dividend income," and that therefore because of the relatively high tax rates applicable to income, as compared with no tax for capital appreciation until their securities are sold, and then a net tax for long term holdings of only 25 percent of such capital gain—when you speak of many stockholders who

would prefer during this period of high personal income taxes, etc., to whom are you referring, and what period do you have in mind?

A. Well, that is a generalization, Mr. Kanton, based on the fact that there are many large stockholders among our common stockholders, and I just assumed that they would prefer to take this Virginia common stock at the termination of the liquidation of Engineers, and if they then decided to sell it, take a capital gain on it, rather than getting the dividends during the period, and paying a very high rate of tax on those dividends.

Q. Well, that is a very important assumption, Mr. Benjamin. Did you speak to many of the stockholders?

A. I did not speak to any of them.

Q. In other words, you make the statement "Many of our stockholders prefer, during this period, etc.,"—you are speaking as if you had consulted with them, but you have testified that you did not. You are basing it entirely on your own opinion that if you were a large stockholder you would make that a consideration?

A. That is correct.

Q. Well, don't you realize that in these tax situations involving 25 percent of taxable gains, it would vary with an individual common stockholder, whether he is a large stockholder or a small stockholder?

A. I realize that fully, Mr. Kanton,—and one other thing I pointed out was that this leaves the choice up to the stockholder himself. In other words, he may have a situation where he prefers to take the Virginia common stock, which would be non-taxable to him at the time he receives it, and keep it until such time as he has a tax loss to offset whatever gain he might have in disposing of it.

Q. That is correct, Mr. Benjamin, but you said this was one of the important factors you took into consideration when you set the price at $11.50, and I can't see that consideration. Could you please amplify your remarks in that respect, based on this quotation I gave from your previous testimony here?

A. Well, I made that assumption, Mr. Kanton.

Q. It was your own personal assumption?

A. That is right.

Q. Would you say that your main consideration,—and when I use the word "your" I mean the Board of Directors of Engineers—in setting forth the proposals under this Plan, based upon certain income tax advantages that would fall to the Engineers' stockholders, either the preferred or common?

The Witness: Would you read that question, please?

(The question is read.)

The Witness: I frankly don't understand that question, Mr. Kanton. Could you rephrase it?

By Mr. Kanton:

Q. Let me see if this statement would help you:

It seems, from reading your testimony and the exhibits placed into evidence to supplement it, that every consideration was given to the deferring of the payment of taxes until such time as the—and I am quoting now—"tax rates are lower, or until he"—meaning the common stockholder—"has a tax loss to offset the gain?"

A. That is right.

Q. I am referring specifically to the result of taxable gains to the Engineers' common stockholder, in respect to distribution of the warrants to purchase Gulf States common, the exercise of such warrants, and the distribution of the El Paso common and the distribution of the Virginia common. As a matter of fact, you specifically stated in your testimony,—and I quote again:

> "Any increase in the value of the Virginia common stock during the period preceding the distribution of that stock will not result in a tax on the Engineers' common stockholder at the time of the distribution, whereas, if the Virginia common stock were distributed to the Engineers' stockholder im-

mediately, he would become subject to taxes on the dividend income."

Then you further stated that—and again I quote:

"These relatively large unit holdings indicate ownership by people of substantial means, many of whom, in all probability, would prefer to have capital appreciation, rather than dividend income."

Now, my question to you is this: Would you say that the Board of Directors' main consideration in setting forth the proposals in this Plan has been based upon certain income tax advantages which would fall to the Engineers' stockholders, either preferred or common?

A. Well, I would like to break that question down into two parts, if I might.

Q. Go right ahead, Mr. Benjamin.

A. Certainly one of the important considerations in this Plan was whether or not the distribution of these various securities through rights, stock dividends and final liquidation, would be non-taxable to the common stock holders.

That was one of the most important factors that had to be taken into consideration, and as the Plan was originally set up, and as it is now set up, we have been advised by our tax counsel that there is no tax to the stockholders at the time of the receipt of these securities.

As to the second part of the tax saving, namely, the non-receipt by the common stockholder during the liquidation period, of the Virginia dividends, I considered that was a collateral advantage that the stockholder got.

I think the primary consideration was not to require the common stockholder to put up any more money than was necessary, in order to provide the funds for the payment of the preferred stock.

Q. Well, with reference to the Virginia common stock, is this the reason—and I underline "the", why Engineers

did not consider the selling or the distribution of its common stock through the exercise of warrants by its common stockholders—the tax benefit, I mean?

A. No, I don't think so, Mr. Kanton. I think that the reason was the one we have been discussing this evening, that, to repeat it again, we did not want to require the common stockholder to put up any more money than was absolutely necessary.

Q. Did this tax factor have any bearing upon whether the Virginia stock should be issued at this time?

A. I don't think so.

Q. Well, don't you think a person who has a relatively large unit holding would prefer to have capital appreciation rather than dividend income?

A. Yes, I think he would.

Q. And aren't about 84.77 per cent of the Engineers common stockholders considered to be holders of large units of holdings?

A. Well, the Applicant's Exhibit 16 shows that 84.77 per cent of the record holdings represent holdings of 101 shares or more. That was your question, wasn't it?

Q. Yes, that was my question. Well, then, considering this fact, would you say that was one of the reasons that Engineers has not considered the selling or the distribution of the Virginia common stock through the exercise of warrants, because of these tax advantages? You see, I am using the quotes that you put in the record when you stated —and I quote again: "These relatively large unit holdings,"—and that is this 84.77 per cent—"indicate ownership by people of substantial means, many of whom, in all probability, would prefer to have capital appreciation rather than dividend income."

Now, assuming that—and you did assume it—did you have any basis, or did you have any reason for saying that that is a reason, or one of the reasons for not wanting to distribute the Virginia common stock as part of this Plan?

Richard N. Benjamin—Cross Examination (Cont'd)

A. I think that that is a collateral advantage that goes along with the plan, Mr. Kanton.

You asked me earlier, I think, before the recess, what would happen if all of Engineers' liabilities had been liquidated, and I said that, after they had been liquidated, I think Engineers itself would be liquidated. In other words, Engineers would not be continued for the purpose of giving this collateral advantage to the large stockholders. It is just one of the incidental advantages that crops up because of the principal purposes of keeping Engineers in a state of liquidation for a period of not exceeding three years.

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Hearing on December 18, 1945.

[R. p. 313]

RICHARD N. BENJAMIN

Cross Examination (Resumed)

Mr. Kanton: Mr. Examiner, I would like to incorporate by reference the 1944 Form U-5-S statement of Engineers filed in Commission's dockets No. 30-105-2 which is the first duplicate copy. I haven't been able to obtain the original, so, this being an exact copy, I am offering this in place of the original.

• • • • •

[R. p. 321] By Mr. Kanton:

Q. Mr. Benjamin, do you know who Pratt Brothers are who are located at 90 Broad Street, New York, New York?

A. Pratt Brothers to the best of my knowledge is a nominee for clients of Investors Records Corporation which corporation handles the affairs of certain individuals in the Stone family.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Is that the Stone and Webster Corporation?

A. I do not know who their present clients are. I speak only as to my own knowledge from the time prior to 1938. I know at that time they were.

Q. I notice also, on page 27 of the Form U-5-S, that Mr. Whitney Stone and Whitney Stone & Edward C. Brewster, executors of the estate of Charles A. Stone, also have their addresses, care of the Investors Record Corporation.

Do you know whether these two listings here on page 27, care of the Investors Corporation, also involve holdings by these people and their associates, and that these people are connected with the Stone and Webster interests?

Mr. Tucker: Now, will you show him the record that you are talking about and let him see what it is.

Mr. Kanton: Surely. I am sorry.

The Witness: Mr. Whitney Stone is President of Stone and Webster Incorporated. Mr. Edward C. Brewster is a relative of Mr. Whitney Stone's by marriage, and I do not know Mr. Brewster's present occupation. I think he is in the armed forces.

By Mr. Kanton:

Q. But he was connected with the Stone and Webster interests?

A. At one time he was connected with Stone and Webster.

Q. Will you turn to Exhibit J-8, Mr. Benjamin, please. As I understand it, this is a letter addressed to Engineers Public Service Company by Investors Records Corporation and signed by P. M. Skillin, the Treasurer.

This letter is in answer to an inquiry addressed by Engineers Public Service Company to its twenty largest holders, asking them to list the individuals who have interests or beneficial interests in the common stocks or preferred stocks of Engineers, is that correct?

A. That is correct.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. And this letter, if we glance at it, is three pages and it shows on the second page the common stock owners, with the address in each case in care of Investors Records.

Now, will you go down that list on that page and tell me to the best of your knowledge whether any of these people listed here, or the interests listed, have been at any time connected with the Stone and Webster interests, or are at present connected with such interests.

A. Well, the first item on this list is the Estate of Charles A. Stone. Mr. Stone was one of the founders of Stone and Webster Incorporated.

Whitney Stone is the next name on the list. He is as I have just stated, President of Stone and Webster Incorporated. Anne M. Stone is the next name on the list. She is the wife of Whitney Stone.

Margaret S. Winthrop is the next name on the list and she is the sister of Whitney Stone.

Janet S. Brewster is the next name on the list and she is another sister of Whitney Stone.

Stone Farm Association is the next name on the list and I do not know the present stock ownership or interest in that Association, but the last information I had, some years ago, that was owned by members of the Stone family or trust.

The next item on the list is Whitney Stone trustees under deed of trust dated January 17, 1922 for the benefit of Charles A. Stone, Jr.

Mr. Charles A. Stone, Jr., is a brother of Whitney Stone.

The next item on the list is Whitney Stone, et al, trustees under deed of trust dated June 16, 1926.

I do not know anything more about that trust than what is stated here, that Mr. Stone is a trustee.

The last information I had on that, I think, that was a trust for the benefit of members of the Stone family.

The next is another trust for the benefit of Whitney Stone as trustee and apparently there are other trustees, for the benefit of Diana Brewster. I do not know who Diana Brewster is. Whitney Stone, et al——

Q. Excuse me just a minute. Isn't Diana Brewster a niece of Mr. Stone?

A. She may be. I don't know. I never saw that name before other than this correspondence.

Whitney Stone, et al, trustees under deed of trust dated December 27, 1938 for the benefit of Virginia W. Brewster. I do not know who Virginia W. Brewster is.

Q. What are the total common holdings that you see appearing on that page, Mr. Benjamin?

A. 202,625 shares.

Q. What percentage of the total outstanding shares of common stock of Engineers would that amount to?

A. Slightly over 10 per cent.

Q. Will you now turn to Exhibit J-12.

A. Yes.

Q. Which is a letter addressed to Engineers Public Service Company from Accounting Service Corporation, is that correct?

A. Yes.

Q. Signed by Donna E. Shay, the agent.

Turning to page 2 of this five page letter, I notice that under the owners of common stock we have listed certain people and certain trustees estates.

Glancing over this list, Mr. Benjamin,—and these common stock holdings extend on pages 2, 3 and the top of page 4—can you tell me if any of these people listed there are connected in any way or have been connected with the Stone and Webster Interests?

A. The first name on the list is Mabel W. Harte, and I do not know who this person is.

Q. Do you think Mr. Barnes might know?

A. He might. I don't know.

Q. Go ahead.

A. The next on the list is Edwin S. Webster, Jr., Richard Harte, and Lawrence J. Webster, trustees under declaration of trust dated April 2, 1919 for the benefit of Francis W. Hiam.

The only person on that list that I know is Mr. Edwin S. Webster, Jr., who is partner, Kidder, Peabody.

Mr. Webster, Jr., is the son of Edward S. Webster, who is one of the founders of Stone and Webster.

Q. Let's look through this list generally without taking up each specific item and tell me which names you recognize as connected or having been connected with the Stone and Webster interest. We, of course, see on page 2 that Mr. Edwin S. Webster, Jr.'s name appears in six of the seven items in the trust estate as set up.

Now, could you turn to the next page.

A. There is another trust at the top of the next page in which appear the names of Edwin S. Webster and Edwin S. Webster, Jr. Those are the only two people in that list that I have any knowledge of.

The next is Chestnut Hill Farm Association, and it states here that that is a personal holding company whose stock is owned by a list of people and trusts.

The first one is Edwin S. Webster. The second one is Jane de P. And then there are four trusts of which Mr. Edwin S. Webster, Jr., is one of the trustees.

The next page is Suffolk Corporation, another personal holding company in which it lists the stock owned by Jane de P. Webster, and then there are four trusts in which the name of Edwin S. Webster, Jr. appears as trustee, and another trust under the will of Russell Robb.

Q. Do you know who Mr. Robb is?

A. It is my understanding Mr. Robb was one of the original partners of Stone and Webster.

Q. What are these total holdings of common stock listed on Exhibit J-12?

A. On page No. 3, which is attached to this letter, there is a column headed "True Owner" against which is total common shares held in the name of Edwin S. Webster, Jr., 37,100 shares.

Q. Looking at these pages again, Mr. Benjamin, we also notice, do we not, that there are certain shares held under

the Chestnut Hill Farm Association and the Suffolk Corporation, totaling approximately 72,000 shares held by certain of these individuals you have mentioned before; is that correct?—and which amount is not included in the 37,100 share figure which you just gave me.

A. I think, from reading this letter, that these shares you have referred to relate to the participation in the shares of Chestnut Hill Farm Association by these various individuals.

Q. But these various individuals if we look at the Chestnut Hill Farm Association on the Suffolk Corporation appear to be generally made up of people who have been or are associated with the Stone and Webster interests, is that correct, Mr. Benjamin?

A. The only ones I know about are Mr. Edwin S. Webster and Edwin S. Webster, Jr.

(Discussion off the record.)

By Mr. Kanton:

Q. Mr. Benjamin, also looking at Exhibits J-8 and J-12 and the preferred stock holdings thereunder specifically the $5, $5.50 and the $6 preferred, do you find on glancing through these exhibits that the people you just spoke about as being connected or having been connected with the Stone and Webster also appear as connected with certain stock interests of Engineers Public Service Company?

A. Yes. On Exhibit J-8, page 3, it appears that Stone Farm Association owns 500 shares—or did at December 31—all of this information is as of December 31, 1944—owned 500 shares of the $6 preferred that the Whitney Stone *et al.* trustees under deed of trust dated June 16, 1926 owned 690 shares or a total of 1,190 shares, that the estate of Mary L. Stone owned 4,200 shares of $5.50 preferred, and Mary L. Stone was the wife of Charles A. Stone.

Stone Farm Association owned 900 shares of the $5.50 preferred. The trust of June 16, 1926 owned 300 shares.

And there is another trust, Whitney Stone, *et al.*, trustees under deed of trust, dated December 22, 1924 for the benefit of Marion S. Hince, 25 shares, and another trust of the same date for the benefit of Catherine S. Rentoul.

(Discussion off the record.)

The Witness: 25 shares, or a total of 5,450 shares of $5.50 stock, and it also shows that there were 3,100 shares of $5 preferred stock owned by some of these same persons and trusts that we have already referred to.

Over on Exhibit J-12 it appears from this Exhibit that Chestnut Hill Farm Association owns 5,700 shares of the $5 preferred stock, that another trust which Mr. Webster and Mr. Webster, Jr. are trustees owned fifty shares or a total of 5,750 shares.

By Mr. Kanton:

Q. Mr. Benjamin, turning now to Applicant's Exhibit No. 43, which shows the twenty largest holders of record of Engineers common stock as of October 31, 1945, we have already discussed the holdings of Pratt Brothers, care Investors Record Corporation, who as of this date owned 90,643 shares.

The next name that appears there is Kidder, Peabody and Company, Boston, Massachusetts. Isn't one of the members of this firm Mr. Edwin S. Webster, Jr.?

A. It is my understanding that he is.

Q. He is what?

A. It is my understanding that he is.

Q. Connected with——

A. That he is a partner of Kidder, Peabody.

Q. And Kidder, Peabody owns 79,532 shares.

Do you know who Labb & Company is of Boston 6, Massachusetts?

A. I believe that they are a nominee for an investment trust in Boston but I don't know the name of the trust.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Who is Frank J. Gould?

A. He is an individual who I believe at the present time is in France. I don't know much about Mr. Gould.

Q. Wasn't he formerly one of the owners of Virginia Electric and Power Company?

A. I have heard that he was. I don't know the facts in connection with that.

Q. Which company is now controlled by Engineers. And is he or was he connected with the Stone and Webster interests?

A. Not to my knowledge.

Q. I believe it is true that Mr. Gould, when he sold his interests in what is commonly known as Vepco to the Engineers Public Service Company, received in exchange Engineers common stock, is that correct?

A. I don't know.

Q. We also find appearing on page 1 of Exhibit 3, the names of Whitney Stone & Edward C. Brewster, executives, Estate of Charles A. Stone, holding 37,935 shares and Edwin S. Webster, Jr., care of Mr. George W. Elwell, Accounting Service Corporation, holding 34,200 shares.

On the top of the second page we find that Clarence J. Shearn, trustee under declaration of trust by Stone & Webster, Incorporated, dated February 14, 1938, New York, New York, holding 23,335 shares.

Is it not true that J. M. Forbes was at one time a partner with the Stone & Webster Company?

A. I don't know whether he was or not, Mr. Kanton.

Mr. Condon: Couldn't we get a stipulation on that on the record if it is a fact.

(Discussion off the record.)

By Mr. Kanton:

Q. Will you answer it now? You have been advised.

A. It is my understanding that J. M. Forbes was the grandfather of W. Cameron Forbes, who was a partner of Stone & Webster at one time.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Is Cameron Forbes now a member of the firm of Forbes and Company?

A. I don't know.

Q. I also notice on page 2 of Exhibit 43 the name of Mrs. Jane de P. Webster, care of Mr. Elwell, care of Accounting Service Corporation, Boston, Massachusetts.

Do you know if she is connected or was connected, either through a family relationship or business relationship with the Stone & Webster interests?

A. It is my understanding that she is the wife of Mr. Edwin S. Webster, Sr.

Q. And the next name I am referring to is Margaret S. Winthrop, care of Investors Record Corporation, New York, New York, the owner of 15,563 shares.

Could you tell me if she has been connected with the Stone and Webster interest either in a business capacity or through a family relationship?

A. She is the sister of Whitney Stone.

Q. And we also have appearing on page 2 Mr. Whitney Stone, care of Investors Records Corporation, the owner of record of 15,463 shares.

Now, if we look at Exhibit 43 again, is it true, Mr. Benjamin, that Pratt Brothers, Kidder, Peabody and Company, Whitney Stone & Edward C. Brewster, et cetera, Edwin S. Webster, Clarence J. Shearn, trustee under declaration of trust by Stone & Webster, J. M. Forbes and Company, Mrs. Jane de P. Webster, Margaret S. Winthrop, Whitney Stone, and possibly Mr. Frank J. Gould, have at one time or another been connected either through business or family relationships with the Stone and Webster interests?

A. I would like to exclude from the list of names you read Mr. Gould and J. M. Forbes and Company, because I don't know what the situation is with respect to those two names other than what I have already told you.

The other names you mentioned—you had quite a few of them there—Pratt Brothers we have already covered.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Kidder, Peabody.

A. Kidder, Peabody, Mr. Edwin S. Webster, Jr. I believe is a partner of that firm, and Whitney Stone Trustee and Edwin S. Webster we have already spoken of.

Mr. Shearn as trustee under this declaration of trust is connected by reason of this trust through a business relationship with Stone and Webster.

Mrs. Webster, Margaret S. Winthrop and Whitney Stone we have already covered. Looking through this list and excluding the parties we have just mentioned, to the best of your knowledge and ability, can you tell me if there are any other names listed here-on that have been or are connected with the Stone and Webster interests?

A. I don't see any other names that might have had any connection with Stone and Webster, to the best of my knowledge.

Q. Do you know of any other holders, from looking at the stock books of the Engineers Company, to the best of your recollection, that own shares of common stock in Engineers, who may have been or who are connected either in a business capacity or through family relationship, with the Stone and Webster interests?

I mean you won't find that in the material you have before you, but do you have any other information?

A. Mr. Kanton, I haven't looked over the Engineers stock list with that purpose in mind and I don't feel I can answer.

Q. Mr. Benjamin, referring now to Exhibit No. 44—this is just a point to clear up in my mind.

This Exhibit is entitled "50 of the Largest Holders of Common Stock Who Also Hold Preferred Stock, Eliminating Common Holders only as of October 31, 1945."

Q. Could you tell me what the last part of that statement means "Eliminating common holders only?"

A. The purpose of this exhibit which was prepared at your request was to show the 50 largest holders of common stock who also held preferred. This is not a list of the 50

largest holders of common stock. It is only a list of those holders who also own some preferred stock, according to the records of the company, and eliminating common holders only means that it eliminates those of the largest holders who do not own any preferred. Do I make myself clear?

Q. Looking at this exhibit, do you know from your information, if there would be a material change if an exhibit were prepared showing a list of the 50 largest preferred stockholders who also own common stock?

A. The 50 largest preferred stockholders who also own common stock.

Q. Correct.

Q. I have no idea what that list would show. I assume that it would be different—materially different.

Q. You think it would be materially different?

A. I don't know. I just don't know who the 50 largest holders of preferred stock are.

Q. I mean just from looking at this, does this appear to you that the preferred stock holders here appear to be holders of large amounts of preferred stock?

Mr. Tucker: You are referring now to——

Mr. Kanton: Exhibit 44.

The Witness: We have in the record a list of the 20 largest holders of each class of preferred stock, and looking at Applicant's Exhibit 40, the holdings run from 2,170 shares down to 500.

Looking at 41, which is the $5.50, they run from 10,295 shares down to 1,100, and looking at Applicant's Exhibit 42, which is the $5, they run from 5,750 down to 1,100.

Looking at the holdings on Applicant's Exhibit 44 of preferred stock, I find that some of these same holdings appear.

The only one I—N. J. Forbes and Company, for example, has 10,295 shares of $5.50 preferred and that name appears on both lists.

Q. Kidder, Peabody and Company apparently does too, Whitney Stone, and Pratt Brothers.

A. Some of the names appear to be duplicated. On the other hand there are some rather small holdings of preferred stock. One as low as ten shares. Josephthal, for example. I think the lists would show a different result.

Q. Mr. Benjamin, would you now turn to Exhibit 41 which is the 20 largest holders of record of Engineers $5.50 preferred. The third item appearing on the bottom of page 1 of this Exhibit is Mrs. Clara D. Kellog. Can you tell me who she is?

A. I believe she is the wife of Charles W. Kellog, one of the Directors of Engineers.

Q. How about the Cyrus W. Ferris, care of Stone & Webster and Blodgett, Inc? Do you know who he is? He is the last name appearing on page 2 of Exhibit 41.

A. I believe he is the Vice President of Stone and Webster and Blodgett, Incorporated.

Q. Referring to Exhibit No. 45, Mr. Benjamin, entitled "Engineers Public Service Company—Common stock balance as of June 30, 1945."

Just for the record, it is true, is it not, that this exhibit shows the holdings of Engineers common stock and certain "street" names but does not show otherwise the beneficial owners of record, is that correct?

A. Yes. If by "street" names you mean the names of brokers of whom the transfer agent has knowledge. It does not show the beneficial ownership.

Q. Does it also show the names of nominees?

A. No. We asked the transfer agent to include in this list only the names of brokers that he knew of his own knowledge to be brokers.

Q. Looking at Exhibit 45, there is no way of distinguishing whether any of these holdings may be beneficial holdings of the names listed here, is that correct, Mr. Benjamin?

A. The only way we have of getting any information on the beneficial holdings is this letter that we send out annually in connection with U.5-S.

Richard N. Benjamin—Cross Examination (Cont'd)

Some of these people that are on this list did have stock in their name at December 31, 1944, so that you get a little check perhaps on what their beneficial holdings were at that time. It doesn't mean that they are necessarily the same now.

* * * * *

[R. p. 370] By Mr. Kanton:

Q. Exhibit 13 shows the common stock prices up to November 20, 1945. Can you tell me what the price is now on the market and the high for this year so far? That is just to bring the records up to date.

(Discussion off the record.)

By Mr. Kanton:

Q. What was the high so far this year?

A. The high so far this year was 37 and last night's close was 33½.

* * * * *

[R. p. 376] By Mr. Kanton:

Q. Can you please tell me, for the record, what provision has been made in the Plan for any payment of interest with respect to any additional amount that may have to be payable over $100 per share, plus accrued dividends to the preferred stockholders?

A. I would say that there was no provision in the Plan for that at the present time except to the extent of the third paragraph of Part II of Division C of the Plan, where it is stated that Engineers agrees that in the event the Commission shall, in any findings, find that it is not fair and equitable to the persons affected, that Engineers shall pay to its preferred stockholders no amount in addition to $100 per share plus accrued dividends to the date of deposit then Part II is automatically amended to provide for the payment of such additional amount as the Commission shall

specify and if the Commission specifies the payment of interest, I would think that section would cover it.

Q. In other words, you are leaving it within the province of the Commission to determine if any interest payment is to be paid on this additional amount of over $100 a share, plus accrued dividends.

Mr. Tucker: Subject to our reservation to contest it?

Mr. Kanton: Oh, sure. That is not the point. The point is, as I have stated the question that it is entirely within the province of the Commission as you have stated, whether any interest is payable on this additional amount, if any.

Mr. Tucker: I still make the statement. You say, "Entirely within the province of the Commission."

I say it is not entirely within the province of the Commission because we are reserving the right to contest it.

By Mr. Kanton:

Q. No provision has been made for any payment of interest on any amount that may be found to be fair and equitable over $100 per share plus accrued dividends.

Mr. Tucker: I think you are getting into a discussion of legal problems with the witness on that subject. He has given you the provision of the plan and he has told you that he understands that if the Commission shall find that interest shall be payable in addition to $100 per share plus accrued dividends, the plan will be automatically provided for it, and I say that is, of course, subject to our reservation of the right to contest it.

The rest, it seems to me is a legal question.

* * * * * *

[R. p. 413] By Mr. Kanton:

Q. In your testimony regarding the price ranges of the preferred stock of Engineers, on their respective issue dates, up to November 1, 1945, you made the statement

with respect to the $5 dividend preferred stock, that the reason it sold above $100 in 1928, 1929, and 1930 was "due to the conversion privilege which then existed."

And you said the same thing with respect to the $5.50 dividend preferred stock, with respect to its excess in value in 1929 and 1930 being due to stock purchase warrants attached thereto.

Would you please explain for the record what you mean when you say that the excess in value over $100 per share was due to certain rights attached to the security?

A. Well, the $5 stock was convertible into common stock at that time, and this conversion privilege added value to the preferred stock.

In other words, as the price of the common stock went up the conversion privilege became more valuable.

Q. That wasn't the only reason then that, as you put it, it was due to the conversion privilege or the stock purchase warrants. It may have been due to other factors, isn't that correct?

A. Perhaps the condition of the market at that time.

Mr. Scheetz: While we are on that, could we have for the record the conversion rate if it was a fixed rate. If it was a sliding scale I don't know whether it is feasible.

Mr. Kanton: I think it was attached to the charts that were put in, is that correct, Mr. Benjamin?

The Witness: Well, the charts show the number of shares that were converted. The charter amendment shows the basis of the conversion.

Mr. Scheetz: If that is so, Mr. Benjamin, that is all right. Then I will find it.

Mr. Tucker: I might also add for the information of counsel that all of that information is also contained in detail in these annual reports, and all of the annual reports are in from the beginning.

Mr. Scheetz: Thank you, Mr. Tucker.

The Witness: You will notice that the $5 stock in 1929 went up to approximately $123 a share, and I believe that

the reason it went that high was because of the conversion privilege.

By Mr. Kanton:

Q. I am just trying to get clear what you testified to, but you stated "it was due to the conversion privilege."

Is that the only factor that was involved that made the $5 dividend preferred stock sell as high as 123 in 1929? Weren't there other conditions involved, or other factors?

A. I think that was the factor that made it go that high, Mr. Kanton.

Q. That high above what?

A. Above what it ordinarily would have sold for on a straight yield basis.

Q. What would it have sold for at that time?

A. I can't give you the exact figure.

Q. Weren't the preferred stocks at that time all selling above $100 per share? By that I mean preferred stock on the same dividend yield and the same comparative quality as the preferred stock of Engineers?

A. Well, the $5.50 preferred stock which has a higher dividend rate than the $5 stock was selling in 1929 at one point at a high of 109 so that I think it is a fair assumption that the reason $5 stocks sold higher was because people gave weight to the conversion privilege.

Q. With respect to the $5.50 you say it went as high as 109 in 1929 and that was due to the stock purchase warrants? If there weren't any stock purchase warrants would that have gone has high as 109? What I am really getting at, Mr. Benjamin, is your exact phraseology of your testimony with reference to these privileges that you just spoke about. You don't mean that it was due to these things? This was one of the factors that perhaps added value to the securities in question at that time, is that correct?

A. I think that is a correct statement.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. You testified that as of June 30, 1945, Virginia Gulf and El Paso had $2,773,000 of free earned surplus and Engineers had $7,095,000 of free earned surplus or a total of $9,868,000 which could have been declared out in common stock dividends.

I would appreciate it if you would tell me again why you consider that important as bearing upon the Plan that we now have before us.

Mr. Tucker: You haven't got a page reference that the witness could look at, have you, Mr. Kanton?

Mr. Kanton: Frankly, I am sorry, I don't.

(Discussion off the record)

The Witness: I think the only bearing that that statement has on the present situation is that by reason of the fact that these dividends have not been paid, the security behind the presently outstanding preferred stock has been kept up to that extent.

By Mr. Kanton:

Q. You mean the common stock? Is that what you just said?

A. Preferred stock I said.

Q. Well, doesn't it also increase the value of the common stock?

A. Yes, it does.

Q. Were you prevented from paying out this sum of money?

A. No.

Q. Why didn't you pay it out?

A. Well, the directors of Engineers have adopted a policy of not declaring dividends on the common stock because of the uncertainties due to the Holding Company Act.

Q. What do you mean by that exactly?

A. Well, the future of Engineers has been uncertain because of the requirements of the Public Utility Holding Company Act requiring divestment, and so forth, and the

orders of the Commission that have been issued and pending the final work-out of the Plan, this money has been kept in the system rather than having been paid out.

Q. Are you trying to say in effect that the money was being kept in in order to pay out the preferred stockholders?

A. That is what the money is going to be used for.

Q. Is that the reason it wasn't paid out in dividends?

A. Yes. I think it was one of the principal reasons.

Q. Can you tell me the purpose of Exhibit 30 again please?

A. Exhibit 30 shows the amount that has been left in the system over the period of years shown in the exhibit, and to the extent that it was left in, it has accomplished the same result that I just testified to on this free earned surplus that we talked about.

If it had been left in for other reasons, the amount over and above the free earned surplus has been left in because of freezes and the two figures you just mentioned have to do only with free earned surplus.

Q. The money that is left in has added not only to the value of the common but also to the preferred stock.

A. It has added to the value of both classes stock.

Q. I think you testified this morning that if this money had been paid out as dividends to the Engineers common stock the effect would be that on the final dissolution and liquidation of Engineers, if there was no cash available, some other method would have to be found as for instance the payment to the preferred stockholders of either with the common stock of one of the Utility Companies, or the sale of such stock in order to generate cash to pay off their claim, is that correct?

A. The preferred stockholders claim would certainly have to be paid in one way or another.

Q. Isn't it true that it would have to be paid in one of the methods I have just used rather than with cash if there was no cash available?

Richard N. Benjamin—Cross Examination (Cont'd)

A. If there was no cash available it would have to be paid off either through securities or through the sale of securities to raise cash.

Q. Isn't it true that a dividend policy, as you tried to explain is the purposes of Exhibit 30, of any corporate management of any company is one of the risks an investor takes into account when he purchases a security in such a company?

A. That is true.

Q. Therefore, don't you think the preferred stockholders of Engineers should be in a position to be compensated for their risk as well as the common stockholders?

A. I don't know just what you mean by that, Mr. Kanton. The preferred stockholders have received full dividends on their preferred stock.

Q. What I mean is this: You tried to point out by Exhibit 30 that by holding back the payment of dividends on the common stock you have increased the value of the preferred stock and also increased the value of the common stock. I asked you, isn't it true that a dividend policy is one of the risks an investor takes, meaning a preferred stock investor or a common stock investor and my final question was, if that is one of the risks he takes shouldn't he be in a position to be compensated for that risk because that is one of the risks he took?

A. The basic difference between a preferred stockholders risk in that regard and a common stockholders risk is that a preferred stockholder would have first call on those earnings and dividends and whenever dividends are declared they must first go to the preferred stockholder.

Q. That is right.

A. So the degree of risk is considerably less in the preferred stock.

Q. But if the dividend policy of a company is to hold back dividends it would accrue to the benefit of the preferred stockholders. If the dividend policy of a company is to hold back the payment of its dividends to its common

stockholders, as you have just testified, it would be to the benefit of the preferred stockholders, is that correct?

A. I say that the effect of keeping this money in the system has been to increase the security behind the preferred stock.

Q. I asked you before, isn't that one of the risks that a preferred stockholder takes into account when he purchases a security—the dividend policy of the company, the corporate management of the company—and then I asked you shouldn't he be compensated for that risk if it ultimately comes to his benefit?

(Discussion off the record.)

The Witness: I think that the first part of your question as to whether or not a preferred stockholder takes into account the risk in whether or not he is going to receive dividends, and the corporate management, and so forth is correct.

I think a preferred stockholder does take those things into account.

The second part of your question you asked me whether he should be compensated for the risk he takes. I always understood that he got full compensation for whatever risk he took by buying a security with a fixed dividend rate on it and apparently whatever price he paid for the stock he thought was a fair price in view of all the risks that he took.

By Mr. Kanton:

Q. Yes, but doesn't he look to the company balance sheet to see if there is the assets and the cash to pay his dividends?

A. Absolutely should.

Q. And if he sees a company that has $14,000,000 in cash that isn't being paid out in dividends he would like to become a preferred stockholder in that company as contrasted to a company that doesn't have any cash?

A. Because he is relatively sure of getting his dividends on the preferred stock and in the event the company is

liquidated he is relatively sure of getting whatever amount is payable to him in liquidation, yes.

Q. The only point I have in bringing this out: if it is finally decided that the preferred stockholders of Engineers should be compensated on a going concern basis—and I am not saying what the answer is—we don't know at this time—but if that is the answer, don't you think that one of the elements that should be considered is the present condition of engineers as it is today?

A. I think if the decision is going to be made on the supposition that Engineers is going to continue in business—and I suppose that is what you mean by a going concern basis——

Q. That is correct.

A. All those factors would have to be taken into consideration.

Q. On page 127 of the transcript, Mr. Benjamin?

A. I have it.

Q. You were asked the question in what alternative ways Engineers could comply with that order of the Commission, dated September 16, 1942, which requires the divestment of its interest in Gulf States and El Paso and you answered that: "There were four ways, the first being Engineers could sell its interest in Gulf States to the public through competitive bidding for cash and with the proceeds retire the Engineers preferred stock and distribute the El Paso common stock to its common stockholders.

"Second, Engineers could file a one stock plan whereby a new class of common stock would be issued to replace the present preferred and common stock of Engineers on such basis as might be determined to be fair and equitable.

"Third, Engineers might exchange the common stocks of Gulf States and El Paso or a portion thereof, with or without cash, for the preferred stock of Engineers, and such prices as might be found to be fair and equitable.

"And, fourth, Engineers might divest itself of Gulf States and El Paso in accordance with a plan such as that now under consideration."

Q. I take it then that you, or rather the Board of Directors, considered these four possibilities as a Plan to be proposed before this Commission, is that correct, Mr. Benjamin?

A. I think these Plans have been discussed with the Board informally from time to time, yes.

Q. Were any other plans considered, or were these the only four that were considered?

A. There have been a good many plans that have been considered by the management, and the Board has discussed some of these plans. Whether or not they have discussed all of them, I don't know.

Q. I mean recently. Of these four plans they have considered recently they have decided on Plan No. 4, is that correct?

A. The 3 Holding Company Plan was one that has been considered for sometime in addition to the ones that are mentioned here.

Q. Would you say that of the four plans mentioned the first three should have been discarded because from the tax standpoint they would not be favorable to the Engineers common stockholders?

A. I believe that that was not the reason why these plans were discarded.

Q. Isn't it true, or would you know if it is true, that Plan No. 4 would be more advantageous from a tax standpoint than the first three plans?

A. I don't know the answer to that.

Q. Would Mr. Radcliffe know that?

A. He might.

Q. Also isn't it true that, considering these four plans that you mentioned in your testimony, that under the first three the present common stockholders of Engineers would

lose control of Gulf States and El Paso which they would not do under Plan 4 which is now under consideration?

A. Under Plan 1 where Gulf States would be sold through competitive bidding, the Engineers common stockholders would only have an opportunity to acquire an interest in that stock by going out and buying it in the open market.

Q. We can assume in that case that they have lost control. Considering the present engineers common stockholders as a group?

A. The one stock plan which is the second Plan would result certainly in a dilution of the interest of the present common stockholders in El Paso and Gulf States, also ultimately in Virginia.

Q. I think that by that you mean that a majority of the so-called new common stock that could have been issued under that Plan would go to the preferred stockholders.

A. I wouldn't say what the percentage would be, whether it is a majority or a minority, but in any event the common stockholders would get less than they get under this plan.

Q. Correct.

A. The third Plan, if Gulf States and El Paso or a portion of them were exchanged for the preferred stock obviously the common stockholders would have considerably less interest in those two companies.

Q. You testified on page 123 that when Engineers has divested itself of El Paso and Gulf States, there would no longer be any justification "economically or otherwise" for the continuation of Engineers as the parent of Virginia only.

Could you please explain for the record what you mean by "Economically or otherwise" in detail?

A. Well, I can't see any advantage to any one in continuing Engineers as a holding company over one subsidiary, namely, Virginia.

Q. That is economically?

A. I can't see any reason for continuing them——

Q. Is that what you meant by economically or otherwise?

A. Economically I meant that all it would do would be to add expenses, and so far as I could see, without any particular result being gained from those expenses.

Q. Well, if the actual or present capitalization of Engineers were continued, do you think that Virginia could support it?

A. I haven't analyzed that, Mr. Kanton, but I think even if it could it wouldn't change my feeling on the subject.

Q. That it wouldn't be economically desirable?

A. I don't see any advantage to it.

Q. If it were not for the Holding Company Act, do you think it would be economically desirable to eliminate Engineers as a corporate entity?

A. I think if Engineers were allowed to retain Gulf States, El Paso and Virginia, that there would be some advantage in maintaining Engineers.

Q. And also Puget, Savannah and the rest of the companies which you distributed?

A. That is correct.

Q. However, there is no order of the Commission directed to Engineers requiring it to cease to be a corporate entity, is that correct?

A. That is my understanding.

Q. However, as you stated, Engineers business is not economically desirable any more. However, isn't it possible under the charter of Engineers to voluntarily liquidate Engineers at this time?

A. I think it is open to any Delaware Corporation to liquidate voluntarily with the consent of its stockholders if it so desires.

Q. And it so provided in the Engineers charter?

A. I assume so. Let me look at the charter. I think that is a legal question. I think it is provided in the Delaware law to that effect that any corporation can dissolve.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. I think we can all agree—counsel and yourself and the other counsel here, that it is provided in the Engineers charter.

Mr. Tucker: I won't agree to it because I don't think it is so.

Mr. Kanton: Let me finish the question.

By Mr. Kanton:

Q. —that it is possible under the charter for Engineers to voluntarily liquidate its business at this time?

A. As I understand it, I think it is possible under the Delaware law. I haven't found it in the charter yet.

(Discussion off the record.)

By Mr. Kanton:

Q. What I am really getting at is this: Has Engineers considered the voluntary liquidation of itself as a corporate entity?

A. The Engineers management and Board of directors has filed this plan, when it filed this plan, for the complete liquidation of Engineers, because of the requirement to divest itself if the Act is upheld, of Gulf States and El Paso, and therefore the whole plan was looked at as a unit, because the Directors feel, I am sure, that there is no purpose served in continuing Engineers with just the one subsidiary. You asked me whether——

Q. You considered such action. The answer is——

A. Considered a voluntary action.

Q. The answer is yes or no?

A. The answer is no.

Q. If it is true that the Act has made it economically or otherwise desirable to dissolve Engineers as a corporate entity, isn't it true that Engineers still has the right and the power by vote of its common stockholders, under Delaware law, to voluntarily liquidate the company?

Mr. Tucker: I think he is asking the witness for a legal conclusion and I object to the question.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Tucker: If you want to go into his recollection of what my opinion said, it was a very elaborate opinion as I remember it—10 or 12 pages long—and I doubt if he has a very accurate recollection. I know I haven't. It dealt with the thing rather exhaustively.

Mr. Kanton: I think that the question of paying the preferred stockholders $100 plus accrued dividends has a fundamental basis somewhere, either legally or from a financial point of view. Now, if it was picked up from the charter, and you pointed to a specific provision of the charter, I asked you just now to tell me what it was, and you said you don't care to tell me. Now, I went to the witness to ask him what his recollection was. He is on the stand and I told him that there is nothing in the testimony so far to indicate to us how Engineers or its Board of Directors arrived at $100 per share plus accrued dividends, and as was agreed upon by yourself and the Trial Examiner, I was willing to go along back to the time when this was considered by the Board of Directors, and that is what I am attempting to do now as to what took place at that time and how they arrived at $100 per share plus accrued dividends.

Mr. Tucker: Well, go ahead with your examination then.

(The question was read.)

The Witness: To clear up one thing, you said, "You and the other directors." I am not a director. My recollection is that he told us that this was an involuntary liquidation, in his opinion, and that under the charter—and my recollection is that it is this Section 3 that you refer to—that they were entitled to receive just $100 plus accrued dividends.

By Mr. Kanton:

Q. Did he refer to any other part of Section 3 of Division A as being applicable to the payment of these preferred stockholders?

A. I don't remember, Mr. Kanton. That opinion was pretty long.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. When that statement was given to the Board of Directors, did they consider from the point of view of the preferred stock, that the preferred stock was giving up certain rights, to which a preferred stockholder would be entitled, if he remained in the enterprise, or, in other words, did the Board of Directors, after this opinion was given to them, did they attempt to evaluate the Engineers' preferred stock on a going concern basis? I mean, trying to find out whether the stock was worth, say $80, $90, $100, or more than $100?

A. I don't recall anything of that nature.

Q. In other words, when this was considered, after Mr. Tucker's opinion was given to the Board of Directors, they considered it and adopted it as their opinion?

A. That is right, they adopted the Plan with those provisions in it.

Q. In other words, the Board of Directors gave all their weight to this one factor, the involuntary liquidation provision?

A. I don't know what weight they gave the factors, Mr. Kanton. All I know is that Mr. Tucker's opinion was presented and discussed, and as a result of that presentation the Board adopted the Plan.

Q. Was anything else discussed in the nature of what should be paid to the preferred stockholders, after Mr. Tucker gave this opinion?

A. Well, Mr. Streeter objected to that basis, and I understand he thought they were entitled to more than $100.

Q. What did the other directors say?

A. The other directors thought that Mr. Tucker's opinion was correct, and decided to follow his opinion.

Q. And no attempt was made to evaluate the preferred stocks on any basis, at that time?

A. I don't recall anything of that nature.

Q. When did this occur, Mr. Benjamin?

Richard N. Benjamin—Cross Examination (Cont'd)

A. At——The meeting at which the Plan was adopted was held on September 5, 1945.

Q. And you can't recall at this time whether the Board of Directors considered anything else but Mr. Tucker's opinion as to what should be paid to the Engineers' preferred stockholders?

A. I think they relied mainly on Mr. Tucker's opinion.

Q. Mainly?

A. There may have been some other discussion in which they indicated that they thought that this treatment of the preferred stockholders was the appropriate treatment under the circumstances.

Q. Did they consider the market prices of the Engineers' preferred at that time, on September 5, 1945?

A. I don't recall whether they did or not. One of the directors may have mentioned—I am not going to guess at it. I don't recall that they did.

Q. Discuss the market price?

A. The market price.

Q. Did they discuss anything else? You said they discussed mainly the liquidating provision, the involuntary liquidation provision, as expressed in the charter. What were the other considerations that you recall that they discussed in reference to arriving at $100 per share plus accrued dividends for the Engineers' preferred stockholders?

Would the minutes of that meeting of September 5 refresh your recollection?

A. No, they would not. I have just looked at them and they don't disclose any details of the discussion. No, as I recall it, the principal basis on which this was decided was the opinion of counsel.

Q. Well, I don't want to press the matter, Mr. Benjamin. I understand you say it was the main contection, or principal contention. I want to know whether any other ideas were expressed in reference to the preferred stock

in arriving at this $100 plus accrued-dividends price, other than Mr. Tucker's opinion?

A. That is all I recall at the moment.

[R. p. 143] By Mr. Kanton:

Q. Were any financial statements or reports of studies submitted to the Board of Directors on September 5, when this matter was considered, as to what price should be paid the preferred stockholders of Engineers?

A. I can check that matter. I don't recall at the moment. I can check that matter by reference to the folder for that particular meeting.

Q. Would your minutes show how long this meeting consumed?

A. No.

Q. They would not show that?

A. It doesn't show the time.

Q. Do you happen to recall?

A. Well, as I recall, that meeting lasted about an hour to an hour and a half,—something in that neighborhood.

Mr. Kanton: That is all I have, Mr. Examiner.

Mr. Scheetz: May I ask one or two questions?

By Mr. Scheetz:

Q. Mr. Benjamin, do you remember when Mr. Tucker's opinion was furnished? That is, his written opinion?

A. When it was furnished?

Q. Yes.

A. Yes, it was furnished just, I think, about a week before this directors' meeting of September 5th.

Q. Had there been a previous oral opinion of the same effect?

A. No, I don't think so. Mr. Tucker was asked to give the directors this opinion and he spent considerable time in preparing that opinion.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Then when was the present plan formulated, substantially as it is now? When was it first formulated?

A. I think this warrant plan, Mr. Scheetz, referring to this Section 11(e) Plan, has had its inception about in the middle part of June of this year. You asked me whether Mr. Tucker had given us an oral opinion. By that I assumed you were talking about the Board of Directors, and I think that he had advised us, the officers of the Company, for some time, that it was his opinion that the preferred stock was entitled to $100 a share and accrued dividends.

Q. At the time of the inception of the warrant plan, had you already had an indication from Mr. Tucker as to the value to be put on the preferred?

A. The amount which they were entitled to receive?

Q. Yes.

A. Well, that is not a new question. Under all of the plans that we had discussed, the liquidating holding company plan, and all the others, it has always been stated that the position of the Company is that the preferred stockholders were to receive $100 a share and accrued dividends.

Mr. Tucker: And no more?

The Witness: That is right.

Mr. Scheetz: That is all.

Mr. Kanton: Mr. Tucker, I think you stated you would make available to us that written opinion that was submitted to the Board of Directors?

Mr. Tucker: Well, Mr. Benjamin can make it available to you. I submitted it to the Board and it is in their records.

Mr. Kanton: You have no objection to it, do you?

Mr. Tucker: No.

Mr. Kanton: I would like to reserve,—or will you, if you wish, Mr. Tucker, reserve an exhibit number and submit that at the next meeting.

Mr. Tucker: I have no objection.

Richard N. Benjamin—Cross Examination (Cont'd)

The Examiner: Applicant's Exhibit No. 38 will be reserved for a copy of the opinion of Mr. Tucker.

(Applicant's Exhibit No. 38 is RESERVED as noted.)

By Mr. Condon:

Q. Mr. Benjamin, you are familiar with the technique of drafting plans in corporate reorganizations and liquidations, are you, from your past experience?

A. Yes, I have had some experience.

Q. And you have worked with lawyers in connection with the drafting of such plans?

A. Yes.

Q. And has it been your custom and practice to keep what is commonly known as a tickler, to show the historic development of the various steps of the Plans, and drafts and things of that sort?

A. No, I have kept, sometimes, drafts, early drafts of plans, but we don't have any system about it.

Q. Is it a fact that you have in your files drafts of all the plans that have been projected by either counsel or employees of the Engineers Company, and/or by the directors?

A. I would say we had drafts of some of them—I wouldn't go so far as to say we have all of them.

Q. Well, the more important ones?

A. I think we have some drafts of the more important ones, yes.

Q. And do you have collected the memoranda of discussions had with various officials of the Engineers and counsel for Engineers, and with one or more of the directors of the Company, concerning the development of the Plans as they have progressed?

A. I don't have any memoranda of that sort.

Q. Do you have any records of conversations and discussions at which these things were considered?

A. You said the directors and officers and who else?

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Employees and counsel.

A. I don't think I have any memoranda on those subjects.

Q. Do you have a record of amendments and changes as to specific paragraphs and sections of the plans and things of that sort?

A. I don't believe I quite understand what you mean.

Q. Well, when you say this warrant plan was promulgated some time in June, of 1945,—now, who prepared that original draft, if you know? It had to start somewhere.

A. Well, I can tell you a little about that. I had been down here at the SEC discussing another plan with them, and at a conference with the head of the Utilities Division the suggestion was made that perhaps we should give some consideration to a warrant plan.

Some other companies had adopted such a plan and it was suggested that we give consideration to that type of plan.

We did give consideration to it and decided that that was a workable plan, and then we worked out the figures in connection with that and went ahead on that basis.

Q. Now, when you say "we" gave consideration, will you state for the record who was included in that plural pronoun?

A. Mr. Barnes, Mr. Tucker, Mr. Hastings and the other executives in the New York Office.

Q. No, who actually undertook the chore of preparing an outline or resume of the steps and the Plan itself? Did you do that?

A. I guess I did do that.

Q. In Mr. Tucker's office, was it?

A. I think it was in my own office. I can't recall whether Mr. Tucker was in my office at the time or not, but we had a very brief statement of the steps to be followed. It wasn't what you would call the Plan, but it was a statement of the steps.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Now, from June, 1945, until the Plan as presently submitted to the Commission as filed, with the amendments, were there any changes made as a result of discussions had by this group of people that you mention, or with others, or did it still remain in its initial form without change?

A. Oh, no; there were changes made in it. As I testified today, our original Plan, prior to its being filed, contemplated the issuance of Gulf States common stock under rights, the sale of Gulf States stock under rights, at $10 a share, and that involved a $6,000,000 bank loan. We changed that to $11.50 and a $3,000,000 bank loan. We introduced the idea of exchanging Engineers' preferred stock for Gulf States' common stock after the original filing had taken place. We changed the three-week period to a ten-day period, as I explained in the testimony.

Q. Other than you have testified to on your direct, Mr. Benjamin, can you think of any other changes that were made, of substance, or have you fairly stated them all, between June and October?

A. I think I have fairly stated them all.

Q. I will ask you again—you don't keep a tickler with the chronological development of changes and amendments, —or you didn't in this instance?

A. No, I do not. I keep a record of conversations with the SEC staff. I mean, when I get back to my office, I usually put down my best recollection of what developed at the conference, so that I can keep clear on what the decisions are.

Q. And when you amend drafts of a Plan or exhibits to a Plan, do you keep any record of the changes, and why you have made the changes?

A. No.

Q. I noticed on some of your exhibits, "Fifth Draft". By way of illustration, what would have happened to the four prior drafts, and why did you have a fifth draft of a particular exhibit?

Richard N. Benjamin—Cross Examination (Cont'd)

A. Well, because every time somebody looks at one of these drafts, they think of something else.

Q. And by "somebody" you mean the group of people?

A. I would pass it around the office for comments, and to the SEC for their comments, and Mr. Tucker, and I would work on it, and even we get different ideas sometimes, after we look at it again.

Q. How many plans were actually submitted by Engineers to this Commission or the staff for consideration, other than the one now before the Commission for formal action?

A. I couldn't answer that question.

Q. Who could answer it, Mr. Benjamin?

A. Well, I don't know—perhaps Mr. Barnes has a more accurate memory than mine, but there were so many plans that have been discussed.

We started in discussing plans with the SEC I think as far back as 1941, and there have been all sorts of variations of them, and there just have been quite a few of them, that's all.

Q. There were records made of all these changes and developments since 1941, every time you or Mr. Barnes discussed the matter with someone here in the Commission?

A. I wouldn't say every time. My practice is to make a record of conversations on those plans.

Q. Would you have available your memoranda of those conversations and bring them with you when you resume for cross-examination?

A. Yes, sir.

Mr. Condon: That is all.

(Witness excused.)

Richard N. Benjamin—Direct Examination (Cont'd)

Hearing on December 17, 1945.

[R. p. 160]

RICHARD N. BENJAMIN,

was called as a witness on behalf of the Applicants and, having been previously sworn, resumed the stand and testified as follows:

Direct Examination (Continued)

By Mr. Tucker:

Q. Mr. Benjamin, I show you Amendment No. 4 to the Plan Pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters which was filed today. The original Plan and the three amendments thereto were filed as Applicant's Exhibits Nos. 1, 2, 3 and 4.

Was Amendment No. 4 prepared under your direction, and do you believe the statements contained therein to be correct?

A. Yes, this was prepared under my direction and I believe the statements contained therein to be correct.

Mr. Tucker: I would like to offer as Applicant's Exhibit No. 39, Amendment No. 4, and have it marked.

(Applicant's Exhibit No. 39 is marked for identification.)

The Examiner: If there is no objection, that will be received as Applicant's Exhibit No. 39.

(Applicant's Exhibit No. 39 is received in evidence.)

By Mr. Tucker:

Q. What changes are accomplished by this amendment?

A. The changes effected are as follows:

1. A new step was added to Part I of the Plan, namely, Step 9 which provides that within 60 days after the Plan

becomes effective, the officers of Engineers Public Service Company (Incorporated) will file, without further action by the Directors or Stockholders of Engineers, a Certificate of Dissolution in the Office of the Secretary of State of the State of Delaware, and other supporting dissolution papers will be filed whereupon the Directors of Engineers would become trustees to take charge of the assets of the Company and to carry on such business as may be necessary to effect the final settlement of the unfinished business of the Company during the period specified by the Delaware law for dissolved corporations.

2. Part III of the Plan was eliminated.

3. The proviso in the third paragraph of Part II of Division C was eliminated which stated that in the event that any order of the Commission provided that Engineers should pay to its Preferred Stockholders any amount in addition to $100 per share plus accrued dividends to the date of deposit Engineers would be deemed to be a party aggrieved pursuant to Section 24 of the Act and could contest such an order pursuant to that Section and a new proviso was substituted in lieu thereof which reserves the right of Engineers to contest before the Commission or any court any finding or order of the Commission as a result of which Engineers should be directed or required to pay any amount in addition to $100 per share plus accrued dividends to the date of deposit.

4. The financial statements attached as Exhibits A through E were eliminated, it being the purpose to file these exhibits subsequently at this hearing.

5. Certain other changes were made in order to bring the statements up to date and to make the statements consistent with the other changes.

Q. Have there been any developments in connection with The Western Public Service Company since November 20, 1945?

A. Yes, on December 3, 1945, Engineers received five bids for the purchase of either the capital stock or the assets of The Western Public Service Company.

The Board of Directors of Engineers, at a meeting held that day, authorized the acceptance of the bid of William C. Gilman and associates for the capital stock of The Western Public Service Company. This bid was in the amount of $843,000.

A contract was signed the same day by Mr. Gilman and Engineers. Pursuant to the contract Engineers will also receive at the Closing Date cash equal to the principal amount of a demand note of $508,800 from Western to Engineers and in addition adjustments for net current assets and other items provided for in the contract as a result of which Engineers' cash will increase by approximately $1,500,000.

It is expected that the closing will take place in January, 1946. The differences between the pro forma statements contained in the Plan and the expected actual result are so minor that it was not deemed necessary to make any change in these pro forma statements.

Q. Do you have with you statements showing the twenty largest stockholders of record on October 31, 1945, of the three classes of Preferred Stock and of the Common Stock of Engineers?

A. Yes.

Q. Were these statements prepared under your supervision and do you believe them to be correct?

A. Yes.

Mr. Tucker: I would like to offer these in evidence at this time and ask that they be marked Applicant's Exhibit No. 40.

The Examiner: No. 40 will be a reference to the $6 Preferred Stock.

(Applicant's Exhibit No. 40 is marked for identification.)

Richard N. Benjamin—Direct Examination (Cont'd)

The Examiner: If there is no objection, that will be received as Applicant's Exhibit No. 40.

(Applicant's Exhibit No. 40 is received in evidence.)

Mr. Tucker: I offer as Applicant's Exhibit No. 41 the same with respect to the $5.50 Preferred Stock.

(Applicant's Exhibit No. 41 is marked for identification.)

The Examiner: If there is no objection, that will be received as Applicant's Exhibit No. 41.

(Applicant's Exhibit No. 41 is received in evidence.)

Mr. Tucker: As Applicant's Exhibit No. 42 the same with reference to the $5 Preferred Stock.

(Applicant's Exhibit No. 42 is marked for identification.)

The Examiner: If there is no objection, that will be received as Applicant's Exhibit No. 42.

(Applicant's Exhibit No. 42 is received in evidence.)

Mr. Tucker: As Applicant's Exhibit No. 43, the same with respect to the Common Stock.

(Applicant's Exhibit No. 43 is marked for identification.)

The Examiner: If no objection, that will be received as Applicant's Exhibit No. 43.

(Applicant's Exhibit No. 43 is received in evidence.)

By Mr. Tucker:

Q. Do you have with you a statement showing fifty of the largest holders of Common Stock of Engineers who also held Preferred Stock of Engineers as of October 31, 1945?

A. Yes.

Richard N. Benjamin—Direct Examination (Cont'd)

Q. Was this statement prepared under your supervision and do you believe it to be correct?

A. Yes.

Mr. Tucker: I offer as Applicant's Exhibit No. 44 a statement of the 50 largest holders of Common Stock, eliminating Common stockholders only as of October 31, 1945.

(Applicant's Exhibit No. 44 is marked for identification.)

The Examiner: Hearing no objection, that will be received as Applicant's Exhibit No. 44.

(Applicant's Exhibit No. 44 is received in evidence.)

By Mr. Tucker:

Q. Do you have with you a statement showing Common Stock held by brokers as of June 30, 1945?

A. Yes.

Q. Was this statement prepared under your supervision and do you believe it to be correct?

A. Yes, to the extent that the names of brokers are known to the Transfer Agent. This statement contains the names and addresses of certain brokers together with their record holdings of Common Stock of the Company as of June 30, 1945, and was prepared at my request by the Transfer Agent.

This statement does not purport to contain the names of all brokers who hold Common Stock of the Company but is limited to the names of brokers who are members of an Exchange and certain other holders whom the Transfer Agent had knowledge were brokers.

Mr. Tucker: This statement of Engineers Public Service Company, Common Stock balances as of June 30, 1945, giving the names of brokers with the explanation that the witness has made, I offer as Applicant's Exhibit No. 45.

(Applicant's Exhibit No. 45 is marked for identification.)

Richard N. Benjamin—Direct Examination (Cont'd)

The Examiner: Hearing no objection, it will be received as Applicant's Exhibit No. 45.

(Applicant's Exhibit No. 45 is received in evidence.)

[Note: R., pp. 168-171—Engineers Annual Reports for 1925 through 1932 introduced and received in evidence as Exhibits 37M-37T.]

[R. p. 172] By Mr. Tucker:

Q. Do you have a statement which supersedes Exhibit E attached to the Plan as originally filed?

A. Yes, I have a statement showing income statements of Gulf States for the years 1939 through 1945 with the last two months of 1945 estimated which is a revision of Exhibit E to the Plan as originally filed. The principal change effected by this new exhibit is to reflect an increase in the item "reduction in Federal excess profits taxes resulting from amortization of emergency facilities" from $544,100 to $1,254,290. This change arose by reason of the fact that subsequent to the preparation of the first exhibit the President, on September 29, 1945, terminated the period for amortizing emergency facilities and Gulf States elected to take all of the credit for the period ending on September 29, 1945.

Q. Was this statement prepared at your direction and do you believe it to be correct?

A. Yes, it was so prepared and I believe it to be correct.

Mr. Tucker: This statement which the witness has described, we offer as Applicant's Exhibit No. 48.

(Applicant's Exhibit No. 48 is marked for identification.)

The Examiner: Hearing no objection it will be received as Applicant's Exhibit No. 48.

(Applicant's Exhibit No. 48 is received in evidence.)

Richard N. Benjamin—Direct Examination (Cont'd)

By Mr. Tucker:

Q. Do you have another statement covering this same period for Gulf States Utilities Company?

A. Yes, I have a statement covering the same period for Gulf States which applies to taxes, the tax reduction resulting from amortization of emergency facilities and reflects amortization of plant acquisition adjustments as a deduction from income. This statement was prepared in this form at the request of the Staff.

Q. Do you believe this statement to be a correct statement of income for these years set up on the basis requested by the Staff?

A. Yes.

Mr. Tucker: I offer this as Applicant's Exhibit No. 49.

(Applicant's Exhibit No. 49 is marked for identification.)

The Examiner: Hearing no objection it will be received as Applicant's Exhibit No. 49.

(Applicant's Exhibit No. 49 is received in evidence.)

By Mr. Tucker:

Q. Do you have with you a statement relating to income of El Paso Electric Company?

A. Yes, I have income statements for the years 1939 through 1945, last two months of 1945 estimated, of El Paso Electric Company, pro forma, giving effect to present fixed charges and preferred dividends and proposed number of shares of Common Stock.

Q. Was this prepared at your direction and do you believe it to be correct?

A. Yes.

Mr. Tucker: This statement I offer as Applicant's Exhibit No. 50.

(Applicant's Exhibit No. 50 is marked for identification.)

Richard N. Benjamin—Direct Examination (Cont'd)

The Examiner: Hearing no objection, it will be received as Applicant's Exhibit No. 50.

(Applicant's Exhibit No. 50 is received in evidence.)

By Mr. Tucker:

Q. Do you have with you a financial statement which supports Schedule J of Applicant's Exhibit No. 9?

A. Yes. I have a statement which is headed Engineers Public Service Company Incorporated and Subsidiary Companies Consolidating Income Statement for the 12 months ended June 30, 1945 showing tax adjustment applied against taxes and reflecting amortization of plant acquisition adjustments as a deduction from income.

Q. Was this prepared at your direction and do you believe it to be correct on the basis you just outlined?

A. Yes, it was so prepared and I believe it to be correct.

Mr. Tucker: This statement I offer as Applicant's Exhibit No. 51.

(Applicant's Exhibit No. 51 is marked for identification.)

The Examiner: Hearing no objection, it may be received as Applicant's Exhibit No. 51.

(Applicant's Exhibit No. 51 is received in evidence.)

By Mr. Tucker:

Q. Do you have with you a similar statement supporting Schedule J-1 of Applicant's Exhibit No. 9?

A. Yes, I do.

Q. Was this prepared at your direction and do you believe it to be correct on the basis stated?

A. Yes, it was so prepared and I believe it to be correct.

Mr. Tucker: This statement I offer as Applicant's Exhibit No. 52.

(Applicant's Exhibit No. 52 is marked for identification.)

Richard N. Benjamin—Direct Examination (Cont'd)

The Examiner: Hearing no objection it will be received as Applicant's Exhibit No. 52.

(Applicant's Exhibit No. 52 is received in evidence.)

By Mr. Tucker:

Q. Do you have income statements of Virginia Electric and Power Company for the years 1944 and 1945?

A. No, these statements are in the process of preparation.

Mr. Tucker: If the Examiner please, I would like to have reserved for this statement, when it is prepared, Applicant's Exhibit No. 53.

The Examiner: I understand there is no objection. Applicant's Exhibit No. 53 will be reserved for that purpose to be incorporated in the record as received, after being duly marked, without reopening the hearing.

(Applicant's Exhibit No. 53 is RESERVED, as noted.)

* * * * *

[R. p. 184] By Mr. Tucker:

Q. Do you have with you a statement which summarizes the Common Stock issues of Engineers?

A. Yes, I have a statement which shows that.

Q. Was it prepared under your supervision, and do you believe it to be correct?

A. Yes.

Mr. Tucker: I offer this statement of summary of the Common Stock issues of Engineers Public Service Company as Applicant's Exhibit No. 54.

(Applicant's Exhibit No. 54 is marked for identification.)

The Examiner: Hearing no objection, it will be received as Applicant's Exhibit No. 54.

(Applicant's Exhibit No. 54 is received in evidence.)

By Mr. Tucker:

Q. What does this exhibit show?

A. This exhibit shows that 1,274,240 shares of Common Stock were issued for cash, either directly or on conversion of Preferred Stock which had been sold for cash, aggregating $38,294,679.85, an average of $30.05 per share and that 99,708½ shares were issued as stock dividends through capitalization of surplus at $10 per share; 535,638 shares were issued in exchange in connection with acquisitions at an average price of $35.03 per share based on market of Engineers Common Stock at the time, and that the balance was issued in conversion of scrip at an average rate of $10 per share, or an average for all issues of Common Stock of $30.40 per share.

Mr. Kanton: May I ask, Mr. Tucker, what the purpose of this exhibit is?

Mr. Tucker: I think it speaks for itself but it is for the purpose of showing what was paid for the Common Stock that is outstanding now of Engineers Public Service Company.

Mr. Kanton: Bearing upon what aspects of the Plan, sir?

Mr. Tucker: Bearing upon the question of how much would be paid to the Preferred stockholders for retirement of their Preferred Stock.

Mr. Condon: May I inquire of this witness with one question with your permission, Mr. Tucker?

Mr. Tucker: Yes, surely.

Mr. Condon: Mr. Benjamin, with respect to these exhibits that were offered today and to a substantial extent at the last hearing, is it not the fact that these were all prepared, or most of them were prepared in connection with the preparation for these hearings rather than having been data that was submitted to the Board of Directors of Engineers on or about September 5, when the Plan was approved?

The Witness: I don't like to answer a question quite as broad as that. I would say that certainly most of these exhibits have been prepared since September 5.

Mr. Condon: Would you have a record of which of your exhibits that have already been received in evidence were prepared prior to September 5?

The Witness: I can't answer that question without going back through all of these exhibits.

Mr. Condon: Perhaps you could consider it and then later on state for the record.

The Witness: I would be glad to.

Mr. Condon: Thank you.

The Examiner: Anything further on direct, Mr. Tucker?

Mr. Tucker: Yes, there is, Mr. Examiner.

(Discussion off the record.)

By Mr. Tucker:

Q. Mr. Benjamin, you have before you certain statements which I understand are breakdowns of some figures previously given and which you have heretofore delivered to the staff of the Commission, have you not?

A. I do.

Q. These breakdowns were prepared under your direction and do you believe them to be correct?

A. Yes, sir.

Mr. Tucker: Mr. Examiner, I offer under one cover as one exhibit the breakdown that the witness has just testified with respect to, as Applicant's Exhibit No. 55.

(Applicant's Exhibit No. 55 is marked for identification.)

Mr. Tucker: These are described as Engineers Public Service Company Detail of Expenses 12 Months Ended June 30, 1945—Actual; Engineers Public Service Company Pro Forma Detail of Expenses After Consummation of Parts I and II of the Plan; Engineers Public Service Com-

pany Detail of Taxes—Other 12 Months Ended June 30, 1945 Actual and Pro Forma; Engineers Public Service Company Computation of Reduction in Federal Income Taxes Based on Engineers and Virginia Electric and Power Company Filing a Consolidated Federal Income Tax Return in 1946.

The Examiner: Hearing no objection they will be received as Applicant's Exhibit No. 55.

(Applicant's Exhibit No. 55 is received in evidence.)

Mr. Tucker: Now, I would like to offer the Divestment Orders in Engineers Section 11 proceeding. I offer as Applicant's Exhibit No. 56 Holding Company Act Release No. 2897.

[Note: H. C. A. Rel. No. 2897 is reported at 9 S. E. C. 764 (1941).]

(Applicant's Exhibit No. 56 is marked for identification.)

The Examiner: Hearing no objection it will be received as Applicant's Exhibit No. 56.

(Applicant's Exhibit No. 56 is received in evidence.)

Mr. Condon: What was the date of that?

Mr. Tucker: That was released——

Mr. Kanton: July 23, 1941.

Mr. Tucker: It was released July 24. I guess it was entered the day before.

Mr. Kanton: Yes.

Mr. Tucker: And as Applicant's Exhibit No. 57 Holding Company Act Release No. 3230. That was released December 31, 1941.

(Applicant's Exhibit No. 57 is marked for identification.)

The Examiner: Hearing no objection, that will be received as Applicant's Exhibit 57.

(Applicant's Exhibit No. 57 is received in evidence.)

Richard N. Benjamin—Direct Examination (Cont'd)

Mr. Tucker: As Applicant's Exhibit No. 58 Holding Company Act Release No. 3245. That was released on January 6, 1942.

(Applicant's Exhibit No. 58 is marked for identification.)

[Note: H. C. A. Rel. No. 3245 is reported at 10 S. E. C. 904 (1941).]

The Examiner: Hearing no objection that will be received as Applicant's Exhibit No. 58.

(Applicant's Exhibit No. 58 is received in evidence.)

Mr. Tucker: And as Applicant's Exhibit No. 59 Holding Company Act Release No. 3796 which was released on September 17, 1942, having been actually dated September 16, 1942.

(Applicant's Exhibit No. 59 is marked for identification.)

The Examiner: Hearing no objection that will be received as Applicant's Exhibit No. 59.

[Note: H. C. A. Rel. No. 3796 is reported at 12 S. E. C. 41 (1942).]

(Applicant's Exhibit No. 59 is received in evidence.)

Mr. Tucker: As Applicant's Exhibit No. 60, Holding Company Act Release No. 3835, released on October 7, 1942 and actually dated October 6, 1942.

[Note: H. C. A. Rel. No. 3835 is reported at 12 S. E. C. 269 (1942).]

(Applicant's Exhibit No. 60 is marked for identification.)

The Examiner: Hearing no objection that will be received as Applicant's Exhibit No. 60.

(Applicant's Exhibit No. 60 is received in evidence.)

Richard N. Benjamin—Direct Examination (Cont'd)

By Mr. Tucker:

Q. Mr. Benjamin, would you describe the relationship between El Paso Natural Gas Company and Engineers Public Service Company?

A. The present relationship?

Q. No. What is the history of that relationship?

A. Engineers relationship with El Paso Natural Gas Company began around 1930 when Engineers loaned certain money to El Paso Natural Gas Company in order to assist them to make an extension to their lines.

At that time Engineers received an option to purchase 85 per cent of the outstanding common stock of that company, and Phelps Dodge Corporation, which also advanced money had a 20 per cent interest in that option.

In 1936 it became necessary for Engineers to exercise this option, but by that time Public Utility Holding Company Act had been passed and Engineers was advised by counsel that it would be inadvisable to exercise that option and acquire the stock. As an alternative to that——

Q. At that time was Engineers Public Service Company a registered holding company?

A. No. That was prior to the time that Engineers Registered. Engineers didn't register as a holding company until February 1938.

Q. Well, go ahead.

A. At that time an arrangement was worked out with Clarence J. Shearn, who acted as independent trustee, to exercise this option, and a five-year trust agreement was worked out pursuant to which it was expected that the shares of El Paso Natural Gas stock would be sold.

The trustee exercised an option to acquire 57,119 shares of El Paso Natural Common Stock at 25. That was on April 27, 1936, total cost of $1,427,975.

This stock was split three for one, so that the trustee received 171,357 shares representing an average cost of $8.33 a share. This stock was sold in three separate blocks.

The first block, 60,000 shares was sold in September 1936 at $19 a share, total proceeds of $1,137,952.

A second block was sold, 60,000 shares at 25, in August 1937, on which was realized $1,497,410, and the final block of that stock was sold in March 1944, 51,357 shares at 29.661 a share, total of $1,523,300.

By that time the trust arrangement with Mr. Shearn had been terminated. Engineers had previously taken over the direct title to that stock pursuant to an exemption that existed in the Holding Company Act Rules at that time, so that that last sale was made by Engineers, itself.

Since that time Engineers has had no connection with El Paso Natural Gas Company.

Q. How much profit did Engineers make on those sales?

A. Engineers made a profit of $2,730,787 from those three sales.

Q. If it had held the stock at the present time what would be the value of the stock?

Mr. Condon: Based on what, Mr. Tucker?

Mr. Tucker: Based on the market on the New York Stock Exchange.

By Mr. Tucker:

Q. That is approximately, at the present time; if you know it.

A. I don't know the price today, but recently, quite recently, the El Paso Natural Gas stock has sold at 47. If you assume a price of 47 that block of 171,357 shares would have a market value of slightly over $8,000,000 which would represent approximately $6,600,000 over and above Engineers' cost.

We realized a profit of $2,700,000 so that the difference between what we actually did realize and what we would realize if we sold the stock at 47, would be approximately $4,000,000.

Mr. Condon: Mr. Tucker, may I inquire as to the purpose of this line of inquiry?

Mr. Tucker: Yes, I am perfectly willing to state what I hope to gain by it. Our position is that Engineers was forced to sell that stock by impact of the Act, that it was prohibited from acquiring the stock at the time that the option matured, by virtue of the operation of Section 4, and so that it would not acquire it in violation of the law it set up this trust arrangement, and that if it hadn't been for the Act, it would have continued to hold the stock, and that that again is another sacrifice that the Common Stock of Engineers had incurred by reason of the impact of this Act.

Mr. Kanton: Isn't this all a matter of public record, Mr. Tucker?

Mr. Tucker: It may be but it isn't in the record.

Mr. Kanton: Is there any record you can incorporate by reference instead of putting these figures in through the witness?

Mr. Tucker: I don't think so. Not that we could collect together in one spot. I think that we are certainly entitled to that purpose that I have stated for putting that evidence in.

Mr. Kanton: I am not trying to foretell your proposed testimony. Are you planning to do this with every company that Engineers is being required to dispose of its interest under the Holding Company Act?

Mr. Tucker: I think we have got a good deal of that information already in the record but I am certainly not resting on my main case here today, and what I may do in the future would be what I feel I ought to do to protect the situation.

Mr. Kanton: Isn't this a matter that is all being taken up now by the Supreme Court of the United States and will be decided by them?

Mr. Tucker: Not at all, as I view it. It would be a different question than that. We were ordered in these orders that have just gone into the record, among other things, to dispose of the tag-end of this stock, 51,000 shares.

To that extent it might be said to—well, I don't think it is even involved in that. I think these considerations are quite different and I don't think it was made an issue in that case whether the El Paso Natural Gas Stock should be sold or whether it shouldn't.

In any event, it is a moot question at this time because it has already been sold and the case was argued.

I certainly wouldn't be trying to argue that to the Supreme Court under those circumstances.

Mr. Condon: Let me see if I read your mind correctly here. This testimony is being offered to show the alleged sacrifices being visited upon the Common because of the impact of the Act and therefore it is probative of the claim of the directors of Engineers that the Preferred stockholders should not receive more than a hundred, is that the purpose?

Mr. Tucker: It has a bearing on that issue. I am not saying it is probative of this or that. It has a bearing on what is fair and equitable to be received under this plan by both the Preferred stockholders and the Common stockholders.

Mr. Kanton: Mr. Tucker, if you will refer to Exhibit 59 which is Holding Company Act Release No. 3796 issued under date of September 17, 1942 by the Commission, you will find on page 58 thereof that Engineers is to sever its relationship with El Paso Natural Gas Company.

Mr. Tucker: I admitted that a few minutes ago, and I said that it operated to the extent that we had stock at the time that this order was issued of which we had then, as I say, 51,000 odd shares to require us to divest ourselves of it, and that since that time and before the argument of the Supreme Court we had.

And you are asking me was it involved in the Supreme Court case; my answer is, it wasn't because we had sold it before and I would have readily admitted that it was a moot question and wouldn't apply to the Supreme Court.

Mr. Kanton: Does that also apply to the properties of Savannah, Key West and Puget?

Mr. Tucker: I think so. I don't know why I should be answering such questions. I certainly don't want to prejudice myself by flash answers on legal propositions.

Mr. Kanton: I just wanted to state this, Mr. Tucker. I am quite agreeable to your putting something in the record that should go in. I just wanted to know for the purposes of the record why you were putting it in and you told me that and I asked one more question whether you had in mind doing that with other properties.

Mr. Tucker: As to that, I don't care to take a position at this time unless the Examiner forces me to take a position. I don't quite see why I should.

Mr. Scheetz: In view of the explanation made of the reasons for this testimony, I move that it be stricken out as not probative to anything bearing on the fairness of this plan.

Mr. Condon: I think we are getting pretty far afield here. I didn't object to the receipt of these releases in the beginning because I didn't want to unduly interfere with counsel's examination, but I don't see that that has any relevance or materiality to the issue before this Commission —that is, what is fair and equitable to pay to the Preferred stockholders here. If we are to have to re-live the integration proceedings of the Engineers Public Service Company and the divestment of all the subsidiaries here as proof of the alleged burdens that have been borne by the Common, arguendo, they should be at least in part borne by the Preferred.

I think that that is outside the scope here of our inquiry and I join in Mr. Scheetz' objection and ask that the exhibits be stricken.

Mr. Kanton: Mr. Examiner, I had no objection to Mr. Tucker putting in through Mr. Benjamin the evidence he did.

The Examiner: We are dealing with two questions.

Mr. Kanton: This is in line with the question of whether I will take an objection to this line of testimony. That is the reason I asked Mr. Tucker if he intended to do this with every company.

I think if burdens the record and it has no materiality. I have no objection to letting this stand, but I would object if this sort of testimony by Mr. Benjamin were to continue.

Mr. Tucker: Wouldn't it be logical to save that objection until I offer some?

Now, does the Examiner care to hear me.

I understand that the point you are making—you are a little confused and I wanted to get it clear. You talked about putting in these releases. You certainly don't object to having releases received as evidence. You are not asking to have them stricken.

Mr. Condon: I don't think they have to be put in evidence. If you want them they can be incorporated by reference for whatever materiality the Commission may want to give them.

The Examiner: They are already in the record.

Mr. Tucker: If you are making a motion to strike——

Mr. Condon: I did make a motion to strike and asking that the testimony be stricken.

The Examiner: Let us confine ourselves to the two issues.

Are you objecting now to the releases that were offered as Exhibits 57, 58, 59 and 60?

Mr. Condon: I object to the testimony of the witness Benjamin and the releases offered while he is a witness with respect to the matter of the El Paso Natural Gas Company, wherein Mr. Benjamin was asked to and did describe the matter of the relationships, the past history, and so on, between Engineers and El Paso Natural Gas Company on the grounds that the same are not relevant and material to the issues before this Commission with respect to what is fair and equitable to be paid to the Preferred stockholders under the plan as filed.

Mr. Tucker: You are confused again because I offered no exhibits with respect to El Paso Natural Gas Company at all except as they were included incidentally in the September release.

The Examiner: Let us shorten this. I will overrule the objection to the exhibits. I will hear your objections to Mr. Benjamin's testimony on the El Paso Natural Gas situation.

Mr. Condon: Mr. Tucker has stated in answer to counsel's inquiry that the purpose of this line of testimony with regard to the El Paso Natural Gas Company is to show first that there was a loss sustained presumably by Engineers, through the enforced sale of Engineers' interest in El Paso through the medium of the trusteeship of Mr. Shearn to which reference has been made and through the actual sale of the remaining stock by Engineers, itself.

His contention, if I understand it correctly, is that:

(1) But for the impact of the Act, that those sales would never have occurred. That the Engineers presumably would have retained that stock, and that if they had retained that stock looking at the present market value of El Paso Natural Gas Company at 46 or 47, whatever Mr. Benjamin said, there was a potential loss that had been visited upon Engineers of some five or six million dollars.

I say that all of that is irrelevant and immaterial to the inquiry before this Commission with respect to the fairness and equitability of the plan insofar as it pertains and relates to the Preferred stockholders of Engineers and I ask that the testimony be stricken.

Mr. Tucker: Does the Examiner care to hear me on the subject?

The Examiner: I will hear Mr. Kanton first. He has taken a different position.

Mr. Kanton: I have Mr. Examiner. I have no objection to the testimony placed in evidence by Mr. Benjamin.

Mr. Scheetz: Mr.. Examiner, I am not standing on protocol but as a matter of fact, my objection was made first and went solely to the line of testimony and not to the releases. I think I stated my reasons but if I didn't it was simply this: that it is wholly speculative as to whether or not they would have sold—I understood Mr. Benjamin to say that if they had held the stock and sold it today they would have had a profit of so much.

Now, we are asked to throw ourselves back to a prior period and compare a loss sustained then with something that might have happened in the future, and one has only to think on and on as Mr. Kanton suggested, if they came in here and took that up with each property in succession we would be wholly in the realm of speculation and I think this is the time to stop it now.

* * * * *

[R. p. 207] The Examiner: While I have expressed myself in this matter that it is a question of whether the Commission will go into this, nevertheless I am going to deny the motion to strike and let the matter go to the Commission.

Mr. Condon: May I have an exception, Mr. Examiner?

(Discussion off the record.)

By Mr. Tucker;

Q. Was the sale of the El Paso Natural Gas Company stock, with respect to which you have just referred, based upon advice of counsel that you couldn't continue to hold it under the Holding Company Act?

A. To which sale are you referring?

Q. The various sales.

A. The three sales.

Q. The three sales?

A. That is correct.

Mr. Tucker: I have no further questions.

Mr. Kanton: I would just like to ask one or two questions on this line now that the testimony has been admitted into evidence.

[R. p. 208]

Cross Examination.

By Mr. Kanton:

Q. Didn't Engineers consider the sale of these securities at the time to be in the best interests of all the security holders meaning the preferred and common of Engineers and didn't they consider that they were receiving a good price for them?

A. Well, so far as the first two sales were concerned, Mr. Kanton, they were made while this stock was under a five-year trust agreement with Judge Shearn, and it was our understanding at the time trust agreement was set up that we were to dispose of that stock during the five year period, and the two sales that were made were made on the basis of the market price at the time the sales were made and it was considered then as the market price, it would be a good time to dispose of those blocks.

I think if it hadn't been for the restrictions of the Act we probably would not have sold the stock at that time.

Q. You didn't answer my question.

Mr. Condon: I ask that the last portion of the answer be stricken as a volunteered statement and not responsive.

The Examiner: Read it.

(Question read.)

Mr. Condon: I think that is not responsive, purely a volunteered statement by this witness.

The Examiner: I will grant the motion to strike.

Mr. Tucker: Just those words.

The Examiner: Just the last sentence of the answer.

Mr. Reporter, will you read the question?

(Question read.)

The Witness: It is my understanding that the management of Engineers at that time thought that the price at which the securities were sold was a fair price at that time. In other words, that was the market price at that time.

By Mr. Kanton:

Q. When were those two sales made exactly?
A. 1936 and 1937.
Q. Before the Engineers registered?
A. That is correct.
Q. When was the last sale made?
A. 1944.
Q. What date?
A. March 21, 1944.
Mr. Kanton: That is all I have.

By Mr. Lester:

Q. Mr. Benjamin, as I recall, the sale of that third block of El Paso Natural Gas stock was subject to a good deal of study and investigation between the executives of Engineers including yourself and members of the staff of the Commission?

A. That is correct.

Q. And those plans and discussions were over a period of months, is that correct?

A. That is correct.

Q. And initially you filed a plan under Section 11(e) which embodied an exchange offer of the El Paso stock with preferred stockholders of Engineers?

A. That is right.

Q. Later on, due to a fluctuation in the market price,—the upward or downward—that is the ratio was changed—thus making the exchange offer unfeasible, and thereafter you sold the stock on the open market?

A. That is right. We asked for bids for that block of stock from people who purchased it for investment.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Do you recall what price you got on that last block?

A. Yes, I have a price. I just——

Mr. Tucker: I think you have testified as to the price.

The Witness: I have it right here.

By Mr. Lester:

Q. If you will just give me the market quotation. That is what I wanted.

A. We received a price of 29.661 per share for that stock.

Mr. Tucker: That is the 51,000 odd shares?

The Witness: That is right.

(Discusion off the record.)

By Mr. Lester:

Q. Mr. Benjamin, what was the price at which the stock was sold?

Mr. Tucker: He just gave it.

Mr. Lester: I didn't hear it. What was it?

Mr. Condon: 29.661.

By Mr. Lester:

Q. As a matter of fact the management of Engineers considered that a pretty good price at that time, didn't they?

A. It was a pretty good price considering the market at that time, yes.

Q. The sale of the El Paso stock was ordered in the Commission's order of September 16, 1942, was it not?

A. That is right.

Q. And before you sold the El Paso stock you had been granted an extension of time within which to comply?

A. We were granted one year's extension on the September 16, 1942 order.

Q. And subsequently you were granted a six months' extension and then another six months?

A. I guess that is right. There were two six month extensions.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Would you say that Engineers was under any real pressure to sell the El Paso Natural Gas stock when it was sold?

A. I think it was a matter of judgment, Mr. Lester, as to what the best time to sell would be, looking toward the possibility that the constitutionality of the Act might be upheld, and since we had been advised by counsel that if the Act were held to be constitutional we would not be allowed to retain this stock, it was deemed best to sell it at that particular time.

Q. As a matter of fact, the case was on appeal to the Circuit Court of Appeals, wasn't it at that time?

A. You may be right. I am not just sure of the timing.

Q. The record will show that of course. And was there any threat on the part of the staff that we would go to court and make you sell this if you didn't do it right then?

A. I haven't heard any threats from the staff.

Q. As a matter of fact, wasn't the management of Engineers a little bit afraid that the market might fall off so you wouldn't get 29½?

A. I don't recall any feeling of that sort.

Q. You did feel at the time that it was a good price?

A. Well, I remember Mr. Kayser testifying at the 11(e) hearing when we were considering the exchange and he was most optimistic about the future of El Paso Natural Gas Company.

Mr. Lester: I remember that, Mr. Benjamin.

The Examiner: Is there anything further?

Mr. Condon: I will wait until we cross examine Mr. Benjamin at a later date.

Mr. Tucker: I was just going to suggest that that is all for the moment of Mr. Benjamin and the staff has suggested that I finish up with the direct that I had at the moment and that was Mr. Barnes' testimony, and I will call him as a witness.

D. C. Barnes—Direct Examination

[R. p. 213] Whereupon,

D. C. BARNES,

was called as a witness on behalf of the Applicants and, having been duly sworn, was examined and testified as follows:

Direct Examination

The Examiner: Give your full name, address and occupation to the reporter.

The Witness: Donald C. Barnes, President of Engineers Public Service Company, 90 Broad Street, New York, New York.

The Examiner: All right, Mr. Tucker.

By Mr. Tucker:

Q. What is the current market price of your preferred stock of Engineers Public Service Company, Incorporated?

A. The last sale on the New York Stock Exchange of the $5 preferred stock on December 15, 1945, was at 105. For the $5.50 preferred stock 105⅝.

The $6 preferred stock didn't sell on December 15 but the bid price on that date was 106½. The asked price was 107½.

Q. What has been the maximum market price at which these stocks have sold on the New York Stock Exchange this year?

A. The maximum price reported for the $5 dividend stock was 106, $5.50 dividend stock 108, the $6 dividend stock 109.

Q. Do you think these prices have been affected by the impact of the Public Utility Holding Company Act of 1935?

A. Yes, I think these prices reflect the uncertainty in the minds of investors as to whether as a consequence of the impact of Section 11 these stocks will be retired at $100 a share or at some premium in excess of this amount up to, but not exceeding the voluntary redemption premium,

namely $5 for the $5 dividend stock and $10 for the $5.50 and the $6 dividend stock.

Q. If the Public Utility Holding Company Act should be repealed tomorrow, what effect do you think it would have on the market prices of these preferred stocks?

Mr. Condon: I object to that question on the ground that it is speculative in character and irrelevant and immaterial to the inquiry before this Commission.

The Chairman: I will sustain the objection.

Mr. Tucker: Will the Examiner save my exception?

The Examiner: Yes, sir.

Mr. Kanton: Mr. Examiner, I don't know if I can say anything at this time, now that you have made a ruling, but I think the witness is perfectly qualified to give his opinion as to what effect he thinks the repeal of the Public Utility Holding Company Act would have on the market prices of these preferred stocks.

I don't see the basis of Mr. Condon's objection.

Mr. Condon: It seems to me that if we are going to get into the speculative field here—I didn't object to the preliminary questions because he is stating—and undoubtedly correctly—what he believes to be the market prices of the preferred stocks.

I think when the witness is asked to express a view as to what would happen to the market prices if the statute were repealed I feel that we are getting away off the beam. That is my only objection.

If staff counsel wish that type of testimony I will withdraw the objection.

Mr. Kanton: It is not that I wish it. It is that in order for the Commission to make a determination of these securities, if it does so on a going concern basis, and if you will look at some of our recent releases, Mr. Condon, you will see that they do assume in our cases, beginning with United Light and Power case, what effect ex the impact of the Act would have on a security.

Mr. Condon: Yes, but I don't feel, Mr. Kanton, that the two points are akin. I feel the Commission is under a duty as it has to indicate the value of a security and to evaluate it regardless of the liquidation of Engineers Company or other companies in a comparable status and to evaluate it on a going concern basis. If that question were asked perhaps I would not object.

The Examiner: I am going to let Mr. Barnes answer the question and then entertain a motion to strike it.

By Mr. Tucker:

Q. Will you answer the question, Mr. Barnes?

A. In the current market based on the present level of earnings I would expect each of the series to sell somewhat above its voluntary redemption price. The excess, however, would be small and would represent the discount of the present dividend yielded for such time as the company might require to effect a refunding of these issues at a lower dividend rate.

The Examiner: Now, Mr. Condon, do you want to move to strike the answer?

Mr. Condon: No.

(Discussion off the record.)

The Examiner: Then, as I understand it, Mr. Condon, you are withdrawing your objection to the question?

Mr. Condon: Yes, I withdraw it.

By Mr. Tucker:

Q. Do you think such a market price would under the condition assumed in the last question represent the fair value of these three series of preferred stock?

A. If by fair value is meant a value which will be maintained as an average for an indefinite time in the future my answer is no, but if it is intended to mean what a willing buyer would pay and what a willing seller would take in today's market for such securities, my answer is yes.

D. C. Barnes—Direct Examination (Cont'd)

The future market price level of these securities if they were continued outstanding without the impact of the Public Utility Holding Company Act, could move from its present level in only one direction, since the voluntary redemption price acts as a stopper to prevent any material rise in price over the respective voluntary redemption price, whereas adverse conditions which we are bound to meet from time to time in the future as we have in the past would be reflected in declines in prices from this top level.

It is of course impossible to predict at this time whether the future has in store as severe declines as those indicated in the chart showing the company's price level of the preferred stock since if was issued—company's Exhibits Nos. 26, 27 and 28.

The factors which might affect the future price level adversely are: (1) continued inflation. The country is now facing wide-spread demands from labor for 30 per cent increase in wages. The former chairman of the War Labor Board has indicated that in his opinion, in a five-year period, wages may be expected to go up as much as 50 per cent.

If any such inflation spiral is in store for us it will affect adversely the market prices for fixed income securities, particularly in regulated industries where there is an inevitable time lag in securing increased rates to cover increased costs.

(2) Periodic depressions. I do not believe that it is possible to develop a regulated economy which will continuously balance supply and demand. When these get out of balance to an extent that causes decreased employment, it is a characteristic of human nature which I do not believe can be changed to conserve resources and limit spending which further aggravates the dislocation of supply and demand.

We have had these cycles periodically in the past and I believe there is every reason to expect a continuance of

them in the future. We have expanded our productive capacity in the last six years to provide the requirements of war and have built up a deficit in so doing of some $300,000,000,000.

During this period the supply of goods for civilian requirements has been withheld to a large extent and in the immediate future production to fill this demand may be expected to continue productive activity at a high level.

When this deferred demand has been satisfied we will be faced with the problem of readjusting supply to demand, and in my opinion it is reasonable to expect that during such readjustment we may have another of the periodic depressions.

(3) Possibilities of Government competition. There is agitation in Congress and elsewhere for substantial hydro developments by the Federal Government on rivers not only in areas adjacent to Gulf States Utilities Company, where the Southwestern Power Authority has been organized and is functioning but also in the territories served by the Virginia Electric and Power Company, where developments have already been approved by Congress on the Roanoke River, although appropriation has not as yet been made.

Further developments have been recommended by the army engineers or studied by them for hydro plants on the James River and the Rappanhannock River in Virginia. If such developments follow the pattern of those in the Northwest it will affect adversely the market prices for utility stocks in the areas affected.

(4) Adverse changes in the policy of regulatory authorities. If the principles of rate regulation advocated by some of the more radical exponents of regulation are later adopted by authorities having jurisdiction in the area served by Engineers subsidiaries, it would also have an adverse effect on securities of companies doing business in those areas.

(5) Nuclear energy. The effect on value of utility securities if nuclear energy becomes commercially usable in the utility industry is impossible to predict.

These adverse factors which I have just referred to are common to the utility industry generally and are no more imminent in the areas served by our subsidiaries than they are generally throughout the country so that present price levels of securities reflect the extent to which the investing public is presently appraising these hazards, but to say that these prices reflect reasonably foreseeable future values is obviously not correct as only the future can disclose what these later values may be.

The Examiner: We will excuse you now, Mr. Barnes.

(Witness excused.)

Mr. Tucker: Mr. Examiner, I understand that so-called Exhibit No. 38 was mailed down to be incorporated in the record under what we understood was a reservation. If it isn't a fact that that was done and there was no reserve number for it, I now offer the Opinion, which by the way the staff of the Commission asked that we put in, as Applicant's Exhibit No. 38.

Mr. Condon: Mr. Examiner, at page 146 of the transcript Mr. Tucker is right, there was a reserved No. 38 for this exhibit. It was my understanding from the colloquy that the offer was to be made at a subsequent hearing. I have no objection to the fact that it was filed down to the Commission and has already been marked provided we can note an objection to that.

The Examiner: You may note your objection if you have any, Mr. Condon.

Mr. Condon: I object to the receipt in evidence of Exhibit No. 38 as proof of any of the facts contained therein or as legal conclusions other than the expressions of Mr. Tucker's personal opinion.

I do not object to its receipt merely as a document subject to those two limitations, which was before the Board of

Directors of the Engineers Company at the time it adopted the plan filed with this Commission.

Mr. Scheetz: Mr. Examiner, I concur in that objection to the extent that I think the opinion should be received for a limited purpose. I think it is entirely appropriate to introduce it as the document which was before the Board of Directors or the management of Engineers when they considered the plan but I don't believe that it should be regarded as proof of the validity of the conclusions that are in there.

Mr. Tucker: Mr. Examiner, even though technically, this exhibit, if it had been received, would have the effect that these gentlemen just suggested, I wouldn't think it was ethical for me to take a position in view of the circumstances under which it was put on the record, which would be the basis of a claim that the facts stated in there were to be proved by that opinion or that the legal conclusions were to be established in that opinion and I am perfectly willing to say on the record that I will never undertake to have that kind of result come from the admission of this exhibit.

Mr. Scheetz: I am sure you wouldn't, Mr. Tucker. I merely wanted to have the record straight.

The Examiner: With that understanding I understand there is no objection to the exhibit being referred for these limited purposes and it will be received as Applicant's Exhibit No. 38.

(Applicant's Exhibit No. 38 is received in evidence.)

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[R. p. 222]

RICHARD N. BENJAMIN,

was recalled as a witness on behalf of the Applicants, and having been previously sworn, was examined and testified further as follows:

Cross Examination

By Mr. Kanton:

Q. Has any consideration been given to the disposal of the Norfolk Gas property of Virginia prior to the consummation of the Plan?

A. Not to my knowledge.

Q. You realize, of course, that our order of September 16, 1942 requires Engineers to dispose of this property?

A. That is correct. I realize that.

Q. And I take it from your answer that the Board of Directors in considering the plan now before us didn't give any consideration to the disposal of this manufactured gas business?

A. That is right.

Q. Have any efforts been made to sell this manufactured gas of Virginia?

A. No, I don't believe any efforts have been made. Not to my knowledge in any event.

Q. No consideration whatsoever has been given to the disposal of this interest?

A. That is correct so far as I know. I must repeat that, because I don't know what has gone on in the mind of the President of the operating company, Mr. Holtzclaw, but so far as I know that statement is correct.

Q. Isn't it reasonable to assume that if he had any ideas like that he would communicate with Mr. Barnes or other senior officers of Engineers?

A. That is right.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Have any efforts been made to sell the steam, water or manufactured ice property of Gulf?

Mr. Tucker: So far as steam is concerned we weren't ordered to dispose of them.

By Mr. Kanton:

Q. I amend my question to include the water and manufactured ice properties of Gulf.

A. The ice properties in Gulf States have all been contracted for sale so that Gulf States, after the end of this year, will no longer have any ice business.

Q. Could you explain that more fully, Mr. Benjamin.

A. Well, we have reached agreements for the sale of these ice properties. I am not sure whether or not the transfer has actually taken place but I think that they will take place before the end of this year.

I can give you a little more information on that if you would like to have it.

Q. I would.

A. The Groveton Ice Vault and Refrigerating Equipment has already been sold for a total price of $1,500.

Q. When was that sold?

A. In the last month or two. Very recently.

Q. That hasn't been the subject of the filing of an application before this Commission has it?

A. No. Signed agreements have been entered into to sell the ice manufacturing equipment and ice storage vaults in connection with the ice business in Calvert, Huntsville, Conroe and Navasoto, to the Texas Utilities Company of Dallas for a total consideration of $65,000 and negotiations have been entered into for the sale of the ice manufacturing equipment in Orange, Texas for a total price of $20,000.

These negotiations are not concluded yet but it is expected that they will all be concluded by the end of this year.

Q. Does that comprise all the manufactured ice properties of Gulf? Are there any left?

A. No other ice properties.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Do you happen to know if the Texas Public Utility Company of Dallas is a utility company of a registered holding company under the Act?

A. I don't know what their affiliations are.

Q. As far as the water properties of Gulf are concerned no effort has been made to sell them, Mr. Benjamin?

A. That is correct.

Q. Has any consideration been given to such sale?

A. Not to my knowledge.

* * * * *

[R. p. 231] By Mr. Kanton:

Q. As of September 30, 1945, how much cash did Virginia have available for the payment of dividends on its common stock?

(Discussion off the record.)

The Witness: There are two dividend freezes applicable to Virginia Electric and Power Company. One is the freeze that was put on in the merger agreement of 1944 and the other is the freeze that was put on by the fifth supplemental indenture in March 1945.

Under the first freeze—well, I guess for the purpose of answering your question, all you are interested in is what is the maximum amount that could be paid out in dividends at that time.

By Mr. Kanton:

Q. Yes. We are now taking the date of September 30, 1945.

A. There was a balance available for common dividends at that time of $1,628,905.96.

There was declared at the November meeting of the Virginia Board of Directors a dividend of $1,175,370, which left a balance of $453,535.96.

* * * * *

Richard N. Benjamin—Cross Examination (Cont'd)

[R. p. 233] By Mr. Kanton:

Q. What percentage of earnings were paid up by Virginia in the past couple of years to Engineers? I am including in there the free earnings and not those subject to the freezes that you spoke of a while ago?

A. As I say, the first freeze started in 1944. Under that freeze we had more of a difference between what was actually paid and what could have been paid, but as I just told you about the present freeze, it is at the moment more restrictive than the merger freeze. They have paid all but $453,000 out of this balance that they could pay.

Q. I was interested in a percentage figure roughly. What percentage of the free earned surplus and the free earnings a year were paid up by Virginia to Engineers?

A. That would take a little time to figure out, Mr. Kanton. I would be glad to do that but the thing that confuses it in my mind is that this freeze started in the middle of the year. If you wanted to take this figure from October——

Q. Give me an approximate figure.

A. Here is one year's period, October 1, 1944 to September 30, 1945 in which this latest freeze was in effect. During that period there was a net income available for common dividends before the freeze of $4,590,000.

Now, the freeze was $660,000 plus $900,000. Total freeze for that period of $1,560,000.

A. In the neighborhood of 80 per cent in the last year.

Q. Do you think that has been the approximate amount of dividends being taken up by Engineers from Virginia in the past couple of years?

A. I think it is in that neighborhood but I could check it specifically if you want to get an exact figure.

Q. I don't think that is necessary. This $1,560,000 which you gave me as the freeze from October 1, 1944 to September 30, 1945.

A. That is right.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. When is that freeze or part of that freeze to come off from the earnings of Virginia?

A. That freeze is broken down in two parts. The first one is $55,000 a month. It continues for 25 full months after September 30, 1944. That is two years and one month so that would be October 31, 1946. That would be when that $55,000 freeze would come off.

Q. What would the freeze be at October 31, 1946 again, please?

A. That would run $75,000 a month for a considerable period after that. That is the freeze that runs for 116 months after September 30, 1944.

Q. I was interested in the total freeze as of October 31, 1946.

A. As of September 30, 1946 would be another year, and I think that would—just a minute. That would be an additional $1,560,000.

Q. So the freeze as of October 31, 1946 would be—the total figure I mean.

A. $3,250,000. In other words, there is another month in there. You said October 31.

Q. I don't recall exactly which one of the freeze provisions of the indenture is from the merger but I believe there is a provision—correct me if I am mistaken—that about $550,000 is to be taken off the freeze as of November 1, 1946, is that correct?

A. I don't recognize that figure. You say that $550,000 —$55,000 a month is what it is.

Q. I see. Thank you. You testified that it would not be feasible to combine parts I and II of the Plan because if there was any protracted delay pending the determination of this so-called premium question, the Company would suffer by reason of holding approximately $14,000,000 of idle cash which it could not put to work, and also by paying dividends on the preferred stock outstanding, is that correct, Mr. Benjamin?

A. Yes.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. What do you mean by protracted delay? How could that come about, in your opinion?

A. There are a good many ways protracted delay could come about. One thing I had in mind in connection with that testimony was that it might take even the Commission longer to decide that point than it would to decide some of the other features of the plan.

Q. Let's assume the Commission decides it in its own course of time, what do you have in mind thereafter when you say "protracted delay"?

A. Litigation.

Q. On whose part?

A. On the part of either class of stockholders or the company that happens to be dissatisfied with the opinion of the Commission.

Q. In other words, if the Commission were to issue an order that you would have to pay more than a hundred dollars per share plus accrued dividends, it is your opinion I think and the opinion of the Board of Directors of Engineers that they would appeal such an order, is that correct?

A. I think that the company has reserved its right to do that. I don't think that anybody has made any commitment at this time that the company would appeal such an order.

Q. Some common stockholder might appeal the order. In other words, it is a matter of question on that score?

A. I think so.

Q. And I suppose when you also say "protracted delay" you have in mind that perhaps some preferred stockholder might appeal in case the Commission decided that the preferred stockholders were only entitled to a hundred dollars per share plus accrued dividends?

A. I think that is a possibility.

Q. Is it possible to pay out now any of this $14,000,000 in cash as dividends to the Engineers' common stockholders?

A. Yes, I think it is. Engineers has an earned surplus; at June 30 the earned surplus was $7,095,000, so that I think it is possible for Engineers to pay out a common dividend.

Q. Do you think they would pay out a common dividend during this period?

A. I don't think so.

Q. Why not?

A. Because we had this plan on file which contemplates the use of the money.

Q. For this particular purpose of paying off the preferred stockholders?

A. That is right.

Q. You have said that they could use this cash for the payment of dividends. Couldn't they also use that cash to call part of the preferred stocks as provided in the charter, I believe?

A. I think the company could make a voluntary redemption of part of the preferred stock if they desired to.

Q. Can you tell me which of the following, which I will mention, you think most important for keeping Engineers in existence after say Parts I and II of the Plan are consummated—the delay in the determination of what the fair value may be to be paid to the Engineers preferred stockholders, or the $3,000,000 loan, or the possible tax benefits to Engineers in keeping it alive as a corporate entity?

A. By "keeping Engineers alive" you mean as reflected in Amendment No. 4?

Q. That is correct.

A. I think the principal reason is to provide a means for paying off the $3,000,000 bank loan. In connection with that I have in mind that there will be probably a delay in the determination of the amount to be payable to the preferred stockholders. Therefore, my own feeling is that the $3,000,000 bank loan will not delay any further the final liquidation of Engineers.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Well, if there were no need for the $3,000,000 bank note and there was no delay in the determination of the so-called premium question, from your testimony I gather there would be no reason for keeping Engineers in existence for any purpose after the sale of Gulf and El Paso?

A. I think when Engineers' liabilities are finally determined,—and so far as I know the two liabilities that I have in mind, the $3,000,000 bank loan and this possible contingent liability in connection with the preferred stock—as soon as those are cleared up Engineers would be liquidated. As a matter of fact the way I understand it, from explanation by counsel, when Engineers files this Certificate of Dissolution the Trustees' only power is to continue the corporation for the purpose of liquidating and winding up the affairs of the company.

Q. That is correct, Mr. Benjamin, except that I don't believe you answered my question. I am saying: Suppose there was no delay on the so-called premium question and it was found that no note were needed, my question is, right then and there, would there be any reason for keeping Engineers in existence for any purpose after the sale of Gulf and El Paso?

A. I also testified that it would be advantageous to certain stockholders to receive the Virginia common stock at the end of this period rather than now, and get a capital gains instead of a dividend during that period, but if these two elements were out of the way that you mentioned, I don't believe that Engineers would be continued.

Q. This element you just spoke of, about the capital gains tax, you mean to certain common stockholders of Engineers?

A. That is right.

Q. You mean certain large common stockholders of Engineers?

A. Well, it affects large stockholders. It also effects small stockholders to the extent that when they receive the common stock of Virginia they will get that stock,

according to opinion of counsel, without any tax at the time they receive it, and therefore if this stock is worth more at the end of a year or two they will not have to pay a tax at that time and it might be beneficial for them to delay paying tax until a later time.

Q. Isn't it true, Mr. Benjamin, if you assume there was no delay in determining the so-called premium question, and there is no need found for the $3,000,000 note, aside from your so-called tax benefits, Engineers would be liquidated as and of that time?

A. I think that is right. In other words, because of the procedure set forth in Amendment No. 4 I think that would be the only alternative to Trustees.

Q. That was my original question. If we can do away with two of these problems, Engineers can be liquidated forthwith on the consummation of Parts I and II, if these two problems were not included?

A. I think that is right.

Q. And the possibility of any tax benefits to the Engineers' common stockholders would not be taken into consideration, or would be taken into consideration?

A. I don't think that would be reason enough for continuing the corporation.

Q. You don't know the answer to that legally?

A. No.

Q. But assuming that there was no legal barrier for you to continue Engineers in existence, and these two problems as we have just discussed them, were taken care of, do you have any opinion at the present time, or do you know the opinion of the Board of Directors of Engineers as to whether they might not consider the advisability of continuing Engineers as a corporate entity for the benefit of certain of its common stockholders, for whatever tax advantages may be available at that time?

The Witness: Will you read that question back, please?

(The question is read.)

The Witness: No; as I have testified before I think that there is no business purpose served in continuing Engineers, and I think, if these two problems were settled that Engineers would not be continued.

Mr. Scheetz: May I ask a question, Mr. Kanton?

I am a little bit confused by your reference to the continuation of Engineers as a corporation. Are you talking about the period of the trusteeship and the deferring of the distribution of its assets, or are you actually talking about a deferment of the dissolution?

Mr. Kanton: I am talking about a deferment of the liquidation. The plan provides, as now amended, that the dissolution is to take place 60 days after the consummation of Part I of the Plan.

Mr. Scheetz: So that we are talking about the period of trusteeship.

Mr. Kanton: That is correct, sir.

* * * * * *

[R. p. 251] By Mr. Kanton:

A. You could raise the cash by selling the Virginia common stock under rights.

Q. Do you know in your opinion any objection to such a procedure?

A. Yes, I do. I think that I developed pretty fully in my direct examination that we think that $11.50 a share is enough of a burden to put on the common stockholder in connection with these rights, and we would not like to increase that amount, either by increasing the amount to buy Gulf States, or by adding some other security to it. We think that the Plan as set up is a fair way of accomplishing this result, and we also believe that the bank loan is a pretty short-term bank loan and there should not be any objection. I mean we think it is a fair way to work it out.

Q. Do you think that the Engineers' common stockholders, during this period you have in mind, are not paying

1½ per cent on a sum of money that they have or they can put up themselves, and thereby forego any interest and the expense of keeping Engineers alive during this period?

A. The expenses of keeping Engineers alive during this one year are not very heavy.

Q. Let's assume it is three years or two years.

A. Well, the same thing applies to two years. I don't believe the expenses are very heavy during that period, and we think the common stockholders will get enough collateral advantage out of it to make it worth while.

Q. Do you mean by collateral advantage, tax advantage?

A. Yes.

Q. Is that the only collateral advantage you have in mind?

A. And also not having to put up the $3,000,000. You say they have to pay 1½ per cent interest for this $3,000,000?

Q. I didn't say they have to pay 1½ per cent interest. It is provided and proposed in the Plan that they pay 1½ per cent. That is a correction, Mr. Benjamin.

A. Under the Plan Engineers would pay 1½ per cent interest for this $3,000,000 loan. If common stockholders put up this $3,000,000 they would either have to borrow the money, in which event I assume they could not borrow it on as favorable a basis as Engineers, or they would have to give up the opportunity to have that money invested in some other securities, and I would think they could invest it in securities with a higher return than one and a half per cent.

Q. Then you did consider the question of whether perhaps Virginia might be issued through the sale of warrants?

A. No.

Q. Aren't you in effect now—I am not trying to put words in your mouth—weighing the advantages of the present proposal as against the proposal I just presented to you?

A. Well, certainly I think we have weighed the advantages of having the $3,000,000 bank loan, as opposed to

Richard N. Benjamin—Cross Examination (Cont'd)

charging the common stockholders more in the way of warrants, whether for Gulf, El Paso and/or Virginia.

Q. That is the so-called burden that the common stockholder has to pay?

A. That is right.

Q. As you put it, because he has to put up $11.50 in order to get the preferred stock out of the picture?

A. That is right.

Mr. Tucker: Wouldn't it be well to break off at this point?

Mr. Kanton: Yes, I was just going to suggest it.

* * * * *

[R. p. 256] By Mr. Kanton:

Q. Did the Engineers board have in mind the continuation of Engineers as a corporate entity at the time the proposed note was drawn up, that is, back on September 17, 1945?

A. Well, under the original plan, as you know, it was proposed to dissolve and liquidate or merge Engineers at the expiration—in fact, the way it was stated was within one year after the liabilities of Engineers had been determined and provided for so that it was in the original plan the intention to keep the full corporate existence of Engineers alive during that period.

* * * * *

[R. p. 262] By Mr. Kanton:

Q. If you admit that you could get more money by selling the Gulf States common stock as such rather than by the issuance of warrants to the Engineers common stockholders, did the Engineers' management consider the selling of Gulf States common stock by public offering or by competitive bidding?

A. The purpose of offering the common stock of Gulf States to the Engineers' common stockholders under war-

rants is to give the Engineers' common stockholders an opportunity to keep their proportionate investment in the picture. If the stock were sold at competitive bidding an underwriting commission would have to be paid and the common stockholder would have no choice if there were cash left over, over and above the payment of preferred stock, to simply receive cash.

Q. For the basis of my next question, assuming the low figure of $20 per share in the recent estimate of Paine Webber, if Engineers were to offer the Gulf States common stock for the market by public offering or by competitive bidding, including underwriting and all expenses attendant to that, don't you think they would be able to get more than the $21,000,000 they will get if they issue the Gulf States warrants at $11.50 a share?

A. Obviously the company would get more cash by selling Gulf States common stock at competitive bidding than it would through offering it to the common stockholders at $11.50 per share.

Q. Wouldn't that also make it possible to forego any borrowing of $3,000,000 by a note?

A. Yes.

Q. Have you considered that possibility?

A. Yes.

Q. You testified that the reason you didn't consider such a possibility feasible was because you wanted to keep the present Engineers common stockholders who wanted to maintain their interest in Gulf States to have an opportunity of purchasing by warrant this Gulf States common stock so if they wanted to keep it they could do so by exercising those warrants?

A. That is right.

Q. And that is the only reason?

A. Yes, that and to save the underwriting commission that would be payable in the event they were sold at competitive bidding.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. You speak of competitive bidding. Have you made a comparison of the total expenses of issuing the warrants as against the expenses that would be entailed if the Gulf States common stock were sold by public offering or by competitive bidding, and checking that against what you would receive possibly through the warrants as against what you would receive if this Gulf States common stock were sold to the public?

A. We have not made a comparison of the expenses, no.

Q. So it is possible then that more money may be realized by the sale of the Gulf States common stock less the expenses that may go with the underwriting than could be realized through the issuance of the warrants to the Engineers' common stockholders?

A. Yes, I think it is posible that the company itself would receive more cash, but, as I pointed out, you are taking away from the common stockholder the opportunity to participate in this Gulf States common stock.

Q. Couldn't he, if there was a public offering or an underwriting, repurchase?

A. Yes.

Q. If we use that word?

A. Yes, and pay the underwriting discount in so doing.

Q. And also, as you put it, get the preferred stock out of the picture? and perhaps get all the other expenses needed in the present proposal?

A. I think it would raise more cash.

Q. In other words, these things have to be weighed one against the other to see which would benefit the Engineers' stockholders?

A. That is right.

Q. Isn't it possible under present market conditions for Engineers to get at least $28,000,000 to $30,000,000 for the sale of the Gulf States common stock? This is your opinion based on your personal analysis and from looking at other analyses by people competent and qualified to make such analyses?

Richard N. Benjamin—Cross Examination (Cont'd)

A. I wouldn't want to put a figure on what we could get by competitive bidding now.

Q. You could get more than $21,000,000?

A. Yes, I think so.

Q. Have any efforts been made to sell the property of Gulf States to any of the surrounding utility companies down in that area?

A. Not to my knowledge.

Q. Were any offers made by the utilities companies which surround the Gulf States properties?

A. I don't know of any.

* * * * * *

[R. p. 266] By Mr. Kanton:

Q. Have your estimates shown that the present earnings and dividend declaration policy of Virginia will continue?

A. Based on the estimate for 1946 that was referred to this afternoon, it appears likely that the dividend policy could be continued through 1946.

Q. What about the present level of earnings?

A. In speaking of that I had in mind the present level for common stock and surplus.

Q. Could you tell me at this time whether it will be higher or the same as the present levels?

A. Well, I would like to see completed the 1945 actual statement of earnings before I answer that question. There has been considerable discussion about what items are properly includable, and there are a good many questions regarding taxes that are not yet settled.

Q. Do you have any opinion of your own at this time? I mean, you stated that you believed the dividend declaration policy will continue, but you have no opinion as to the present level of earnings being continued or being higher or lower?

A. I would rather not say at this point whether it would be higher or lower.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Do you have any opinion or any reason to believe that the present level of earnings of Gulf and El Paso will be the same in 1946 as they are at present?

A. Well again, based on the estimate for 1946, I think it likely that the dividend policy of Gulf States would be maintained.

Q. What percentage is that, approximately, of earnings, Mr. Benjamin?

A. I was just going to check the freeze on that Gulf States. Based on our estimate for 1946 I think that Gulf States can maintain the same dividend policy during 1946.

Q. What percentage is that of earnings? Is it 80 per cent approximately, the same as Virginia; or is it more or less?

A. We are limited to 75 per cent by that dividend freeze. I would say it was slightly under 75 per cent during 1945.

Q. Do you think that will be the same in 1946?

A. I think it would be a slightly less percentage in 1946.

Q. Why is that?

A. Based on the estimate, in the earnings for 1945 there are some non-recurring earnings due to this amortization of emergency plant facilities, and I think that the percentage will be approximately the same in 1946.

Q. Could you do the same for El Paso, Mr. Benjamin?

A. Based on the estimate for 1946, I think that the same dividend policy in El Paso can be maintained.

Q. What percentage is that?

A. In speaking of the same dividend policy, I have referred to the one set forth in the accompanying letter to the Plan where it was stated that Gulf States is presently paying common dividends at an annual rate approximating 80 cents per new share and El Paso at an annual rate approximating $1 per new share, which translated into Engineers common stock is 20 cents a share because the El Paso new stock is to be distributed on the basis of one-fifth of a share of El Paso for each share of Engineers common stock.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Yes, I recall it, Mr. Benjamin, but I was just wondering, in line with our testimony with reference to Virginia and Gulf, if you could give me your estimate or your opinion as to how the present dividend declaration policy and level of earnings for El Paso in 1946 will compare with those of 1945.

A. In 1945 the actual dividends paid by El Paso, Texas, on the common stock were at a rate higher than the 20 cents per new share that I just referred to. There was a dividend of $6 per share paid on March 15th, 1945; 62½ cents on June 15th, 1945; 62½ cents on September 14th, 1945; and 62½ cents on December 14th, 1945. That is on the old shares of stock.

Q. What percentage of earnings for 1945 is that?

A. I will have to figure it out if you will give me a few minutes.

Q. All right, sir.

A. Applicants' Exhibit No. 50 shows the balance for common stock and surplus in El Paso Electric Company for 1945, with the last two months estimated, of $525,600. I would like to check this figure of dividends paid. According to my pencil figures here El Paso Electric Company paid out in dividends on its common stock during 1945 $1,180,250.

Q. Was that more than the earnings?

A. That is more than the estimated earnings for 1945 available for the common stock.

Q. Is that the usual practice of Engineers with El Paso?

A. It is not the usual practice of Engineers' subsidiaries. This dividend paid in March of 1945 was due in part to the fact that there was only one dividend paid in 1944, namely, 62½ cents, and in part to the fact that the transportation property had been sold the previous year.

Q. What would you say is the usual or the average dividend policy for El Paso, if we consider this to be an unusual dividend payment during the year of 1945?

A. Well, I believe that a dividend at a rate specified in this letter to the common stockholders would be a normal dividend rate for El Paso.

Q. Would that be about 80 per cent of the current earnings of the company?

A. Well, if we apply that rate to the 1945 estimate, $1 per new share of El Paso common stock would be equivalent to $381,994 and the estimated earnings available for the common stock for 1945 were $525,600, so that is approximately 75 per cent.

Q. Assuming the 75 per cent figure, do you think that that would be the estimated dividend declaration policy of El Paso during 1946?

A. I would expect, if our estimate is correct, that the dividend rate would be approximately the same as this so-called normal rate of dividends that I just referred to during 1946.

By Mr. Tucker:

Q. 20 cents on the new stock?

A. 20 cents on the new Engineers stock.

By Mr. Kanton:

Q. How do you estimate the level of earnings for 1946 for El Paso, the same or higher than in 1945?

A. Based on the estimate we made for 1946, the level of earnings would be slightly higher than in 1945.

Q. Is it possible that the dividends would be slightly higher, correspondingly? I say possible.

A. It is possible. I was just going to look at the construction requirements but I think it is safe to say it is possible that they might be higher.

Q. Would you say, since the time you have been with the company, it has been the policy of the company—and I am speaking now generally and I just want a rough estimate from you—for Engineers to take up 80 per cent in dividends from its operating companies based on the then current level of earnings for each one of its operating companies?

A. I just couldn't guess at a percentage, Mr. Kanton.

Richard N. Benjamin—Cross Examination (Cont'd)

I think it has been the policy of the Engineers' companies as a rule not to declare out all of the earnings.

Q. In a particular year?

A. That is right, except for an extraordinary situation.

Q. In other words, not 100 per cent?

A. Except in an extraordinary situation like the El Paso one that I just referred to.

* * * * *

[R. p. 274] By Mr. Kanton:

Q. Have you consulted with any preferred stockholders or common stockholders about any of the elements of this Plan?

A. I have talked with a good many stockholders and representatives of brokerage firms who have called up and asked questions about it. I have gotten quite a few phone calls at the office asking me to explain various parts of the plan, how it worked, and things of that sort.

Q. That is after the plan was filed?

A. That is right.

Q. I am speaking of before the plan was filed. Did you consult with any preferred or common stockholders to see if what you had in mind for the plan would meet with their approval?

A. No, I did not.

* * * * *

[R. p. 281] By Mr. Kanton:

Q. You testified that a recent check shows 1,069 individual common stockholders hold an aggregate of 139,315 shares of preferred stock of all classes and that you assume that this option will interest a substantial number of the stockholders?

A. That is correct, I did.

Q. Is it also true, because of the assignment feature of the warrants, many preferred stockholders may find it advantageous to acquire such warrants on the market and to exercise those warrants through the exchange option?

A. I think so.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. You testified that the original plan contemplated offering the Gulf States warrants at $10 a share, which would have necessitated a bank loan of $6,000,000.

A. That is correct.

Q. And you further testified that you were anxious, or, rather, the Board of Engineers was anxious, to keep the subscription price to your stockholders as low as possible because of the "burden" which it imposes on them in order "to maintain their interest in the properties which now constitute the Engineers system." How do you distinguish the payment of $10 a share and $11.50 a share any more of a burden on the Engineers common stockholders?

The Witness: Would you read the last part of that question, please?

(The record is read.)

The Witness: I don't know what you mean, Mr. Kanton.

By Mr. Kanton:

Q. Well, you considered the payment of $10—let me put it this way. Do you consider the payment of $10 by the common stockholder to be a burden?

A. Well, certainly any amount that they put up is a burden.

Q. If they had to put up $1, is it a burden?

A. Well, I guess it would be to some of them.

Q. In other words, any payment is a burden to a common stockholder?

A. I think so.

Q. Why is this payment being made by the common stockholders?

A. The payment is being made to provide funds to carry out this plan.

Q. Who will that benefit eventually?

A. I think it is a matter of necessity that funds be provided in order to carry out this liquidation plan. Now, the liquidation plan was filed because of the Public Utility Hold-

ing Company Act and this is one means of working out the liquidation of Engineers which is made necessary because of the Public Utility Holding Company Act.

Q. My question was: Whose benefit will——

Mr. Condon: May I ask that the answer be stricken as not responsive, and let's have the question re-read to the witness, please.

Mr. Kanton: Excuse me. Off the record.

(Discussion off the record.)

The Examiner: The motion is granted. Strike it from the record.

Mr. Kanton: Read the question.

(The question was read, as follows:)

"Q. Who will that benefit eventually?"

A. The exercise of these warrants—I am just trying to think out the answer to your question—will provide sufficient cash which, together with the bank loan, will pay the preferred stockholders $100 a share and accrued dividends. Therefore—you speak of benefit. I don't quite follow you.

Q. I distinguish it as you used it, as a burden.

A. Well, I think if the common stockholder had his choice he would not put up any money at all, but would prefer to have the Engineers with all three subsidiaries continuing in operation.

The Examiner: Off the record.

(Discussion off the record.)

The Witness: Let me try to answer the question again.

Mr. Kanton: Go right ahead.

The Witness: To the extent that the Engineers common stockholder gets the Gulf States common stock, which he does get by exercising these warrants, he gets a security. However, he has to put up cash in order to get the security.

The Examiner: To retire the preferred stock?

The Witness: To retire the preferred stock, but I do not believe that it is to be considered of benefit to the com-

mon stockholder to have to put up this money. Now, he does put it up in order to protect his interests in the whole situation.

By Mr. Kanton:

Q. What do you mean "the whole situation"?

A. In the Gulf States stock. In other words, if he wants to participate in the future growth of Gulf States Utilities Company, the only way he can do it is to put up $11.50 per share. If he doesn't want to participate in the growth of that particular company, he sells his warrant and lets somebody else put up the money.

Q. Then if he is considering that—and you are speaking for all of the common stockholders—then it is not a burden; it is a benefit to him?

A. It is something he has to do in order to protect his interests, I think.

Q. In other words, if Engineers, or the common stockholders, doesn't want to distribute the common shares of one of its utilities in order to pay off the preferred stockholders, no matter what the price is, $100, or whatever the fair value is, instead of paying cash they would have to issue the common stock of one of their utilities, or sell it, is that correct?

A. When this stockholder bought his common stock when the company was first formed, he bought it with the idea that he would not have to pay off this preferred stock until it suited him to pay off the preferred stock. Now, we have a Public Utility Holding Company Act and the Act says that you can not retain certain companies, in fact you can't retain more than one integrated system.

Q. Correct.

A. And I believe that, as I have testified, when you get down to one system there is no economic justification for keeping Engineers. Now, in order to protect his interests you ask the stockholder to put up $11.50 per share. It is

true he gets his Gulf States common stock, but the only reason he gets it is because he puts up the money to get it. Now, if that is a benefit to require him to pay off the preferred stock ahead of him, I just don't see it.

Q. Well, if he had the cash in the treasury he wouldn't have to put it up, would he?

A. If Engineers had $39,000,000 in cash in the treasury, no, he wouldn't have to put it up.

Q. And if they didn't have $39,000,000 in cash, and conditions weren't as good, you would have to distribute the common stock of one of the utility companies, or perhaps two of the utility companies' common stocks, is that correct, in order to comply with the Act?

A. I don't know what you mean by "distribute". You mean if Gulf States common stock were worth, say, $10 a share, you would have then to add El Paso Electric Company, perhaps, or Virginia to it?

Q. I didn't mean the worth of the preferred or the common, I wasn't referring to that. In order to satisfy the claim, no matter what it is, if you didn't have the cash and you couldn't raise the cash by sale, you would have to distribute the common stock equity that Engineers now has in the utility companies, is that correct?

A. Well, the only assets we have are those common stock equities and we would have to pay off the preferred stock.

Q. Therefore, in order to protect that common stock equity, not having sufficient cash, the common stockholder is called upon to put up a sufficient amount of cash in order to protect that equity?

A. That is right, to protect himself, that is right.

Q. That is right. Is that a burden on him to protect himself?

A. I think it is a burden.

The Examiner: I think that is more or less argumentative. I think the whole thing here is perfectly obvious as to what the answer is. Mr. Benjamin's idea of it is that

the common stockholder has to assume a burden to derive a benefit.

The Witness: That is right.

The Examiner: Now, whether the words used are right or not, I don't know that it make any difference. I think the record is perfectly clear, whether you want to call it a burden or a benefit. I think that is his idea of it. The common stockholder assumes the burden to derive the benefit. I think we don't want any more on that, do we?

By Mr. Kanton:

Q. Is it not possible for the common stockholders to sell their warrants at a price above $11.50 if they care to?

A. Yes. I think that there will be a market in these rights and undoubtedly some of them will sell.

Q. Isn't that the reason the price of $11.50 was set?

A. It is always advisable to have a margin between the price at which the warrant can be exercised and the expected market value of the underlying security in order that the warrants will be traded in and exercised.

Q. Now, just back on this one point, if you have the common stockholder of Engineers here with a warrant in his hand and he considers this possibility: If I put up $11.50 and I pay for this warrant and I get a share of Gulf States common stock, it is because I believe that that is a sound company and that whatever investment I have in there and put in addition will become better as the years go on. If he feels that, in his estimate, the converse is true, he won't put up the $11.50 and will sell it for whatever additional amount he can get over $11.50, is that correct?

A. I think that is the line of reasoning he would follow.

Q. But the underlying reason of the whole thing is to get $11.50 in order to pay off the preferred stock?

A. That is the reason we are issuing the warrants.

Q. Now, when you speak of this burden what stockholders do you have in mind particularly that this would work

a burden to? Do you mean the small stockholders or the large stockholders?

A. Well, I think it is a relative matter. I think even a small stockholder may find it a burden and perhaps to him, relatively speaking, it will be just as much of a burden as to a large stockholder. I don't think you can generalize too much. Certainly the people who own very large blocks of stock will have to undertake a major financing operation to raise the funds. On the other hand, a man who owns 100 shares of stock still has to put up $11.50 and that may be a burden on him.

Q. Have you spoken to any stockholders with reference to this so-called burden?

A. No, I haven't.

Q. Why do you assume, then, that it is a burden? Are you assuming how you would feel in the matter?

A. Yes. I own a few shares and even that amount will be a burden.

Q. Do you know of any of the other members of the Board of Directors who have spoken to common stockholders of Engineers about this Plan to have warrants for the distribution of the Gulf States common stock?

A. There again I think Mr. Barnes may have spoken to some of them, but I don't know of any others.

Q. Well, in other words, you don't know, or I think you have testified that the Board of Directors doesn't know, which of the stockholders would want to retain their interests in Gulf, El Paso or Virginia, that it is a matter entirely with the stockholders, that some may want to retain in all and some may want to retain in some or some may not want to retain in any, is that correct?

A. That is correct. I assume that is the case. I have no basis for knowing how they are going to react. I assume, because of the large number of stockholders, that some of them are bound to act one way and some another, but that is the only basis I have.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. But the basis of your feeling here is based on your own reaction, apparently?

A. No. I just know that the amounts involved, where we have some large stockholders, will be substantial, Mr. Kanton, and I would think that even with the small stockholders that to raise money is not easy, and in the case of every one of our stockholders I just assume that as a general proposition.

Q. Do you think it would be difficult for an Engineers common stockholder who purchased his stock at 1¼ or 2 —would he have any difficulty in raising money with the common stock now selling around $3?

A. Well, unless he sells some of his Engineers common stock to get the money I don't know why he wouldn't be in the same position as somebody else, except that the stock is worth more on the market.

Q. At the present market don't you think that if the warrants were issued at $13 a share they would still have a ready market?

A. I think that is possible.

Q. Well, isn't it true that as long as the price of the Gulf States common stock may exceed the option price within the time limit of the warrants some of them will pay something for it, especially since we can agree that the Gulf States common stock will be selling above the option price? Is that a fair statement, Mr. Benjamin?

A. Well, I don't know that I agreed that it would sell above $13 option price, but assuming for the moment that it does sell above that, I think, so long as there is a reasonable value to the warrants themselves, that the bulk of the warrants will be exercised, and the only reason I can see why anybody would not exercise their warrant or sell their warrant would be because they either didn't pay any attention to the offering or were away, or something of that sort.

Q. Well, in these situations I think it is correct to state that the warrants fluctuate more than the price of the stock involved, isn't that correct, depending on the time limits and other factors?

Richard N. Benjamin—Cross Examination (Cont'd)

A. You say the value of the warrants fluctuate more than the value of the stock?

Q. The price of the warrants fluctuates more than the stock involved?

A. Well, I don't know that that is a fact.

Q. Well, isn't it true, based on your analysis and the recent Paine Webber report, if you consider that to be reliable, that if these Gulf States common stocks have a market price ranging anywhere from, say, $16.50 to $20, it would be very easy to dispose of the warrants at around $13?

A. Well, I think if the Gulf States common stock sold $2 or $3 or $4 above the subscription price, that the warrants would have a definite market value, and I think the bulk of them probably would be exercised.

I don't take any responsibility for Paine Webber's valuation. I don't know that you want to go into that.

Q. How did you arrive at the magic figure of $11.50?

A. I don't know anything magic about it, Mr. Kanton. We started out with $10 and put up the proposition of a $6,000,000 bank loan and after discussion with the staff cut that bank loan in half and thereby raised the $10 figure to $11.50.

Q. Well, let's use the other magic figure. How did you get $10 to start with? Why not $5?

A. Because we wanted to have a bank loan that would liquidate out in a relatively short period of time.

Q. Well, considering this fact, supposing you felt you didn't want a bank loan, would you raise the price to $13 if you could get it?

A. I don't know what you mean by supposing we didn't want a bank loan.

Q. Well, do you want a bank loan?

A. We want a bank loan for $3,000,000.

Q. Why?

A. Because any lesser amount would require increasing the subscription price from $11.50 to some higher figure.

Q. Well, let's start all over again. We are chasing ourselves.

Mr. Tucker: Do we have to do that?

Mr. Kanton: Yes. I think it is quite important. I am trying to find out what is going on here, or what was going on in the mind of the Board of Directors with reference to this bank loan.

By Mr. Kanton:

Q. It seems when you arrived at the price of $10 it was because of the bank note, and because of the bank note you got the price of $10. Now, where did you start?

A: We started with a bank loan of $6,000,000, which we thought could be paid off in a relatively short period of time, and the net result was that we needed the balance, which figured out to be $10 a share.

Q. Well, supposing you didn't want a bank note, how would you start in?

Mr. Tucker: If he can make that supposition.

Mr. Kanton: Yes, I think he can.

Strike that from the record. Let me ask you this.

By Mr. Kanton:

Q. Why do you consider it necessary to have a bank note of $6,000,000 or $3,000,000?

A. The bank note is only necessary because we need that additional money if the subscription price is $11.50, and we have testified before that we did not want to impose any greater financial burden on the common stockholder than $11.50 per share. We started out with $10 and we increased it to $11.50 because we thought that to cut the bank loan in half would be helpful.

Q. How did you get the $10 again? Because of the bank note of $6,000,000?

A. That is right.

Q. You figured a bank note of $6,000,000. You dropped the bank note to $3,000,000, you get $11.50?

A. That is right.

Q. If the bank note disappears you get $13?

A. Yes.

Q. Now, I can't see the difference in how you acquire cash from your common stockholders. If you need, say, $13 a share or $14.50 a share, can't you distribute Virginia or Gulf and El Paso together, because the money so received will be used to discharge the claims of the Engineers' preferred stockholders, in any event?

A. You can raise enough money to pay off the preferred stock by selling Gulf and El Paso, certainly, at $13.

Q. If you distributed Virginia, Gulf States and El Paso for $14.50 a share, based on warrants, rather, would you consider that a burden to the Engineers' stockholders?

A. Yes.

Q. Why? Just because of the $14.50 compared with the $11.50?

A. That is right.

Q. And compared with the $10.00?

A. That is right—it is $3.00 more than $11.50—$14.50.

Q. In other words, when you get down to the basis of this, you feel it is to the advantage of the Engineers' common stockholders to keep the corporate entity alive for three years, by having a note outstanding, either for $3,900,000 or an additional amount, at the rate of 1½ percent, plus the expenses that will be entailed in keeping Engineers alive in the sense of section 42 of the Delaware corporation law? Is that correct?

Mr. Tucker: In the early part of that, you have "keeping it alive" without any reference to Section 42, and I think that is confusing to the witness.

The Witness: I think it is to the advantage of the common stockholder to have Engineers liquidate by borrowing the $3,000,000 on the bank loan, and any additional amount that may be necessary, rather than calling on the common stockholder to put up that cash at this time.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Kanton:

Q. Now, what is the advantage?

A: He doesn't have to put up any money at this time.

Q. You mean the additional money over $11.50?

A. That is right.

Q. That is the advantage, because you assume any money put up is a burden?

A. That is right.

Q. And that is the only one?

A. Yes, I think we get this collateral tax advantage that we talked about before, but that is the primary reason.

Q. The collateral tax advantage from Virginia?

A. From the fact that he doesn't get dividends from Virginia, that is right.

Q. Are there any other tax advantages? How about the sale of the Puget stock? Is that carried over? Could that be used, possibly, the loss arising from the sale of Puget?

A. I don't think that that is required, but I would much prefer you asked Mr. Ratcliffe about the tax questions, because he knows about them.

Mr. Tucker: Mr. Ratcliffe will be here tomorrow.

Mr. Kanton: Thank you, Mr. Tucker.

* * * * *

[R. p. 302] By Mr. Kanton:

Q. In setting the price at $11.50 for the Gulf States warrants, you said you considered as an important factor that "many of our stockholders prefer, during this period of high personal income taxes, to have an investment which would yield capital appreciation rather than dividend income," and that therefore because of the relatively high tax rates applicable to income, as compared with no tax for capital appreciation until their securities are sold, and then a net tax for long term holdings of only 25 percent of such capital gain—when you speak of many stockholders who

would prefer during this period of high personal income taxes, etc., to whom are you referring, and what period do you have in mind?

A. Well, that is a generalization, Mr. Kanton, based on the fact that there are many large stockholders among our common stockholders, and I just assumed that they would prefer to take this Virginia common stock at the termination of the liquidation of Engineers, and if they then decided to sell it, take a capital gain on it, rather than getting the dividends during the period, and paying a very high rate of tax on those dividends.

Q. Well, that is a very important assumption, Mr. Benjamin. Did you speak to many of the stockholders?

A. I did not speak to any of them.

Q. In other words, you make the statement "Many of our stockholders prefer, during this period, etc.,"—you are speaking as if you had consulted with them, but you have testified that you did not. You are basing it entirely on your own opinion that if you were a large stockholder you would make that a consideration?

A. That is correct.

Q. Well, don't you realize that in these tax situations involving 25 percent of taxable gains, it would vary with an individual common stockholder, whether he is a large stockholder or a small stockholder?

A. I realize that fully, Mr. Kanton,—and one other thing I pointed out was that this leaves the choice up to the stockholder himself. In other words, he may have a situation where he prefers to take the Virginia common stock, which would be non-taxable to him at the time he receives it, and keep it until such time as he has a tax loss to offset whatever gain he might have in disposing of it.

Q. That is correct, Mr. Benjamin, but you said this was one of the important factors you took into consideration when you set the price at $11.50, and I can't see that consideration. Could you please amplify your remarks in that respect, based on this quotation I gave from your previous testimony here?

Richard N. Benjamin—Cross Examination (Cont'd)

A. Well, I made that assumption, Mr. Kanton.

Q. It was your own personal assumption?

A. That is right.

Q. Would you say that your main consideration,—and when I use the word "your" I mean the Board of Directors of Engineers—in setting forth the proposals under this Plan, based upon certain income tax advantages that would fall to the Engineers' stockholders, either the preferred or common?

The Witness: Would you read that question, please?

(The question is read.)

The Witness: I frankly don't understand that question, Mr. Kanton. Could you rephrase it?

By Mr. Kanton:

Q. Let me see if this statement would help you:

It seems, from reading your testimony and the exhibits placed into evidence to supplement it, that every consideration was given to the deferring of the payment of taxes until such time as the—and I am quoting now—"tax rates are lower, or until he"—meaning the common stockholder—"has a tax loss to offset the gain?"

A. That is right.

Q. I am referring specifically to the result of taxable gains to the Engineers' common stockholder, in respect to distribution of the warrants to purchase Gulf States common, the exercise of such warrants, and the distribution of the El Paso common and the distribution of the Virginia common. As a matter of fact, you specifically stated in your testimony,—and I quote again:

> "Any increase in the value of the Virginia common stock during the period preceding the distribution of that stock will not result in a tax on the Engineers' common stockholder at the time of the distribution, whereas, if the Virginia common stock were distributed to the Engineers' stockholder im-

mediately, he would become subject to taxes on the dividend income."

Then you further stated that—and again I quote:

"These relatively large unit holdings indicate ownership by people of substantial means, many of whom, in all probability, would prefer to have capital appreciation, rather than dividend income."

Now, my question to you is this: Would you say that the Board of Directors' main consideration in setting forth the proposals in this Plan has been based upon certain income tax advantages which would fall to the Engineers' stockholders, either preferred or common?

A. Well, I would like to break that question down into two parts, if I might.

Q. Go right ahead, Mr. Benjamin.

A. Certainly one of the important considerations in this Plan was whether or not the distribution of these various securities through rights, stock dividends and final liquidation, would be non-taxable to the common stockholders.

That was one of the most important factors that had to be taken into consideration, and as the Plan was originally set up, and as it is now set up, we have been advised by our tax counsel that there is no tax to the stockholders at the time of the receipt of these securities.

As to the second part of the tax saving, namely, the non-receipt by the common stockholder during the liquidation period, of the Virginia dividends, I considered that was a collateral advantage that the stockholder got.

I think the primary consideration was not to require the common stockholder to put up any more money than was necessary, in order to provide the funds for the payment of the preferred stock.

Q. Well, with reference to the Virginia common stock, is this the reason—and I underline "the", why Engineers

did not consider the selling or the distribution of its common stock through the exercise of warrants by its common stockholders—the tax benefit, I mean?

A. No, I don't think so, Mr. Kenton. I think that the reason was the one we have been discussing this evening, that, to repeat it again, we did not want to require the common stockholder to put up any more money than was absolutely necessary.

Q. Did this tax factor have any bearing upon whether the Virginia stock should be issued at this time?

A. I don't think so.

Q. Well, don't you think a person who has a relatively large unit holding would prefer to have capital appreciation rather than dividend income?

A. Yes, I think he would.

Q. And aren't about 84.77 per cent of the Engineers common stockholders considered to be holders of large units of holdings?

A. Well, the Applicant's Exhibit 15 shows that 84.77 per cent of the record holdings represent holdings of 101 shares or more. That was your question, wasn't it?

Q. Yes, that was my question. Well, then, considering this fact, would you say that was one of the reasons that Engineers has not considered the selling or the distribution of the Virginia common stock through the exercise of warrants, because of these tax advantages? You see, I am using the quotes that you put in the record when you stated —and I quote again: "These relatively large unit holdings,"—and that is this 84.77 per cent—"indicate ownership by people of substantial means, many of whom, in all probability, would prefer to have capital appreciation rather than dividend income."

Now, assuming that—and you did assume it—did you have any basis, or did you have any reason for saying that that is a reason, or one of the reasons for not wanting to distribute the Virginia common stock as part of this Plan?

Richard N. Benjamin—Cross Examination (Cont'd)

A. I think that that is a collateral advantage that goes along with the plan, Mr. Kanton.

You asked me earlier, I think, before the recess, what would happen if all of Engineers' liabilities had been liquidated, and I said that, after they had been liquidated, I think Engineers itself would be liquidated. In other words, Engineers would not be continued for the purpose of giving this collateral advantage to the large stockholders. It is just one of the incidental advantages that crops up because of the principal purposes of keeping Engineers in a state of liquidation for a period of not exceeding three years.

* * * * *

Hearing on December 18, 1945.

[R. p. 313]

RICHARD N. BENJAMIN

Cross Examination (Resumed)

Mr. Kanton: Mr. Examiner, I would like to incorporate by reference the 1944 Form U-5-S statement of Engineers filed in Commission's dockets No. 30-105-2 which is the first duplicate copy. I haven't been able to obtain the original, so, this being an exact copy, I am offering this in place of the original.

* * * * *

[R. p. 321] By Mr. Kanton:

Q. Mr. Benjamin, do you know who Pratt Brothers are who are located at 90 Broad Street, New York, New York?

A. Pratt Brothers to the best of my knowledge is a nominee for clients of Investors Records Corporation which corporation handles the affairs of certain individuals in the Stone family.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Is that the Stone and Webster Corporation?

A. I do not know who their present clients are. I speak only as to my own knowledge from the time prior to 1938. I know at that time they were.

Q. I notice also, on page 27 of the Form U-5-S, that Mr. Whitney Stone and Whitney Stone & Edward C. Brewster, executors of the estate of Charles A. Stone, also have their addresses, care of the Investors Record Corporation.

Do you know whether these two listings here on page 27, care of the Investors Corporation, also involve holdings by these people and their associates, and that these people are connected with the Stone and Webster interests?

Mr. Tucker: Now, will you show him the record that you are talking about and let him see what it is.

Mr. Kanton: Surely. I am sorry.

The Witness: Mr. Whitney Stone is President of Stone and Webster Incorporated. Mr. Edward C. Brewster is a relative of Mr. Whitney Stone's by marriage, and I do not know Mr. Brewster's present occupation. I think he is in the armed forces.

By Mr. Kanton:

Q. But he was connected with the Stone and Webster interests?

A. At one time he was connected with Stone and Webster.

Q. Will you turn to Exhibit J-8, Mr. Benjamin, please. As I understand it, this is a letter addressed to Engineers Public Service Company by Investors Records Corporation and signed by P. M. Skillin, the Treasurer.

This letter is in answer to an inquiry addressed by Engineers Public Service Company to its twenty largest holders, asking them to list the individuals who have interests or beneficial interests in the common stocks or preferred stocks of Engineers, is that correct?

A. That is correct.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. And this letter, if we glance at it, is three pages and it shows on the second page the common stock owners, with the address in each case in care of Investors Records.

Now, will you go down that list on that page and tell me to the best of your knowledge whether any of these people listed here, or the interests listed, have been at any time connected with the Stone and Webster interests, or are at present connected with such interests.

A. Well, the first item on this list is the Estate of Charles A. Stone. Mr. Stone was one of the founders of Stone and Webster Incorporated.

Whitney Stone is the next name on the list. He is as I have just stated, President of Stone and Webster Incorporated. Anne M. Stone is the next name on the list. She is the wife of Whitney Stone.

Margaret S. Winthrop is the next name on the list and she is the sister of Whitney Stone.

Janet S. Brewster is the next name on the list and she is another sister of Whitney Stone.

Stone Farm Association is the next name on the list and I do not know the present stock ownership or interest in that Association, but the last information I had, some years ago, that was owned by members of the Stone family or trust.

The next item on the list is Whitney Stone trustees under deed of trust dated January 17, 1922 for the benefit of Charles A. Stone, Jr.

Mr. Charles A. Stone, Jr., is a brother of Whitney Stone.

The next item on the list is Whitney Stone, et al, trustees under deed of trust dated June 16, 1926.

I do not know anything more about that trust than what is stated here, that Mr. Stone is a trustee.

The last information I had on that, I think, that was a trust for the benefit of members of the Stone family.

The next is another trust for the benefit of Whitney Stone as trustee and apparently there are other trustees, for the benefit of Diana Brewster. I do not know who Diana Brewster is. Whitney Stone, et al,——

Q. Excuse me just a minute. Isn't Diana Brewster a niece of Mr. Stone?

A. She may be. I don't know. I never saw that name before other than this correspondence.

Whitney Stone, et al, trustees under deed of trust dated December 27, 1938 for the benefit of Virginia W. Brewster. I do not know who Virginia W. Brewster is.

Q. What are the total common holdings that you see appearing on that page, Mr. Benjamin?

A. 202,625 shares.

Q. What percentage of the total outstanding shares of common stock of Engineers would that amount to?

A. Slightly over 10 per cent.

Q. Will you now turn to Exhibit J-12.

A. Yes.

Q. Which is a letter addressed to Engineers Public Service Company from Accounting Service Corporation, is that correct?

A. Yes.

Q. Signed by Donna E. Shay, the agent.

Turning to page 2 of this five page letter, I notice that under the owners of common stock we have listed certain people and certain trustees estates.

Glancing over this list, Mr. Benjamin,—and these common stock holdings extend on pages 2, 3 and the top of page 4—can you tell me if any of these people listed there are connected in any way or have been connected with the Stone and Webster Interests?

A. The first name on the list is Mabel W. Harte, and I do not know who this person is.

Q. Do you think Mr. Barnes might know?

A. He might. I don't know.

Q. Go ahead.

A. The next on the list is Edwin S. Webster, Jr., Richard Harte, and Lawrence J. Webster, trustees under declaration of trust dated April 2, 1919 for the benefit of Francis W. Hiam.

The only person on that list that I know is Mr. Edwin S. Webster, Jr., who is partner, Kidder, Peabody.

Mr. Webster, Jr., is the son of Edward S. Webster, who is one of the founders of Stone and Webster.

Q. Let's look through this list generally without taking up each specific item and tell me which names you recognize as connected or having been connected with the Stone and Webster interest. We, of course, see on page 2 that Mr. Edwin S. Webster, Jr.'s name appears in six of the seven items in the trust estate as set up.

Now, could you turn to the next page.

A. There is another trust at the top of the next page in which appear the names of Edwin S. Webster and Edwin S. Webster, Jr. Those are the only two people in that list that I have any knowledge of.

The next is Chestnut Hill Farm Association, and it states here that that is a personal holding company whose stock is owned by a list of people and trusts.

The first one is Edwin S. Webster. The second one is Jane de P. And then there are four trusts of which Mr. Edwin S. Webster, Jr., is one of the trustees.

The next page is Suffolk Corporation, another personal holding company in which it lists the stock owned by Jane de P. Webster, and then there are four trusts in which the name of Edwin S. Webster, Jr. appears as trustee, and another trust under the will of Russell Robb.

Q. Do you know who Mr. Robb is?

A. It is my understanding Mr. Robb was one of the original partners of Stone and Webster.

Q. What are these total holdings of common stock listed on Exhibit J-12?

A. On page No. 3, which is attached to this letter, there is a column headed "True Owner" against which is total common shares held in the name of Edwin S. Webster, Jr., 37,100 shares.

Q. Looking at these pages again, Mr. Benjamin, we also notice, do we not, that there are certain shares held under

the Chestnut Hill Farm Association and the Suffolk Corporation, totaling approximately 72,000 shares held by certain of these individuals you have mentioned before; is that correct?—and which amount is not included in the 37,100 share figure which you just gave me.

A. I think, from reading this letter, that these shares you have referred to relate to the participation in the shares of Chestnut Hill Farm Association by these various individuals.

Q. But these various individuals if we look at the Chestnut Hill Farm Association on the Suffolk Corporation appear to be generally made up of people who have been or are associated with the Stone and Webster interests, is that correct, Mr. Benjamin?

A. The only ones I know about are Mr. Edwin S. Webster and Edwin S. Webster, Jr.

(Discussion off the record.)

By Mr. Kanton:

Q. Mr. Benjamin, also looking at Exhibits J-8 and J-12 and the preferred stock holdings thereunder specifically the $5, $5.50 and the $6 preferred, do you find on glancing through these exhibits that the people you just spoke about as being connected or having been connected with the Stone and Webster also appear as connected with certain stock interests of Engineers Public Service Company?

A. Yes. On Exhibit J-8, page 3, it appears that Stone Farm Association owns 500 shares—or did at December 31—all of this information is as of December 31, 1944—owned 500 shares of the $6 preferred that the Whitney Stone *et al.* trustees under deed of trust dated June 16, 1926 owned 690 shares or a total of 1,190 shares, that the estate of Mary L. Stone owned 4,200 shares of $5.50 preferred, and Mary L. Stone was the wife of Charles A. Stone.

Stone Farm Association owned 900 shares of the $5.50 preferred. The trust of June 16, 1926 owned 300 shares.

Richard N. Benjamin—Cross Examination (Cont'd)

And there is another trust, Whitney Stone, *et al.*, trustees under deed of trust, dated December 22, 1924 for the benefit of Marion S. Hince, 25 shares, and another trust of the same date for the benefit of Catherine S. Rentoul.

(Discussion off the record.)

The Witness: 25 shares, or a total of 5,450 shares of $5.50 stock, and it also shows that there were 3,100 shares of $5 preferred stock owned by some of these same persons and trusts that we have already referred to.

Over on Exhibit J-12 it appears from this Exhibit that Chestnut Hill Farm Association owns 5,700 shares of the $5 preferred stock, that another trust which Mr. Webster and Mr. Webster, Jr. are trustees owned fifty shares or a total of 5,750 shares.

By Mr. Kanton:

Q. Mr. Benjamin, turning now to Applicant's Exhibit No. 13, which shows the twenty largest holders of record of Engineers common stock as of October 31, 1945, we have already discussed the holdings of Pratt Brothers, care Investors Record Corporation, who as of this date owned 90,643 shares.

The next name that appears there is Kidder, Peabody and Company, Boston, Massachusetts. Isn't one of the members of this firm Mr. Edwin S. Webster, Jr.?

A. It is my understanding that he is.

Q. He is what?

A. It is my understanding that he is.

Q. Connected with——

A. That he is a partner of Kidder, Peabody.

Q. And Kidder, Peabody owns 79,532 shares.

Do you know who Labb & Company is of Boston 6, Massachusetts?

A. I believe that they are a nominee for an investment trust in Boston but I don't know the name of the trust.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Who is Frank J. Gould?

A. He is an individual who I believe at the present time is in France. I don't know much about Mr. Gould.

Q. Wasn't he formerly one of the owners of Virginia Electric and Power Company?

A. I have heard that he was. I don't know the facts in connection with that.

Q. Which company is now controlled by Engineers. And is he, or was he connected with the Stone and Webster interests?

A. Not to my knowledge.

Q. I believe it is true that Mr. Gould, when he sold his interests in what is commonly known as Vepco to the Engineers Public Service Company, received in exchange Engineers common stock, is that correct?

A. I don't know.

Q. We also find appearing on page 1 of Exhibit 3, the names of Whitney Stone & Edward C. Brewster, executives, Estate of Charles A. Stone, holding 37,935 shares and Edwin S. Webster, Jr., care of Mr. George W. Elwell, Accounting Service Corporation, holding 34,200 shares.

On the top of the second page we find that Clarence J. Shearn, trustee under declaration of trust by Stone & Webster, Incorporated, dated February 14, 1938, New York, New York, holding 23,335 shares.

Is it not true that J. M. Forbes was at one time a partner with the Stone & Webster Company?

A. I don't know whether he was or not, Mr. Kanton.

Mr. Condon: Couldn't we get a stipulation on that on the record if it is a fact.

(Discussion off the record.)

By Mr. Kanton:

Q. Will you answer it now? You have been advised.

A. It is my understanding that J. M. Forbes was the grandfather of W. Cameron Forbes, who was a partner of Stone & Webster at one time.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Is Cameron Forbes now a member of the firm of Forbes and Company?

A. I don't know.

Q. I also notice on page 2 of Exhibit 43 the name of Mrs. Jane de P. Webster, care of Mr. Elwell, care of Accounting Service Corporation, Boston, Massachusetts.

Do you know if she is connected or was connected, either through a family relationship or business relationship with the Stone & Webster interests?

A. It is my understanding that she is the wife of Mr. Edwin S. Webster, Sr.

Q. And the next name I am referring to is Margaret S. Winthrop, care of Investors Record Corporation, New York, New York, the owner of 13,563 shares.

Could you tell me if she has been connected with the Stone and Webster interest either in a business capacity or through a family relationship?

A. She is the sister of Whitney Stone.

Q. And we also have appearing on page 2 Mr. Whitney Stone, care of Investors Records Corporation, the owner of record of 15,463 shares.

Now, if we look at Exhibit 43 again, is it true, Mr. Benjamin, that Pratt Brothers, Kidder, Peabody and Company, Whitney Stone & Edward C. Brewster, et cetera, Edwin S. Webster, Clarence J. Shearn, trustee under declaration of trust by Stone & Webster, J. M. Forbes and Company, Mrs. Jane de P. Webster, Margaret S. Winthrop, Whitney Stone, and possibly Mr. Frank J. Gould, have at one time or another been connected either through business or family relationships with the Stone and Webster interests?

A. I would like to exclude from the list of names you read Mr. Gould and J. M. Forbes and Company, because I don't know what the situation is with respect to those two names other than what I have already told you.

The other names you mentioned—you had quite a few of them there—Pratt Brothers we have already covered.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Kidder, Peabody.

A. Kidder, Peabody, Mr. Edwin S. Webster, Jr. I believe is a partner of that firm, and Whitney Stone Trustee and Edwin S. Webster we have already spoken of.

Mr. Shearn as trustee under this declaration of trust is connected by reason of this trust through a business relationship with Stone and Webster.

Mrs. Webster, Margaret S. Winthrop and Whitney Stone we have already covered. Looking through this list and excluding the parties we have just mentioned, to the best of your knowledge and ability, can you tell me if there are any other names listed here-on that have been or are connected with the Stone and Webster interests?

A. I don't see any other names that might have had any connection with Stone and Webster, to the best of my knowledge.

Q. Do you know of any other holders, from looking at the stock books of the Engineers Company, to the best of your recollection, that own shares of common stock in Engineers, who may have been or who are connected either in a business capacity or through family relationship, with the Stone and Webster interests?

I mean you won't find that in the material you have before you, but do you have any other information?

A. Mr. Kanton, I haven't looked over the Engineers stock list with that purpose in mind and I don't feel I can answer.

Q. Mr. Benjamin, referring now to Exhibit No. 44-J this is just a point to clear up in my mind.

This Exhibit is entitled "50 of the Largest Holders of Common Stock Who Also Hold Preferred Stock, Eliminating Common Holders only as of October 31, 1945."

Q. Could you tell me what the last part of that statement means "Eliminating common holders only?"

A. The purpose of this exhibit which was prepared at your request was to show the 50 largest holders of common stock who also held preferred. This is not a list of the 50

largest holders of common stock. It is only a list of those holders who also own some preferred stock, according to the records of the company, and eliminating common holders only means that it eliminates those of the largest holders who do not own any preferred. Do I make myself clear?

Q. Looking at this exhibit, do you know from your information, if there would be a material change if an exhibit were prepared showing a list of the 50 largest preferred stockholders who also own common stock?

A. The 50 largest preferred stockholders who also own common stock.

Q. Correct.

Q. I have no idea what that list would show. I assume that it would be different—materially different.

Q. You think it would be materially different?

A. I don't know. I just don't know who the 50 largest holders of preferred stock are.

Q. I mean just from looking at this, does this appear to you that the preferred stock holders here appear to be holders of large amounts of preferred stock?

Mr. Tucker: You are referring now to——

Mr. Kanton: Exhibit 44.

The Witness: We have in the record a list of the 20 largest holders of each class of preferred stock, and looking at Applicant's Exhibit 40, the holdings run from 2,170 shares down to 500.

Looking at 41, which is the $5.50, they run from 10,295 shares down to 1,100, and looking at Applicant's Exhibit 42, which is the $5, they run from 5,750 down to 1,100.

Looking at the holdings on Applicant's Exhibit 44 of preferred stock, I find that some of these same holdings appear.

The only one I—N. J. Forbes and Company, for example, has 10,295 shares of $5.50 preferred and that name appears on both lists.

Q. Kidder, Peabody and Company apparently does too, Whitney Stone, and Pratt Brothers.

A. Some of the names appear to be duplicated. On the other hand there are some rather small holdings of preferred stock. One as low as ten shares. Josephthal, for example. I think the lists would show a different result.

Q. Mr. Benjamin, would you now turn to Exhibit 41 which is the 20 largest holders of record of Engineers $5.50 preferred. The third item appearing on the bottom of page 1 of this Exhibit is Mrs. Clara D. Kellog. Can you tell me who she is?

A. I believe she is the wife of Charles W. Kellog, one of the Directors of Engineers.

Q. How about the Cyrus W. Ferris, care of Stone & Webster and Blodgett, Inc? Do you know who he is? He is the last name appearing on page 2 of Exhibit 41.

A. I believe he is the Vice President of Stone and Webster and Blodgett, Incorporated.

Q. Referring to Exhibit No. 45, Mr. Benjamin, entitled "Engineers Public Service Company—Common stock balance as of June 30, 1945."

Just for the record, it is true, is it not, that this exhibit shows the holdings of Engineers common stock and certain "street" names but does not show otherwise the beneficial owners of record, is that correct?

A. Yes. If by "street" names you mean the names of brokers of whom the transfer agent has knowledge. It does not show the beneficial ownership.

Q. Does it also show the names of nominees?

A. No. We asked the transfer agent to include in this list only the names of brokers that he knew of his own knowledge to be brokers.

Q. Looking at Exhibit 45, there is no way of distinguishing whether any of these holdings may be beneficial holdings of the names listed here, is that correct, Mr. Benjamin?

A. The only way we have of getting any information on the beneficial holdings is this letter that we send out annually in connection with U-5-S.

Richard N. Benjamin—Cross Examination (Cont'd)

Some of these people that are on this list did have stock in their name at December 31, 1944, so that you get a little check perhaps on what their beneficial holdings were at that time. It doesn't mean that they are necessarily the same now.

• • • • •

[R. p. 370] By Mr. Kanton:

Q. Exhibit 13 shows the common stock prices up to November 20, 1945. Can you tell me what the price is now on the market and the high for this year so far? That is just to bring the records up to date.

(Discussion off the record.)

By Mr. Kanton:

Q. What was the high so far this year?

A. The high so far this year was 37 and last night's close was 33½.

• • • • •

[R. p. 376] By Mr. Kanton:

Q. Can you please tell me, for the record, what provision has been made in the Plan for any payment of interest with respect to any additional amount that may have to be payable over $100 per share, plus accrued dividends to the preferred stockholders?

A. I would say that there was no provision in the Plan for that at the present time except to the extent of the third paragraph of Part II of Division C of the Plan, where it is stated that Engineers agrees that in the event the Commission shall, in any findings, find that it is not fair and equitable to the persons affected, that Engineers shall pay to its preferred stockholders no amount in addition to $100 per share plus accrued dividends to the date of deposit then Part II is automatically amended to provide for the payment of such additional amount as the Commission shall

specify and if the Commission specifies the payment of interest, I would think that section would cover it.

Q. In other words, you are leaving it within the province of the Commission to determine if any interest payment is to be paid on this additional amount of over $100 a share, plus accrued dividends.

Mr. Tucker: Subject to our reservation to contest it?

Mr. Kanton: Oh, sure. That is not the point. The point is, as I have stated the question that it is entirely within the province of the Commission as you have stated, whether any interest is payable on this additional amount, if any.

Mr. Tucker: I still make the statement. You say, "Entirely within the province of the Commission."

I say it is not entirely within the province of the Commission because we are reserving the right to contest it.

By Mr. Kanton:

Q. No provision has been made for any payment of interest on any amount that may be found to be fair and equitable over $100 per share plus accrued dividends.

Mr. Tucker: I think you are getting into a discussion of legal problems with the witness on that subject. He has given you the provision of the plan and he has told you that he understands that if the Commission shall find that interest shall be payable in addition to $100 per share plus accrued dividends, the plan will be automatically provided for it, and I say that is, of course, subject to our reservation of the right to contest it.

The rest, it seems to me is a legal question.

* * * * * *

[R. p. 413] By Mr. Kanton:

Q. In your testimony regarding the price ranges of the preferred stock of Engineers, on their respective issue dates, up to November 1, 1945, you made the statement

with respect to the $5 dividend preferred stock, that the reason it sold above $100 in 1928, 1929, and 1930 was "due to the conversion privilege which then existed."

And you said the same thing with respect to the $5.50 dividend preferred stock, with respect to its excess in value in 1929 and 1930 being due to stock purchase warrants attached thereto.

Would you please explain for the record what you mean when you say that the excess in value over $100 per share was due to certain rights attached to the security?

A. Well, the $5 stock was convertible into common stock at that time, and this conversion privilege added value to the preferred stock.

In other words, as the price of the common stock went up the conversion privilege became more valuable.

Q. That wasn't the only reason then that, as you put it, it was due to the conversion privilege or the stock purchase warrants. It may have been due to other factors, isn't that correct?

A. Perhaps the condition of the market at that time.

Mr. Scheetz: While we are on that, could we have for the record the conversion rate if it was a fixed rate: If it was a sliding scale I don't know whether it is feasible.

Mr. Kanton: I think it was attached to the charts that were put in, is that correct, Mr. Benjamin?

The Witness: Well, the charts show the number of shares that were converted. The charter amendment shows the basis of the conversion.

Mr. Scheetz: If that is so, Mr. Benjamin, that is all right. Then I will find it.

Mr. Tucker: I might also add for the information of counsel that all of that information is also contained in detail in these annual reports, and all of the annual reports are in from the beginning.

Mr. Scheetz: Thank you, Mr. Tucker.

The Witness: You will notice that the $5 stock in 1929 went up to approximately $123 a share, and I believe that

the reason it went that high was because of the conversion privilege.

By Mr. Kanton:

Q. I am just trying to get clear what you testified to, but you stated "it was due to the conversion privilege."

Is that the only factor that was involved that made the $5 dividend preferred stock sell as high as 123 in 1929? Weren't there other conditions involved, or other factors?

A. I think that was the factor that made it go that high, Mr. Kanton.

Q. That high above what?

A. Above what it ordinarily would have sold for on a straight yield basis.

Q. What would it have sold for at that time?

A. I can't give you the exact figure.

Q. Weren't the preferred stocks at that time all selling above $100 per share? By that I mean preferred stock on the same dividend yield and the same comparative quality as the preferred stock of Engineers?

A. Well, the $5.50 preferred stock which has a higher dividend rate than the $5 stock was selling in 1929 at one point at a high of 109 so that I think it is a fair assumption that the reason $5 stocks sold higher was because people gave weight to the conversion privilege.

Q. With respect to the $5.50 you say it went as high as 109 in 1929 and that was due to the stock purchase warrants? If there weren't any stock purchase warrants would that have gone has high as 109? What I am really getting at, Mr. Benjamin, is your exact phraseology of your testimony with reference to these privileges that you just spoke about. You don't mean that it was due to these things? This was one of the factors that perhaps added value to the securities in question at that time, is that correct?

A. I think that is a correct statement.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. You testified that as of June 30, 1945, Virginia Gulf and El Paso had $2,773,000 of free earned surplus and Engineers had $7,095,000 of free earned surplus or a total of $9,868,000 which could have been declared out in common stock dividends.

I would appreciate it if you would tell me again why you consider that important as bearing upon the Plan that we now have before us.

Mr. Tucker: You haven't got a page reference that the witness could look at, have you, Mr. Kanton?

Mr. Kanton: Frankly, I am sorry, I don't.

(Discussion off the record)

The Witness: I think the only bearing that that statement has on the present situation is that by reason of the fact that these dividends have not been paid, the security behind the presently outstanding preferred stock has been kept up to that extent.

By Mr. Kanton:

Q. You mean the common stock? Is that what you just said?

A. Preferred stock I said.

Q. Well, doesn't it also increase the value of the common stock?

A. Yes, it does.

Q. Were you prevented from paying out this sum of money?

A. No.

Q. Why didn't you pay it out?

A. Well, the directors of Engineers have adopted a policy of not declaring dividends on the common stock because of the uncertainties due to the Holding Company Act.

Q. What do you mean by that exactly?

A. Well, the future of Engineers has been uncertain because of the requirements of the Public Utility Holding Company Act requiring divestment, and so forth, and the

orders of the Commission that have been issued and pending the final work-out of the Plan, this money has been kept in the system rather than having been paid out.

Q. Are you trying to say in effect that the money was being kept in in order to pay out the preferred stockholders?

A. That is what the money is going to be used for.

Q. Is that the reason it wasn't paid out in dividends?

A. Yes. I think it was one of the principal reasons.

Q. Can you tell me the purpose of Exhibit 30 again please?

A. Exhibit 30 shows the amount that has been left in the system over the period of years shown in the exhibit, and to the extent that it was left in, it has accomplished the same result that I just testified to on this free earned surplus that we talked about.

If it had been left in for other reasons, the amount over and above the free earned surplus has been left in because of freezes and the two figures you just mentioned have to do only with free earned surplus.

Q. The money that is left in has added not only to the value of the common but also to the preferred stock.

A. It has added to the value of both classes stock.

Q. I think you testified this morning that if this money had been paid out as dividends to the Engineers common stock the effect would be that on the final dissolution and liquidation of Engineers, if there was no cash available, some other method would have to be found as for instance the payment to the preferred stockholders of either with the common stock of one of the Utility Companies, or the sale of such stock in order to generate cash to pay off their claim, is that correct?

A. The preferred stockholders claim would certainly have to be paid in one way or another.

Q. Isn't it true that it would have to be paid in one of the methods I have just used rather than with cash if there was no cash available?

Richard N. Benjamin—Cross Examination (Cont'd)

A. If there was no cash available it would have to be paid off either through securities or through the sale of securities to raise cash.

Q. Isn't it true that a dividend policy, as you tried to explain is the purposes of Exhibit 30, of any corporate management of any company is one of the risks an investor takes into account when he purchases a security in such a company?

A. That is true.

Q. Therefore, don't you think the preferred stockholders of Engineers should be in a position to be compensated for their risk as well as the common stockholders?

A. I don't know just what you mean by that, Mr. Kanton. The preferred stockholders have received full dividends on their preferred stock.

Q. What I mean is this: You tried to point out by Exhibit 30 that by holding back the payment of dividends on the common stock you have increased the value of the preferred stock and also increased the value of the common stock. I asked you, isn't it true that a dividend policy is one of the risks an investor takes, meaning a preferred stock investor or a common stock investor and my final question was, if that is one of the risks he takes shouldn't he be in a position to be compensated for that risk because that is one of the risks he took?

A. The basic difference between a preferred stockholders risk in that regard and a common stockholders risk is that a preferred stockholder would have first call on those earnings and dividends and whenever dividends are declared they must first go to the preferred stockholder.

Q. That is right.

A. So the degree of risk is considerably less in the preferred stock.

Q. But if the dividend policy of a company is to hold back dividends it would accrue to the benefit of the preferred stockholders. If the dividend policy of a company is to hold back the payment of its dividends to its common

stockholders, as you have just testified, it would be to the benefit of the preferred stockholders, is that correct?

A. I say that the effect of keeping this money in the system has been to increase the security behind the preferred stock.

Q. I asked you before, isn't that one of the risks that a preferred stockholder takes into account when he purchases a security—the dividend policy of the company, the corporate management of the company—and then I asked you shouldn't he be compensated for that risk if it ultimately comes to his benefit?

(Discussion off the record.)

The Witness: I think that the first part of your question as to whether or not a preferred stockholder takes into account the risk in whether or not he is going to receive dividends, and the corporate management, and so forth is correct.

I think a preferred stockholder does take those things into account.

The second part of your question you asked me whether he should be compensated for the risk he takes. I always understood that he got full compensation for whatever risk he took by buying a security with a fixed dividend rate on it and apparently whatever price he paid for the stock he thought was a fair price in view of all the risks that he took.

By Mr. Kanton:

Q. Yes, but doesn't he look to the company balance sheet to see if there is the assets and the cash to pay his dividends?

A. Absolutely should.

Q. And if he sees a company that has $14,000,000 in cash that isn't being paid out in dividends he would like to become a preferred stockholder in that company as contrasted to a company that doesn't have any cash?

A. Because he is relatively sure of getting his dividends on the preferred stock and in the event the company is

liquidated he is relatively sure of getting whatever amount is payable to him in liquidation, yes.

Q. The only point I have in bringing this out: if it is finally decided that the preferred stockholders of Engineers should be compensated on a going concern basis—and I am not saying what the answer is—we don't know at this time—but if that is the answer, don't you think that one of the elements that should be considered is the present condition of engineers as it is today?

A. I think if the decision is going to be made on the supposition that Engineers is going to continue in business—and I suppose that is what you mean by a going concern basis——

Q. That is correct.

A. All those factors would have to be taken into consideration.

Q. On page 127 of the transcript, Mr. Benjamin?

A. I have it.

Q. You were asked the question in what alternative ways Engineers could comply with that order of the Commission, dated September 16, 1942, which requires the divestment of its interest in Gulf States and El Paso and you answered that: "There were four ways, the first being Engineers could sell its interest in Gulf States to the public through competitive bidding for cash and with the proceeds retire the Engineers preferred stock and distribute the El Paso common stock to its common stockholders.

"Second, Engineers could file a one stock plan whereby a new class of common stock would be issued to replace the present preferred and common stock of Engineers on such basis as might be determined to be fair and equitable.

"Third, Engineers might exchange the common stocks of Gulf States and El Paso or a portion thereof, with or without cash, for the preferred stock of Engineers, and such prices as might be found to be fair and equitable.

Richard N. Benjamin—Cross Examination (Cont'd)

"And, fourth, Engineers might divest itself of Gulf States and El Paso in accordance with a plan such as that now under consideration."

Q. I take it then that you, or rather the Board of Directors, considered these four possibilities as a Plan to be proposed before this Commission, is that correct, Mr. Benjamin?

A. I think these Plans have been discussed with the Board informally from time to time, yes.

Q. Were any other plans considered, or were these the only four that were considered?

A. There have been a good many plans that have been considered by the management, and the Board has discussed some of these plans. Whether or not they have discussed all of them, I don't know.

Q. I mean recently. Of these four plans they have considered recently they have decided on Plan No. 4, is that correct?

A. The 3 Holding Company Plan was one that has been considered for sometime in addition to the ones that are mentioned here.

Q. Would you say that of the four plans mentioned the first three should have been discarded because from the tax standpoint they would not be favorable to the Engineers common stockholders?

A. I believe that that was not the reason why these plans were discarded.

Q. Isn't it true, or would you know if it is true, that Plan No. 4 would be more advantageous from a tax standpoint than the first three plans?

A. I don't know the answer to that.

Q. Would Mr. Radcliffe know that?

A. He might.

Q. Also isn't it true that, considering these four plans that you mentioned in your testimony, that under the first three the present common stockholders of Engineers would

lose control of Gulf States and El Paso which they would not do under Plan 4 which is now under consideration?

A. Under Plan 1 where Gulf States would be sold through competitive bidding, the Engineers common stockholders would only have an opportunity to acquire an interest in that stock by going out and buying it in the open market.

Q. We can assume in that case that they have lost control. Considering the present engineers common stockholders as a group?

A. The one stock plan which is the second Plan would result certainly in a dilution of the interest of the present common stockholders in El Paso and Gulf States, also ultimately in Virginia.

Q. I think that by that you mean that a majority of the so-called new common stock that could have been issued under that Plan would go to the preferred stockholders.

A. I wouldn't say what the percentage would be, whether it is a majority or a minority, but in any event the common stockholders would get less than they get under this plan.

Q. Correct.

A. The third Plan, if Gulf States and El Paso or a portion of them were exchanged for the preferred stock obviously the common stockholders would have considerably less interest in those two companies.

Q. You testified on page 123 that when Engineers has divested itself of El Paso and Gulf States, there would no longer be any justification "economically or otherwise" for the continuation of Engineers as the parent of Virginia only.

Could you please explain for the record what you mean by "Economically or otherwise" in detail?

A. Well, I can't see any advantage to any one in continuing Engineers as a holding company over one subsidiary, namely, Virginia.

Q. That is economically?

A. I can't see any reason for continuing them——

Q. Is that what you meant by economically or otherwise?

A. Economically I meant that all it would do would be to add expenses, and so far as I could see, without any particular result being gained from those expenses.

Q. Well, if the actual or present capitalization of Engineers were continued, do you think that Virginia could support it?

A. I haven't analyzed that, Mr. Kanton, but I think even if it could it wouldn't change my feeling on the subject.

Q. That it wouldn't be economically desirable?

A. I don't see any advantage to it.

Q. If it were not for the Holding Company Act, do you think it would be economically desirable to eliminate Engineers as a corporate entity?

A. I think if Engineers were allowed to retain Gulf States, El Paso and Virginia, that there would be some advantage in maintaining Engineers.

Q. And also Puget, Savannah and the rest of the companies which you distributed?

A. That is correct.

Q. However, there is no order of the Commission directed to Engineers requiring it to cease to be a corporate entity, is that correct?

A. That is my understanding.

Q. However, as you stated, Engineers business is not economically desirable any more. However, isn't it possible under the charter of Engineers to voluntarily liquidate Engineers at this time?

A. I think it is open to any Delaware Corporation to liquidate voluntarily with the consent of its stockholders if it so desires.

Q. And it so provided in the Engineers charter?

A. I assume so. Let me look at the charter. I think that is a legal question. I think it is provided in the Delaware law to that effect that any corporation can dissolve.

Q. I think we can all agree—counsel and yourself and the other counsel here, that it is provided in the Engineers charter.

Mr. Tucker: I won't agree to it because I don't think it is so.

Mr. Kanton: Let me finish the question.

By Mr. Kanton:

Q. —that it is possible under the charter for Engineers to voluntarily liquidate its business at this time?

A. As I understand it, I think it is possible under the Delaware law. I haven't found it in the charter yet.

(Discussion off the record.)

By Mr. Kanton:

Q. What I am really getting at is this: Has Engineers considered the voluntary liquidation of itself as a corporate entity?

A. The Engineers management and Board of directors has filed this plan, when it filed this plan, for the complete liquidation of Engineers, because of the requirement to divest itself if the Act is upheld, of Gulf States and El Paso, and therefore the whole plan was looked at as a unit, because the Directors feel, I am sure, that there is no purpose served in continuing Engineers with just the one subsidiary. You asked me whether——

Q. You considered such action. The answer is——

A. Considered a voluntary action.

Q. The answer is yes or no?

A. The answer is no.

Q. If it is true that the Act has made it economically or otherwise desirable to dissolve Engineers as a corporate entity, isn't it true that Engineers still has the right and the power by vote of its common stockholders, under Delaware law, to voluntarily liquidate the company?

Mr. Tucker: I think he is asking the witness for a legal conclusion and I object to the question.

Mr. Kanton: I would be willing to accept your answer to that, Mr. Tucker.

Mr. Tucker: I am not on the witness stand. I think I have gone far enough in my legal conclusions here today without going any further but you are asking a purely legal question.

The Examiner: It is simply a question whether they can under Delaware law dissolve.

Mr. Tucker: That is what he is asking this lay witness to answer.

Mr. Kanton: Let's remember what happened at this opening session. I asked this witness what the Board of Directors considered when they were going to file this Plan and what they were going to pay the preferred stockholders and he said they considered the legal opinion of Mr. Tucker.

On the basis of that opinion they considered it was fair and equitable. We are not questioning their right now to pay $100 per share to the preferred stockholders. I said did Mr. Tucker point out to you the basis for that? He said, yes, the involuntary liquidation provisions of the charter. That is right in the record here. I am assuming the witness here as an officer of Engineers has considered that. I am also wondering, have they also considered, as this group of managers of Engineers, the right and the power that the common stockholders of Engineers have to voluntarily liquidate the company?

Mr. Tucker: That is not the question. He has already answered that. He said they didn't.

As to the voluntary liquidation—now you are asking him a purely legal question.

The Examiner: You are asking him now if under Delaware laws they can voluntarily liquidate. Isn't that a pure legal question. It calls for an interpretation of Delaware law, doesn't it? That is the way I look at it.

Mr. Kanton: Yes. As I said, before, I would be willing to forego asking the question of this witness if Mr. Tucker would undertake to answer the question on the record.

Mr. Tucker: You know the answer just as well as I do and there is no need to mess up the record by our conclusions as to Delaware law.

Mr. Kanton: Then we will assume it is yes.

(Discussion off the record.)

By Mr. Kanton:

Q. Turning to Exhibit No. 14 now, Mr. Benjamin, will you tell me why these four companies were chosen: Houston Lighting and Power Company, Indianapolis Power and Light Company, and Tampa Electric Company?

A. These are four operating public utility companies whose securities are distributed to the public, and we thought that they were fairly representative companies.

Q. Did you choose them?

A. I think Mr. Barnes chose them.

Q. And you concurred in his choice?

A. I did.

Q. Did you attempt to find out if the same business conditions exist in Gulf as exist in these four companies?

A. No, I did not.

Q. Do you know if the franchises are comparable?

A. No, I do not.

Q. Do you know if the Commission regulations are comparable?

A. Houston Lighting and Power is the only one. That is a company that is located very close to Gulf States, and so I think that may be comparable in that point of view.

Q. But there is a possibility that these companies may not be comparable in a lot of these factors that I have just mentioned, is that correct?

A. That is correct.

Q. Exhibit 15, Mr. Benjamin. Would you please explain the source of this exhibit for the record?

A. These are all of the companies, to the best of my knowledge, whose securities have been outstanding in the hands of the public, and which have been offered to the

public recently at either competitive bidding or through underwritings.

There have been some since that time, but those I don't believe have been out long enough for the purpose of making this comparison.

Q. What is the significance of that Public Utility Company Index which has an asterisk mark next to it? Where did you get that, sir?

A. That is one of the S. E. C. statistical publications. I have a copy of it here if you would like to see it.

Q. Will you give me the name please?

A. (Handing).

(Discussion off the record.)

By Mr. Kanton:

Q. Can you tell me when Engineers Management first decided to liquidate Engineers as a going concern?

A. I can't give you any exact date, Mr. Kanton. As far back as 1941, the summer of 1941, consideration was given to this so-called three holding company Plan which would, if carried have resulted in the final liquidation of Engineers as a going concern.

Q. I didn't mean that. When did Engineers management finally decide to liquidate Engineers as a going concern. You will remember that in the Plan as first filed there was a question of whether Engineers would be finally liquidated, or that it might be merged with Virginia.

I also recall, from reading past records, that at the time of the Western Public Service Company case Engineers took the position that at that time it had not decided to finally liquidate itself as a corporate entity, is that correct?

A. I think that is right, Mr. Kanton. At that time there was a substantial tax advantage in the picture.

Mr. Tucker: You mean by "in the picture" resulting from consolidated returns?

The Witness: That is right.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Kanton:

Q. Can't we say that when the Board of Directors first made up its collective mind to finally liquidate and dissolve Engineers was as of the date of the Amendment of December 14, 1945.

Mr. Tucker: You are referring to Amendment No. IV?

Mr. Kanton: That is correct, Mr. Tucker.

The Witness: I think under the Plan as originally filed the Board of Directors had determined that the business of Engineers, as such, would cease, as a result of the Plan.

The merger alternative was in the picture as a possibility. It was not until this last Amendment was adopted that the decision was made to dissolve Engineers as a part of Part I of the Plan, and to eliminate the merger possibility from the picture.

By Mr. Kanton:

Q. As I understand the Plan, as originally filed without Amendment No. 4, it had part III, which at that time said Engineers would be liquidated and dissolved or merged, so as the Plan was originally filed the Board of Directors at that time had not made up its collective mind as to whether Engineers would be continued as a going concern or not, is that correct? I am just trying to get a date.

A. You speak of Engineers continuing as a going concern. Even under the merger alternative there was no continuance of the business of Engineers. It is possible that it would have been merged with Virginia but there was no business of Engineers left. The business of Engineers as a public utility holding company would certainly disappear even under the merger alternative.

Q. That is true. I don't want to get into another legal argument as to whether a merger keeps a company alive or whether the dissolution means the death of the company. What I want to know is when did the Engineers management first decide that it wanted to say it wanted to dissolve

Engineers as a corporate entity. Wasn't that on December 14, 1945 when they decided to file Amendment No. 4?

A. That is when the final step was taken to dissolve Engineers as a part of this plan, that it right.

* * * * *

[R. p. 435] By Mr. Kanton:

Q. Mr. Benjamin, turning now to Exhibit No. 29, the average market price of preferred stocks of Engineers, I would like to ask you this question: If you were an investor in the market, and you were looking for a security with quality and earning capacity comparable with the present Engineers preferred stock, would you have an exhibit like Engineers Exhibit No. 29 prepared in order to determine whether you would buy such a security?

A. I think if I were purchasing a security I would be interested in the past history of that security, and I might be interested in this information.

Q. You would have an exhibit like that prepared then, is that correct?

A. I think I would take——

Q. The factors in this exhibit.

A. —the factors into consideration.

Q. And you do take such factors into consideration when you purchase stocks for your own benefit, is that correct?

A. Yes, I take them into—past fluctuations in market prices of securities that I bought.

Q. And the volume?

A. Well, in my own personal case, I buy so few securities that I don't go into quite as much detail as that.

Q. In determining whether you should buy a security, would you place a lot of weight on an exhibit of this kind or would you take a look at the present earnings of the company and the present market conditions?

A. I think the present condition of the company is more important than what has happened in the past.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. So you wouldn't put much weight on this type of exhibit then if you were going to purchase——

A. It is hard to say how much weight you would put on it.

Q. I am asking you. If you were purchasing a security today say of comparable earnings and quality as Engineers preferred stock in today's market how much weight would you give an exhibit of this kind if it was before you?

A. I don't think I would give as much weight to it as I would to present conditions.

Q. In other words, you would give more weight?

A. To present conditions.

Q. And isn't earnings the most important factor you would consider when purchasing a security—earnings of the company?

A. Yes, I think it is the most important.

Q. You would look at earnings coverages?

A. Yes, I would.

Q. Has any estimate been made to show the earnings per share on the preferred stock in 1945 on a corporate and a consolidated basis, of the Engineers preferred stock?

A. We have in the record the earnings statements for Gulf States and El Paso for 1945, with the last two months estimated. We do not have in the record yet the earnings statements for Virginia.

Q. Do you think you could supply us with the information when available?

A. Yes, I think so.

Q. Such estimates of the preferred shares?

A. The coverage on the preferred shares.

Q. Yes.

A. Yes, sir.

Q. Could you do that on the basis of the weighted average dividend for the three shares of preferred stock also?

A. Let me see that I understand what you mean. The coverage on the——

Q. Well, the weighted average—by the weighted average I meant—say you took the three shares together and they have, as I figured it out, 5.33.

A. That is approximately correct.

Q. I was wondering if you could do it on that overall basis too?

A. I think so.

Mr. Kanton: Could we reserve an exhibit for that?

The Examiner: Do you want to offer that, Mr. Tucker?

(Discussion off the record.)

Mr. Tucker: I am advised that there are certain complications in connection with that matter that will have to be considered before we would prepare that kind of exhibit. And I would prefer not to reserve an exhibit number at this time, but let us see what we can work out on if we can solve some of the problems we will produce what we have and tell you what it is at the time. Is that satisfactory?

(Discussion off the record.)

Mr. Tucker: I will reserve an exhibit number for the kind of statements which the record shows the counsel for the Commission desires to have put into the record as Applicant's Exhibit No. 63.

The Examiner: I am going to ask him to do that.

(Applicant's Exhibit No. 63 is RESERVED, as noted.)

Mr. Condon: Would you mind stating the specific——

The Examiner: I just had in mind asking him to state specifically what he wants. Did you finish, Mr. Tucker?

Mr. Tucker: No, I hadn't finished.

The Examiner: Go ahead and finish.

Mr. Tucker: I haven't any objection to his saying what he wants. Perhaps that would be logical before making the rest of my statement.

Mr. Kanton: Complying with the Trial Examiner's request, I have in mind an exhibit showing the earnings per share on the preferred stocks on a corporate and con-

solidated basis for 1945 pro forma, and also based on the weighted average dividends for the three series of preferred stocks, and also may I request at this time an exhibit prepared on the same basis, except only on your estimate for the year 1946.

Mr. Tucker: Those figures will be combined in one exhibit. What I am not clear about, Mr. Condon, and Mr. Scheetz, is whether you want the opportunity of seeing these before they go in, or whether you are willing to have them go in under the reserved number when they come in?

(Discussion off the record.)

Mr. Tucker: It will be understood as I get it then that these exhibits will come in as Applicant's Exhibit No. 63 and that either Mr. Condon or Mr. Scheetz shall have the right to move to strike after they come in.

Mr. Scheetz: One question: Will that be on the basis of showing excess profits taxes for 1945, and of course without them for 1946, and if so, can the amount of excess profits taxes payable at 45 be shown separately?

Mr. Kanton: I have no objection to that, counsel.

The Examiner: We will reserve Applicant's Exhibit No. 63 then for that purpose, with the understanding that after Mr. Condon and Mr. Scheetz have reviewed those statements, if they desire to move to strike they can do so. Otherwise, they will be incorporated in the record after being duly marked.

* * * * * * *

[R. p. 441] By Mr. Kanton:

Q. Would you say, Mr. Benjamin, that in evaluating the amount that is proposed to be given to the Engineers preferred stockholders the Board of Directors of Engineers gave all the weight to one factor, namely, the involuntary liquidating preference as contained in the charter.

Mr. Tucker: I object. He is asking for a disclosure of

what was in the minds of the Board of Directors when they approved this Plan, as I understand his question.

The Examiner: Read the question.

(Question read.)

The Examiner: If he has any knowledge on that I think he can answer that, Mr. Tucker. He may not know but if he does know I think he can answer it.

Mr. Tucker: I don't see how he can possibly know the answer to that question.

The Examiner: Let him say that.

Mr. Tucker: All right.

The Examiner: I will overrule the objection and if the witness has any knowledge on the subject, let him answer it.

The Witness: I don't know whether all of the weight was given to that particular point, Mr. Kanton, by the Directors.

Mr. Tucker: Have you finished?

The Witness: No.

All I can say as to the opinions of the Board of Directors is what I heard them say at various meetings, as well as I can remember what they said, and there was a great deal of discussion, and as I told you at the November 20 hearing, my recollection at that time was that the greatest weight, according to their statements, was given to Mr. Tucker's opinion.

Mr. Tucker's opinion is in the record and covers a great many aspects of this problem. As I recall the opinion one of the statements in there is that in his opinion this is an involuntary liquidation, and that in that event the preferred stockholders are entitled to $100 a share and accrued dividends.

By Mr. Kanton:

Q. Then the Board of Directors adopted Mr. Tucker's opinion to the extent of considering the present plan before

us as an involuntary liquidation of Engineers, is that correct?

A. The directors with the exception of Mr. Streator agreed with Mr. Tucker's opinion and so stated, and thereupon adopted the Plan.

Q. Do you recall, at the November 20 meeting, I asked you if any consideration were given to the value of the preferred stocks of Engineers, whether market value, fair value, or any value?

A. Well, I recall some discussion at some of these meetings, at which the market value of the preferred stock was referred to. I believe it was Mr. Streator at one of the meetings who referred to the fact that the preferred stock was selling in excess of $100 a share, so that I am quite sure that the directors were aware of the market value of Engineers preferred stock.

Q. You were present at these discussions?

A. I was.

Q. Did you have any ideas or did you have any considerations which you expressed to the directors at that time? In other words, did you partake in this discussion?

A. I did not partake in the discussion that I recall except to answer specific questions. I don't recall any of those at this time.

* * * * *

[R. p. 444]

Re-direct Examination

By Mr. Tucker:

Q. Now, Mr. Benjamin, on your cross examination, you were asked with respect to the Norfolk Gas properties. I think you said there had been no consideration given to this sale, is that true?

A. Yes, sir.

Richard N. Benjamin—Re-direct Examination (Cont'd)

Q. Isn't it true that in the Supreme Court of the United States there were issues with respect to the decision of this Commission as to the Norfolk Gas properties?

A. There is an issue pending concerning the Norfolk Gas properties before the Supreme Court.

Q. Which may possibly send consideration of that matter back to this Commission for reconsideration?

A. That is my understanding.

Q. Now you had some discussion about the risk of the preferred stockholders that I didn't think was left particularly clearly on the record. The exhibit that you were referring to in that comection had to do with dividends that the common stock could have declared out, or that could have been declared out, and the common stock get the benefit of them, which were not declared out. Isn't that true?

A. No. I think the exhibit that we were referring to was the one that showed the amounts left in the operating companies and the holding company for all reasons.

Some of them could not have been declared out because of dividend freezes, and some of them could have been declared out, over and above the freezes.

Q. So that you have no segregation in that exhibit, and perhaps not in the case, with respect to what could have been declared out and what could not be declared out to the common stock?

A. Yes, I testified on November 20 that there was $2,773,000 of free earned surplus at June 30, 1945 in Virginia, Gulf and El Paso, and Engineers parent company had $7,095,000 of free earned surplus.

Q. So on the assumption that the free surplus in the subsidiaries could have been declared out, and the assumption that the surplus of Engineers is available for dividends, the common stock could have taken out something like—just give me an estimate of the total of those figures?

A. Could have taken out the $9,868,000.

Q. To the extent that that was not declared out to the common stock, didn't it benefit the preferred stock?

A. I think it did.

Mr. Kanton: And the common stock, Mr. Benjamin?

Mr. Tucker: Well, the common stock didn't get the money. It was left in.

Mr. Kanton: I am asking the witness if you don't mind. I think you testified before that——

The Witness: I think that leaving the money in the company had some benefit on the common stock, although the common stockholders could have gotten the money the other way but I think it did benefit the relative strength—it increased the strength of the Engineers system.

By Mr. Tucker:

Q. If it had been declared out in dividends to the common stock, the common stockholders had that money to do with as they will, then it would not have benefited the preferred stock any extent?

A. That is correct.

Mr. Condon: They would have had the money they would have received less the taxes they had to pay.

Mr. Tucker: That is true of anything you receive in the world these days.

(Discussion off the record.)

By Mr. Tucker:

Q. You referred a little while ago to my opinion, Mr. Benjamin, that was submitted—I think the opinion was dated July 26 as I recall. Exhibit No. 12 is it, Mr. Benjamin?

A. No. It is Exhibit No. 38.

Q. Referring to Exhibit No. 38, did that opinion also consider broadly the fairness and equitableness of paying $100 plus accrued dividends to the preferred stock overall?

A. It did.

Q. And wasn't reference made in that opinion to the price that the preferred stock of all series was sold at——

Mr. Condon: Mr. Examiner, may I note a——

The Examiner: Let Mr. Tucker finish his question. Mr. Tucker, proceed.

By Mr. Tucker:

Q. —by the preferred stockholders, among other things.

Mr. Condon: May I note an objection on the ground that it calls for a statement of the conclusion of the witness characterizing an exhibit that is in evidence.

The Examiner: On cross examination the witness was questioned regarding this and I think Mr. Tucker has a right to go into it further on redirect examination.

The point was certainly raised on cross examination.

Mr. Condon: As I view it, all Mr. Tucker is doing is calling the witness' attention to specific abstracts from that opinion.

The Examiner: On cross examination he was asked about some of the very things that Mr. Tucker is asking him about now. If Mr. Tucker wants to go into it further I think he has a right to do it on redirect.

Mr. Condon: If the Examiner wishes to hear it—I feel that on cross examination perhaps a slightly different rule would apply than on redirect. After all he is Mr. Tucker's witness.

Mr. Tucker: It was gone into on cross and the subject didn't come up until then.

The Examiner: I feel it is proper. Do you want to make an objection?

Mr. Condon: I did object, but in view of the Examiner's ruling I shall take no exception.

The Witness: Would you repeat the question please?

(Question read.)

The Witness: Reference is made to this on page 13.

Richard N. Benjamin—Re-direct Examination (Cont'd)

By Mr. Tucker:

Q. Didn't the opinion also refer to the cost of the preferred stock in the market?

A. That is correct.

Q. Weren't there several other factual situations that were referred to therein?

A. There were several other factual situations such as the non-payment of dividends on the common stock of Engineers, and additional facts.

Q. And didn't the opinion say, Mr. Benjamin, that in my opinion the mere fact of the presence of the liquidation provisions in the charter would not be perhaps controlling but that overall it seemed to me, under all the facts, that the payment of $100 and accrued dividends would be fair and equitable?

A. You did state that in the opinion.

Q. Now, would you look, Mr. Benjamin at page 236 of the record, and you will see a statement in there about $55 a month in connection with the freeze. Will you state what the record shows and whether or not that record correctly states what you intended to say?

A. Mr. Kanton made a reference to $550,000 figure and I answered that "I don't recognize that figure." The record says "You say that $550,000—$55 a month is what it is." What I stated at that time was that $55,000 a month is what it is.

Q. Instead of $55 a month?

A. That is correct.

Q. Will you look at page 260. I think you will see a question and answer with a line down the side of the page. Would you describe that and make any statement about it that you care to make?

A. The following question and answer appears on page 260.

"Question: But that is only an assumption, the 2½ years like all other estimates. It may take a shorter period

or a longer period I suppose, depending on the condition of the market and how much cash can be generated from Virginia."

Q. That is the question, is it?

A. And the answer quoted here is, "That is true."

I did not catch the qualification "depending on the condition of the market" and I understood the question to mean depending on how much cash can be generated from Virginia.

(Discussion off the record.)

By Mr. Tucker:

Q. Mr. Benjamin, will you look at page 270 and you will see a question there with a line down the side. Will you explain what that is?

A. This was a discussion about El Paso common stock dividends, and Mr. Tucker asked: "20 cents on the new stock?" and the answer as quoted here is "20 cents on the new Engineers stock."

What I meant to say at that point was that it was 20 cents per share of Engineers stock, although the dividend would be on the El Paso Common stock.

In other words, the dividend rate that we were discussing was a dollar on the new El Paso common stock which is the equivalent stated in terms of number of shares of Engineers stock, 20 cents.

Q. Yesterday Mr. Kanton asked you if you could get for him, as I understood it, some information with respect to percentage of dividends usually declared out by the companies for some period in the past.

Will you explain what you understood him to ask for and what you have there? Percentage of earnings available for dividends?

A. Since Mr. Kanton made that request I have had prepared a statement that shows the balance for common stock of the three companies, excluding reduction in taxes due

to amortization of emergency facilities, and the freeze on those three companies.

Based on that statement, I find that for the years '42 through '45 on El Paso, the common dividends paid represented 96 per cent of the balance for those years. As I explained before, there was an extraordinary dividend in El Paso in 1945.

Gulf States, the comparable percentage would be 75 per cent, and in Virginia the comparable percentage would be 67 per cent.

Mr. Kanton: One question: Without that so-called extraordinary dividend payment on El Paso what would the average be? Have you computed that?

The Witness: I haven't computed that. That dividend was $900,000 which represents almost half of the $2,025,000 paid during that period.

Mr. Kanton: When was it paid?

The Witness: That dividend was paid in the early part of 1945.

Mr. Kanton also asked me yesterday to calculate how much money would be put up under the warrants by the holders of over 500 shares. That figure is $15,934,500.

Mr. Kanton: During the recess that we are now going to take for lunch, I think it would be to the advantage of all of us, including yourself, if you could give me the average dividend coming up on El Paso excluding that extraordinary dividend in 1945.

* * * * *

[R. p. 454] The Witness: Mr. Kanton asked me to calculate the percentage on El Paso, including the $900,000 special dividend.

That percentage is 53 percent after excluding that dividend.

Mr. Kanton: Over what period was that?

The Witness: A four-year period, 1942 through 1945.

* * * * *

Jason C. Leighton—Cross Examination

[R. p. 455]

JASON C. LEIGHTON,

a witness produced by Mr. Tucker, and called by the Commission, is examined and testified as follows:

Cross Examination

* * * * *

[R. p. 461] By Mr. Kanton:

Q. The estimated cash income from July 1 to December 31, 1945, inclusive, in the sum of $1,515,545, can you tell me with reference to that figure how actual operations compare with this estimate as given here?

A. I think they are practically as we estimated because that is made up of dividends to be declared out by the operating companies. There has been no change in the plans for those dividend payments.

Q. So this estimate now, you think, will be a fact?

A. Practically as is, yes.

Q. Referring now to Engineers' Exhibit "B", which is the pro forma balance sheet consolidated as of June 30, 1945, giving effect to the consummation of parts 1 and 2 of the plan, I refer you to the item listed under El Paso, and marked "Special Funds". Can you tell me how this item arose, Mr. Leighton?

A. Yes. $800,000 of that represents the proceeds from the sale of the transportation properties in 1943 that were deposited with the trustees under the mortgage. $220,000 roughly, the difference, represents the amount we put up with the trustee in 1945 to make up for the difference in the 15 per cent maintenance clause and the actual maintenance for El Paso for that year.

Q. Isn't it a fact that the cash on hand both in the special fund and in current assets is after payment of the special dividend that Mr. Benjamin testified?

A. Certainly.

Q. What is happening to the $800,000, Mr. Leighton.

A. We are taking steps now to prepare a certificate to be presented to the trustee covering the construction that is available up to December 31, which can be used to reduce this amount.

We are also, or the company is also putting in a new addition to its boiler plant, which is going to cost some $600,000, and as that money is expended out of current cash, we will then get it back from the trustees through the release of these funds in escrow.

Q. Referring now to Note "A" to this exhibit, can you tell me the present status of the studies referred to before the State Regulatory Body, that is Sub-paragraph 2 under Note "A"?

A. Yes, that applies to the gas property in Norfolk of the Virginia Electric and Power Company. The studies have been completed and filed with the State Body, and in September of this year, we charged off some $93,000 to earned surplus, to set up a reserve to offset the amount we found was 100.5 on this study.

That has not yet been approved by the State Commission, but we have no reason to believe that it will be disapproved.

Q. You have discussed the matter with them?

A. Surely.

Q. And an order or some form of announcement will be forthcoming from the Virginia Commission in the near future?

A. I presume so, in some time.

Q. It is a statement appearing under Note "D" here to the effect that there is a contingent asset of approximately $3,740,000 representing possible refunds of federal income and excess profits taxes.

Please explain the basis for this possible refund and who is to get it.

A. At the time the Virginia Electric & Power Company filed its consolidated return, consolidated with Engineers for the year 1944, it was necessary for us to estimate the

loss which would be sustained for tax purposes on the sale of the transportation properties on December 31, 1944, in Richmond and Norfolk. At that time, based on figures that were available, it was believed that we were safe in assuming there would be a loss, a tax loss of $2,405,000, and the tentative return on March 15 was made up on the basis of that loss.

Consequently, the consolidated returns showed a tax payable of some $4,000,000 for 1944. Subsequent to that time, Mr. Radcliffe spent some eight or nine months building up a story as to what could be a real tax loss on the sale of those properties, and in August, 1945, the final returns for 1944 were filed, which showed a tax loss of $12,171,000 on the sale of these properties.

Consequently, the return as filed showed no taxes payable, and resulted in not only the reduction of the $4,000,000 we had set up in 1944, but also certain carry-backs under the excess profits tax laws to prior years. In August, I believe it was, Virginia reversed through a credit to surplus and a charge to accrued taxes of some $2,800,000. The March 15 payment of $1,000,000 had been made, and we filed a claim for refund for that amount, so that is in this $3,700,000 that we talk about as being a contingent asset, and we now have in mind before the end of the year to comply with the auditor's recommendations to reverse the million dollar payment back to earned surplus. There will then be some $2,700,000 of carry-backs which will be due to Virginia primarily if and when the tax loss as claimed is allowed.

Q. Have you any intimation when it might be allowed?

A. Well, we should hope the 1944 return might be examined in the early part of 1946, but that may take some time before that question is finally settled.

Q. Could you tell me—I couldn't exactly keep track of your figures there. Could you give me the sum that is possibly returnable as a refund here?

A. Around a million dollars. That is the payment we made in March 15, 1945.

Jason C. Leighton—Cross Examination (Cont'd)

Q. Is that in addition to the $3,740,000?

A. No, that is a part of it.

Q. So that the total cash refund approximately from your testimony would be a million dollars?

A. Based on the payment we have already made.

Q. That is correct.

A. And then there would be a refund for prior years based on the tax loss as claimed.

Q. How much do you estimate that to be, Mr. Leighton?

A. As I say, it is some $2,700,000 of additional refund due to the carry-back provisions of the law.

Q. This million and two million seven makes a possible cash refund of $3,700,000?

A. In time, yes, sir.

Mr. Scheetz: Mr. Kanton, could I ask Mr. Leighton a question off the record?

The Examiner: Off the record.

(Discussion off the record.)

The Examiner: Mr. Leighton, there were certain questions asked you off the record. Do you want to make any statement in connection with your previous statement on the subject?

The Witness: Yes. If and when these tax refunds are approved and paid over to Engineers Public Service Company, the parent of the consolidated return, we would have in mind applying to the SEC for exemption to their rule as to allocation of taxes on consolidated returns to allow Virginia to get their proper proportion of this refund.

The balance would go to Engineers as Engineers Virginia Western Public Service and Missouri Service were all the companies in the consolidated return. We have sold Missouri Service, expect to sell and have a contract signed for the sale of Western Public Service Company, so that all of that portion would have come back to Engineers. Therefore, all the proceeds from this tax refund will remain in the Engineers system.

Jason C. Leighton—Cross Examination (Cont'd)

By Mr. Kanton:

Q. Isn't it a fact though that any refund which is finally determined to be payable by the Internal Revenue Department will accrue to the benefit of the Engineers common stockholders or the Virginia common stockholders if at that time El Paso and Gulf States are out of the Engineers system?

A. That is correct.

Q. Referring to the next page of notes, to Exhibit "B", specifically, Note 1——

The Examiner: Off the record.

(Discussion off the record.)

By Mr. Kanton:

Q. Could you please explain this note in connection with Applicant's Exhibit No. 9, Schedule "F"?

A. I have Schedule "F". But what page is it on?

Q. Page 7.

A. There are no notes. These are journal entries.

Q. I am sorry. I meant Journal Entry No. 1 instead of Note 1.

Can you give me that explanation just for the record, please?

A. May I have the question again, please?

Q. Please explain exactly if there is a tie-in between Schedule "F" of Exhibit 9 and Schedule "B", Page 7, of Applicant's Exhibit 47.

A. Yes.

Q. And I am referring specifically to Journal Entry No. 1.

A. Yes, that is the explanation I have just given you, that is I have used a million dollars instead of the actual $959,250 as applying to Virginia alone, but the explanation is the same. That is, the $959,000 was the portion that we paid in March 15, 1945, first payment for 1944 taxes, of which we have now filed a claim for refund, including the

$959,000, plus Engineers' portion which makes it roughly a million dollars, which we trust some time we will get back.

Q. In Journal Entry 2 on this page, you have an item of $2,570,000 as utility plant debit. Is that approximately the amount of increase in utility plant of Vepco?

A. That is the estimated amount they expect to spend during this year. I don't know whether that is just the amount or not. I haven't compared it with any later figures, but there has been very little change in their expenditures over what they estimate.

Mr. Condon: May I have the answer read, please?

(Answer read by the reporter.)

By Mr. Kanton:

Q. Referring now to Journal Entry 3 on the same page, will you please explain the conception of the special fund of $92,000 and the release of this item by the sale of Western items.

A. Yes. At the time Engineers sold its investment in the common stock of the Western Public Service Company, Maryland, to the Public Utility District of Nebraska, it was necessary for the company to put up surety bonds of some $350,000 covering the liability for so-called municipal bonds which the old Maryland Company owed, which the new company did not assume, and also, about $50,000 assumed tax liabilities; and the insurance company insisted on our putting up funds to the amount of $92,000 in escrow.

We are now in the process of getting those funds released through the fact that all the municipal bonds will have been paid off before the end of this month, and the tax liability runs out early in 1946.

Q. Is there any additional amount plus this $92,000 that will need be paid on payment of the municipal bonds of Western on consummation of this sale?

A. That has nothing to do with the $92,000. The Western Public Service Company of Delaware has paid up these municipal bonds out of their own cash.

Q. I was referring to the municipal bonds now outstanding that I thought were going to be taken up by Engineers when the sale of the Laramie properties is consummated.

A. No, I just said, the Western Public Service Company, the present company, has paid off all of those bonds, so that Engineers have nothing to take up as a liability.

Q. What are the proceeds that you expect to receive from the proposed sale of Western?

A. Well, we put in the pro forma entries a million, five hundred thousand, and it would be practically that amount.

Q. Does this affect some of your pro forma accounting entries, namely, with respect to the sale of Western?

A. The change is very small and we do not think it will.

Q. You do not think any changes need be made to these entries now?

A. I do not.

Q. On Page 8 of Applicant's Exhibit No. 47, Journal Entry No. 7, would you say that the distribution of the stock of El Paso represents a return of capital?

A. Yes, that is why we propose charging it to capital surplus.

Q. Do you consider the same to be the effect of the distribution of the stock of Gulf States?

A. No, I do not. In so far as the sale of the rights go. There we were actually selling rights for an amount in excess of what the Gulf States cost us, and we felt it was proper to credit that difference to earned surplus.

Q. Do you recall Mr. Benjamin's testimony this afternoon that he considered the distribution of Gulf and El Paso as a distribution in liquidation, and that was because he had received advice of counsel to that effect. For accounting purposes, you do not recognize that, but you distinguish one as a distribution of stock?

A. Yes, sir, I take it as a sale because of the warrant in the Gulf States situation.

Mr. Tucker: Before you answer the question, Mr. Benjamin did not testify that he consulted me with respect to Gulf States being in partial liquidation.

Mr. Kanton: I don't think it would serve our purpose to argue the point, but as I recall it, I asked him if he had received advice of counsel to that effect and as I remember it, he said he did.

Mr. Tucker: I remember quite to the contrary.

Mr. Kanton: Well, we will let the record speak for itself.

Mr. Tucker: Can't you re-word your question to avoid that. Otherwise, I think we have to look in the record.

Mr. Kanton: Let me re-state the question.

By Mr. Kanton:

Q. Do you consider the distribution of the stock of El Paso as a return of capital, and you do not consider the distribution of the stock of Gulf States as a return of capital? In one case you do and in the other case you do not, is that correct?

A. That's right, for accounting purposes at least.

Q. And with respect to El Paso, such an accounting entry would be proper as you propose here?

A. It would.

Q. Is it not permissible also to make this charge to earned surplus?

A. It is certainly permissible, but I do not believe proper.

Q. Why is that?

A. I think it is a dividend in liquidation which ordinarily is charged against capital surplus where you have capital available for that purpose.

Q. So, in other words, if Gulf States were considered to be a dividend in liquidation, you perhaps would make the same charge as you propose to make here with respect to El Paso.

A. If we did that, we would have a credit to surplus of around nineteen or twenty million dollars for the sale of the rights.

Jason C. Leighton—Cross Examination (Cont'd)

Mr. Tucker: Speaking about the sale of the rights, I am somewhat confused. Would you explain that?

The Witness: I mean the money that we get.

Mr. Tucker: From the sale of the stock?

The Witness: From the Gulf States warrants.

Mr. Tucker: From the exercise of the warrants.

The Witness: That is probably right.

Mr. Tucker: Very well.

By Mr. Kanton:

Q. Then I take it you would have an objection to this amount being charged to earned surplus?

A. What company?

Q. El Paso.

A. If the Commission felt that ought to be done, I would have no objection, but I still feel that is not proper. In this respect, I might say I have consulted with three accounting experts of Lybrand, Ross Bros. & Montgomery, and they all say I am right.

Q. Could you tell me again, just referring to the Gulf States transaction, why you are crediting earned surplus with the proceeds received from the warrants?

A. Because we are receiving an amount in excess of what the Gulf States stock cost us.

Q. And you consider that a sale?

A. It is for this purpose.

Q. Assuming, Mr. Leighton, that the preferred stock were to remain outstanding but that the El Paso common stock were to be distributed as a dividend in partial liquidation to the Engineers common stockholders, would you still charge capital surplus with such distribution of the El Paso common stock?

A. Offhand, I don't see how Engineers could declare a partial dividend in liquidation while preferred stock was outstanding.

Q. You mean to the common stockholders?

A. That's right.

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[R. p. 475]

SAMUEL E. RATCLIFFE

having been duly sworn, was examined and testified as follows:

Direct Examination

* * * * * *

[R. p. 478] By Mr. Tucker:

Q. Mr. Ratcliffe, have you made a determination of the tax savings to the consolidated group of which Engineers is a common parent, resulting from the filing of consolidated returns under Federal Income Tax Laws?

A. Yes, sir, I have.

Q. Would you state please what those tax savings have been?

A. Engineers Public Service Company first became a qualified common parent of an affiliated group that would permit it to file a consolidated return in the year 1931, and consolidated returns were filed for the includible corporations in that group for the years 1931, 1932, and 1933.

The savings to the group for those three years, as the result of filing consolidated returns, was some $302,000. Consolidated returns, except for railroad corporations, were not permitted after the year 1933, until the year 1941, for excess profit tax purposes, and beginning 1942, both normal tax and excess profit tax purposes.

For the years 1941 to 1944, the savings to the group resulting from the filing of a consolidated return, was some $1,616,000, so that for the seven years that I have enumerated, the savings have been $1,918,000.

For the year 1945, present estimates indicate the consolidated savings will amount to some $312,000. That is a savings to the group in reduction in taxes through the filing of the consolidated return for 1945.

Q. Now, Mr. Ratcliffe, assume that as provided in this plan, El Paso and Gulf go out of the picture, would there

be any particular savings in connection with consolidated returns by Engineers and Virginia?

A. There would be no savings to the system through having Engineers and Virginia file a consolidated return, that is, which would warrant the continuation of Engineers over Virginia.

Q. Let us pass that for the moment and will you tell us what the savings would be. Be specific about what happens with reference to the savings.

A. I don't understand your question.

Q. I asked you to assume that El Paso—you say there would not be enough to warrant something, and I say I am not interested in what your opinion is as to whether there would be enough to warrant something. I am asking you what they would be if you had just Virginia under Engineers, what the consolidated tax picture would be under those conditions with respect to the savings that would be made because of a consolidated return.

A. If Engineers were continued as a separate company, there would be a savings to the group of approximately $102,000, predicated on the payment of approximately $3,000,000 of dividends by Vepco up to Engineers.

Mr. Kanton: Are you reading from Page 4 of Applicant's Exhibit 55, Mr. Ratcliffe?

The Witness: I think I am now. That's right.

But looking at it from the system as a whole, there would be no real tax savings to the group because naturally the expenses of Engineers would not all be returned in the form of reduced taxes in a consolidated return.

By Mr. Kanton:

Q. When you speak of savings to the group, what do you have in mind, just Engineers and Virginia, if they existed?

A. Engineers and Virginia.

The Examiner: Let Mr. Tucker finish his examination.

Mr. Kanton: I thought you were finished, Mr. Tucker. I am sorry.

Mr. Tucker: I don't know whether I am or not, but I will turn him over to you when I am through with him.

By Mr. Tucker:

Q. Do you mean by that that if the expenses of maintaining Engineers as a single system amounted to the figure you mentioned, $102,000, then there could be no possible saving because that would offset the savings from this consolidated return; is that what you mean?

A. Not exactly.

Q. If it is not, tell me what you do mean.

A. What I mean is that if your expenses were $102,000, you could not get a tax reduction equivalent to $102,000, so that you would be out of pocket, the difference between the expenses of continuing the corporation and what reduction you would get in the form of taxes through those expenses.

Mr. Tucker: You may cross-examine.

[R. p. 482]

Cross Examination

By Mr. Kanton:

Q. The expenses, I take it, you mean are $132,000 as is shown in Page 2 of Applicant's Exhibit 55. Is that the figure you had in mind when you were comparing the tax savings with the cost of keeping Engineers in existence, Mr. Ratcliffe?

A. I do not have those statements before me.

That is correct, those expenses, together with the estimated dividends.

Q. However, if Engineers is kept alive, under this plan to the extent that it is legally dissolved and it is to be liquidated over a period of three years, during this period of time, can Engineers file a consolidated return with Virginia? Do you know the answer to that?

A. Under the tax law in that case, Engineers would be considered as an association and an association for tax

purposes is considered to be a corporation. Therefore, there would be no difference taxwise, whether Engineers continued as a corporation or continued as it is proposed under the plan.

Q. So if——

A. That is, so long as they do not distribute any of their Virginia stock.

Q. That is correct.

Now, assume the figures are correct on Pages 2 and 4 of Applicant's Exhibit No. 55, and the tax law were to continue in effect as you have estimated here on Page 4, based on the 1946 taxes, if Engineers were to consider filing a consolidated return, during these next three years, which as you just testified they could, they still would be gaining $101,000 or $102,000, is that correct, even though they have these expenses of $132,000.

A. The difference between what the tax would be if both Engineers and Virginia file separate returns, and what the tax would be if they joined in the consolidated return, would be a reduction of $101,000 on these figures.

Q. In your opinion then, if Engineers were to continue along the lines proposed in this plan, you would recommend that they file a consolidated return on that basis, because of the probable saving of $101,000, assuming of course we have the same income tax rates in effect say for 1946, 1947, and 1948, is that correct?

A. On the basis of the present tax law, yes.

Mr. Scheetz: May this be off the record?

The Examiner: Off the record.

(Discussion off the record.)

By Mr. Kanton:

Q. Isn't it true with respect to Page 4 of Applicant's Exhibit No. 55, that the $101,000 saving obtained is based on the income tax rates for 1946?

A. They are based on the present income tax rates. I don't know what they will be for 1946.

Q. You mean including the excess profits tax?

A. There are no excess profits. It is the Revenue Act of 1945, which these figures are used for that basis. Of course, Congress could pass a new Revenue Act next year and change the rates.

Q. But it is on that basis?

A. That's right.

Mr. Scheetz: I would not have asked the question that way. I am referring to your testimony generally, Mr. Ratcliffe, when you first indicated the saving on filing consolidated returns, you were then speaking of the year 1946 with the Revenue Act of 1945 as the basis?

The Witness: I don't know just what part of my testimony you have reference to.

Mr. Tucker: He is referring to the first question that I asked you, I think.

Now, that was the actual saving under the income tax laws as they existed at the time the consolidated returns were filed?

The Witness: That's right. That is the actual savings that have realized in past years on the tax laws in effect for the respective years.

Mr. Scheetz: That was not the thing I was referring to.

By Mr. Scheetz:

Q. I was referring, Mr. Ratcliffe, to your testimony as to what the savings would be if the group were composed of just Virginia and Engineers, and I think you referred to this saving of $101,000, but you did not identify it with reference to any act or any year, and I was simply trying to peg it.

In the end of your testimony, you did refer to Exhibit 55, which does show that it is 1946, and I simply wanted to tie those two things together.

A. I will say that what I had reference to was to the year 1946.

The Examiner: Based on the 1945 tax law.
The Witness: That is correct.
Mr. Scheetz: Thank you.

By Mr. Kanton:

Q. Now, in that connection, Mr. Ratcliffe, carrying this one step further, will you turn to Page 6 of Applicant's Exhibit 15-A, Sub-paragraph 4 thereon:

"Engineers has a net capital loss carry-over from 1944 in excess of $31,000,000."

Would you please explain that for the record.

A. That carry-over stems from the capital loss which was suffered in the year 1944, when Engineers Public Service Company sold its investment in stock of Puget Sound Power & Light Company. The capital loss was some $33,000,000, and the difference between that $33,000,000 and the $31,000,000 represents the portion of the capital loss which was used to set off against capital gain, originating principally from the sale of the El Paso natural gas stock, and under the tax law, that carry-over, we have five years in which we can avail ourselves of its use.

Q. How about the sale of the Savannah properties or assets?

A. That sale took place of course this year, and this loss will be available to apply against any gain that may result.

In other words, that loss can be carried forward for five years to set off against capital gains.

Q. Now, my question is do you think in your opinion that you will ever have occasion to use this net capital loss for the next three years assuming that Engineers is in existence during this period.

A. As I say, it can only be used against capital gains, and unless Engineers was to sell Virginia stock, why, I can not conceive how they would have a capital gain.

Q. Other than through the sale of Virginia, you mean after the distribution of El Paso and Gulf, they only have Virginia, and if they distributed Virginia as the final liqui-

dating dividend to its final common stockholders, in your opinion they would not have any opportunity to use this net capital loss during the next three years.

A. On the basis of the existing law, no.

The Examiner: Let us take a short recess right now.

(Whereupon a short recess was taken after which the hearing was resumed.)

The Examiner: The hearing is in order.

By Mr. Kanton:

Q. Referring again to this net capital loss of $31,000,000, could you tell me if that can be applied to the sale of Western if a profit is realized on Western?

A. Oh, yes.

Q. Can it also be applied to or will it be applied to the sale of the warrants and the proceeds thereof resulting in a gain to Engineers over and above the cost that Engineers had in acquiring Gulf?

Mr. Tucker: You say the sale of the warrants. Let us keep the record clear. We are not going to sell the warrants. The exercise of the warrants, but not the sale of the warrants, please.

By Mr. Kanton:

Q. All right. Let us call it the exercise of the warrants. I have no objection to amending my question to that extent.

A. The exercise of the Gulf States warrants taxwise is a sale by Engineers of its holdings in Gulf States stock. Any gain that might be realized taxwise through that sale can be used against this operating loss or net capital loss carryover, can be used to offset such gain.

Q. You say it can be?

A. It can be.

Q. Is there an alternative, sir? When you use the word "can", can you do something else rather than offset it against this capital loss?

A. If you had other capital losses in 1945, those would first be used to set off against capital gain that might result from the sale of Gulf stock. Furthermore, it would be possible, if the company so elected, to proceed under Supplement R, in which case you could postpone the tax consequence of the profit resulting from the sale of Gulf States' stock.

Q. You mean postpone it as far as the Engineers common stockholders are concerned or the Engineers as a corporation?

A. As a corporation. The Engineers as a corporation.

Q. Referring now to subparagraph——

Mr. Scheetz: Mr. Kanton, before you leave that, since Mr. Ratcliffe has mentioned it, would you follow through on that, Mr. Ratcliffe.

If you do postpone it, am I correct in saying that it then goes to reduce the cost basis for tax purposes of the remaining assets of Engineers?

The Witness: That is correct; to avail yourself of that provision, you must elect to follow through the regulations prescribed by the Commission, which have the effect of reducing the tax cost basis of the remaining assets.

By Mr. Kanton:

Q. Referring now to subparagraph 5 on this page 6, could you please explain that for the record?

A. The deficit in accumulated earnings and profits computed on a tax basis of Engineers Public Service Company is created entirely because of the loss of some $33,000,000 which Engineers suffered in the sale of Puget Sound Power & Light Company stocks in the year 1944.

Q. I am not quite clear on that. Is that $2,000,000 reflected in any way in the $31,000,000, or is that two different figures?

A. It is $20,000,000.

Q. I beg your pardon. Is that $20,000,000 in any way reflected in the $31,000,000 figure?

Samuel E. Ratcliffe—Cross Examination (Cont'd)

A. The $31,000,000 is a result of the $34,000,000 figure.

Q. That's right, and——

A. And the $31,000,000 is a balance of the $34,000,000.

Q. That is correct.

Would you turn to page 13, please, of the same exhibit, 15-A.

A. Yes.

Q. About the 11th line down, beginning with the sentence:

> "The expenditure will be in accordance with an order of the Securities and Exchange Commission as defined above, and which will satisfy the requirements of Section 371(f) summarized above, and recites that such expenditure by Engineers is necessary or appropriate to the integration or simplification of the holding company system of which Engineers is a member."

While I have just given you this particular quote, and which I am going to ask you to explain, I would appreciate it if you would read the text that goes before it and explain for the record what you mean by integration or simplification there, what you had in mind.

A. That is quoting from the law.

Q. In other words, you have considered whether this is a proceeding of integration or simplification, which is Section 11(b)(1) or 11(b)(2), the same tax law would be in effect, is that correct?

A. No, the phraseology of those terms are terms as used in the Internal Revenue Code.

Q. Have you been acquainted or advised by counsel, by Mr. Lynch or Mr. Tucker whether this is to be considered an integration proceeding or simplification proceeding or both?

That is what I have in mind. I can not just tie this sentence in with what is preceding it and what follows, and if you will just give an explanation in the record of what

you are trying to get at here, I would appreciate it very much.

A. Well, what we are trying to say here is that the expenditure that would be made, would be in accordance with an order of the Securities and Exchange Commission, which would satisfy this Section 371(f) of the Internal Revenue Code, and in order to satisfy that provision of the tax law, the order of the Commissioner must recite that such expenditure is necessary as appropriate to the integration or simplification of the holding company system.

Q. In other words, if it is integration, 11(b)(1), and if it is simplification, 11(b)(2), if you are acquainted with those sections of the Public Utility Holding Company Act. Is that the idea?

A. That is true.

Q. Turning to the next page, page 14, I would appreciate it if you would explain for the record subparagraph 5, and advise me whether that has been pointed out to the preferred stockholders of Engineers.

A. The preferred stockholders have been advised that in the opinion of counsel, the exchange would be non-taxable. A number of preferred stockholders have inquired as to the treatment, and they have all been told, and it is my understanding that when the Plan is consummated, the stockholders would be fully advised of the tax consequence and how they should treat it.

Q. Will they be advised, in other words, before the exchange is to take place? Is that what you have in mind, notifying the Engineers preferred stockholders that they have this tax advantage before the exchange is made? Is that correct?

A. That is correct.

Mr. Tucker: Just to clarify the record, we included that in the letter that was sent out explaining the second amendment, when the preferred stock as an exchange was brought into the picture.

Mr. Kanton: Thank you, Mr. Tucker.

Samuel E. Ratcliffe—Cross Examination (Cont'd)

Mr. Tucker: And I think that is already in the record.

By Mr. Kanton:

Q. Turning to the next page, page 15, the third paragraph thereon, Mr. Ratcliffe, could you also explain for the record if there is a difference taxwise, if the distribution of the El Paso common stock were distributed in partial liquidation or sold and net proceeds were realized?

A. May I have that question again, please?

The Examiner: Read the question, Mr. Reporter.

(The question is read.)

The Witness: A difference to whom?

By Mr. Kanton:

Q. First to Engineers and second to the Engineers common stockholders.

A. If there was a sale of stock, then to the extent Engineers might realize a gain, there would be a tax, unless the transaction took place during the period when Engineers could avail itself of this net loss carry-over. In the case of the shareholder, if that cash were distributed by Engineers to the shareholder, it would not be taxable to him because I am assuming that Engineers would not have in the interim sufficient transactions resulting in gains which would eliminate the $20,000,000 of deficit in accumulated earnings and profits. The exception to that would be that to the extent Engineers had earnings and profits for the year of the distribution, then to that extent, the dividend would be taxable to the shareholder.

* * * * * *

[R. p. 498] By Mr. Condon:

Q. Mr. Ratcliffe, in connection with your $31,000,000 net loss carry-over, have you prepared, or if not, have you considered the preparation of any figures as to how Engineers could best put that net loss carry-over to use and

how it was going to avail itself during the period of these proceedings and the proceedings in the period following the decision of the Commission?

A. Well, as I say, it can only use it in the event it has a capital gain, and it has been used thus far to offset in part capital gains that have arisen from dispositions of securities.

Q. I understand that, but prospectively, have you anything in mind or has the Board of Engineers anything in its mind as to how this $31,000,000 loss may be still used in the future?

A. I can not speak for the Board of Directors, but as I say, unless Engineers were to sell some of its holdings of Virginia stock, I know of no occasion that they could have a capital gain of sufficient amount that would be material against which this loss could be used.

Q. What part of the loss would be included in connection with the sale of the Gulf States stock?

A. Whatever the tax gain is that results from the sale of the Gulf States stock.

Q. Do you know what that is, and have you any idea——

A. It is substantially the credit to surplus in these entries.

Q. Approximately?

A. That is true.

Q. Do you know how much it is approximately? Approximately $2,000,000?

A. That is correct.

Q. Now, what will the tax savings be? Will that be the amount?

A. It would be 25 per cent of $2,000,000.

Q. Using $2,000,000 as a base, the net tax savings would be approximately half a million dollars?

A. That is correct.

Q. Now, suppose they sold Virginia stock, do you know what the tax savings to Engineers would be on that transaction?

A. It will all depend on what you sold Virginia stock for.

Q. Can you take some arbitrary figure, please, presumably above cost, and give us an estimate of how much of the remaining net loss carry-over might be used in connection with the sale of Virginia stock?

A. Well, we have $31,000,000 against which we would use this $2,000,000, leaving $29,000,000 and you could have a $29,000,000 capital gain. Then you would have a savings of 25 per cent of $29,000,000 or $725,000.

Q. $725,000 or $7,000,000?

A. $7,000,000. Excuse me.

* * * * *

Re-direct Examination

[R. p. 504] By Mr. Tucker:

Q. You answered some questions by Mr. Condon with respect to offsetting, if that is the proper word, the profit that might be gained in Gulf States against this Puget loss. That is the subject matter of some of your questions, is that correct?

A. Yes.

Q. Isn't it true that if this transaction, that Gulf States transaction, comes within Supplement R, that you have no occasion to use any of that loss in that case?

A. You would have no occasion to use the loss in that case, but in availing yourself of that privilege, you would have to reduce the basis of your assets, your remaining assets.

Q. You mean by the remaining assets——

A. Of Engineers.

Q. Which would be the Virginia stock?

A. Yes, sir.

Q. I don't know where I am going, but would it make any difference if you ultimately distributed that stock to

the common stockholders of Engineers, what your tax base was?

A. No, it would not.

Mr. Tucker: That is all.

The Examiner: Mr. Scheetz has a few questions.

[R. p. 505] *Re-cross Examination*

By Mr. Scheetz:

Q. Mr. Ratcliffe, has any use been made of Supplement R heretofore so that the present cost basis of remaining assets to Engineers would be reduced?

A. No, sir.

* * * * *

Hearing on January 3, 1946.

RICHARD N. BENJAMIN

[R. p. 513] The Witness: * * * May I make a statement?

The Examiner: Yes.

The Witness: * * * [R. p. 514] At the November 20th hearing Mr. Kanton asked me to supply him with the source of Applicant's Exhibit No. 13. The source of this data was the Commercial and Financial Chronicle.

* * * * *

[R. p. 516] The Witness: Another matter that has transpired since the last hearing, to which I would like to call attention, is that Virginia Electric and Power Company has paid off $5,100,000 principal amount of notes, paying off the latest maturities first. This takes care of all the maturities in 1949 and subsequent thereto. It is expected that Virginia Electric and Power Company will negotiate shortly for the refinancing of the balance of approximately

6,500,000 of notes over a 10-year period at a lower interest ate.

One of the items in the pro forma statements was a con-mplated pension payment of $1,342,000 to certain trans-ortation employees. This proposed payment was con-mplated upon the expectation that a ruling could be btained from the Treasury Department that the entire ayment could be deducted as an expense during 1945. We ave recently received a ruling from the Treasury Depart-ent to the effect that this payment could be deducted over 10-year period. Therefore it is not planned to make this ension payment, and such payment was not made during 945, but the pensions will be paid to the employees cur-ntly when the respective employees go on the pension lls. These pension payments to which I have just re-rred relate to pensions payable to former employees of irginia Electric and Power Company who were between e ages of 60 and 65 at the time the transportation prop-ties were sold in 1944 and 1945. These pensions will be id to such former employes when such employes are re-ed by the transportation companies.

Mr. Sheetz: Mr. Benjamin, as a result of the withdrawal these employes from your regular pension plan will that sult in a compensating adjustment of your contributions your former plan?

The Witness: No, because our regular pension plan came effective July 1, 1945.

Mr. Condon:

Q. Mr. Benjamin, you state the Treasury Department led in effect that the payment of $1,342,000 proposed to made in 1945 could only be deducted by Virginia over 10 year period?

A. That is correct.

Q. It is correct to assume that the annual cost to Vir-nia, assuming the normal expectancy of life and other ctors implicit in such a situation, that that would affect

the earnings of Virginia in a downward direction to the extent of $134,200 a year?

A. Well, I can't give you the exact figure as to what the cost would be over this period during which the pensioners are still receiving pensions. We believe that the cost would be less to the Company by paying it out over a period than to make such a lump sum payment at this time, in view of the Treasury Department's ruling.

Q. Well, you get tax credit to the extent of these payments, according to the ruling, each year, over a period of ten years?

A. That is right, on the basis of the new tax rates.

Q. Do you have any estimate of basic cost after taxes to Virginia of this plan to provide for the transportation employes in the age brackets to which you have referred?

A. I don't know of any such estimate, but I will be glad to check further and see if there is one available.

By Mr. Scheetz:

Q. Is the $1,342,000 an actuarial estimate before taxes?

A. The $1,342,000 is our estimate of what it would cost to purchase these pensions from an insurance company, plus the amount necessary to reimburse the recipients for their income taxes.

* * * * *

[R. p. 520]

D. C. BARNES,

a witness previously sworn, was recalled and testified further as follows:

Cross Examination

* * * * *

[R. p. 521] By Mr. Kanton:

Q. Mr. Barnes, you recall that when Mr. Benjamin originally testified in this proceeding he advised us to the best

of his knowledge as to what the Board of Directors of Engineers considered at the September 5, 1945, meeting with respect to the adoption of the present Section 11(e) plan now pending before us. On cross-examination I asked him several questions and the witness deferred to you, and the questions that I had asked him were to the effect that in your considerations at that time and the adoption of the present plan I wanted to know what the Board of Directors considered or what you considered in arriving at $100 per share plus accrued dividends for the preferred stockholders.

A. In order to give you a complete answer to that I think perhaps I ought to sketch some of the background prior to that meeting. The first discussions as to major divestment plans were had at meetings of the Board in 1941. Subsequent to the interim opinion of the Commission giving their interpretation of Big B I believe the directors were concerned only with developing a plan which would preserve the greatest value for the stockholders and which distributed it fairly between the various classes of stockholders. They have always felt that such a plan should preserve, as far as possible, the interests of the common stockholders in the companies in which they chose to invest, leaving to them the decision as to when and if they should sell their interest. One-stock plans were considered and rejected because of the conclusion that the inevitable changes in future market values would make whatever allocation was adopted ultimately inequitable to one class or the other. At that time all of the directors felt that the provisions of the charter established the basis of allocation between the stockholders and none questioned that such divestments would constitute involuntary liquidation under the charter entitling the preferred stockholders to $100 a share and accrued dividends and no more.

The liquidating holding company plan which we presented to the staff of the Commission in August, 1941, had been discussed fully with the directors and no one ques-

tioned the fairness of its provisions paying off the preferred stock at $100 per share plus accrued dividends and no more. At that time Engineers preferred stock was selling in the market under $90 and in my opinion the market then reflected approximately their fair value, but I am sure that all of the directors would have felt that it would have been unfair to require the preferred stockholders to take anything less than $100 a share and accrued dividends. Subsequent discussions were had with the Board in 1943, prior to submitting this plan to the staff in September, 1943, and again the fairness of the proposed payment of $100 per share and accrued dividends and no more was not questioned by any director.

In February, 1944, the directors approved an application to the Securities and Exchange Commission for permission to expend up to $4,000,000 for the purchase of preferred stock at prices up to $100 per share and no more. The directors understood that this maximum price was consistent with the provision in the pending 3-holding-company plan and agreed that it would be unfair to pay more for such purchases than might shortly be required to be taken by the remaining preferred stockholders under the plan.

In June, 1944, the directors approved a plan for El Paso Electric Company of Delaware to liquidate and pay off its preferred stockholders at $100 per share and accrued dividends and no more, although the stock was currently selling at a premium and although the company had retired on tenders 11,713 shares in 1941 at an average premium of some P2 points.

On February 27, 1945, the directors, without objection, authorized the officers to proceed with the plan to retire shares of preferred stock on a pro rata basis at $100 per share plus accrued dividends by the use of approximately $8,500,000 of cash. At that same meeting the directors approved, without objection, the letter in the annual report to stockholders for 1944 which contained statement shown

on page 7 therein of the intention of the company to seek approval of the Securities and Exchange Commission to the 3-holding-company plan if it became necessary or desirable to do so, and that plan proposed the retirement of the preferred stock at $100 per share and accrued dividends. No stockholder, on the receipt of this report, made any protest.

The directors have been advised from time to time of discussions had by the officers with members of the staff of the Securities and Exchange Commission and the suggestion made by some of them that the Commission might require payment of some amount in excess of $100 a share and accrued dividends, but not in excess of the voluntary redemption price. They were informed of the dissenting opinion in our El Paso Delaware liquidation case and of the opinion of the Supreme Court in the Otis case in January, 1945, but as I recall it there was no expression on the part of any director of doubt as to the fairness of our plan to limit the payment to the preferred stockholders to $100 a share until the board meeting on May 24, 1945, at which Mr. Streeter raised the issue and asked if there was not some way in which the directors would not have to take a position as to whether or not it would be fair to pay the preferred stockholders a premium. Mr. Coonley stated that he thought it was the responsibility of the directors to recommend what, with their more intimate knowledge of the affairs of the company, they considered to be fair. Having in mind the statement of the Supreme Court in the Otis case to the effect "enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders," I pointed out to the directors the losses that were being borne by the common stockholders as a result of the Section 11 order. I presented to them a statement showing the sales of securities and assets from the time the holding company Act was passed up to May, 1945, and pointed out that the common stockholders had been

deprived through such sales of the benefits of diversity which would otherwise have accrued to their interest, the benefits which would have come from channeling the large flow of earnings available for effective financing in the individual subsidiary companies from time to time without impairment of uniform flow of common dividends, the loss of economies to be derived from a supervisory mutual service organization, the loss of opportunity to realize the increment in value resulting from growths in the existing properties as evidenced by the developments in the Puget Sound situation since its divestment in 1943, the sacrifice which the common stockholders had made in foregoing common dividends in order to accumulate funds with which to pay off the preferred stock, and in this connection I presented a statement showing the amounts accruing to the interests of Engineers common stockholders and undistributed in the system from September, 1935, through March, 1945, aggregating over $22,000,000 at that time, and it now aggregates over $25,000,000.

I pointed out the further burden which was proposed to be put on the common stockholders to provide $10 a share, the amount provided in the plan then under consideration, for the balance of the funds required to retire the preferred stock, and that such retirement of the preferred stock would cause them to lose the leverage which they had and presumably were seeking when they made their investment in Engineers common stock.

In contrast to the sacrifices by the common stockholders I pointed out that the preferred stock would certainly be getting a windfall if they were paid any more than $100 a share and accrued dividends, particularly in view of the record of the market value of the preferred stock in the past, and the fact that much of its present market value was attributable to the sacrifices made by the common stock and to war earnings.

I stated that I thought the directors should have the advice of counsel and that I would ask Mr. Tucker to pre-

pare a memorandum for them. This was prepared and presented to them by Mr. Tucker in person on July 26, 1945. That is Applicant's Exhibit No. 38. Mr. Tucker answered various questions and a full discussion was had.

On September 5, 1945, a meeting of the Board was held to authorize the filing of the present plan. At that meeting I called on each director individually to express his opinion, which they did. I do not recall now the particular points made by each director, but I do recall the statement made by Judge Wilson in substantially these words: "The purpose for which the company was organized has been frustrated by the Holding Company Act and hence the fair thing to do is to return to the preferred stockholders the money which they put into the enterprise."

The other statements were all favorable to approval of the plan, with the single exception of Mr. Streeter.

The directors had three months in which to consider the premium issue as raised by Mr. Streeter, and a month to consider Mr. Tucker's opinion, before acting formally on the plan. I am sure all of the directors desire to do only what is fair as between the various classes of stockholders and that their action on this plan reflects their honest opinions without regard to their personal interests.

Q. During this period from 1941 to the time the plan was filed and, more specifically, say, from May, 1945, up to the time the plan was filed, what stockholders did you personally speak to regarding the filing of the present plan?

A. All of our stockholders had been notified in the 1943 and 1944 annual reports of a possible plan for further disposition of the assets of the company if it became necessary or desirable to do so in view of the S.E.C.'s order in our Section 11 proceedings.

Q. Did you speak to any large stockholders of Engineers?

A. Yes, I did.

D. C. Barnes—Cross Examination (Cont'd)

Q. Did you speak to any large stockholder who represented the Stone & Webster interests?

A. Yes, following the directors' meeting I discussed—

Q. Which directors' meeting, sir?

A. The directors' meeting to which you referred in your question, in May, 1945. I discussed two plans for the first time with outside stockholders. Those were what we have called the preference common plan, and the other, the warrant plan. The first discussion which I had was with Mr. Edwin S. Webster, Jr., on May 28th, the directors' meeting having been, as I recall it, on May 24th. I also discussed the two plans at this time with Mr. W. T. Crawford, a Vice President of Stone & Webster, in order to enlist his support. After I had explained the two plans to Mr. Edwin S. Webster, Jr. he stated that he greatly preferred the preference common plan because the warrant plan would impose a substantial burden on him, but that if I felt that it was in the interest of the stockholders to follow the warrant plan he would not oppose the program. The following day I stopped off in Boston on my way to Cape Cod and discussed the two plans with Mr. Edwin S. Webster, Sr., Mr. Henry G. Bradley and Mr. James Orr. They stated that they thought the plan was a fair one and although it would require the putting up of considerable cash, which would be a burden, they would not oppose it. Some weeks later I discussed the warrant plan with Colonel Whitney Stone, when he was in New York on leave. By that time we had had further conferences with the staff and had concluded that it was hopeless to pursue further the preference common plan. And let me remark that the warrant plan was originally suggested to us by the staff at the time we were discussing and pressing for the preference common plan, which was an alternative plan that we had picked up because we could get no encouragement on the liquidating holding company plan. Colonel Stone indicated that he would not oppose the plan. These were all of the large stockholders whom I knew personally.

D. C. Barnes—Cross Examination (Cont'd)

In addition, I recall a discussion which I had with a small stockholder from Brooklyn whose name I don't recall, who called on me to discuss the prospects of his investment, and I asked him what his reaction would be to such a plan, and his reply in substance was that he thought it was fair and that while it would burden him to raise the money necessary to exercise his warrants he felt that that was preferable to selling out part of his interest to other investors.

Up to this time we were considering a subscription price of only $10 a share. Since the plan was mailed out to the stockholders on September 10, 1945, we have had a number of contacts with stockholders both in person and by letter, and the reaction generally has been favorable, with only three letters complaining as to the proposed treatment of the preferred stockholders and only one letter in which a stockholder has suggested that the subscription price of the warrants be increased to avoid a bank loan. No stockholder has suggested the sale through public offering of any of the portfolio securities.

Q. Do you know if any of the other members of the board of directors also had discussions with common and preferred stockholders of Engineers?

A. I don't know whether they have or not, with one exception. Mr. Streeter, I know, discussed it with Drew Fletcher.

Q. With respect to this preference common plan, could you just give us very briefly what that plan entailed, Mr. Barnes?

A. Yes. The preference common plan was a modification in form of the liquidating holding company plan, designed to avoid the objections that had been raised that it was inconsistent for the Securities and Exchange Commission to create new holding companies when their objective was to eleminate many of the existing ones. The preference common plan was originally adopted in the case of Philadelphia Electric Company. The proposed form

of adaptation to our situation contemplated that the existing common stock brackets of Virginia, Gulf States, and El Paso, be broken down or reclassified into preference common stock and common stock, that the preference common stock would be exchanged pro rata with the preferred stockholders of Engineers, and the common stock would be exchanged pro rata with the common stockholders of Engineers, with a provision in each of the charters requiring that no common dividends be paid until the preference common had been retired. So that all of the earnings that might be available for dividends in these three subsidiary companies would be applied first to the payment of dividends on the preference common and then to the extent available applied to the retirement of the preference common itself. So that on the basis of the estimates that were then made in some five or six years the preference common would have been liquidated out and Engineers common stockholders would have the had the full equity interest in these three subsidiary companies and would have been in a position to start receiving common dividends.

Q. Would the preference common have had a vote in the charters? Would the charters of the three operating companies provide for a vote for the preference common stock? Do you recall?

A. I don't recall whether we got as far as determining whether or not voting rights should be given to the preference common stock.

Q. But on an over-all basis, under the so-called preference common plan, the preference common stock which would perhaps have been given entirely to the preference preferred stockholders of Engineers—over a period of five or six years these preference common stockholders would have been paid out?

A. That is correct—at $100 a share.

Q. Plus accrued dividends?

A. Plus accrued dividends, and no more.

D. C. Barnes—Cross Examination (Cont'd)

Q. You testified this morning, Mr. Barnes, in relating to the general background leading up to the filing of this plan, that no one questioned the fact that this was an involuntary liquidation that Engineers had in mind, that is, from the period that you first started discussing this plan in 1941 up to the time you filed it. Is that correct?

Q. Well, I don't know that that is correct, up to the time we filed it. The statement that I made earlier this morning was that when we were considering the plan in 1941 nobody considered that there could be any question but what it was an involuntary liquidation.

Q. You mean by "no one" the Board of Directors or the stockholders?

A. That is correct.

Q. The stockholders?

A. No, either in the Board of Directors or the stockholders.

Q. Do you recall in the matter of Western Public Service Company, File No. 70-453, where the Commission denied your application to reacquire your preferred stock? The reason I am referring to that case is because I have before me the brief of Mr. Tucker which was filed previous to the oral argument in that case, and I am specifically referring to page 10 where, in introducing this subject of reacquiring the preferred stock of Engineers, he made the following statement in his brief on page 10; "The contract preferences of preferred stock on liquidation do not furnish a fair standard for the treatment of preferred stockholders in a reorganization necessitated solely by Section 11." And then he went on to say, on the following page, page 11, "Requirements long imposed after any contractual rights of preferred stockholders viz-a-viz common stockholders had been established"—that in such a case liquidation preferences which stockholders agreed should govern in case the enterprise should fail "are only one of many factors to be taken into consideration in determining what is a fair and equitable adjustment of the rights of

security holders under these unforeseen circumstances". Now, in the light of that statement and in the light of your remarks this morning, do you recall that at the time of this proceeding the Engineers preferred stock was selling around 60, and I believe the Engineers Board of Directors or the management took the position that even if a Section 11 proceeding were pending at that time it would not be fair to pay the Engineers preferred stockholders out at $100 because of what you considered at that time to be the fair value, which was around 60. Is that correct, Mr. Barnes?

A. I think that is substantially correct. Let me state the situation as I understood it at that time. At the time of this hearing that you speak of there was very little, if any, market equity for the common stock in Engineers Public Service Company, and following the decision of the Securities and Exchange Commission in the United Light and Power case—I may be wrong as to the particular case, but some precedents that had been set by the Securities and Exchange Commission—I think led Mr. Tucker to feel and led us to feel that where there was not sufficient equity to take care of the common stockholders under the so-called fair and equitable standards the charter contract provisions might not be followed. That seems to me an entirely logical conclusion to reach. The situation as I see it in the United Light and Power case, for example—there were not sufficient assets to cover the common stock. If the charter had been followed legally the preferred stockholders would have taken all of the assets and the common stockholder would have lost 100 percent of his interest. In the situation that we are facing today there are sufficient assets to take care of the common stock, so that that problem is not facing us.

Mr. Condon: Do you mean the preferred stock, Mr. Barnes, instead of the common? You said there are sufficient assets to take care of the common.

The Witness: No, I think you have got to decide at the present time whether the enforcement of the contract rights

on the preferred stock is inequitable and unfair, and the maximum amount that can be claimed as being unfair to the preferred stockholders is from 5 percent to 10 percent of the amount of their contract rights.

By Mr. Kanton:

Q. When you speak of the United Light and Power case I take it you are speaking of what we know as the second United Light and Power case, the one involving the preferred stocks which were paid out 95 percent of the assets of the company and which went to the Supreme Court under the name of Otis & Company versus S. E. C.?

A. That is correct. I had in mind particularly the quotation in reference to "an overriding public policy should not be enforced against one class of security holders with a windfall for another class."

Q. In response to my question, Mr. Barnes, you just told me that because of what you considered to be the prevailing opinion around the time that the Western case was before the Commission, your counsel, the Board of Directors and yourself considered it fair to only pay the preferred stockholders whatever you considered or whatever was considered to be the fair value of the preferred stock.

A. No. I think at that time the majority of the Board of Directors would have felt that the preferred stockholders should have had the involuntary liquidating price.

Q. Well, wasn't it the position of counsel for Engineers at that time that it wouldn't be fair to pay the voluntary or involuntary liquidation price when the stock was selling around 60?

A. That was Mr. Tucker's opinion and that was my opinion at that time.

Q. But that was the position that was taken before this Commission?

A. That is correct.

Q. Was that against the opinion of the rest of the Board of Directors?

A. Well, I don't think the Board of Directors ever read Mr. Tucker's brief.

Q. But throughout your testimony and also the brief the position taken was as I have just stated it. Now my question is, Mr. Barnes, did the Board of Directors of Engineers fully agree with that position or did they disagree? Was there a divergence of opinion at that time?

A. Well, I don't think that was an issue that ever came up before the Board of Directors at that time.

Q. In other words, as you are testifying now, that was the position taken by yourself and Mr. Tucker at that time?

A. Well, that wasn't an issue in the case at that time, as a matter of fact. The issue in the case was whether or not we should be allowed to buy preferred stock from preferred stockholders who were seeking a market for their stock. It wasn't a question of what should be taken as an action by the Board of Directors as to payment of the preferred stockholders in the event of liquidation or compliance with Section 11.

Q. I am afraid, Mr. Barnes, that it was quite an issue in the case, because your testimony brings that out—Mr. Tucker's oral argument and Mr. Tucker's brief does make that point. In fact, the Commission's decision goes into it quite fully as to whether Engineers should be allowed to reacquire its preferred stock in the light of the Section 11 problems that the Commission was faced with at that time and which were decided by the Commission later on.

A. That was an issue, but I still assert that it wasn't an issue as to whether the preferred stockholders in the ultimate liquidation proceedings should be paid off at their contract price or at some other price.

Q. Well, if this pending proceeding were presented to the Commission at the time the Western case was before the Commission would it be your position to pay the preferred stockholders $100 per share plus accrued dividends, or, rather, give them the fair value, which, say, was determined to be 60.

A. I think the position of the Board would be that they should receive $100 a share and accrued dividends.

Q. Why do you say you think?

A. Because I can't speak for the rest of the directors other than from my observation of the discussions that have been had when I was at the Board meetings.

Q. But it wouldn't have been your position or Mr. Tucker's at that time, would it, sir?

Mr. Pickering: I object to that question calling for what Mr. Tucker's opinion might have been. The witness can't testify what someone else's position might have been.

The Examiner: I will sustain the objection.

Mr. Kanton: I will amend the question.

By Mr. Kanton:

Q. That would be your position at that time?

A. My position would be that if there weren't sufficient assets to give the common stockholder anything, it would be fair and equitable to give him a small percentage in order to give him a run for his money, so to speak, in the future.

Q. Let's assume that there were sufficient assets, and I think the case brings that out, that there were some assets for the common stockholders. Would you say that if there were sufficient assets that you would have recommended that the preferred stockholders only get $60 rather than $100 per share?

A. No, I would not.

Q. You would recommend that they get $100 per share?

A. That is right, if there was sufficient assets to take care of the preferred stock and leave some for the common stock.

Q. If you think the fair value of the present preferred stocks were only, say, $50 or $60, would you still recommend that the preferred stockholders receive $100 per share plus accrued dividends?

D. C. Barnes—Cross Examination (Cont'd)

A. If there were sufficient assets for the common stock, yes.

Q. That wasn't my question. I am assuming that there are sufficient assets for both the preferred and common stockholders but I am saying it is determined that the fair value was only around $50 or $60. Would you still recommend that the preferred stockholders receive $100 a share plus accrued dividends?

A. I certainly would.

Mr. Pickering: I object to that question as assuming an impossible situation. You can't have it both ways.

The Examiner: I didn't understand that the question was both ways. I think Mr. Kanton's question was assuming that there were assets sufficient to cover preferred and common stock.

Mr. Pickering: He said "not sufficient".

Mr. Kanton: No, I said "sufficient".

Mr. Pickering: Well, assuming there were assets to cover them and then that the preferred stock was worth only $50 or $60—it is inconsistent.

The Examiner: I think the record is perfectly clear.

I think Mr. Barnes' position is this, that if there were not sufficient assets to cover the preferred stock, that he would then favor paying the preferred stock less than $100 a share and give the common stockholders, as he said a moment ago, a run for their money. I think that is the expression he used. But if there are sufficient assets to cover the preferred and common, then, regardless of the value of the preferred stock, his position is that they should be paid, the preferred stockholders should be paid $100 and accrued dividends.

Is that your position, Mr. Barnes?

The Witness: That is correct.

The Examiner: And that is your position then and now, as I understand it?

The Witness: That is right.

D. C. Barnes—Cross Examination (Cont'd)

By Mr. Kanton:

Q. Mr. Barnes, did you speak to any preferred or common stockholders of Engineers with respect to whether they were in favor of exchanging their preferred stock interests for the Gulf States warrants?

A. No, I did not ask anybody whether they were in favor of doing it, but I told several stockholders we had amended the plan to provide for that.

Q. Mr. Benjamin testified on direct that he considered it an important factor for setting the price at $11.50 for the Gulf States warrants that "many of our stockholders preferred during this period of high personal income taxes to have an investment which would yield capital appreciation rather than dividend income." On cross examination he stated that his previous statement was a generalization based on the fact that there are many large common stockholders and that he just assumed that they would prefer to take this Virginia common stock at the termination of the liquidation of Engineers rather than get the dividends during the three-year period and pay a very high rate of tax on those dividends. Do you, as president of the Company, assume the same generalizations and make the same assumptions that Mr. Benjamin did with respect to this phase of the plan?

A. Well, I think it is axiomatic, Mr. Kanton, any stockholder whose income last year—and we were talking about this plan when we had last year's taxes—who had a personal income, I think it is of over $14,000, would be better off to take his income through capital appreciation than he would through dividends, and many of our stockholders have incomes substantially greater than that. We have had examples of the efforts that people go to in seeking that kind of investment in, for example, the sale of our Savannah property, where the purchasers felt that it was a very desirable investment because it offered them an opportunity to get capital appreciation and not income. The

same thing is true of the people to whom we sold Missouri Service Company and Northern Kansas Power. The same is true of the people who have contracted to buy our Western Public Service (Delaware) property.

Q. Aren't your generalizations and assumptions only with reference to large stockholders? Does it necessarily have to apply to all stockholders, to small stockholders? Because of the illustrations you have just given me, the Donner interests, and the people who bought the Northern Kansas property, and the people who were interested in the Western properties, those are people of substantial means who have large holdings in companies.

A. Well, as I said in my previous answer, as I recall the figure, everybody who has an income of over $14,000—we have an exhibit that shows the distribution of holdings of our stock. It is Applicant's Exhibit No. 16, which shows that 84.77 per cent of our stock is held in blocks of over 100 shares. That indicates concentrated holdings of 84 per cent of our stock and presumably in order to make a substantial investment the owners must on the average be fairly well to do.

Q. You mean in order to buy a hundred shares' worth of common stock of Engineers?

A. I don't limit my amount to 100 shares. The amounts that I have cited are those that have bought over a hundred shares, and 72½ per cent out of the 84.77 per cent hold 500 shares or over.

Q. Then your generalizations and Mr. Benjamin's generalizations are made on the basis that large stockholders would be interested in tax advantages through the proposal we are speaking of now, but that neither you nor he did speak to any stockholders, large or small, on this particular phase of the plan?

A. That is correct, and I don't think we needed to talk to anybody because we haven't been paying dividends on our common stock since 1932, and we get very few com-

plaints because people are not getting dividends. They are perfectly satisfied to see the appreciation in capital and to take their gains in that form.

Mr. Condon: Mr. Barnes, were there any 102 proceedings instituted against the company by the Bureau of Internal Revenue during this period, to your knowledge?

The Witness: No, there were none.

Mr. Condon: Did the question come up in connection with the audit of your returns annually?

The Witness: I don't think the question has ever been raised. I think the Internal Revenue Bureau recognized the fact that this company was faced with the necessity of liquidating under the Holding Company Act and that it needed to accumulate cash in order to retire its preferred stock in order to permit distribution of its assets.

Mr. Condon: Were any statements made by any officer of the company to the Bureau of Internal Revenue with respect to the accumulation of earnings in this company?

The Witness: We filed all the returns, of course, as required by the statute.

Mr. Condon: Were there any supplemental statements or affidavits, to your knowledge?

The Witness: No, I don't think there were any.

By Mr. Kanton:

Q. Mr. Benjamin testified that one of the principal factors considered by the Board of Directors in formulating the present plan was that the present Engineers common stockholders want to continue their interest in the three operating companies, namely Gulf, El Paso, and Virginia. Do you recall his testimony?

A. Yes, I do recall his testimony.

Q. And I take it that is your opinion?

A. I have so testified this morning.

Q. And the basis for that opinion is what, sir?

A. Merely an analysis of what any person's reaction is if you make an investment in a security, particularly a

holding company security. You make that investment because you like the character of securities in the portfolio of that company. Therefore the natural feeling of the owner of the holding company security is that he would like to continue his interest in the properties that constitute that system.

Q. Well, aren't you assuming that a holder in a holding company would also want to be a holder in the subsidiary companies—a direct owner? Don't you think there might be a distinction in the mind of, say, the Engineers common stockholder? Could there also be a distinction of whether he wanted to hold only Virginia or Virginia and Gulf and not El Paso?

A. Well, I think that is something for him to decide. I think it is—not the duty, exactly, but I think it is desirable policy, we will say, for the officers in setting up a plan to conform to this Section 11 order, to make it possible for the stockholders to continue their investment if they desire to do so or to make the decision that they don't want to do it, and not have the officers make that decision for them.

Q. But in any of your discussions with the large stockholders did they show any preference to retaining their interests in these three operating companies I have just mentioned?

A. No, they did not. That question has never been suggested to me, and until you indicated by your line of questioning of Mr. Benjamin that you thought our policy in this matter may have been influenced by what you described as the Stone & Webster interests, it was the first time that that thought had ever been put into my mind and I can assure you that I don't think there is any substance in it in fact.

Q. I didn't try to intimate that you were influenced or Mr. Benjamin was influenced by the Stone & Webster interests. All I am trying to do here right now, and what I

have been trying to do, is get the facts, and the only way I can get the facts is to ask the people who come before us to testify. And the fact that I ask you a particular line of questioning does not mean I feel one way or the other. It is for the Commission to decide how it feels after getting all the facts before it, and it makes its decision upon that. Is that clear?

A. In making my statement I merely wanted to answer what anybody might draw as an implication from the questions that you asked. I don't resent or object in the least to your asking the questions. I want to—

Q. I thought you intimated that it was my intimation.

A. I want to make it perfectly clear, definite, and emphatic that there isn't anything to the implication that might be carried by that line of quesioning.

Q. Regarding the dissolution of EPSCO, Incorporated, the mutual service company, of its service contracts with Virginia, Gulf States, and El Paso, can you, tell me first, briefly, how EPSCO at the present time operates?

A. EPSCO has a treasury department headed by Mr. Leighton, which supervises the accounting procedures in the subsidiary companies. I don't know how broadly you want me to go into the detail of the work——

Q. Just generally, the services they perform.

A. They perform supervisory accounting service and treasury service for the subsidiary companies. We have a corporation department headed by Mr. Benjamin which handles the records, corporate records, and does much of the corporate work in connection with mortgages, new financing, work of that character for the subsidiary companies. We have a statistical and research department headed by Mr. Hastings, who has handled for the subsidiary companies depreciation studies, rate studies, pension studies, developed the present pension plan. They also prepare statistical and financial analyses of the performances of the subsidiary companies. Under the executive department, that has shrunk to the point where now we

have Mr. Hanlon, the vice-president, who supervises the operations of Gulf States and El Paso, the two Southwestern subsidiaries, and I supervise the operations of Virginia Electric & Power Company, which is our only remaining subsidiary.

. . . . . .

[R. p. 567] By Mr. Kanton:

Q. Throughout the plan, as detailed, and the testimony to date, it is provided as a condition to Part One of the plan, that "there shall be no court enforcement, therefore, in a court of competent jurisdiction and until the Commission is so requested by the company." Can you tell me what your intentions are at the present time for requesting the Commission to apply the court enforcement as provided under Section 11-E of the Act?

A. Yes. If the Supreme Court decision is adverse to the position taken by the company, in the litigation now under consideration by the United States Supreme Court, the company will forthwith file a request with the Commission, asking them to request the District Court to enforce the Commission's order.

Q. In other words, if the decision is not favorable to Engineers, it is the intention of the Board of Directors to amend the plan to so provide?

A. That is correct.

Q. Under Part Two of the plan, it is provided that "Engineers agrees that in the event the Commission shall, in its opinion, find (1) that the plan is not fair and equitable to the persons affected, and (2) shall, in its order, specify an amount in addition to $100 per share, that Engineers should pay its preferred stockholders, Part Two of the plan becomes automatically amended so that Engineers is to pay to its preferred stockholders such additional amount as the Commission shall have so specified."

Now, if the Commission only found that the plan is not fair and equitable to the persons affected and did not order

or specify an amount in addition to $100 per share, that Engineers should pay, as I understand it, the plan in such event does not become automatically amended; is that correct?

A. I should think that was the language.

Q. Well, no. This is an important point, Mr. Barnes. I hope I have made myself clear. In other words, if the Commission finds that the plan is not fair and equitable but does not order or say that Engineers should pay more than $100, then this automatic amendment does not come into effect, is that correct?

A. Well, if they find the plan is not fair and equitable, I do not think they approve the plan, do they?

Q. No, they do not. The plan is denied. But assuming they do not order that Engineers pay any more but do not say anything about that, my question is, does the automatic amendment come into play?

(Discussion off the record)

Mr. Tucker: Well, Part One of the plan, of course, provides that the preferred stockholders shall be paid $100 and accrued interest to the date of deposit per share.

Part Two of the plan says that Engineers shall not pay anything in addition to the amount just specified and says that Engineers believes that is fair and equitable.

Then Part Two of the plan provides: "To the end that there may be determined by the Commission in the proceedings in connection with Part Two of this plan, the amount, if any, which, in the opinion of the Commission is fair and equitable to Engineers, shall pay to its preferred stockholders, in addition to $100 per share plus accrued dividends to the date of deposit provided to be paid under Part One of the plan, then, Engineers agrees that if the Commission in any findings or order respecting Part Two shall find that it is not fair and equitable to the persons affected thereby, that Engineers shall pay to its preferred stockholders no amount in addition to $100 per share and shall

in such findings or order specify an amount in addition thereto, which Engineers should pay to its preferred stockholders." Then the plan will be automatically amended to cover such payment.

It seems to me that is entirely clear. I do not understand what it is that you do not understand about it.

Mr. Kanton: I just want the record to be clear. Supposing the Commission does not find or order or specify any amount over $100 but finds the plan to be unfair and unequitable as now constituted. My question is, is the plan then automatically amended?

Mr. Tucker: Well, obviously not.

Mr. Kanton: That is all I wanted to know.

(Discussion off the record)

Mr. Tucker: The Commission has in many cases that I have seen, said that they would find a plan was fair and equitable if certain things were done, if the plan were amended, so that certain things were done. You have no question but what they have that power?

Mr. Kanton: That is correct.

Mr. Tucker: Well, they could say here exactly the same thing, that they thought the plan would be fair and equitable if it provided that there should be paid X dollars in addition to the $100 per share. Then would come into play the automatic amendment.

(Discussion off the record)

By Mr. Kanton:

Q. You recall that there was a discussion at our last meeting, Mr. Barnes, and during that discussion Mr. Tucker said that the Commission can order the payment of interest for any additional amounts as found to be payable over $100 per share plus accrued dividends to the preferred stockholders, subject, of course, to the right of Engineers to contest. Now, I just would like to clear up one point. Does this also provide that the Commission may, in its

determination, say that Engineers should also continue to pay dividends to its preferred stockholders during this period?

A. After they have had the principal?

Q. Yes. Well, not after they have had the principal. The question is, if the Commission finds that $100 per share plus accrued dividends is not fair and equitable but some additional amount during the time, say, that this point is contested and, say, $100 per share has been paid, is it also your intention that the automatic amendment should provide; that is, in the event the Commission does so provide, that dividends shall also be paid during this period until a final determination is made as to what is the fair and equitable amount to be paid to the preferred stockholders of Engineers?

(Discussion off the record.)

(The last question was read back by the reporter.)

The Witness: I think the plan is perfectly definite in saying that if Part One of the plan has been approved by the Commission, then any amount that the Commission either by opinion or order says shall be paid to the preferred stockholders in addition to $100 a share, will be incorporated in the plan by an automatic amendment, that we will, of course, reserve our right to contest such a provision, and if the Commission should hold, for example, in the example which you cite, that the preferred stockholders, having gotten the $100 a share, should get a premium, and in addition to the premium, six per cent while the thing was being liquidated, plus six per cent on the premium, I think we would contest that and I think the courts would support us.

Q. Suppose the Commission in its consideration, does not see fit to combine Parts One and Two of the plan as now constituted but is of the opinion that Parts One and Two should be consolidated, and in so finding, also makes the determination that $100 per share plus accrued dividends is not fair and equitable, but that some additional

amount should be paid. On such a consideration, has Engineers or the Board of Directors given any thought to such a possibility and the fact that they may have to consider the combining of Parts One and Two and the payment to the preferred stockholders as one entire plan?

A. Yes, we have given consideration to that. The reason that we broke the plan up was because we thought that that was the fair and equitable way in which the plan should be handled, that there was $100 a share coming to the preferred stockholders plus accrued dividends without any question either by them or by the common stockholders or by the company. That was admitted. Therefore, we should be allowed to go ahead and pay that amount.

Then as to the amount in dispute, that could be carried out in due course without burdening the company with continuing $14,000,000 of cash in its treasury not at work. Now, as an example to show the reasonableness of that position, I would like to cite what the Commission permitted Electric Bond and Share Company to do. They let them pay $30 a share on their preferred stock and save the interest or the dividends that were payable on that thirty per cent of the preferred stock that was outstanding. Now, we are asking the same thing here, except that they give us the opportunity to pay down $100 on the preferred stock and save the dividends that have to be paid while this premium question is being determined.

Q. Not that I want to get into a discussion of the Electric Bond and Share case, with which I am familiar—isn't it true that in that case the company only had $30 to pay the preferred stockholders and not the full amount, and that the second part of that plan, if consummated, would generate sufficient cash in order to pay off the stockholders?

A. Well, I do not see any difference in principle between paying down $30 a share on the stock and paying down $100 a share. In one case you have $30 a share and in the other case you have $100. The principle, it seems to me, is identical.

D. C. Barnes—Cross Examination (Cont'd)

Q. Except that in that case, Electric Bond and Share did not tell the Commission that they thought $100 per share was a fair and equitable amount that should be paid, but left it for the Commission to decide, is that correct?

A. No, I do not think that it has been left to the Commission to decide.

Q. We will not go into that but I think that is the answer, Mr. Barnes.

[R. p. 575] By Mr. Kanton:

Q. Referring to the Plan as filed, Mr. Barnes, Division E, ——

A. (Interposing) As amended?

Q. Yes, sir. (Continuing)—the last sentence in the first paragraph thereunder "No amendments to the Plan or any part thereof shall be made without the consent or agreement of Engineers."

Could you tell me if this in any way affects the automatic amendment as provided under Division C of the Plan?

A. I don't know what the language is, but I am sure that it wasn't intended that it should.

Q. In other words, it means any other amendment, other than provided for the automatic amendment?

A. That is correct.

Q. Part 3 of the Plan originally provided that Engineers will be dissolved and liquidated, or Engineers could have been merged with Virginia.

Could you tell me what change in circumstances brought this amendment about?

A. I think there were two reasons that caused this change in the Plan. In discussions with the staff of the Commission of the Plan when it had part 3 incorporated in it, the staff urged that the Company include a provision in the Plan that would give the Commission jurisdiction to order the elimination of Engineers within a specified time, if the Company didn't go ahead and do it under Part 3.

Another factor was the change in the tax situation that developed from the time the Plan was originally drafted. At that time we were inclined to think that the final distribution of the Virginia stock to Engineers' stockholders, if done as a liquidation, might be a taxable transaction to the Engineers' common stockholders, and therefore we contemplated the possibility of accomplishing this through a merger with the Virginia Electric and Power Company, and thus avoid any immediate tax liability for Engineers' common stockholders; subsequent to the filing of the Plan, discussions were had by tax counsel with the Bureau, and it is my understanding that as a result of those discussions, counsel was satisfied that no substantial tax advantage would be had by following the merger route.

Therefore, we concluded to meet the idea of the Commission, the staff of the Commission, the simple thing to do was to provide for the immediate dissolution of Engineers, which would give full assurance of the point that the staff was pressing, and abandoned the idea of merger.

Q. When you say "the staff was pressing" do you mean that the staff, in your discussions with them, made certain suggestions?

A. Exactly. I don't mean they were attempting to use any influence; they were trying to be helpful in suggesting to us that we put such a provision in.

Q. Wasn't, if I recall some of those conversations, wasn't it more in line of getting Engineers out of the picture as quickly as possible?

A. The staff has always pressed for that.

Q. And under the present proposal, as distinguished from the original proposal, Engineers will still be in existence for the same length of time, say perhaps three years after the consummation of this Plan?

A. No, I think that is not correct. Engineers will be dissolved forthwith on completion of Step 1 of the Plan, within, I think it is, 60 days, as provided in this amendment.

Q. That is correct, Mr. Barnes.

D. C. Barnes—Cross Examination (Cont'd).

A. A dissolution certificate will be filed in the State of Delaware.

Q. At any rate, as I see the purpose of this amendment, the only thing that it accomplishes is that the dissolution takes place 60 days after the consummation rather than right after the three-year period when all the affairs of Engineers are finally liquidated?

A. Well, apparently the staff felt that they didn't have sufficient assurance that Engineers would be liquidated even then, because, as I understood their request or suggestion, it was that we incorporate a provision in there submitting to the jurisdiction of the Commission, if we had not, in the specified time, liquidated.

Q. If the tax benefits which may have been obtained by Engineers through a merger had not changed, would Engineers have provided for this amendment, outside of what the staff suggested?

A. If the distribution of the Virginia stock to Engineers' stockholders in final liquidation had been a taxable transaction, I think we would have stuck to the merger route, in order to avoid such tax liability.

Q. Then would you say the over-riding weight, then, was the change in tax circumstances?

A. I think so. That, and to meet the ideas of the staff and the Commission.

Mr. Scheetz: Could we be informed at this time as to when these conversations with the staff occurred, with relation to the November hearings?

Mr. Kanton: Well, these conversations have been going on with the Engineers' people, I would say, prior to the filing of the Plan and once or twice thereafter, and we did mention—of course, subject entirely to the discretion of Engineers, that there was no assurance in the Plan as filed that Engineers would be dissolved under the filing.

We did suggest at one meeting, as was done in another case—I think Electric Bond and Share, where it was provided that if within a certain time after the consummation

of the Plan the holding company did not finally liquidate, the Commission was authorized to go into Court, and it was so stipulated; to force the liquidation.

We just discussed those matters generally and we didn't urge or suggest what should be done, we just gave our opinion and said,—Had they considered it.

Mr. Scheetz: You misunderstood my question, and since Mr. Barnes is under cross-examination by you, I was merely asking you whether it couldn't be placed on the record as to when the conversations to which Mr. Barnes had alluded took place, with reference to the November, 1945 hearings,—before or after.

Mr. Kanton: I really don't recall. Perhaps Mr. Barnes does.

The Witness: My recollection is that in the conference which Mr. Benjamin attended here in Philadelphia, and at which I was not present, but which he told me about on his return, the suggestion was made by the staff—and it was long before the November hearing,—and the same suggestion was repeated subsequently when I was down here in a conference with representatives of the staff, and that may have been subsequent to the November hearings. I am not certain as to that.

Mr. Condon: Mr. Barnes, isn't it a fact that that discussion with respect to the problem of dissolution of Engineers to which you have made reference, was taken up even before the actual drafting of the Plan?

The Witness: I think it may well have been, Mr. Condon. I am not clear as to the date but, if that is important, Mr. Scheetz, I think we can find it in our memoranda.

Mr. Scheetz: What I did want to know, Mr. Barnes, was, whether any discussions with the staff held since the November meeting accounted for this.

The Witness: No, I think it was the discussions prior.

D. C. Barnes—Cross Examination (Cont'd)

[R. p. 586] By Mr. Kanton:

Q. Mr. Barnes, in Applicant's Exhibit No. 1, Exhibit A thereof, page 1 and Exhibit B, page 2, there is a statement made at the bottom of these exhibits, which reads as follows:

"It is the opinion of Company counsel that no such redemption premium is payable."

Can you tell me why that footnote was put in there, sir?

A. Well, I suppose it is put in there so that the pro forma statement will correctly reflect what the accountants were attempting to show, and it calls attention to the fact that there is no provision made in the balance sheet for any redemption premiums, and it carries the footnote that counsel has advised that such a redemption premium is not payable.

Q. Isn't it also the opinion of the Board of Directors and officers of Engineers that no such redemption premium is payable?

A. Yes, it is.

Q. Well, I was just wondering why the opinion of the Board of Directors wasn't put in here, rather than the opinion of counsel?

A. Well, I think it is customary in these financial statements, when we make a reservation of that kind, to refer to the opinion of counsel and not to the opinion of the Board. There was no attempt on the part of the Board to duck any responsibility for the statement.

* * * * * *

[R. p. 590] By Mr. Kanton:

Q. You mentioned something this morning about Virginia paying off a $5,100,000 note. I believe it was Mr. Benjamin who mentioned that.

A. That is correct.

Q. Could you tell us some of the details of that transaction, Mr. Barnes?

D. C. Barnes—Cross Examination (Cont'd)

A. I will be glad to tell you all of the details of it. Virginia Electric & Power Company had notes outstanding of some $11,580,000. As a result of the sale of the railway property and as a result of tax credits resulting from the sale of the railway property and as a result of tax credits resulting from the end of the war emergency period, Virginia found itself with an extraordinary large amount of cash on hand, something over $9,000,000 of cash on hand, estimated at December 31. This was the estimate that was made early in December. The company's net current position at September 30 showed net current assets of some $7,200,000. The cash that we received from the acceleration of these war emergency tax credits was cash that we had counted on in scheduling the maturity of many of these notes in the future. We had anticipated that as the war continued and as we get these tax savings we would apply the cash derived from that source to the meeting of the maturing notes in the future, and those maturities were quite heavy on that account. Having anticipated the receipt of this cash, it seemed appropriate to use the excess amount of it to retire outstanding indebtedness. Under the terms of our bank notes we can redeem outstanding notes with the use of cash derived from operation in the system and any cash other than that derived from the sale of securities bearing a lower interest rate for the retirement of outstanding notes without the payment of any premium, provided that we retire the notes in the reverse order of their maturity, taking the last call first. We concluded, after viewing the cash situation and discussing the matter with the Virginia directors that we would call the last maturities of the existing serial notes which are all the maturities from 1949 on, in the amount of $5,100,000, and that was done on December 31. The company had certain advantages which it obtained from anticipating the payment on that date as against carrying it over into the next year in that we have a tax in Virginia of .2 per cent, on, I think it is intangibles. It covers cash in the bank, in any event, so

that this cash, this $5,100,000 had it stayed in the bank, we would have had a tax liability of some $10,200 on account of that asset.

It is our intention after the first of the year to negotiate with the banks for either a resetting or a refunding of the remaining $6,480,000 of notes which have just under a five-year maturity, to extend those over a 10-year period with semi-annual maturities in equal amounts, with a reduction in interest rate.

Q. Could you tell me how many notes exactly went to make up this $5,100,000? Was that one note or more than one note?

A. Well, they were serial notes, you understand. The Northwestern Mutual Life Insurance Company held ten notes, as I recall the number, maturing serially beginning in 1949 and running through to 1959. Those notes were in the aggregate amount of $4,000,000. Those were paid off to the Northwestern Mutual Life Insurance Company.

Q. What interest rate did those notes bear?

A. Those bore 2⅝ per cent.

Then we had the remainder of the paydown with a February 1, 1949 maturity, bearing interest at the rate of 2¼ per cent. The bulk of those notes—I say the bulk, 40 per cent, the largest single item in those notes, as I recall it, was held by the First National Bank of Boston. The remainder, the remaining 60 per cent of the $1,100,000, was distributed among local banks in Virginia.

Q. When was it first decided to pay off these notes, that is by the Board of Directors of Virginia?

A. The Board of Directors of Virginia at a meeting of the directors held on November 16, authorized the officers in their discretion to pay down up to $5,100,000 of the notes indebtedness of the company.

Q. Did you know that at that time?

A. I was present at the meeting and recommended that the directors authorize the officers to make such paydown.

Q. On November 16, 1945?

A. That is correct.

Q. Did you also consider the possibility of declaring a dividend on that money up to Engineers in order to provide, perhaps, sufficient funds in order to forego the borrowing of any note from the Chase National Bank as provided in this plan?

A. That suggestion was conveyed to me and I considered it and was greatly shocked at the suggestion, because I thought that that's what we were here for. It was my understanding that one of the purposes of the Holding Company Act was not to bleed the subsidiary companies in order to take care of requirements of the parent company, and in view of Virginia's capital structure and the efforts that they are all making to build that up it didn't seem appropriate to me to consider paying any more than the normal dividends out of Virginia, particularly if the purpose of that was to help out a holding company.

Q. Well, eventually the common stockholders of Engineers will, in effect, be the common stockholders of Virginia?

A. That is correct, but we also have some preferred stockholders and some bondholders who are concerned about the financial integrity of the company.

Q. You mean of Virginia?

A. Of Virginia.

Q. I believe when you testified last time, Mr. Barnes, you were asked the following question by Mr. Tucker:

> "If the Public Utility Holding Company Act should be repealed tomorrow, what effect do you think it would have on the market prices of these preferred stocks?"

And you answered:

> "In the current market, based on the present level of earnings, I would expect each of the series to sell somewhat above its voluntary redemption price.

The excess, however, would be small and would represent the discount of the present dividend yield for such time as the company might require to effect a refunding of these issues at a lower dividend rate."

Are you saying in effect here that in the absence of the Holding Company Act the credit of the company would be such that the preferred would be refundable?

A. Yes, I think it would, in this market.

Q. Now, if the Act continued in effect, and there were no imminence of Engineers disposing of El Paso and Gulf States, what do you think the market prices of the Engineers preferred stocks would be? That is, in your opinion? Does your assumption predicate that Engineers would be permitted to continue to own El Paso, Gulf States and Virginia?

A. That is right. Without fear of being required to divest itself of them?

Q. Well, not forever and ever—just no imminence of it at the particular time that we have under my question. Say in the present market.

A. Well, I don't know what you mean by "imminence," Mr. Kanton. If the investors were assured that Engineers was not going to be forced to liquidate as a result of the impact of the Act I think in the present market the preferred stocks would sell as I have testified at slightly above their redemption prices.

Q. Therefore would you say that the only reason that you think the preferreds are not selling above their respective all prices in the present market is because of the pendency of the present Section 11 preceeding now before this Commission?

A. Well, I think it is due to the fact that Engineers in the investors' mind is going to be required to divest itself of its properties and to liquidate, and that the holders of the preferred stocks will not get an opportunity to continue their investment, and therefore they are not willing to pay premium over the redemption price.

D. C. Barnes—Cross Examination (Cont'd)

Q. I don't believe you have answered my question. Let me try to state it again, Mr. Barnes. In light of what you answered me previously, would you say that the only reason that you think the preferreds are not selling above their respective call prices, as you have just testified, in the present market, is because of the pendency of the present Section 11 proceedings now before this Commission?

Mr. Tucker: What do you mean by "the pendency of the present proceedings"? Do you mean the case before the Supreme Court or the plan?

Mr. Kanton: The plan. I said "Section 11 proceedings."

Mr. Tucker: I know but there is also a Section 11 proceeding before the Supreme Court that is undecided, and I wanted to be clear you were not referring to that. You are referring to the plan?

Mr. Kanton: That is correct, Mr. Tucker.

The Witness: I think the depressive factor on the price of the preferred stocks is not this application that we are making under Section 11 (e), but is the effect of Section 11 on the continuity of Engineers Public Service Company as a holding company.

By Mr. Kanton:

Q. Well, it is practically the same thing, it is the enforcement of Section 11 and the filing of this plan in order to comply with Section 11?

A. I think it is due to Section 11, and not the plan.

Q. Then you would say that the only reason that the preferreds are not selling above their respective call prices in the present market is because of the pendency of the Section 11 proceeding, as you put it?

A. That is correct.

Q. Well, anyway, whether the Act was in effect or not, under present market conditions the preferreds would be held down in any event by their respective call prices?

A. That is right.

D. C. Barnes—Cross Examination (Cont'd)

Q. Now, if we will use the following as a definition of fair value, "Fair value is a value arrived at by capitalizing reasonably foreseeable earnings at an appropriate rate determined by what informed buyers would pay and informed sellers would ask for comparable securities of like terms and investment quality," would your answer be the same to the question that Mr. Tucker asked, "Do you think that such a market price would, under the conditions assumed in the last question represent the fair value of these three series of preferred stock?"

A. That is a rather long hypothetical question to answer offhand, Mr. Kanton. Let me see if I have your hypothesis in mind. You want to capitalize the reasonably foreseeable earnings?

Q. At an appropriate rate.

A. At an appropriate rate. You don't define what an appropriate rate is?

Q. I said, "determined by what informed buyers would pay and informed sellers would ask for comparable securities of like terms and investment quality."

A. Well, in my opinion securities are not valued on the basis of reasonably foreseeable earnings. I think they are valued a good deal more on the basis of past performance. They have built up a record of earnings in the past. I don't think the person who is going to sit down and value a security is going to arrive at his decision on the basis of estimating that the earnings for the next five years are going to be a stipulated amount. He can't predict that far ahead. He knows what they have been in the past, he knows what the immediate trend and the immediate outlook is, and he arrives at his conclusion as to value on the basis of such factors as that.

Q. What I had in mind was this. I repeat again the question Mr. Tucker asked you, "Do you think that such a market price would, under conditions assumed in the last question, represent the fair value of these three series of preferred stock?" You answered, if you recall, "If by fair

value is meant the value which will be maintained as an average for an indefinite time in the future, my answer is No. But if it is intended to mean what a willing buyer would pay and a willing seller would take in today's market for such securities, my answer is Yes."

Now, I was just using a different definition than you were to fair value, and I was asking you on the basis of that assumption if you would adopt it, would your answer still be Yes?

A. Well, the fair value as you have defined it contemplates capitalizing reasonably foreseeable earnings at an appropriate rate that willing buyers and sellers would adopt. Now, I think in a free market where people are not forced to buy and where people are not forced to sell that the market value reflects fair value, and people in deciding whether they are going to buy or not—I don't think they arrive at their value by taking a piece of paper and putting down that the earnings for the next five years are going to be thus and so; they say that, "We know what the property has done in the past, we know the outlook for the future, and on that basis we are willing to buy this or willing to sell it at that price." And that is the present price. I don't think that there is any formula that you can get that is going to set a value today that is going to be the value in the future.

Q. Well, the only distinction I was making in my so-called definition was that you were relying more on market value being determinative of fair value, where I was not, as you will recall from the definition I gave you. I was just wondering if fair value was determined that way and market value, of course, being just an element, would your answer still be "Yes" to Mr. Tucker's question?

A. It would be yes, with the same qualifications that my answer in here has, that if I valued the property today on any basis of valuation that would be what I considered a fair value on that basis today, but it would not be, in my opinion, a fair value that you could assume would continue over a period of years in the future.

Q. Well, using your definition of "fair value" and my so-called definition, on any basis, then, you would expect in the current market and the present level of the earnings, that each of the preferred series would be expected to sell somewhat above their respective voluntary redemption prices?

A. I so testified, if I understand your question.

Q. That is correct. You also testified—and I quote—"The future market price level of the securities, if they were continued outstanding without the impact of the Public Utility Holding Company Act, could move from its present level in only one direction, since the voluntary redemption price acts as a stopper to prevent any material rise in price over the respective voluntary redemption prices."

Well, with reference to that statement about the market prices only being able to move in one direction, outside the impact of the Public Utility Holding Company Act, isn't it true that under the present market conditions you would have to refund the preferred stocks of Engineers at the present time?

A. If there were no Public Utility Holding Company Act today I think Engineers would refund the outstanding preferred stock.

Q. Well, then, when you say it only can move in one direction, that statement, in the light of your present answer, is not exactly true, because under present market conditions, outside the impact of the Act, these preferreds would be taken out of the picture?

A. They wouldn't move in any direction if they were refunded, so that if they move they can only move in one direction.

Q. You went on to testify that, "It is impossible to predict at this time whether the future has in store for us as severe declines, as those indicated in the charts showing the price level of the preferred stock since it was issued.

What did you mean exactly, when you said "It is impossible to predict at this time?"

D. C. Barnes—Cross Examination (Cont'd)

A. I meant just that, Mr. Kanton. We have introduced the Company's exhibits, Nos. 26, 27 and 28, which show wide fluctuations in the market value of the preferred stocks of Engineers Public Service Company.

I am satisfied that in the future we are going to have, if the stocks continue out, a repetition of fluctuations, but whether to the extent shown in these charts as having occurred in the past or not, is something that nobody can predict at this time.

Q. However, as you testified before with reference to these specific preferred stocks, under present market conditions, this particular group of preferred stocks under present market conditions, would be refunded, and the possibility of what would happen in the future would not play such an important part?

A. That is correct, as far as the present stockholders are concerned, unless they elected to exchange their stock for a lower dividend yield stock.

Q. You also testified, Mr. Barnes, as to certain factors which might affect future price levels.

I take it you are speaking in that instance of both the preferred stocks and the common stocks of Engineers?

A. I was speaking, in this instance, of the preferred stock, but obviously, anything that affects the preferred stock adversely affects the common stock even more adversely.

Q. With respect to your remarks about continued inflation, in your considerations of this matter, did you also consider possible deflation in the immediate future?

A. I don't think we are headed for deflation in the immediate future.

Q. It is your opinion that it would be inflation?

A. I think we are facing inflation. We have already had a substantial amount of it, and I think we are facing further inflation.

Q. Regarding the 30 percent demands of labor, do you think that labor will get their demands to this extent?

D. C. Barnes—Cross Examination (Cont'd)

A. No, I don't think they will get the full amount, but I think they will get substantial increases, which they have already.

Q. Of 10 percent or 15 percent?

A. I would say fifteen percent as a minimum, based on the awards that I have seen so far.

Q. Can you tell us specifically what awards you have in mind?

A. Yes, I have particularly in mind the awards that some of the Oil companies have made to their employees.

Q. Have you had any recent discussions with employees, among your operating companies?

A. Yes, we gave the employees in Gulf States a wage increase which they haven't accepted yet, which is subject to vote still, of 15 percent.

The El Paso Union has accepted a 13.8 percent increase. Those are the only two that we have had any results from negotiating with.

Q. Is it true that if there are any wage increases, that they would ultimately be reflected in your rates, or at least be considered in rate proceedings by a State Commission which has jurisdiction over rates?

A. Well, they are an element, of course, in operating expenses, but you realize that it is very difficult to secure increases in rates. A substantial time must elapse after the company has been burdened with increased costs, before it can get Commissions to take the necessary action to give the companies relief. Fortunately, the progress of the industry up to date has been such that there have only been relatively few instances where it has been necessary to increase rates, but there is a limit to the extent that you can go without requiring an increase in rates to compensate.

Q. In other words you say there is a time lag between the time that the employees of a utility company get their increase and the time that a State Commission which has jurisdiction over rates can consider it?

D. C. Barnes—Cross Examination (Cont'd)

A. That is correct.

Q. But, in the long run, whether it is a year or two, that matter is usually taken up?

A. Well, I would say that it might be longer than that if there was a progressive series of rate increases made.

Q. Turning now to your remarks regarding periodic depression, would you say that, in the next few years, there would be an indication of a high level of productive activity?

A. Yes, I think I mentioned in here that there had been a pent-up demand as a result of war activities. The statement that I made was "During this period the supply of goods for civilian requirements has been withheld to a large extent and in the immediate future, production to fill this demand may be expected to continue productive activity at a high level."

Q. Do you think this period of high productive activity will continue, say for the next two or three years?

A. I don't like to predict the number of years, Mr. Kanton, because I don't set up to be a prophet, but I can readily conceive that by the end of three years we will have caught up with our consumer demand, and will be geared up to excessive production which would be very difficult to readjust back to a more normal level of consumer demand.

Q. And you expect, then, after this period of high productivity of next going into a readjustment period?

A. That is right.

Q. Do you have in mind the cycle running from the 20's through the 30's and up to the present time—the high, the low, and then the come-back?

A. Well, that is one cycle that we have been through in that period, and in past history we have been through other cycles in earlier periods.

Q. And is that what you are trying to state here in effect, that this is the possible cycle that we may be entering into at this time?

D. C. Barnes—Cross Examination (Cont'd)

A. Yes, I think we are in a boom period at this time, and I think we are going to have depression periods in the future and then after that we will have boom periods again.

Q. With respect to your remarks regarding the "possibilities of Government competition", is it generally true that in the areas where there have been Federal hydro-developments, that the respective market prices of a utility company have been adversely affected?

Mr. Condon: Do you mean the plant, the equipment or the stocks?

Mr. Kanton: I am talking about the securities, as compared with other securities where there isn't any Federal hydro-development.

The Witness: Well, I might cite to you as an example, a company that has suffered from that—one with which I was connected for a great many years, some thirty-one years, as I recall it,—namely Puget Sound Power & Light Company.

They have a $5 dividend preferred stock selling in the current market at $109 a share.

The call price is $110 a share. It is a good preferred stock, it deserves a much higher investment rating, but I think the reason that it has as low an investment rating as it has—and that is also true of the common stock of the company—is because of the threat of Government competition.

Q. My question was of a general nature, not specific.

A. Well, I thought I could best answer your general question by a specific example.

Q. Well, on an over-all basis, have you made any comparison of securities held by utility companies served by Federal hydro-developments, with other companies that supply their own electricity, or get it from a private source?

A. Well, you take what happened down in the Tennessee Valley authority.

There the Government went into this extensive hydro-development project and has taken over all of the private

utility industry in the State of Tennessee—the Government or the local governments,—and the prices that were paid for those properties, in my judgment, were less than the fair values of the properties that were taken over.

Q. What are the probabilities of Federal Hydro-developments in the areas now served by the Gulf, El Paso and Virginia?

A. In the properties served by El Paso, the Government has already developed a plant at Elephant Butte. There are no immediate projected developments, that constitute any threat, as far as I can see, to the El Paso plant. The presence of the government dam at Elephant Butte, what effect it may later have on the municipal authorities at El Paso remains to be seen, and I can't predict, but I can say that in 1943, I think that is the date, having negotiated with the City Council of the City of El Paso for the sale of our electric properties in El Paso, because of the desire of some parts of the community to go into government ownership, when the matter was put up to popular vote it was turned down. How long that condition will continue I don't know. I hope it does indefinitely. In the Gulf States area the government is projecting a development on the Neches River at the so-called Rockland Dam development of some 13,060 kilowatts. At McGee's Bend on the Angelina River, which is right near the Neches River, a development of 23,220 kilowatts. There are two other small developments proposed on the Neches River, one known as Dam A and the other known as Dam B with 4108 and 4800 kilowatts, respectively. The government is also projecting a development on the Brazos River known as the Whitney development, with some 30,600 kilowatts installation proposed.

Q. Are these just proposals or are they being put into effect?

A. They are projects that have been surveyed by the War Department and the Neches Rockland dam development and the Angelina development are being tentatively worked on at the present time.

D. C. Barnes—Cross Examination (Cont'd)

Q. Has Congress appropriated money for them, Mr. Barnes?

A. They have not appropriated the money for the developments as yet. However I think they have appropriated money for engineering surveys. On the Whitney development on the Brazos River I can't tell you exactly the status of that project, but it is one of the active projects.

In Virginia, on the Roanoke River, there is a proposed development at Bugs Island which has an ultimate capacity of 114,000 kilowatts, and in the deficiency bill that passed Congress just before the close of the year there was $1,000,000 included for costs of survey by the Army. That is one of the projects that have been recommended for development by the Army Engineers. There are other developments proposed by the Army on that same river consisting of Smith Mountain, 33,000 kilowatts, Leesville, 16,000 kilowatts, Tabor, 10,000 kilowatts, Melrose, 34,500 kilowatts, Randolph, 24,000 kilowatts. There is also a development proposed at Gaston of 54,000 kilowatts, and one at Roanoke Rapids of 58,100 kilowatts. Then there are two small developments on the James River that are proposed, one known as the Cathwright and the name of the other I don't find. They are both relatively small developments.

Q. What are the possibilities of development in any of these areas referred to as affecting the operation of any of the three utility operating companies of Engineers?

A. What are the prospects?

Q. In the next five years.

A. I think it is reasonable to expect in the next five years that Congress will appropriate money for further hydro developments in the areas served by our three subsidiaries. I think the Bugs Island development on the Roanoke River is a development that is quite likely to go through. I think that the McGee's Bend and Rockland developments in the Neches River in the Gulf area are quite likely to be accomplished. I might say for your in-

formation that we have been trying to buy from the government a surplus power plant located at Lake Charles, Louisiana, and the Reconstruction Finance Corporation has tentatively accepted our proposal for the purchase of that plant, but under the statute they have to give notice to the public agencies, and they have the option to take the property at the same price bid by any private interest. And so far we have not been able to get clearance on the Lake Charles power station because of the indicated desire on the part of government agencies to preserve that for operation in connection with government hydro developments in that area.

Q. With respect to the present Congress' action, having in mind the Missouri Valley project and the St. Lawrense project, do you think that that action indicates that there will be any hydro development in the near future?

A. I think there will be hydro development on the Missouri Valley. As I understand the problem in Congress, it is largely a question of whether the development should be done by an authority, such as was done on the Tennessee River with T. V. A., through the creation of a so-called Missouri Valley Authority, or whether the project shall be constructed by the War Department without the creation of any authority, and operated by the Department of the Interior, Power Division.

Q. If an electric company has the monopoly which they usually do to operate in a certain area, how does Federal hydro development affect it? Assuming, first, that it does, and then assuming it does not, purchase power from the Federal hydro development.

A. I think, again, the best way to answer that question is to be specific and take the case of the Northwest. In the Northwest, when the government came out and built Grand Coulee and Bonneville it provided a tremendous stimulus to the people who were anxious to form public power districts and go into public operation of utility businesses, and with that background they have been endeavoring to

secure public support to take over all of the private utility properties in the State of Washington and conduct the operations through public utility districts.

Q. I didn't have that in mind as the purpose of my question. I was assuming just that there was Federal hydro development in an area.

A. Well, that is the answer to your question.

Q. And your answer is, of course, that that leads to power districts?

A. That is correct. It did the same thing in Nebraska.

Mr. Scheetz: Might I suggest a question, Mr. Kanton, at this point?

The Witness: May I finish the answer?

Mr. Scheetz: Excuse me.

The Witness: And it is also being attempted today in Arizona.

Mr. Scheetz: Would it be appropriate to ask Mr. Barnes to comment on the success which those power districts have had in Washington?

The Witness: Well, so far they have not been very successful. They attempted to condemn from Puget Sound Power & Light Company, by piecemeal condemnation, five or six—I have forgotten now the exact number of counties served by Puget Sound Power & Light Company. Because of severance damages that were awarded, for attempting to take the property in pieces, those districts were unable, with one exception, to finance the cost of the combination award. The one exception was Clallum County, which is at the extreme end of the Puget Sound Power & Light system, over on the Olympic Peninsula. In the case of the Washington Water Power Company, they have been successful in condemning three of the counties served by the Washington Water Power Company, and whether they have actually taken over and begun the operation or not I don't know, but I think they are in a position to complete those acquisitions. Recently they condemned the property of the Portland General Electric Company in Clark County, and

it is my understanding that a bond house has agreed to provide the requisite funds to pay the condemnation award, but a suit has been brought to enjoin the transaction on the ground that the proposed bonds were not authorized by a vote, if I am correctly informed. I would say that they are making progress out there but making it probably slowly.

Mr. Scheetz: Isn't it correct to say that, generally speaking, the Puget Sound properties are still intact and no important pieces have been carved out of them?

The Witness: That is correct, but it has suffered the threat of being torn asunder, and its securities and its security holders have suffered accordingly.

By Mr. Kanton:

Q. Even in areas where we have Federal hydro development, is not the rate of return fixed by the State Commission?

A. In Texas we have no State Commission, you understand, so that no rate of return is fixed in Texas by a State Commission.

Mr. Condon: Isn't that done by the district court in Texas?

The Witness: No, I think the municipalities have the right to regulate rates.

Mr. Condon: Subject to review by the district court?

The Witness: Mr. Tucker will have to answer that. We have never got to the ease in our experience in Texas where we had to take an appeal. We have made it our business to sit down with the commissions and regulatory authorities and regulate our business on a sound and sensible basis.

By Mr. Kanton:

Q. The purpose of my question was just of a general nature, whether it is a district court, a regulatory body, or a state body that fixes the rate. Any rate fixing body

which determines the rate of return for a utility, wouldn't they take into consideration whether energy was being supplied by a Federal hydro development of whether it was coming from a private source, and in the long run perhaps not affect the rate of return to the private utility?

A. No, I don't think that the rate commission is in a position to protect the private utility from encroachment of government ownership. It generally takes the form of either threatened competition or actual competition, and in most of the States the commissions have no jurisdiction, certainly as to a Federal project they would have none.

Q. Aside from the fact of the encroachment of public district ownerships I had in mind just areas where there is Federal hydro development. Isn't the rate of return still fixed on whatever bases are taken into consideration in rate determinations?

A. As I said in my testimony, if that is what we are discussing, the possibilities of government competition, the presence of government hydro development in an area is not of itself a menace, and no immediate menace is evidenced by our experience so far in El Paso. There the government, in connection with an irrigation project, put in a hydro-electric development and El Paso Electric Company worked out a contract with the consent of the City of El Paso and buys a substantial amount of power from this hydro development. But the danger of that development being there is that there is always the urge on the part of certain of the citizens to say, "Well, why don't we take this God-given power that the government is willing to give to us for nothing and go into business for ourselves?"

Q. In other words, the effect, to your way of thinking, is that the development of hydro in a particular area by the Federal government leads to these other ramifications as you have just explained them?

A. That is correct.

Q. Speaking of adverse changes in the policy of regulatory authorities, will you explain, please, or amplify your remarks in this connection?

A. Yes. As I just mentioned a few moments ago, in all the situations where we are operating it has been our policy to cooperate with the Commission in endeavoring to follow rate policies which are fair both to the consumer and to the investor, and by following such a procedure we have been able to get along without the necessity of litigation, and we have gotten fair results for the investors, and we have had fair rates for the consumers. There is a move on the part of some regulatory exponents to apply harsh standards of regulation that would be a severe burden on our properties and on the industry generally if they were universally adopted, and I have in mind particularly in that, reference to the adoption of straight line depreciation retroactively.

Q. Well, can you foresee any adverse changes in the policy of regulation in the next five years?

A. Well, I can see a trend to it in certain quarters. Now, how far it is going I don't know. As I said earlier, I don't attempt to be a prophet and don't care to put myself in the position of attempting to be one.

Q. I gather from your testimony with respect to nuclear energy as a factor which might affect future price levels that it is impossible for you to make any prediction at this time?

A. That is correct.

Q. You testified that "the adverse factors which I have just referred to"—I take it you are speaking of the five factors you have just spoken about—"are common to the utility industry generally and are no more imminent in the area served by our subsidiaries than they are generally throughout the country, so that present price levels of securities do reflect the extent to which the investing public is presently appraising these hazards, but to say that these prices reflect reasonably foreseeable future values is obviously not correct, as only the future can disclose what these latter values may be."

D. C. Barnes—Cross Examination (Cont'd)

Will you admit, Mr. Barnes, that to the extent that these factors which you have discussed and which we have discussed again, are foreseeable, that the present market does reflect and weigh them accordingly?

A. Yes, I think it does.

[R. p. 618] By Mr. Kanton:

Q. Mr. Barnes, in the considerations that the Board of Directors and you as a member of the Board of Directors discussed before the filing of this plan, was it your general opinion that liquidation of Engineers was the only practical method that you knew of to carry out the objectives of Section 11?

A. Yes, I think it was.

Q. Could it be done in other ways?

A. Yes, we could have sold the securities of Gulf States and El Paso and continued to hold Virginia.

Q. You also could have merged or consolidated Engineers and Virginia or sold any of the assets or distributed any of the assets in other different ways than as proposed herein?

A. Having first sold Gulf and El Paso, we could have merged Virginia and Engineers as an alternative method.

Q. Why did the Board of Directors think that the machinery of liquidation should be availed of if there are other practical ways of carrying out the objectives of Section 11?

A. Well, if your first question related to carrying out the objectives of Section 11, I want to change my answer in which I said that Engineers could have been continued as a holding company over Virginia alone because I do not think that would have carried out the objectives.

Q. You mean it is your belief that under the Holding Company Act, Engineers could not be continued in existence as a holding company over Virginia alone?

A. If it were, I do not think it would be carrying out the objectives of Section 11. In other words, I think that would be an unnecessary complication of corporate structure because it would serve no useful purpose and would merely burden the investors with the expense and cost of maintaining an extra corporation without any compensating benefit.

Q. I do not think you quite got the intent of my question. Let me try it again. Why did the Board of Directors think that the use of the machinery of liquidation should be availed of if, as you have just testified, there are other practical ways of carrying out the objectives of Section 11 which as you put it, and which we know, is to get rid of Gulf States and El Paso?

A. Well, I am not sure that I understand the purport of your question. It seems to me that the disposition of the properties that we are required to divest ourselves of under Section 11 constitutes a liquidation. You might sell the properties to some new security holders but it seems to me, in my lay mind, that would be a sale in partial liquidation of the holding company business, so I do not see how you are going to conform to Section 11 without following the procedure of liquidation.

Q. Liquidation to your mind meaning whether you sell the assets, distribute the assets or merge the company—it means to you under the objectives of Section 11 that you were, in effect, liquidating the company?

A. That is correct.

Q. Did the Board of Directors, including yourself, think that the liquidation preference of the Engineers preferred stock furnished the overriding standard for the treatment of the preferred stockholders in this proceeding?

A. I think the directors recognized that what you refer to as the liquidating preference is the contract right under the charter. I think the Board of Directors figured that that should be considered in the light of what was fair and equitable.

D. C. Barnes—Cross Examination (Cont'd)

Q. And you gave, as I understand from Mr. Benjamin's testimony and from hearing the opinion of Mr. Tucker, the main weight to that consideration, the liquidation preference as providing the fair and equitable treatment of the preferred stock?

A. I think after weighing what was fair and equitable, the directors were all convinced that it was fair and equitable to the preferred stockholders to receive the involuntary redemption price.

Q. As provided in the charter?

A. As provided in the charter.

Q. Isn't it true, Mr. Barnes, when you speak of a proposed dissolution and liquidation of Engineers as being an involuntary liquidation, this is in your own mind as a layman—don't you have in mind the Federal bankruptcy laws of Chapter Ten of the Bankruptcy Act or any financial failure of the company?

A. No, I do not in my own mind analyze it in that regard. In my mind it seems to me that had the draftsmen of the charter had that solely in mind, they would have so stated in drafting the charter. They made the charter broader than that so it would cover any involuntary liquidation of the property whether from bankruptcy, receivership or from any other cause, and what carried weight in my mind was, what I think, the Chief Justice said in the Otis case—he pointed out that the language should not be restricted or that the application of the charter should not be restricted merely because the Public Utility Holding Company Act had not been passed at the time the charter was drawn, that is was, in effect—he did not use this language but I am paraphrasing it—like an insurance company saying that they could not pay death benefits to a person who was killed by an atomic bomb because they did not know there was an atomic bomb at the time they wrote the policy.

Q. Wasn't the Chief Justice's decision in the Otis case a minority opinion?

D. C. Barnes—Cross Examination (Cont'd)

A. His was a minority opinion but there is nothing to show that the rest of the court did not follow him on that particular point.

Q. Then it is your opinion, as I understand it, and the opinion of the Board of Directors, that this is a possible situation which the parties had in mind when they entered into this charter and formed Engineers?

A. I cannot speak for the rest of the directors but I feel very strongly that the people who drew the charter of Engineers did not intend to limit it solely to a bankruptcy or a receivership proceeding.

Q. In other words, you feel that the use of the language "liquidation", voluntary or involuntary notwithstanding, does not have in mind only Federal bankruptcy or financial failure of a company, that perhaps something else may arise; is that correct?

A. Yes, I think in my mind liquidation means disposal of the assets and it can be done either voluntarily, in which case if the common stockholders elect to do it, they should pay a premium to the preferred stockholders. If it is done involuntarily, without their desire, then, in my opinion, the people who drew the charter intended that the preferred stockholders should only receive $100 a share.

Q. The Holding Company Act did not take away the right, as you understand it, from the common stockholders to voluntarily liquidate this company, did it?

A. Not in the least.

Q. And that if the common stockholders of Engineers today wanted to voluntarily liquidate Engineers, they could?

A. Certainly they could.

Q. Then do you consider Section 11 a situation where the company is in financial difficulty in the ordinary sense?

A. Not in the least.

Q. And you do not consider Engineers to be in financial difficulties at the present time?

A. Well, not in the way of financial difficulties as ordinarily expressed. In other words, they are not embarrassed to pay their debts. They are suffering financial reverses as a result of the impact of the Holding Company Act.

Q. I would like to read to you a statement made by counsel for Engineers, Mr. Tucker, at the time he argued the Western Public Service Company case before this Commission. I am referring to Page 10 specifically of his oral argument, the second paragraph thereon, and I quote: "Section 11 is not a situation where the company is in financial difficulty in the ordinary case and it certainly would be so in our case because we have no bonds, we have no bank debts. We just have preferred stock. It is an arbitrarily and forced statutory determination of the enterprise and it has no relation whatsoever to any factors which the parties could have had in mind when they entered the enterprise."

Also, just previous to that statement by Mr. Tucker, he made another statement and I quote: "When you act under the bankruptcy laws of Chapter Ten on account of the financial failure, the stockholders must have been deemed to have had the financial failure of their organization in mind when they acquired their investment."

This information that I am reading is contained in Commission's Docket No. 70-453-1-2, which is the first duplicate copy. I may state for the record that I tried to find the original docket but I could not. Therefore, I used this first duplicate copy.

In the light of the remarks of Mr. Tucker which I just read to you, do you still think that this is a situation that the parties had in mind when they entered into the charter and formed Engineers, and also——

A. May I answer that first?

Q. Yes, sir.

A. I do not think they had the Holding Company Act specifically in mind when they framed the charter but I do think they had in mind that the involuntary liquidation

provision should apply in a case of involuntary liquidation, whether by bankruptcy or otherwise.

Q. What about his statement, "When you act under the bankruptcy laws of Chapter Ten, the stockholders must be deemed to have had the financial failure of their organization in mind when they acquired their investment"?

A. I do not know what that means.

Q. Referring now to Amendment No. 4, Paragraph 9, Part One of Division C, the paragraph beginning that "Within sixty days after Part One of the plan becomes effective . . . Engineers shall, without further action by the directors or stockholders of the Engineers", take certain steps to provide for the dissolution of Engineers. Can you tell me what rule or provision of law the Board of Directors had in mind when you set up the four steps specified under this Paragraph 9 for dissolution of Engineers?

A. I think they relied on the legal knowledge of their counsel, Mr. Tucker.

Q. And they adopted his recommendation to that effect?

A. I think so.

Q. Did Mr. Tucker advise you whether he was relying to any extent upon Section 39 of the Delaware Corporation Law?

A. It is my understanding that Mr. Tucker was following the procedure that we followed in the case of Puget Sound Power and Light Company where we had a Section 11-E plan approved by the Securities and Exchange Commission and the company took certain corporate action in Massachusetts in accordance with the order of the court.

Q. In other words, the plan as now set forth does not provide for any stockholder's vote for either the dissolution of Engineers or the naming of a board of trustees to carry out the proposed liquidation after the dissolution?

A. That is correct.

Q. What is meant in the plan and in the statement which follows in Paragraph 9 where it is stated that in the liquidation of the debts and obligations of Engineers from the

estate of Engineers, it shall only be "other than the shares of the common stock of VEPCO"?

A. Well, I think the purpose of that is to impose on the trustee the burden of liquidating the debts and obligations of Engineers out of the income derived from the common stock of Virginia Electric and Power Company, so far as they could do it, to the extent that in final liquidation the largest number possible of shares of Virginia Electric Power Company common stock should be distributed to the Engineers common stockholders.

Q. In other words, does this foreclose the trustees from selling any common stock of VEPCO?

A. Not at all. It just says, to the extent possible to liquidate the debts; that is, other than the shares. If it is not possible to liquidate debts and obligations without disposition of the stock of Virginia Electric Power Company, presumably they would be required to do so.

Q. Is it the purpose of this provision to say, in effect, to the trustees, "You have a three-year period within which to liquidate Engineers. During that period, try to generate enough cash from Virginia in order to pay off all the obligations of Engineers and by so doing, at the end of the three-year period, liquidate Engineers and turn the Virginia common stock over to the present common stockholders of Engineers"?

A. As far as it can be done.

Q. Of course, does this foreclose the trustees from ever selling any of the common stock of Virginia during this three-year period?

A. It does not foreclose them if it is necessary to do that in order to liquidate the debts and obligations, provided it could not have been done from some other source.

Q. Meaning Virginia?

A. Meaning Virginia.

Q. In other words, it is just a warning to the trustees?

A. I think it is a direction of how to conduct the trust. The purpose of the statement in here is to direct the trus-

tees in the operation of this trust to apply the income of the trust as far as possible to the payment of debts and obligations of the trust.

Q. And this was adopted by the Board of Directors?

A. That is correct.

Q. Except, of course, Mr. Streeter who objected?

A. Mr. Streeter did not vote because he had not been in receipt of a draft of the proposed amendment in sufficient time to give the matter consideration.

Q. But the six other directors who perhaps will all be trustees, with the except of Mr. Hanlon, all voted for this provision?

A. That is right.

Q. Correct me if I am mistaken, Mr. Barnes, but it appears from the testimony given and the exhibits placed in evidence in this proceeding, that Engineers is apparently giving lip service to the proposal of selling its Virginia common stock for the use of any payment to be made to its preferred stockholders and instead is just attempting to keep the corporate entity of Engineers going in one form or another in order to permit VEPCO to generate sufficient cash to meet any of these payments so that if the final liquidation of Engineers occurs as proposed several years after the consummation of Parts One and Two of the plan, the Virginia common stock will be distributed to the Engineers common stockholders just as it is today.

A. I do not know what you mean by giving lip service. There is no attempt to give lip service to anything. This is a straightforward, honest plan designed to meet the requirements of Section 11. It is also designed, as far as possible, to protect the interests of all classes of the stockholders, preferred as well as common, to do what the directors thought was fair for the preferred stockholders. They thought that it was in the interest of the common stockholders to conserve the trust as far as possible and to see that they got continuance of their interest in the subsidiary companies, and this is part of that same program.

D. C. Barnes—Cross Examination (Cont'd)

Q. The overriding idea that I had in mind here was then, as we discussed it before, is to keep Virginia intact as it is today?

A. As far as it can be done.

Q. And get cash some place else?

A. And get cash from the earnings of Virginia.

Q. But if it becomes necessary to sell any of the common stock of Virginia in order to liquidate Engineers finally, it will be done?

A. That is correct.

Q. Why was the statement placed in the plan—and I am paraphrasing—that upon the dissolution of Engineers, no common stockholders of Engineers shall have any right to require any different method of liquidation than the one which would attempt to distribute as many of VEPCO common shares as possible to the Engineers common stockholders? What is the purpose of that provision?

A. I think that was largely designed to prevent strike suits.

Q. You mean individual or small groups of stockholders trying to tell the trustees to sell. Well, under the formula that this is set up, stockholders cannot be in a position to advise the trustees or make the trustees sell any of the VEPCO common stock if the Commission approved the plan as now filed.

A. That is correct. The common stockholders' recourse, as I understand it, ceases when the plan becomes effective, when the dissolution certificate has been filed. Then it becomes the responsibility of the trustees.

Q. In other words, the only reason that this was included was in order to prevent, as you put it, strike suits?

A. I would like to check with Mr. Tucker on that. He is fully qualified to answer that.

Mr. Tucker: Well, the ordinary liquidation—if a stockholder wants to insist on it—is one where the liquidation is in cash and he gets cash money. That was one thing that we did not want to happen in this situation. To the ex-

tent possible, as Mr. Barnes has explained, we wanted to distribute the common stock of Virginia Electric Power Company to the common stockholders of Engineers. Now, we wanted to preclude any stockholder coming in and insisting on the sale and the distribution of the cash, and this was an attempt to do that.

* * * * *

[R. p. 635] Mr. Kanton: At this time, I would like to offer in evidence certain releases which I think have some bearing upon the proceeding here and to which specific references have been made by counsel and myself during the time that this proceeding has been in progress.

I would now like to introduce into evidence as Commission's Exhibit No. 3, the Holding Company Act Release No. 1453 which is contained in the volume numbered Four-SEC-619. I attempted to get a copy of this release from the Publications Division but they say none is available, so I would like to incorprate by reference, if counsel will concur, this opinion which is contained in the Commission's Volume 4, Page 615.

The Examiner: Is there any objection?

Mr. Tucker: Well, I would like to examine them to see what it is all about. (Book handed to counsel) What is the purpose of the offer? What do you expect it to show?

Mr. Kanton: It is serving the same purpose in bringing the record up to date, to show how many shares of preferred stock of Engineers have been acquired and the opinions of the Commission in either granting the re-acquisition of preferred shares or turning it down.

Mr. Tucker: Well, I have no objection.

The Examiner: I understand there is no objection. That it will be incorporated in the record by reference as Commission's Exhibit No. 3.

(Commission's Exhibit No. 3 is incorporated by reference.)

Mr. Kanton: I would now like to offer as Commission's Exhibit No. 4, Holding Company Act Release 2699 issued

under date of April 16, 1941 by this Commission, permitting Engineers to reacquire and retire no more than 5,000 shares of its preferred stock.

Mr, Tucker: May I see that? (Paper handed to counsel.) I have no objection.

Mr. Condon: No objection.

The Examiner: That will be received in the record as Commission's Exhibit No. 4.

(Commission's Exhibit No. 4 is received in evidence.)

Mr. Kanton: I now would like to offer in evidence as Commission's Exhibit No. 5, Holding Company Act Release No. 4114, dated February 15, 1943 by the Commission, wherein the Commission held that the reacquisition of the preferred stocks at that time would not conform to the fair and equitable standards of Section 11 and that they were, therefore, prohibited.

Mr. Condon: Is that the 35,000 shares with respect to the Western application?

Mr. Kanton: That is correct.

Mr. Tucker: No objection.

The Examiner: That will be received in the record as Commission's Exhibit No. 5.

[Note: H. C. A. Rel. No. 4114 is reported at 12 S. E. C. 804 (1943).]

(Commission's Exhibit No. 5 is received in evidence.)

Mr. Kanton: I now offer in evidence as Commission's Exhibit No. 6, the release bearing the number 4997, issued by the Commission on April 14, 1944 and permitting Engineers to reacquire on the open market preferred stock not in excess of $4,000,000.

The Examiner: Any objection?

Mr. Tucker: No objection.

The Examiner: It will be received in the record as Commission's Exhibit No. 6.

(Commission's Exhibit No. 6 is received in evidence.)

* * * * *

Hearing on January 4, 1946.

RICHARD N. BENJAMIN,

resumed the stand and testified further as follows:

Cross Examination

* * * * *

[R. p. 681] By Mr. Condon:

Q. Mr. Benjamin, I have before me and hand you your Exhibit Number or Applicant's Exhibit No. 31, which is a letter to stockholders by Engineers Public Service, dated September 10, 1945, and I direct your attention to this sentence:

> "Further consideration and discussion with personnel of the staff and the Commission of that liquidating holding company plan led to the conclusion by the directors that such a plan would not be likely to receive the approval of the Commission under the conditions existing in the Engineers System."

and I ask you to examine that and see if I have read it correctly?

A. Yes, you have read it correctly.

Q. Now, is it not a fact that your company considered a number of different plans and proposals with respect to the provisions of the Public Utility Holding Company Act of 1935, commencing, let us say, in or about 1939 or 1940 and continuing down until the time the plan was filed in the instant case?

A. I think that is true, except that I don't recall any prior to 1941.

Q. 1941. I accept your amendment. Now, is it not the fact that the decisions with respect to all of those proposals as to whether to proceed with the filing of plans or not to proceed with them were vested in the sound, independent decision of your Board?

A. That is correct.

Q. There would have been nothing to have prevented the Engineers' Board from filing a three-holding-company plan and asking the Commission to set a hearing, if it so chose?

A. That is correct. My understanding is that any company can file a Plan under Section 11(e) if it so desires.

Q. And would your answer be the same with respect to the other considerations for disposing of proposals that faced Engineers between 1941 and 1945 with respect to the freedom and liberty of action on the part of your Board?

A. That is correct.

Q. Now, commencing with 1941, would you state in a general way whether or not there was any basic principle that guided the acts and the decisions of the Board of Engineers as to the method of treatment of the preferred stock?

A. To the best of my knowledge, every Plan that was considered by the Board of Directors of Engineers for full compliance with the Holding Company Act contemplated the payment to the preferred stockholders of $100 per share, plus accrued dividends.

Q. Never anything more?

A. Not to the best of my recollection.

Q. Is it fair to state that the dominant principle that guided the Board in its decisions with respect to its several plans—and I do not mean formal plans, but considerations of plans—was to preserve for the common stockholders the equities in the going concerns that would be left if, as and when it became necessary to dispose of Engineers?

A. Would you read that question, please?

(The question was read by the reporter.)

THE WITNESS: I think that is correct.

By Mr. Condon:

Q. Do you recall your testimony that there were four different ways that this preferred stock problem might have been treated? I do not wish to refer you to the detail, Mr. Benjamin?

A. I do recall.

Q. Just the substance of it?

A. I do recall it.

Q. Now, did you mean to suggest that those were the only four ways that occurred to the Engineers' Board or to the management to deal with this problem of the preferred stock?

A. No, I think there were other ways that might be used. I did not mention here the three-holding-company plan, for example.

Q. Would you state now for the record what additional ways occurred to you as to what treatment might be accorded to the preferred stock in connection with your Plan, other than those you have already mentioned?

A. When you speak of what treatment might be accorded the preferred stock, I do not quite understand your question, Mr. Condon.

Q. Are you unfamiliar with that term, the treatment to be accorded the preferred stock?

A. I did not mean that, but I was not clear as to your question. I hate to ask to have it read again.

Mr. Condon: Yes, please read it.

The Examiner: Will you read the question back to Mr. Benjamin?

(The question was read by the reporter.)

"Q. Would you state now for the record what additional ways occurred to you as to what treatment might be accorded to the preferred stock in connection with your Plan, other than those you have already mentioned?")

By Mr. Condon:

Q. By way of illustration, if this will assist you, Mr. Benjamin, did you give any consideration to a one-stock Plan? Did you give any consideration to a package plan?

A. Both those plans were mentioned.

Q. All right. Now, would you continue? Tell us what additional ways or methods might have been employed by

the Board to take care of the preferred stock, other than the ones reflected in the present plan filed in September?

A. Well, another possible plan would be the so-called Preference-Common Plan, similar to the Philadelphia Electric Plan.

Q. Yes.

A. That was adopted by this Commission. Commonwealth & Southern has recently proposed a plan whereby the stocks would be put up in trust for a period of five years, and the common stockholders given the right to take down their pro rata portion of the underlying securities upon payment of the preferred stock, I believe. I am not too familiar with the terms of that plan, but——

Q. That is near enough for identification purposes. Can you think of any others?

A. That is all I can think of now, Mr. Condon.

Q. Yes. Now, will you state for the record what one or more of those proposals were given consideration by the Engineers' Board, and state when that was done?

A. (No answer).

Q. Let us take them one at a time. Did the Board of Directors ever consider a one-stock plan?

A. I do not recollect that any formal presentation of a one-stock plan was made to the Engineers' Board or discussed by them on that basis. I believe that the general subject of one-stock plan has been discussed from time to time, but I cannot give you any definite dates or statements concerning that.

Q. Yes. Now, have you had occasion to review the minutes of the Board of Directors of the Engineers Company since 1941 on, recently, Mr. Benjamin?

A. Yes. I went through the minutes from 1941 on.

Q. Yes. Were you kind enough to send me over copies of those?

A. Yes.

Q. Is it your best recollection that there is any reference to a one-stock plan in any of those minutes?

A. I don't recall seeing any reference to a one-stock plan in the minutes itself.

Q. No. Let us talk about the package plan. When, if at all, did the Board consider a package plan for the preferred stock,—and I ask you whether or not there is any reference to that in the minutes of the Board of Directors from 1941 to date?

A. No, I don't believe there was any reference to a package plan in the minutes of the Board of Directors of Engineers during that period.

Q. Now, other than the Plan that was filed, do you know whether it was considered by the Board?

A. Well, I think it was discussed in a general way with the Board from time to time, as one of the means which companies had been using for a compliance with the Act, but I don't believe there was any particular plan ever proposed.

Q. Do you have any independent recollection, Mr. Benjamin, as to when and under what circumstances the package plan was discussed with the Board or at a Board meeting?

A. No, not other than what I have just stated; I don't have any idea as to dates, or——

Q. Could you fix the year? Was it done in 1945 or 1944 or 1943?

A. Well, I think that when these other plans were discussed, there was some general discussion about other ways that it could be done, and at the moment the particular plan that was being considered was the one that appeared to be the best one from the point of view of the directors.

Q. You mean the Plan as filed?

A. The Plan as filed, and the previous plans that had been discussed with the Directors, such as the Three-holding-company Plan and the Preference Common Plan, and things of that sort.

Q. Now, was the Three-holding-Company Plan discussed with the Directors?

A. Yes, that was discussed with the Directors.

Q. Can you distinguish that in your own mind, between that Plan and, say, the Package Plan?

A. Yes, I think there is a distinction.

Q. In other words, from the standpoint of the degree of interest and consideration by the Board?

A. Well, I think the Three-Holding-Company Plan was the one that the Board thought was the best plan to follow, and therefore that was the one that was considered at that time.

Q. Most carefully?

A. Well, I would not say most carefully. I think the other plans were considered, but the Board felt, I gather from statements I heard made there, that they thought the Three-Holding-Company Plan was the best plan to follow.

Q. Now, did you keep the minutes of these meetings, Mr. Benjamin?

A. Yes, I did.

Q. Was it the custom and practice for you to omit discussions about plans from the minutes of the meetings of the Board?

A. Well, I did not record all of the discussions made at these meetings, because they were general in character, and I put down, to the best of my ability, the specific data, when the specific data was presented, but did not always do that. In other words, sometimes Mr. Barnes would have a statement of general interest that he would discuss with the Board, and I would not make any particular record of that statement.

Q. What data was mentioned to the Board with respect to the Package Plan, Mr. Benjamin?

A. Well, I don't believe any formal plan or any formal draft of a plan was presented with respect to the Package Plan. I think that the feeling was that both the Package Plan and the One-Stock Plan involved a determination of values in the future which was very difficult to establish with any degree of certainty, and that the Three-Holding-

Company Plan, for example, avoided the need of that, because the preferred stockholders would get the amount to which they were entitled, in the opinion of the Board, as I understood it from conversations, namely, the involuntary liquidating price.

In other words, they would be paid off in cash, and there would be no need of taking the uncertainties of the future into consideration.

Q. Mr. Benjamin, is it not a fact that another concept which the majority of your Board had was to resolve all the uncertainties as to future earnings and prospects in favor of the common stockholders, and to restrict the preferred to $100 and accrued dividends?

A. Will you read that, please?

(The question was read by the reporter.)

The Witness: Well, it seems to me that the purpose of the Board was to see that the preferred stockholders received the amount to which the Board thought they were entitled, and that they felt that, for example, no dividends would be paid in on the common stock, and that all of the equity behind the preferred stock would be kept there until this commitment to the preferred stockholders had been met.

By Mr. Condon:

Q. I believe, with respect to that, you testified in response to one of Mr. Kanton's questions, that the principal objective, aside from the tax technique, implicit in the retention of dividends, was to provide a fund to pay off the preferred stock. Is that clear in your mind?

A. I think that was the—I don't recall that I testified to that but in any event I think that one of the principal purposes in retaining the cash in Engineers was to provide funds to pay off the preferred stock.

Q. Yes. Now, coming back to this consideration that you say the One-Stock Plan and Package Plan had, you said that the Board felt that they wanted to provide for what they felt the preferred was entitled to receive, some such

language as that. I am not quoting your precise words—is that the substance of your testimony?

A. Yes, I think so.

Q. Yes. Now, will you state for the record just what was before the Board of Directors in the way of financial data, statistical reports, studies, analyses, surveys and any other material of like tenor, and effect, upon which the Board acted in reaching the conclusion as to just what it was that the preferred was entitled to get?

A. Well, I think that prior to the time we filed our El Paso (Delaware) application with the Commission, that——

Q. That was in 1944?

A. In 1944—that everyone had in mind, as far as I know, that the amount to which the preferred stockholders were entitled was $100 a share in case of an involuntary liquidation.

Q. That was just because of the provisions of the Charter; is that right?

A. The Charter provisions, and also the cases that had come before the Commission here. It was not until there was a dissenting opinion in the El Paso (Delaware) case that this question was raised.

Q. That is, Commissioner McConnaughey's dissent?

A. That is correct.

Q. Do you recall the date of that opinion or the time of its approximate release, Mr. Benjamin?

A. Well, it was in late 1944.

Q. It was the latter part of 1944?

A. That is right.

Q. Yes.

A. And the Board of Directors was advised of this dissenting opinion, and then, to the best of my recollection, none of the directors raised the question about any additional amount being payable until the May, 1945 meeting, when Mr. Streeter raised the question.

Q. Mr. Benjamin, I do not wish to interrupt you, but my question related to the data and statistical reports,

analyses, surveys, studies, and data of that type that the Board had before it in deciding on the question as to the amount to which the preferred was in its judgment entitled.

I do not wish to stop you. If you feel that you wish to continue, I do not want to preclude you, but I think if you can focus your answer more directly on the question, it might help.

A. Well, I was giving a little of the background, and your question relates to the data presented to the directors on the basis of which they arrived at this decision and——

Q. The decision in September and also prior decisions, if there were any?

A. That is what I thought you referred to.

Q. Yes.

A. The prior decisions under the Three-Holding Company Plan and the various plans that had been presented, all of which had this same factor in there, and the reason I gave that background was to bring out that there was a feeling on the part of everyone on the Board, I believe, that the preferred stockholders were entitled to receive their contract obligations.

Q. As they were advised?

A. As they were advised, and they—after the dissenting opinion of Commissioner McConnaughey and after the Otis case, which was brought to their attention, then statements were presented to show what the management felt had a bearing on the fairness of living up to the contract provisions, and the only statements that I recall that were presented to the Board were the statements showing the amount of dividends, amount of earnings which had been left in the operating properties, the sales by the company of various properties since the Holding Company Act was passed, the financial statements that were included in the plan itself, as originally filed.

Q. Anything else?

A. I am just trying to think. (Referring to papers.) There was considerable discussion, I recall, of the present

market prices of both the preferred stock and the common stock. Mr. Tucker's opinion, which was a most important consideration, I believe, in the Directors' decision—of course, I don't know what their motives and thoughts were, but this opinion, as you know, was presented to the Board, and in it Mr. Tucker pointed out some of the reasons which led him to the conclusion that it was fair and equitable to pay $100 and accrued dividends and no more, and among those considerations was the contract, and it was that the liquidation of Engineers was an involuntary liquidation, and that to pay the premiums would be to throw the entire burden arising from the Act on the common stockholders, and that the circumstances under which the preferred stock was issued, and its course in the market since its issuance, lead to the conclusion that the preferred stockholders would be fairly treated if they received $100 per share.

In connection with that he mentioned some of the history of the preferred stock, with which, I believe, all the directors were familiar of their own knowledge.

He also referred to this dividend statement and the fact that Engineers' common stock has not received any dividends since 1932.

Q. Those are all the statements you recall?

A. Those are all the statements I recall at the moment, Mr. Condon.

Q. Mr. Benjamin, have you fully and fairly stated, to the best of your knowledge, information and belief, each and all of the data and material that was before the Board of Directors of Engineers at the time it made its decision in or about September of 1945, to pay the preferred stockholders $100 plus dividends accrued, as set forth in the Plan?

A. That is all, to the best of my knowledge, information and belief,—yes; yes, sir.

Q. Mr. Benjamin, does it not impress you that this was rather a one-sided consideration, and that each and every one of these points that you have mentioned were argu-

ments as to why the common stock should receive all the benefits and the preferred get none?

A. No, sir; it does not impress me that way.

Q. It did not then and it does not now?

A. What you are asking me is whether the consideration given by the Board of Directors was taking into consideration only the interests of the common stockholders?

Q. Yes.

A. No, sir, I think that is not true.

Q. Mr. Benjamin, is not the contention that amounts were left in Engineers and not paid out in dividends a reason why the common should be favored?

A. Read that.

(The question was read by the reporter.)

By Mr. Condon:

Q. According to your concept of this.

A. I don't know that I understand that, Mr. Condon. Let me see if I can try to answer it. The leaving of the funds in the operating company and in the holding company, I think, increased the equity behind the preferred stock and increased the possibility—probability—that they would receive the amount to which they were entitled.

Q. Yes. Now, was that the exhibit that you prepared, and which was submitted here in evidence with respect to the total amounts of moneys left in the companies, the operating companies, and in Engineers before the Board at the time of the plan?

A. I think that statement was presented to the Board by Mr. Barnes in substantially that form, Mr. Condon, and not brought down quite as far. An earlier draft of that same statement, I think, was presented to the Board. Mr. Tucker referred to a figure of $22,000,000 in his opinion, and I think that the difference between the $22,000,000 and the amount shown in this exhibit is due to the lapse of time between the preparation of the two exhibits.

Mr. Scheetz: Mr. Condon, could we have that exhibit identified? I believe it is Exhibit 30.

Mr. Condon: 30.

By Mr. Condon:

Q. Now, when is your best recollection as to when the prior draft of Exhibit 30 was submitted to the Board, at what meeting?

A. I think that statement was presented at the May 24, 1945 meeting, and the figures were brought down through March, 1945.

Q. Is that the meeting at which Mr. Streeter voiced his first formal dissent to the proposal to limit the preferred to $100?

A. Yes, I think that is correct.

Q. That is the meeting referred to by Mr. Barnes in his testimony yesterday?

A. Yes.

Q. Now, was there any exhibit submitted to the Board at or about that time or prior or subsequent thereto about the total amount of property sold by the Company since the Holding Company Act became effective?

A. I think that statement was presented at the same——

Q. At the same meeting?

A. At the same meeting.

Q. Were the financial statements presented at that late meeting?

A. The financial statements included in the plan, you mean?

Q. Or drafts, or something of that sort?

A. (No answer).

Q. When I say "at that meeting," Mr. Benjamin, I am not restricting you to the May meeting—either prior or subsequent thereto is what I am concerned about.

A. I don't believe that the financial statments were presented at the May meeting. There were presented at that meeting copies of two possible plans. One was the so-called

Preferenee Common Plan and the other was the Warrant Plan. I don't believe those statements were presented at that time. There was a draft of the Plan presented to the Board at the July meeting, and I don't know whether the financial statements were in that plan or not.

Q. Is it not your best recollection that they were not?

A. Well, they certainly were not presented in the form as finally filed, because Exhibit B for example, refers to an adjustment made on the books of Virginia in August. I cannot recollect whether they were presented in draft form or not.

Q. Now, is it the fact that whether or not they were presented at the July meeting or the September meeting, the financial statements annexed to the Plan were the only statements that were submitted of a financial character, the statements submitted to the Board were the only statements of a financial character that you can recall, as having been considered by the Board in fixing what the Board felt the preferred was entitled to get?

A. Well, you say, are those the only financial statements that were presented to the Board. I would like to point out that at every meeting of the Board the customary procedure is to present fairly detailed financial statements covering the operations of the Engineers' System, including the so-called White report and other data, bringing the financial information of the company up to date. I mean, that is one of their regular duties, and I think the directors keep advised of the financial situation of the Company and its subsidiaries. Other than that I don't recall any other financial statements being presented.

Q. Now, coming to Mr. Tucker's opinion, Mr. Benjamin, you said that you were impressed that that was the most important consideration, as far as you could read the minds of the directors. I know you cannot speak for them, but is that a fair statement of your understanding?

A. It seemed to me, from listening to the discussions at the various meetings, and particularly those at the July

26 and September 5 meetings, that the directors placed—the directors who voted in favor of the plan—placed great weight on Mr. Tucker's opinion, and in the statements made by Mr. Tucker in his opinion, I know——

Q. The statements, or his conclusions?

A. Well, I think that they were relying on the advice of their counsel and Mr. Leighton, for example, if I remember, stated that he considered the directors should rely on the opinion of its counsel, Mr. Tucker. Some of the other directors stated that they agreed with Mr. Tucker's opinion, and Mr. Kellogg stated that the 11(e) Plan seemed to him to be a dissolution of the Company and an involuntary one, and therefore he thought the preferred stockholders were entitled to $100 a share, but all of those statements were in accord with Mr. Tucker's opinion, and I got the impression that they relied quite heavily on Mr. Tucker.

Q. Did you get the impression that Mr. Kellogg was wholeheartedly behind Mr. Tucker's opinion?

A. Well, there were certain aspects of Mr. Tucker's opinion that Mr. Kellogg had raised some question about, but, as I recall it, none of them had to do with the matter of the amount of the payment to the preferred stockholders.

Q. You mean he did not object to the $100, but he objected to other things?

A. In the first instance, I think he objected to the filing of the plan at all at this time.

The Witness: Off the record for a minute.

The Examiner: Off the record.

(Discussion off the record.)

The Examiner: On the record.

Mr. Condon: I would like the record to indicate that the witness was refreshing his recollection from a letter written by Mr. Kellogg to Mr. Barnes, dated July 27, 1945.

The Witness: Subsequent to the July 26th meeting, Mr. Kellogg spoke to Mr. Barnes and stated that the preferred stock matter, in his mind, was as follows:

He stated that he thought the 11(e) plan——

By Mr. Condon:

Q. Excuse me, Mr. Benjamin, for interrupting you. I plan to use that letter. I do not object to your reading from it. I was trying to get you to tell us what Mr. Kellogg said at the meeting of directors before the date of the letter. Now, if that letter fairly represents Mr. Kellogg's position, at the meeting, as you recall it, I have no objection.

A. Well, I do not believe that Mr. Kellogg raised any of these points at the meeting. I think he raised them subsequent to the meeting.

Q. All right.

A. That is my belief.

Mr. Condon: Would you mind letting me mark that letter for identification, because I plan to question Mr. Barnes about it at a subsequent time. May this be marked as Preferred Stockholders' Exhibit 12 for identification?

The Examiner: Preferred Stockholders' Exhibit 12 for identification. That is a letter from Mr. Kellogg to——?

Mr. Condon: Mr. Barnes,—dated July 27, 1945.

(Preferred Stockholders' Exhibit No. 12 is marked for identification.)

Mr. Condon: Off the record.

The Examiner: Off the record.

(Discussion off the record.)

The Examiner: On the record.

By Mr. Condon:

Q. Now, you recall quite clearly the conversations and discussions that took place at those two meetings on the 26th of July and the 5th of September, last summer?

A. I recall certain of them, Mr. Condon. I don't recall all of the discussion there. I will do the best I can to remember them.

Richard N. Benjamin—Cross Examination. (Cont'd)

Q. Now, can you tell us, using your best recollection of your judgment, would you say that very substantial weight was placed by the directors on Mr. Tucker's conclusion that as a matter of contract, according to his interpretation of it, the preferred was only entitled to $100 plus accrued dividends? Was that a substantial consideration or just a trivial and minor one?

A. Well, I certainly would not say it was a trivial or minor one, Mr. Condon. I think that they felt, in the way they expressed themselves, that it was fair to the preferred stockholders to pay what Mr. Tucker had advised them was their contract right, in the light of all the circumstances that were under consideration.

Q. Now, what were those circumstances, Mr. Benjamin? You note Mr. Tucker's opinion, he refers to circumstances and statements that he is going to discuss orally. Do you recall what those circumstances were and what these oral discussions that were not included in the opinion referred to were?

A. Well, I remember Mr. Wilson making the statement that he considered that the business enterprise of Engineers had been frustrated, and that therefore he felt and believed that the money should be returned to the preferred stockholders without the payment of any premium.

Q. All right. Is that a circumstance that was discussed or is that a conclusion that was expressed?

A. I think there was some discussion at that meeting about the business enterprise of Engineers having been terminated or required to be terminated by the Holding Company Act.

Q. Yes. Now, was there any discussion of the circumstance that the common stockholders were going to have ultimately distributed to them the common stocks of the three operating subsidiaries? Was that circumstance considered?

A. Yes.

Q. What was said about that?

A. Mr. Streeter stated that he opposed any plan which proposed retiring the preferred stock at par instead of its call price as, in his opinion, an attempt to retire the preferred stock at par, while the equity in the companies remained with the common stockholders, would not be the involuntary liquidation referred to in the charter of the company, and that such a partial retirement of the outstanding capital stock would, in his opinion, create a windfall for the common stockholders at the expense of the preferred stockholders.

He also stated that even if the partial liquidation of the capital stock were the involuntary—partial retirement of the stock were the involuntary—just a minute now. (Just strike that out.

No,—he also stated that it would be highly inconsistent to rely on the Public Utility Holding Company Act as authority for the action while the Company continues to assert in the Supreme Court that the Act is unconstitutional.

Q. By "authority for the action" you mean the authority of the Board paying $100 to the preferred, is that right, Mr. Benjamin?

A. Well, I think what he meant was that it was inconsistent to file an 11(e) Plan and pay off the preferred stock as an involuntary—result of the involuntary liquidation of the Company, when the Company was claiming that the Holding Company Act was unconstitutional.

Q. Yes. Now, coming back to those circumstances referred to in your testimony, and in Mr. Tucker's opinion, and with further reference to what he said he was going to discuss orally with the Board of Directors, would you elaborate on that? Can you think of any other circumstances that were mentioned?

A. I think I have already referred to Mr. Kellogg's statement that the 11(e) Plan seemed to him to be a dissolution of the Company, and since such dissolution was contrary to the interests of the Company and undertaken solely due to the requirements of law, it seemed to him to be

clearly involuntary, and therefore, as the charter provides, the preferred stockholders are entitled to $100 a share only.

I recall that Mr. Barnes advised the directors of this dividend statement that was heretofore referred to and the sales of the properties, and that Engineers had been required to dispose of many of its properties.

Q. We have covered that, Mr. Benjamin.

A. Yes.

Q. But I am trying to find out what else you remember.

A. Mr. Barnes stated that it was his opinion that inasmuch as this was an involuntary liquidation, and since an agreement had been made with the preferred stockholders at the time the stock was sold to pay them $100 in the event of an involuntary liquidation, that it was fair to pay that amount to the stockholders, and he also stated the——

Q. That is the so-called contract theory?

A. Well, he was describing the contract and he said he thought it was fair to live up to the contract.

Q. Yes. Now, I am trying to get you to come back to the circumstances that were referred to in your testimony and Mr. Tucker's opinion, as to the suggestion that the preferred would be well treated if they got $100. You mentioned a moment or two ago the circumstances under which the preferred stock was issued. Do you recall that testimony?

A. Yes, sir.

Q. Now, is it not a fact that that preferred stock was issued for cash at par or 99½, I think, in the case of one of the series, two at par or 100 and one at 99½?

A. I think that is correct.

Q. That was not the circumstance, was it, that weighed heavily in the minds of the Board in deciding that the preferred was entitled to only 100?

A. Well, I don't remember whether that was mentioned or not, Mr. Condon.

Q. You mentioned in your testimony a few moments ago the circumstances under which the preferred stock was

issued. Now, I am asking you what the circumstances were that were so extraordinary?

A. Well, nothing extraordinary about them, except for the fact that the stock was not sold in excess of $100 a share. In other words, the stockholders paid approximately $100 a share for it.

Q. Actually $100 for two of the series and $99.50 for the third?

A. Yes.

Q. We will keep the record straight on that.

A. Right.

Q. All right. Now, was it your impression that that fact that the preferred did not pay more than par for the stock weighed in the minds of the directors?

A. Well, I think that was a consideration. How important it was, I don't know, Mr. Condon. I remember the statement was made that if the Holding Company Act had been passed the day after the stock had been issued, that the stockholders should be entitled to—the preferred stockholders should expect to get their capital or their investment back and I think that may have been one of the considerations. I am not too clear on that.

Q. You would not be confusing that with part of Judge Healy's opinion in the United Light & Power case, would you?

A. I would not be confusing it with that. I recall reading Judge Healy saying the same thing.

Q. Did he say that before your meeting or afterwards?

The Examiner: Off the record.

(Discussion off the record.)

The Examiner: On the record.

Mr. Condon: What is the last question, Mr. Reporter?

(The pending question was read.)

The Witness: I don't know.

Richard N. Benjamin—Cross Examination (Cont'd).

By Mr. Condon:

Q. Now, did the circumstance that the preferred stock sold below par for a number of years, say from 1932 to from then on, weigh heavily, according to your impression, with the directors in fixing the amount of $100, which they felt the preferred was entitled to?

A. I think that subject was discussed, Mr. Condon. I don't know how heavily it weighed in the minds of the directors.

Q. Do you recall any comments by any of the directors as to the degree of importance, if any, to be given to such a statement or contention?

A. No, I don't recall any.

Q. It made no impression on your mind particularly, is that correct?

A. That is correct.

Q. Now, have you fully and fairly stated for the record everything that you can recall in the way of discussions that took place at the meetings on the 26th of July and the 5th of September, with respect to what the Board had in mind and before it in deciding that the preferred was entitled to the $100?

A. That is all that I recall now, Mr. Condon.

Q. Would it be fair to say that you have reviewed the minutes of the meetings of the Board and your notes from which minutes were prepared, and all other data in aid of refreshing your recollection, and may your answer be viewed in that perspective?

A. I think that is a fair statement.

* * * * *

(Formal matter concerning adjournment for luncheon omitted.)

[R. p. 709] By Mr. Condon:

Q. Mr. Benjamin, shortly before we reconvened this hearing this afternoon, you made a statement to me that

you wished to either correct or amplify an answer to a question that I propounded this morning concerning the considerations for which the several series of preferred stock in Engineers were issued. Would you so do?

A. In response to one of your questions this morning, in which you asked whether or not all of the Engineers preferred stock had been issued for cash, I answered in the affirmative. It is true that some shares of each series were sold for cash. All of the $5 stock and the $6 stock was sold for cash.

Q. At what prices? Is there any correction in price?

A. No, in the case of the $5 stock, it was originally sold to the public at $100 a share. In the case of the $6 stock, it was originally sold to the public at $100 a share. In the case of the $5.50 dividend stock, 130,000 shares were sold to the public at $99.50 per share. There were additional shares issued in exchange for Puget Sound Power & Light Company securities, and they were fixed on the books of Engineers at $99.50 per share. There were 92,364 shares of this stock issued in the first instance, and later on a few additional shares were issued in connection with that exchange, all at $99.50.

Mr. Kanton: Were there not warrants issued with the $5.50 preferred stock?

The Witness: The $5.50 cumulative dividend preferred stock did carry with it warrants for the purchase of common stock.

Mr. Kanton: Which were never exercised?

The Witness: None of those warrants were ever exercised.

By Mr. Condon:

Q. Would you state for the record, if you know, the date of the issuance of that block of, you say, 92,000?

A. They were issued in——

Q. Approximately.

A. 1928.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Does that clarify the record?

A. Yes, sir.

Q. This morning, Mr. Benjamin, at one point you mentioned among the plans that you said had been explored—if I might use that term—or considered was the so-called preferred common plan; do you recall that?

A. The preference common plan, yes, sir.

Q. The preference common plan. Now, would you state briefly when that was considered?

A. For the first time?

Q. Yes. Fix the approximate time of the consideration of that type of treatment for the preferred stock of Engineers.

The Witness: Off the record.

(Discussion off the record.)

The Examiner: On the record.

The Witness: In referring to my file of drafts of plans, I find a draft dated July 8, 1943, which involves the preference common idea.

By Mr. Condon:

Q. Now, would you state what you mean by the preference common idea, very briefly?

A. This type of plan involved the creation in the operating company of preference common and common stock, the preference common to go to the preferred stockholders of Engineers and the common stock to go to the common stockholders of Engineers. Now, that plan was developed in more detail in May, approximately May of 1945.

Q. Now, is it fair to say, Mr. Benjamin, that the effect of a preference common plan is to give the preferred stock of Engineers a right to participate in the continuing enterprise in principle?

A. It gives them a right to participate in a security in the operating company, but the provisions of this preference common plan were that all of the earnings available for the common stock, payable in the way of dividends,

would be applied first to the payment of a fixed rate of dividends on the preference common stock and then to the payment of that preference common stock, with no dividends being payable on the common stock of the operating company.

Q. And by payment to the preferred stock, you mean the voluntary retirement?

A. No. It means payment at the rate of $100 a share.

The Examiner: What were the provisions for the retirement of that preference common stock, if any?

The Witness: The provisions for the retirement of the preference common stock were that they would be retired at the equivalent of $100 per share.

The Examiner: At any time at the option of the company?

The Witness: At any time at the option of the company.

By Mr. Condon:

Q. Is that the 1943 memorandum you are referring to or the spring of 1945 memorandum?

A. I think that both plans contemplated that. I see a reference here in the 1943 memorandum that they were redeemable at par and no dividends on the common until the preference common is retired, through application of excess cash, and I know that was the intent of the 1945 plan, that they would be retired at the par value.

Q. Did both the 1943 and the 1945 plans, as you have outlined them, anticipate an 11(e) proceeding by the company?

A. Yes, they both anticipate that.

Q. Now, in giving us the list of plans that you say had been considered, did you omit to mention what we might call the "partial payment and reduction of par value plan"?

A. Yes. I overlooked—I think your question this morning was what other ways would there be of complying with the section, and I named several additional ways, and I neglected to name one that was considered by the Board of

Richard N. Benjamin—Cross Examination (Cont'd)

Engineers in the early part of 1945. It is really two plans, but substantially the same idea in both plans.

Q. Would you state, if you will, the time of their consideration by the Board and refer me to the meeting?

A. At a meeting held on February 2, 1945, the Board authorized, subject to the consummation of the sale of Savannah Electric & Power Company securities, the use of $7,849,100 of cash of Engineers to make a payment in partial liquidation of $20 per share on all of the shares of preferred stock of this company, with a 20 per cent reduction in the dividend rate, and a $20 reduction in the redemption price and liquidating value of each of such shares and directed the officers to formulate plans in connection therewith.

Mr. Kanton: When was that, Mr. Benjamin, again?

The Witness: February 2, 1945.

By Mr. Condon:

Q. Now, did I understand you to say that one of the facets of that plan was to reduce by $20 the voluntary redemption price to the extent of $20 for each series?

A. That was the suggestion at that time, yes, sir.

Mr. Tucker: Wait a minute. The voluntary redemption: is that what you asked?

The Witness: That is right.

Mr. Condon: That is what Mr. Benjamin testified to and what he stated and I believe to be the fact. Am I wrong?

Mr. Tucker: All right.

Mr. Kanton: Is that the first time that the Board of Directors ever considered using excess cash to make a pro rata down payment on preferred stock?

Mr. Condon: Off the record.

The Examiner: Off the record.

(Discussion off the record.)

The Witness: Well, I recall at the time of the purchase of preferred stock, 35,000 shares, that Judge Healy made

Richard N. Benjamin—Cross Examination (Cont'd)

the suggestion that a pro rata pay-down on the preferred stock be made.

By Mr. Condon:

Q. You do not mean the purchase, the proposed purchase, Mr. Benjamin, of the 35,000 shares?

A. That is correct. Judge Healy mentioned this as one of the possibilities.

Mr. Kanton: Were you present at the——

The Examiner: One minute. Did Mr. Benjamin finish?

The Witness: Yes.

The Examiner: You said Judge Healy considered it. When and where? I do not think his answer gives that.

The Witness: I said that he made that statement in connection with the order that was issued denying Engineers' application to reacquire 35,000 shares of preferred stock.

The Examiner: That is referred to in Commission's Exhibit No. 5, is it?

The Witness: That is correct.

Mr. Kanton: Do you happen to recall, Mr. Benjamin, at the time of the hearing in the Western case just referred to, when Mr. Barnes was asked a question of this nature by Mr. Tucker, which I will give you in a moment, and which is contained on pages 111 and 112 of the official report of those proceedings on March 20, 1942:

"Q. Mr. Barnes, have you given consideration to the possibility of using your excess cash to make a pro rata pay-down of all the preferred stock?

"A. Yes, we have considered this suggestion, but it seems to be an extremely complicated one from a legal point of view. Our lawyers advise that it would involve, first, a partial liquidation and under the law this could not be accomplished without a majority vote of the common stock, and in my opinion such a vote could not be obtained because it is in effect buying in the stock at the rate of $100 a share at a time when the price in the market is much lower.

"Such a partial liquidation, even if voted by the common stockholders would not be at all satisfactory unless it were accompanied by a radical reclassification of the preferred stock so as to reduce proportionately the liquidation value, the redemption price, and the dividend rate.

"Counsel advises that such a reclassification could only be accomplished under the Delaware law by a charter amendment which would be approved by a majority of the preferred stock, which means a majority of the common stock, and here again, in my opinion, such a program would not receive the requisite approval."

Do you recall that, Mr. Benjamin?

The Witness: Yes, sir.

Mr. Kanton: Does that refresh your recollection as to whether any consideration may have been given prior to this time by the Board of Directors to such a proposal?

The Witness: Well, I can not say, Mr. Kanton, whether that was discussed by the Board of Directors or not. I assume that the Board was kept fully advised of the proceedings in this preferred stock case at the meetings because that was the practice of Mr. Barnes, to do so. Other than that, I don't have any further recollection of discussions on that point at the directors' meetings.

Mr. Kanton: But would you not take it from the question and answer which I have just read that there probably was some discussion on that possibility, but it was turned down for the reason stated by Mr. Barnes?

The Witness: I think that is probably correct.

By Mr. Condon:

Q. Coming back to the other methods of treatment or the possible methods of treatment for the preferred, Mr. Benjamin, among others, you referred this morning to the one-stock plan and the package plan. Was there any consideration given to a partial exchange between the preferred of Engineers and the stock of Gulf States and El Paso, and if

that be the fact, would you state when consideration was given to that and what happened to that proposal?

A. Before I answer that question, could I complete the answer to your previous question?

Q. I thought that you had; I am sorry.

A. No, I had not. At this meeting of February 2, 1945, to which I referred, the directors authorized the officers to file an amendment to the application to the Securities and Exchange Commission for permission to purchase shares of the preferred stock of this company at a price not to exceed $100 per share plus accrued dividends, requesting authorization to reduce the price from $100 per share to $80 per share. The reason for that was that with the $20 pay-down the directors wanted to keep the same proportionate top figure on the preferred stock. Then at a meeting held on February 27, 1945, the directors authorized the officers to proceed with the plan to retire shares of preferred stock of this company on a basis of $100 per share and accrued dividends by the use of approximately nine and a half million dollars of cash of this company.

A cash statement showing the effect of the payment and partial liquidation of $20 per share on the outstanding stocks was presented to the meeting. It was stated by the president that he proposed to discuss this matter further with the Commission before filing an application.

That completes the answer to your question about the two plans that were considered in the early part of 1945.

Q. Before renewing my preceding question, historically what happened to the preference common plan? When was that proposal or consideration abandoned? Was that the last, preceding, or the predecessor of the warrant plan which came up in June?

A. Yes, it was the predecessor of the warrant plan.

Q. Now, in the preference common plan the Board still adhered to the maximum of $100?

A. That is correct.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. And when I say "maximum of $100" I mean plus accumulated dividends.

A. Yes.

Mr. Condon: Now, Mr. Reporter, would you be kind enough to read and transpose the question that I asked Mr. Benjamin when he had not completed his answer to the preceding question?

(The question referred to was read, as follows:)

"Q. Coming back to the other methods of treatment or the possible methods of treatment for the preferred, Mr. Benjamin, among others, you referred this morning to the one-stock plan and the package plan. Was there any consideration given to a partial exchange between the preferred of Engineers and the stock of Gulf States and El Paso, and if that be the fact, would you state when consideration was given to that and what happened to that proposal?"

The Witness: I don't recall the presentation to the Board of any plan for the exchange of Engineers preferred stock for Gulf States and El Paso common stock. I do recollect a suggestion made for such a plan, but it is not clear to me whether or not that plan was discussed by the Board itself.

By Mr. Condon:

Q. Would the effect of that suggestion that you say had been made have been to give the preferred stock a participation in the continuing enterprise, if carried out?

A. If the preferred stockholders exchanged their stock for the common stocks of Gulf States or El Paso, or both, they would have continued in the operation of those—participating in the operation of those companies.

Q. Now, you say the suggestion was made, Mr. Benjamin. Would you fix the approximate time, according to your best recollection, as to when that was made?

A. Well, it was made several years ago and——

Q. Could you be more definite?

Mr. Condon: This is off the record.

The Examiner: Off the record.

(Discussion off the record.)

The Examiner: On the record.

The Witness: My best recollection of when that suggestion was first made was that it was made in 1941. Since that time the suggestion has been made again, but no formal plan, to the best of my knowledge, has been presented to the Engineers Board of Directors. The Engineers Board of Directors were aware of the possibility of the exchange plan as well as the one-stock plan, but my impression of their attitude, gathered from my best recollection of their remarks, is that they felt that those plans had features to them that were not as readily determinable as would be the case in the other plans which the Board from time to time did consider and look upon favorably.

Q. And that one feature, Mr. Benjamin, was the leverage for the common stockholders, was it not?

A. I would say that the one feature was that—the certainty of giving the preferred stockholders the amount to which they were entitled or are entitled is the outstanding feature of the three-holding-company plan and the other plans that have been filed since that time. The one-stock plan and the exchange plan require a determination of factors now which may vary considerably in the future.

Q. And the Board wanted to avoid any such calculation?

A. The Board wanted to give the preferred stockholders the amount to which they were entitled, and they thought the clearest way of doing it was the plans that they had favored.

Q. The Board wanted to avoid calculating the effect of the continuing enterprise in so far as the common stockholders were concerned?

A. It was not——

Q. Valuation and so on?

A. It was not my understanding that they were seeking to avoid the responsibility or the work involved or the expense of making such calculations. My understanding

of their feeling is that they felt that such calculations were necessarily uncertain because of the unknown factors which exist in any situation.

Q. At all events, they did not make those calculations?

A. That is correct, Mr. Condon.

Q. Now, do you recollect a proposal that was considered some time in or about June, 1943, of offering to the preferred stockholders of Engineers in exchange, on substantially the following basis: for each share of $6 preferred, two shares of El Paso Natural Gas common, plus $30 in cash; for each share of $5.50 preferred, two shares of El Paso Natural Gas common, plus $25 in cash; and for each share of $5 Engineers preferred, two shares of El Paso Natural Gas and $22 in cash. Do you recollect that?

A. Yes, I do.

Q. Was that considered by your Board?

A. Yes, that was considered and the plan was filed with this Commission in connection with that exchange.

Q. Yes. Now, that, to the extent that it provided the Engineers preferred stockholders with stock in the El Paso Natural Gas Company, gave them a modest stake in a continuing venture, did it not?

A. Yes, it did.

Q. Now, that plan failed of action, did it not, for reasons that you would state for the record?

A. Yes, the plan failed because at the time the exchange date arrived the offer became unattractive to the preferred stockholders on the basis of market quotations at the time.

Q. For the preferred?

A. Yes, sir. There were some 2,000 shares, I believe, of Engineers preferred stock that had been deposited in exchange for the El Paso Natural stock, but in view of the fact that this was unfavorable to the preferred stockholders, the exchange was called off.

Mr. Condon: Yes.

The Examiner: Why was it unfavorable to the preferred stockholders?

Richard N. Benjamin—Cross Examination. (Cont'd)

The Witness: On the basis of existing market prices, they could have done better to have sold their Engineers preferred stock on the market and purchased El Paso Natural Gas on the market.

By Mr. Condon:

Q. Is it the fact, Mr. Benjamin, that the aggregate value of the exchange proposal in each case for each series amounted to less than $100 per share of Engineers preferred?

A. That is my recollection, Mr. Condon.

Q. And that was an element also that the Board considered as being desirable from the standpoint of the common stockholders of Engineers?

A. Well, this was a voluntary exchange offer that a preferred stockholder could take or not as he saw fit. To the extent that the preferred stock was retired through this exchange at less than $100 it benefited the remaining preferred stockholders and, of course, the common stockholders.

Q. This proposal of exchange indicated a willingness on the part of the Board to permit the preferred to have a modest continuing stake in the enterprise, provided it did not cost more than $100; is that a fair statement?

A. I don't believe that an offer would have been made to the preferred stockholders which would have been in excess of $100.

Mr. Kanton: Is it not true, Mr. Benjamin, that during the time this case was considered the market prices ranged from a low of $40 for the $5 preferred stock to a high of $74 for the $6 preferred stock?

The Witness: I don't recall what the market prices were at that time, Mr. Kanton.

Mr. Kanton: I was reading from Footnote 19 of Release No. 4559 in the matter that Mr. Condon is questioning you about with the question about approving the plan as

proposed, which you are discussing at this time, and that Footnote 19 appears on page 8 of Release No. 4559. Do you wish to look at it, Mr. Benjamin?

The Witness: Yes.

(Mr. Kanton hands the witness a paper.)

The Witness: Yes, it appears that that was the range of the market prices of the preferred stock, a low of $40 for the $5 preferred and a high of $74 for the $6 preferred.

Mr. Kanton: If counsel does not mind my interrupting at this time, I think this would be the proper place to offer in evidence as Commission's Exhibit No. 7 this Holding Company Act Release No. 4559.

Mr. Condon: May I see it, Mr. Kanton?

(Mr. Kanton hands Mr. Condon a paper.)

Mr. Condon: No objection.

The Examiner: It will be received as Commission's Exhibit No. 7.

Mr. Scheetz, I assume you have no objection?

Mr. Scheetz: No objection, sir.

(Commission's Exhibit No. 7 is received in evidence.)

By Mr. Condon:

Q. Mr. Benjamin, do you recall any proposals along this same line for exchanging Gulf stock for the preferred of Engineers, and if you do, will you state when those considerations came about and what happened to that method of treatment for the preferred stock of Engineers?

A. I don't recall any specific proposals put up to the Board of Directors of Engineers, Mr. Condon. I think that that method of compliance has been discussed from time to time in the Board, but I don't recall any specific proposal.

Q. Mr. Benjamin, in your testimony here do you suggest that the management—and in that I include Mr. Barnes, yourself, and other officers and employees, as contra-distinguished from directors, even though I know that some overlap—that the management considered a number of

these matters that we have outlined and that they were not presented to the Board.

A. There undoubtedly have been variations of some of the major types of plans that the management has worked on and not presented to the Board because they had not been fully thought out. However, I believe, to the best of my recollection, that every major type of method of compliance has been brought to the attention of the Board and discussed with them. In other words, I know that Mr. Barnes has mentioned plans filed by other companies and methods followed by them, and I am quite sure the Board has been kept fully advised of each general type of plan that has come along.

Q. Could you fix with any degree of definiteness when the Board was advised of the suggestion of having an exchange of Gulf States stock for Engineers preferred, and if so, where it finds reflection in the minutes?

A. I can not point to any reflection in the minutes of reference to that plan, Mr. Condon. As I have stated before, I think the first time that suggestion was made was in 1941, and I don't remember whether that was discussed with the Board at that time, although I assume it was because I know Mr. Barnes has had the policy of keeping the Board fully advised of discussions on this subject.

The Examiner: Was it the general policy to have discussions at the Board—informal discussions, if you please, at the Board meetings, which were not recorded in the minutes of the Board?

The Witness: Oh, yes, that is the policy. I have not attempted to place in the minutes all of the discussions that have been had but have tried to reflect action taken by the Board on specific matters, and therefore there were many discussions that have not been reflected in the minutes.

The Examiner: Was it the general policy of the company to have the management first consider the various plans and then submit them to the Board?

The Witness: Yes, I would say that was true.

Richard N. Benjamin—Cross Examination (Cont'd)

The Examiner: Did any of these plans originate in the Board itself?

The Witness: I don't believe so.

The Examiner: It was generally done by a suggestion or, rather, by suggestions from the management?

The Witness: That is true.

By Mr. Condon:

Q. Is it not the fact that there was no formal plan ever submitted to the Board of a one-stock variety by the management or anyone else?

A. That is correct so far as Engineers is concerned. As you know, there was a one-stock plan on Puget Sound Power & Light Company.

Q. Is your answer the same with respect to a package plan and a partial exchange plan?

A. So far as the three principal subsidiaries are concerned, yes.

Q. Now, for the purpose of the record is it fair to state that in principle the one-stock plan, the package plan, and the partial exchange plan are more or less variations of the same concept of giving the preferred stock a stake in the continuing enterprise in one form or another?

A. I think that is true.

The Examiner: I gather from your testimony, Mr. Benjamin, that it was the idea of the management and of the Board as well that the preferred stock should be retired rather than treated otherwise. Is that the substance of your testimony?

The Witness: That is correct.

By Mr. Condon:

Q. In May of 1945 when, according to your testimony, the proposal was made to distribute to the preferred stockholders of Engineers $30 a share in cash in partial liquidation and to reduce the dividend rates of each series of pre-

ferred 30 per cent and provide for new dividend rates, did not the matter of a new redemption premium come up for consideration, in May, 1945?

The Witness: Will you read that, please?

(The question was read.)

The Witness: At that time there were three plans under consideration, one of which was the plan to which you refer, and that plan did contemplate a reduction in the premium for voluntary redemption of 30 per cent.

By Mr. Condon:

Q. In other words, the $5 stock would have a new redemption premium of $3.50 and the other two series would have a redemption premium of $7, is that right?

A. That is right.

Q. Now, is it not the fact, Mr. Benjamin, that that consideration came up after the decision of the Supreme Court of the United States in the Otis case?

A. I think so. The Otis decision came out in the early part of the year, did it not? January, 1945.

Q. Is that a fact, then?

A. That this came up for consideration after that?

Q. Yes.

A. Well, this $30 plan was a continuation of the plan to which I referred.

Q. The partial payment plan, Mr. Benjamin?

A. The partial payment plan. That was considered by the Board of February 2, 1945. This particular development of it did occur subsequent to the Otis case.

Q. Now, was that brought up to the Board or was this something that was just the concern of the management?

A. I think that at the May 24 meeting Mr. Barnes referred to previous plans that we had considered, one of which was this partial pay-down plan and the $30 plan was a continuation of the $20 plan spoken of sooner, and after consideration of that, that was the meeting at which the

preference common plan and the warrant plan were presented to the directors.

Q. In answer to my question, was this matter of recasting the redemption figures on the preferred brought up at the directors' meeting in May?

A. I think it was brought up in February, at the February meeting, and whether or not it was repeated at the May meeting, I don't recall. That would only be a partial solution of the Section 11(e) problem, and in my recollection, the directors felt that it would be better to have an overall plan rather than the partial plan.

Q. Now, was Mr. Tucker consulted by your Board or by the management with respect to this proposal to recast the premium provisions, revising them downward percentage-wise?

A. Yes, I think he was.

Q. Did you participate in any discussions or meetings at which Mr. Tucker was present when the Otis case came up for consideration on that point? A. Well, I don't recall any discussion of the premium reduction in connection with the discussion of the Otis case.

Q. That was not discussed?

A. I would not say the Otis case was not discussed. It was discussed, and this partial pay-down plan was also discussed, it being, as I understand it, the opinion of counsel, of Mr. Tucker, that to the extent this statement was made, it was an involuntary liquidation and therefore it was retained, I believe.

Mr. Condon: May it be stipulated by counsel that the opinion in the Otis case was handed down by the Supreme Court of the United States on or about January 29, 1945?

Mr. Tucker: I will not stipulate it because I do not know whether anybody has a copy of it.

Mr. Condon: Subject to verification and check, would you so agree, Mr. Tucker?

Mr. Tucker: If it does you any good, I will so stipulate. I have no independent recollection of it.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Condon: I did not mean that, and if there is a correction, we will correct it. I know it came down about then, but I think that is close to it. If it is not correct, we will make it right.

By Mr. Condon:

Q. Mr. Benjamin, is it not a fair statement to say that while your management considered numbers of proposals only certain of those were submitted in any formal way for action by the Board, concerning the method of treatment to be accorded the preferred stock of Engineers in connection with the Public Utility Holding Company Act?

A. Well, I think that every plan that the management considered, except for minor variations which occurred in between meetings, was discussed by the Board in a general way. I can not say how many of them were presented formally, but I am quite sure that the Board was advised of any major plan that the management had worked up.

Q. Yes, and who decided which were major and which were minor?

A. Well, Mr. Barnes.

Mr. Tucker: Mr. Condon, could I just break in to say that I find in my July 26 opinion, applicant's Exhibit 38, a reference to the Otis case, and I say in there that it was decided January 29, 1945. I unquestionably had the opinion before me when I wrote that opinion, so I am willing to stipulate that that is the date it was decided.

Mr. Condon: All right.

By Mr. Condon:

Q. No one in the management would gainsay Mr. Barnes' decision in that regard, would they, Mr. Benjamin?

Mr. Kanton: I did not hear that question.

The Examiner: Read that question back.

(The question is read.)

Mr. Condon: If that question is embarrassing, Mr. Benjamin, I will withdraw it.

Richard N. Benjamin—Cross Examination (Cont'd)

The Witness: It is not embarrassing. Mr. Barnes' judgment is so sound that I very seldom disagree with him.

By Mr. Condon:

Q. I suppose you work pretty closely with Mr. Barnes and know how he looks at problems like this, do you?

A. I work very closely with Mr. Barnes.

Q. Now, is it not the fact that Mr. Barnes philosophically felt that all of the securities in the Engineers family in the operational zones should be retained for the common stock?

A. I don't know what you mean by "philosophically", Mr. Condon. Let me try to express an answer to your question, if I get the import of it.

I think that all of the plans that the Board has shown a desire to follow contemplates the retirement of the preferred stock at $100 per share and the distribution to the common stockholders of the underlying common stocks.

Q. Now, the only exception to that that you have mentioned, and I would be very glad to have you supplement it, if there are any others to that determination, was the wee small stake in El Paso Natural Gas where the cash and the stock had an aggregate value substantially less than $100, is that right.

A. That is right. The interest in that company was too small to contemplate a distribution to the common stockholders.

Q. In other words, it was so inconsequential that the preferred stockholders could have it and it would not do them any harm?

A. Well, I don't know about that.

Mr. Tucker: I do not think he ought to be required to answer that kind of a question.

The Examiner: You object to it?

Mr. Tucker: Yes, I object.

The Examiner: I will sustain the objection.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Condon:

Q. Is it not the fact that the management did not want to offer the preferred any participation in the underlying securities so that they might participate in the future and growth of the three main operational companies of Engineers?

A. Well, I think the directors felt that, from the discussions that I have heard among them, the preferred stockholders were entitled to receive the amount to which we referred before and that that could be paid off in cash and that the common stockholders should forego any dividends until the obligation to the preferred stockholders had been satisfied.

Q. Is the effect of your answer, Mr. Benjamin, to say yes to my question without using that word?

Mr. Tucker: What word do you refer to?

Mr. Condon: The word "y-e-s".

Mr. Tucker: I do not think he can——

Mr. Condon: I think it is a perfectly proper question. The question was simple and Mr. Benjamin is a very intelligent witness, and I have not pressed for yes or no answers here, but I may have to.

Mr. Tucker: You go ahead and press for them. I will reserve my right to let him explain what he means by yes or no; if he needs to qualify it, I think he ought to do it.

The Witness: I am sorry. I thought I answered the question.

The Examiner: Read the pending question.

(The testimony referred to was read, as follows:

"Q. Is it not the fact that the management did not want to offer the preferred any participation in the underlying securities so that they might participate in the future and growth of the three main operational companies of Engineers?

"A. Well, I think the directors felt that, from the discussions that I have heard among them, the preferred stockholders were entitled to receive the amount to which we

referred before and that that could be paid off in cash and that the common stockholders should forego any dividends until the obligation to the preferred stockholders had been satisfied.

"Q. Is the effect of your answer, Mr. Benjamin, to say yes to my question without using that word?")

The Witness: Well, I can not answer that question yes unqualifiedly because I think the way your question was worded implies that the directors were trying to stop the preferred stockholders from having a participation in the growth of the properties. I think that the directors thought that the preferred stockholders were entitled to receive payment in cash to the amount of their obligation, of the company's obligation to them.

By Mr. Condon:

Q. Mr. Benjamin, are you familiar with the backgrounds of your several officers and directors in a professional way, their connections with utilities and things of that sort?

A. In a general way, yes.

Q. By way of illustration, I heard Mr. Barnes say yesterday that he was connected with the Puget Sound Company for 31 years or thereabouts. Do you recollect that?

A. Yes, I do.

Q. Now, do you know where Mr. Barnes was gainfully employed prior to his connection with Puget Sound?

Mr. Tucker: If you really want to get that expeditiously, I think you might get it from Mr. Barnes.

Mr. Condon: I thought maybe I could get it because of Mr. Benjamin's familiarity. I am not going into this in extenso, Mr. Tucker.

Mr. Tucker: All right.

Mr. Condon: I may ask Mr. Barnes too, but I thought a brief statement by Mr. Benjamin might suffice.

The Witness: Well, Mr. Barnes——

The Examiner: Let me ask you this question before you answer that:

Richard N. Benjamin—Cross Examination (Cont'd)

Have you any knowledge of Mr. Barnes' previous experience or are you merely taking this from the records?

The Witness: I have no personal knowledge of Mr. Barnes' experience prior to 19—well, as I recollect, my first contact with Mr. Barnes was in 1932.

By Mr. Condon:

Q. Do you know as a matter of general information in connection with the discharge of your duties with the company about Mr. Barnes' background and experience?

A. I have heard him testify several times to that.

Q. Yes. When did he come with the Engineers Public Service Company?

A. Well, Mr. Barnes was elected president of Engineers on December 20, 1937, the same day I was elected secretary.

Q. Prior to that, for some 30 years he was with the Puget Sound Company?

A. No, just prior to that, he was with Stone & Webster Service Corporation, and prior to that he was with Engineers Public Service Company.

Q. Do you know the approximate dates of these connections?

The Examiner: Now, do you know it? Close the book. Do you know it?

Mr. Condon: He is secretary of the company, Mr. Examiner. I do not believe that he has to have intimate, personal knowledge of all these things. It is a matter of company records.

The Examiner: I know, but Mr. Barnes is here. I do not see why you want hearsay testimony when Mr. Barnes is here to give you the testimony.

Mr. Condon: We are trying to clear away a lot of things. I thought Mr. Benjamin could certainly answer.

The Examiner: If he has any independent recollection, let him answer it. If he has not, Mr. Barnes is here and can testify.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Condon: The difficulty is, while Mr. Barnes is here the other directors and officers are not, except Mr. Benjamin or Mr. Murphy, so I am going to inquire about these other people in a brief way.

The Examiner: Let him answer from his own recollection, if he has any.

The Witness: To the best of my recollection, Mr. Barnes was with Engineers Public Service Company and/or Engineers Public Service Company, Inc., for three or four years prior to his going with Stone & Webster Service Corporation.

By Mr. Condon:

Q. When did he go with Stone & Webster Service Corporation?

A. Well, I would say in the neighborhood of 1934 or 1935, somewhere around there.

Q. And he was there approximately how long?

A. Two or three years.

Q. Now, as far as you know, you characterize Mr. Barnes as a very competent, able, experienced, resourceful utility man, would you?

A. I certainly would.

Q. Now, do you know Mr. Howard Coonley?

A. Yes.

Q. Would you state briefly Mr. Coonley's connection with the system?

A. Mr. Coonley is a director of Engineers Public Service Company. That is his only connection with the Engineers System.

Q. Was he a utility man at any time?

A. No. He is the head of the Walworth Manufacturing Company. I don't know whether his title is president or chairman of the Board, but he occupies some position like that.

Q. Do you know who nominated him as a director of the Engineers Public Service and the circumstances of the selection?

The Examiner: Off the record.

(Discussion off the record.)

The Examiner: On the record.

The Witness: I think that Mr. Barnes suggested the name of Mr. Coonley.

By Mr. Condon:

Q. Now, what about Mr. Thomas J. Hanlon, who, I noticed in your 1944 annual statement, is also a vice-president? Is he the gentleman who was referred to yesterday by Mr. Barnes as being an executive of the Virginia company?

A. No, sir. He is an executive of the Mutual Service Company in New York.

Q. By Mutual you mean EPSCO?

A. EPSCO, Inc., yes, sir.

Q. What is his background, very briefly, as far as you know it?

A. Well, he was with the Tampa Electric Company for a good many years, and he came to New York approximately around 1931 to work for Engineers and/or the Mutual Service Company.

Q. Now, Charles W. Kellogg is the gentleman who wrote that letter marked as Preferred Stockholders' Exhibit 12 for identification this morning. He is a director?

A. That is right.

Q. Was he ever an officer or other functionary of Engineers?

A. Yes, he was. He was president of Engineers.

Q. From when to when?

A. I can not give you the dates without——

Q. Approximately.

The Examiner: Mr. Benjamin, you can refer to the minutes and get that or the annual reports.

The Witness: All right.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Condon:

Q. Can you state approximately without reference to the records, and if you can not, we will supply it in some other way.

A. Well, I would rather refer to the records if I could.

Mr. Condon: Off the record.

(Discussion off the record.)

The Examiner: On the record.

The Witness: Mr. Kellogg was president of Engineers in 1925 and remained president until Mr. Tuell was elected president, at which time he became chairman of the Board of Directors. He remained as chairman of the Board of Directors until, I think, June, 1939, at which time he became president of the Edison Electric Institute.

By Mr. Condon:

Q. So that for virtually the entire period from the organization of Engineers down to 1938 or 1939 Mr. Kellogg was either president or chairman of the Board?

A. That is correct.

Q. And he still is a member?

A. He is still a director, that is correct.

Q. Now, Mr. Jason C. Leighton is the gentleman who testified here at one of the last sessions and his background is covered in the testimony?

A. That is correct.

Q. And he is an employe of the company?

A. That is correct.

Q. And has been for many years?

A. That is correct.

Q. Now, Mr. Charles G. Wilson, will you identify him? He has been referred to as "Judge" at various times in this record. Would you tell us a little about his background?

A. Well, Mr. Wilson is a director of Virginia Electric & Power Company, as well as a director of Engineers. He

was formerly a practicing attorney, and I believe has been retired for some years. I don't know how many years.

Q. Formerly an attorney, one of the attorneys for the Virginia Company?

A. I don't believe he was ever an attorney for the Virginia Company, but I don't know.

Q. Do you know whether he is employed by any of the companies in the Engineers System or by the Engineers Public Service Company?

A. I believe he is retired now, not employed.

Q. Is he advanced in years?

A. I don't know his exact age, but he is over 65, I would say.

Q. Now, Mr. Streeter has been a director for about how long?

A. Well, Mr. Streeter was a director of several of the subsidiary companies prior to the time when local directors were elected to those boards, and he has been a director of Engineers, I think, since approximately 1938 or 1939.

Q. That is near enough. Now, have you filed any statement showing the stock holdings of these directors of Engineers Public Service Company?

A. I have not filed any statements, but each director is required to file such statements, and I believe they have done so.

Q. Are they in the U-5-S statements?

A. I do not think they are in the U-5-S statements. Their holdings are reflected in the proxy statement that is sent out, however.

Q. Do you know in a general way what their holdings are?

A. Well, I could give you the information as of the date of the last proxy statement.

The Examiner: We will take a short recess at this time.

(Whereupon a short recess was taken after which the hearing was resumed.)

Mr. Condon: May the record show that my question was prompted by a desire on the part of counsel to avoid exam-

ining certain records which I know are here in the Commission and with the thought that Mr. Benjamin might have the data readily available? If it is not readily available, I withdraw the question.

The Witness: I now have the data that you requested, Mr. Condon. The last proxy statement sent out by Engineers was for the April 16, 1945 annual meeting and this showed the stockholdings of the directors of Engineers as of February 1, 1945.

By Mr. Condon:

Q. May I see it, please?

(Discussion off the record.)

Mr. Condon: May this be incorporated by reference, from Securities and Exchange Commission File No. 53-47-1, and I am looking at the first duplicate, proxies statement by Engineers Public Service Company, Page 3?

The Examiner: Which is a list——

Mr. Condon: Which purports to set forth a list of the directors; Mr. Barnes, Mr. Conley, Mr. Hanlon and the others with their principal occupations, dates of their becoming directors, securities beneficially owned and other data.

The Examiner: No objection?

Mr. Tucker: No objection.

The Examiner: It will be incorporated in the record by reference.

* * * * *

[R. p. 752] By Mr. Condon:

Q. With respect to the matter of voting rights of the stockholders here, Mr. Benjamin, the preferred stockholders have had no rights to vote here, exercisable rights since 1937, is that right?

A. That was the date when all the accrued dividends were paid up, I believe, and at that time their voting rights ceased.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. And the only period of time that the preferred had any rights to elect a minority of the Board was during the period of 1935, 1936 and part of 1937, while there were arrearages on the preferred, is that right.

A. I am not exactly certain of the dates.

Q. Sounds approximately right?

A. Sounds approximately correct.

Q. So it is a fact that from 1925, the date of inauguration of the organization of Engineers down to about 1935, 1936 and 1937—and the records would show—the preferred had no rights to elect directors and have not had since 1937 and do not now have any rights exercisable by them; is that a fact?

A. That is correct.

Q. From your knowledge of the workings of the affairs of Engineers, is it not a proper statement to say that Mr. Barnes is the spark plug in the organization and he is the dominant figure who generates the ideas and proposals and suggests things to both management and the Board of Directors?

A. Mr. Barnes is the head of the organization and is the person most directly responsible, in my opinion, for seeing that the organization is run properly. He generates many, many ideas but I would say that some of the other members of the organiaztion generate some ideas.

Q. They are always cleared, however, with Mr. Barnes?

A. That is correct.

Q. If Mr. Barnes had any decided opinion with respect to those ideas that were generated by some of the subordinates that were in conflict with those ideas, is it fair to say that the employees would cease and desist?

A. Yes, it is his responsibility to run the organization.

Q. Mr. Benjamin, Mr. Kanton developed at some length in the testimony a series of undertakings by the Engineers company to secure the elimination of the preferred stock from this picture, and I believe he started back in or about the year 1940 or 1941. Do you recall that testimony either given by you or elicited from Mr. Barnes?

Richard N. Benjamin—Cross Examination (Cont'd)

A. Are you referring to the various——

Q. Proposed purchases and payments on account of stock and retirements and partial retirements and so on.

A. Yes, sir.

Q. You have that testimony generally in mind?

A. I think Mr. Barnes reviewed that pretty much in detail yesterday.

Q. Is your recollection of the facts similar to Mr. Barnes' testimony?

A. Yes.

Q. Didn't you say that the record of activities on the part of the management of Engineers suggests a rather persistent effort during the last four years to get rid of the preferred stock in this situation?

A. Yes.

Q. Is it not a fair statement that it also indicates very definite and positive determination on the part of the management of the Engineers company to acquire the preferred stock as far below $100 a share as possible?

A. Well, Engineers has had more cash than was required for the operation of its business or those of its subsidiaries by reason of sales of securities and withholding of dividends and the Board has had several of these plans to acquire preferred stock with this cash and when the preferred stock was selling in the open market at less than $100, the cash was used in some instances to acquire the preferred stock at less than $100. Does that answer your question?

Q. I guess so. Do you recall any thought of ever paying the preferred stockholders anything in excess of $100?

A. No.

Q. That was never in the minds of the Board or the management as far as you know, was it?

A. No, it was always thought that since any overall plan that might be developed would contemplate the payment of $100, that it would not be fair to pay any more than that to the other stockholders.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Scheetz: You said "Paid to the other stockholders", did you not?

The Witness: To other preferred stockholders.

By Mr. Condon:

Q. The only opinion of counsel that the company directors received via the September 5th plan was Mr. Tucker's opinion of July 26th, is that not so?

A. With relation to the amount payable to the preferred stockholders?

Q. Yes, that is all we are talking about, Mr. Benjamin.

A. I think that is the only written opinion Mr. Tucker gave. I am not sure whether or not he gave verbal opinions part of that time.

Q. It is a fact, is it not, that some of the directors had copies of the Otis decision in the Supreme Court given to them or sent to them?

A. I do not remember.

Q. Do you know whether or not anyone suggested securing any legal opinion from other counsel that would propound the rights and interests of the preferred stockholders vis-a-vis the common, prior to the adoption by the Board of the plan on September 5, 1945?

A. No, the only suggestion of that sort was made in connection with Mr. Streeter's suggestion concerning yourself.

Q. Other than that, there was none?

A. That is correct.

Q. Were you aware of the existence of the problem, and when I say you, I mean the Board of Directors, to the best of your knowledge, information and belief, aware of the existence of the claim that might be asserted by the preferred stockholders that they were entitled to going concern value of this preferred stock or the fair value of the stock prior to the adoption of the plan on September 5th?

A. Well, I think the directors were aware of the fact that there was a difference and could be a difference of opinion between the preferred stockholders and the common stock-

holders as to what would be the fair and equitable treatment of the preferred stockholders, and therefore when Mr. Streeter made the suggestion that someone be employed, namely, yourself, to represent the position of the preferred stockholders, the directors agreed to that suggestion.

Q. When was that suggestion first made by Mr. Streeter, if you remember?

A. Mr. Streeter made that suggestion definitely at the October 25, 1945 meeting but Mr. Streeter had indicated earlier that he was opposed to the plan. In fact, he voted against it.

Q. My question was, did the Board, prior to the time of the adoption of the plan, consider the possibility of having an opinion that would present to the Board the arguments in favor of paying the preferred stockholders more than $100 a share?

A. I do not believe that that was discussed, Mr. Condon.

Q. Mr. Streeter's suggestion was made about five or six weeks after the plan was adopted, isn't that true?

A. That is true.

Q. And that was a suggestion that also was not to advise the Board with regard to a plan that was already filed with the Commission but rather to attempt to protect the rights of the preferred stockholders against the action of the Board subsequent to the filing of the plan, isn't that a fact?

A. Well, it was to represent the position of the preferred stockholders at this hearing before this Commission.

Q. Did you have drawn to your attention or did the Board, to your knowledge, have drawn to its attention the decision of this Commission in the American Light and Power case?

A. I saw the decision.

Q. I think the correct designation is American Power and Light.

Mr. Barnes: November 1, 1945.

Mr. Sheetz: Referring to Release No. 6176 bearing date of November 1, 1945 with a supplemental finding in Release No. 6201 dated November 8, 1945.

Richard N. Benjamin—Cross Examination (Cont'd)

(Discussion off the record.)

The Witness: I think the Board was advised of that decision. I think Mr. Barnes advised them of that decision but I am not entirely clear on that point. I would rather have you check that point with Mr. Barnes.

By Mr. Condon:

Q. Were you present at any meeting at which this decision was discussed?

A. I think Mr. Barnes mentioned it at a meeting of the Board of Directors and that it was briefly discussed, I do not know in how much detail.

Q. Do you recall at what meeting?

A. No, I do not.

Q. Didn't you view that as a rather important landmark in the development of this particular problem that was so important as to occupy one whole step in your plan?

A. Well, it certainly was an important decision, Mr. Condon. I think there were certain differences between that decision and the problem that is being considered now.

Q. Did you find any reference to that in your minutes, Mr. Benjamin?

A. No, I do not believe there was any reference to it in the minutes.

Q. Do you recall on or about the 15th of December when the Board adopted, Mr. Streeter not voting, the fourth amendment to the plan which provides for the elimination of Step Three and the trustee arrangement about Part One: do you recall the fourth amendment?

A. Yes, I do.

Q. Did you have a legal opinion at or about that time from Mr. Tucker?

A. Yes, we did.

Q. Would you produce it, please?

A. Yes, I have a copy of Mr. Tucker's opinion dated December 11, 1945, addressed to the Board of Directors of Engineers.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Condon: May I have that marked for identification as Preferred's Exhibit 13?

The Examiner: Let it be so marked.

(Preferred Stockholders' Exhibit 13 is marked for identification.)

By Mr. Condon:

Q. Is it a fact that Preferred Stockholders' Exhibit No. 13 for identification was submitted to the Board of Directors on or about the date of adoption of Amendment No. 4?

A. Yes; it was mailed to them two or three days before the meeting and considered at the meeting.

Q. Did you notice, Mr. Benjamin, that that opinion makes no reference whatever to the American Power and Light decision of the Commission?

A. There is no reference in here to the American Power and Light decision.

Q. Can you state to the best of your knowledge whether the Board at any time between the 5th of September and the present has sought from Mr. Tucker or any other attorney an opinion with regard to the rights of the preferred stockholders here with respect to the payment of any excess over $100 which they may be entitled to receive?

A. Mr. Tucker was not asked to furnish any additional written opinion. He was present at this meeting of December 15, 1945 and recommended this amendment, so that I think the directors assumed, as I did, that his opinion on that subject had not changed since his previous opinion.

Q. Although it was not discussed?

A. I do not recall any specific discussion at that time.

The Examiner: Do you recall at that meeting whether Mr. Tucker was asked any opinion as to the effect of the American Power and Light decision on the plan?

(The question was read by the reporter.)

The Witness: Yes, Mr. Tucker was asked by the directors as to his opinion as to the effect of the American Power

and Light decision on the Engineers plan. Mr. Tucker pointed out distinctions between the American Power and Light situation and the Engineers situation. That was oral.

By Mr. Condon:

Q. Not mentioned in the opinion?

A. That is correct.

Q. Mr. Benjamin, in connection with your testimony given at this session and at prior sessions in these proceedings, certain exhibits were introduced while you were on the witness stand as having been prepared by you or under your supervision and direction, and I would like you to state, if you will, which of those exhibits now in evidence were prepared prior to September 5th and were before the Board for their consideration. As an aid in your so doing, you mentioned this morning the financial schedules that were attached to the plan on September 5th and had been in some rough draft form or something like that for a month or so prior. You mentioned the sales of the properties of the Engineers system since the Act became effective and I believe the third one represented a total figure of amounts of earnings left in the system. Would you supplement those three by any additional items that were before the Directors and considered by them in connection with the adoption of the plan on September 5th?

(Whereupon a short recess was taken.)

By Mr. Condon:

Q. Mr. Benjamin, I asked you to be prepared to answer that question in substance a matter of a week or so ago, did I not?

A. Yes, sir.

Q. And agreeable to my request, you prepared a memorandum dated 12-27-45 in which you have set forth the

various Applicant's exhibit numbers and a more or less descriptive characterization of the contents of each?

A. That is right.

Q. Other than the three items to which I made reference in the question, is it the fact that the only additional exhibits or data that were submitted to the Board with respect to your exhibits in evidence, is the tax letter from Mr. Lynch dated August 31, 1945, which was apparently prepared prior to the 5th, Exhibit No. 15-A?

Mr. Tucker: I suggest we tie the numbers to the exhibits if they are exhibits.

Mr. Condon: I would be very glad to adopt that suggestion.

By Mr. Condon:

Q. Exhibit 15-A, Exhibit 31 being the first letter of the Engineers common stockholders which was apparently in draft form on the 5th, according to this memorandum?

A. Yes.

Q. And Exhibits 33, 34, 35, 36 and 37 which were the charters of Engineers, Gulf States, El Paso, Virginia and the annual reports of Engineers. Mr. Tucker's opinion of course you mentioned which is Exhibit 38. And I hand you back the memorandum and ask you if I have correctly set forth the items that you have indicated were before the Board on September 5th insofar as they flowered into exhibits by the company in this proceeding.

A. Well, my check mark against the charters of the four companies was not meant to imply that the charters of these companies were actually presented to the Board. I assume that they were prepared considerably before this plan came up, naturally, and I assume that they were available information and not prepared in connection with this hearing, of course. The annual reports of Engineers have, of course, all been presented to the Board of Directors at the time they were being considered in their respective lights.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. There was no annual report being considered, then, was there?

A. No, but the annual reports that are exhibits are over a period of years in the past and every one of those annual reports had been presented to the Board prior to the time they were mailed out to the stockholders, and what I meant to imply by this check was that the Directors had seen those reports and presumably were aware of the information in the reports.

Q. The 1944 one they had seen in the spring of 1945 and the preceding annual reports in the following spring, the next succeeding year that the annual report is supposed to come?

A. That is right.

Q. My question was, Mr. Benjamin, what additional exhibits other than the ones that we mentioned are now exhibits in this case, were before the Board at the time they adopted the plan on September 5th? Do you know of any others that have been mentioned or identified from your memorandum?

A. No, other than the ones that I referred to in my testimony this morning.

Q. I set those forth in my question, did I not?

A. If you did, I missed it.

The Examiner: Mr. Condon mentioned Exhibit 15-A. How about 15-B? 15-A, as I understood it, was the opinion of Mr. Lynch as to the tax gain to common stockholders. How about preferred stockholders?

The Witness: 15-B was dated September 26, 1945.

The Examiner: After the meeting?

The Witness: Yes.

By Mr. Condon:

Q. How long did your meeting last on September 5th, do you recall approximately? I think you said an hour and a half?

A. Yes, to the best of my recollection.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. During the course of your testimony on both direct and on prior cross-examination, you have suggested various arguments which you have contended supported the decision of the Board in adopting this plan on September 5th, is that a correct statement?

A. I tried to state the reasons that appeared to me to be the reasons the Directors arrived at the decision they made in connection with the adoption of this plan.

Q. You made certain assumptions according to your testimony, did you not?

A. Yes, I have.

Q. And you testified that a number of those assumptions were based upon what you thought would be the reactions of stockholders and others; do you recall giving that testimony?

A. Yes, I do.

* * * * *

Hearing on January 5, 1946

[R. p. 771]

RICHARD N. BENJAMIN,

previously sworn, resumed his testimony.

Cross Examination (resumed)

By Mr. Condon:

Q. I ask Mr. Benjamin the same questions with respect to it as I did with regard to Exhibit 7 for identification, asking if his answers are the same.

A. Yes, they are.

Mr. Condon: May it be marked for identification, sir?

The Examiner: Let it be marked Preferred Stockholders' Exhibit 7-A for identification.

(The document referred to is marked as Preferred Stockholders' Exhibit 7-A for identification.)

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Condon:

Q. Mr. Benjamin, under cross-examination by Mr. Kanton you stated in substance that you had expressed a lot of opinions on what the preferred stock or the common stock would or would not do or would or would not like and the record indicates that you admitted that many of your answers were based on personal assumptions. Do you recall that line of interrogation by Mr. Kanton?

A. Yes, I do.

Q. Now is it the fact that in so far as the preferred stockholders are concerned, who own no common stock in the Engineers enterprise, that you never talked to any of those preferred stockholders to get directly from them their views with respect to this plan? Is that a fact?

A. That is correct.

Q. Did you hear the testimony of Mr. Barnes with regard to the stockholders that he discussed the matter of the plans with?

A. Yes, I did.

Q. Did you notice that he did not testify that he had talked to any preferred stockholders that didn't own common stock?

A. Well, I know that Mr. Barnes testified that he spoke to several stockholders. I don't know whether some of the people he talked to owned preferred stock and not common stock. I know that some of the people he talked to were holders of common stock.

Q. Yes. Well now, you remember he said he spoke of Edwin S. Webster, Jr., and a gentleman from Stone & Webster, Mr. Crawford, and a stockholder from Brooklyn whose name eluded him when he testified, quite naturally so?

A. Yes. He said he spoke to Mr. Orr in Boston. I don't know what Mr. Orr's interests are.

Q. Mr. Orr in Boston?

A. Yes.

Q. Did he testify to that?

Mr. Kanton: Yes.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Condon:

Q. You don't know what Mr. Orr's holdings are?

A. No. He is connected with the Railway & Light Securities Company, I think, and I don't know what their stock holdings are.

Q. Well, with the possible exception of Mr. Orr is it the fact that you and apparently Mr. Barnes never discussed the problem with any preferred stockholder who didn't own common, that is with respect to the plan?

A. These reactions that the particular stockholders—we will call them the ordinary preferred stockholders?

Mr. Tucker: I have no objection to the question as far as it concerns Mr. Benjamin, but I don't think you ought to include Mr. Barnes in your question.

Mr. Condon: All right.

By Mr. Condon:

Q. How about you, Mr. Benjamin?

A. I have not. Mr. Streeter, of course, is a director of the company. I don't recall whether he owns any common stock or not. He does own preferred stock.

Q. That is right. Well you noticed on that proxy statement that was incorporated by reference yesterday that, I think Mr. Streeter is the owner of certain shares of preferred and owns no common, is that it?

A. That is my recollection.

Q. As a matter of fact he is the only fellow like that on your Board, isn't that so?

A. Could I look at that proxy statement?

Q. Yes. I think that is a correct statement, with the possible exception of Mr. Wilson.

A. It appears from this proxy statement that Mr. Wilson owns only preferred stock.

Q. Yes. Do you happen to know as a matter of fact whether Mr. Wilson now owns any common stock or whether his family owns any common stock?

A. I don't recall anything that indicates that he does or his family owns any.

Q. Do you know from your experience and general knowledge in matters of corporate reorganization that it is quite customary for the management of companies acting for all the stockholders to talk to representatives of different classes to get their opinions?

A. I guess that has been done in many cases, Mr. Condon.

Q. Do you know whether or not the management conferred with any of the large institutional holders of these preferred shares, like Mr. Scheetz's clients or like the Columbian National Life Insurance Company that I am acting for?

A. Well, I think Mr. Barnes talked to representatives of the Columbian Insurance Company.

Q. About this plan?

A. After the plan was filed.

Q. I am talking about prior to its promulgation and filing, Mr. Benjamin. I thought you understood that.

A. I don't know of any large preferred stockholders which this plan was discussed with prior to its filing.

Q. Or small ones either?

A. That is correct.

Q. Isn't that quite unusual from your experience and knowledge of financial affairs and reorganizations of this magnitude?

A. I wouldn't say it was unusual, Mr. Condon, where the applications are filed with a public body and the opportunity for hearing is given to all preferred stockholders to express their points of view and notice given to them.

Q. I was talking about the unusual feature of not taking it up with substantial holders of preferred stock in advance of decision on the plan.

A. I don't agree that it is unusual, Mr. Condon. I think that in many cases that is done and in many other cases it is not done. We have had other plans that we have filed before the Commission and I don't know that any discus-

sions have been had with large stockholders the feeling being, I believe, that all stockholders would have perfect freedom opportunity to appear and if they objected to the plan to make their objections known.

Q. Is your reluctance to say that it is unusual born of the experience that you have had in the Engineers System or are you expressing your views as to your general knowledge of the technique employed outside the Engineers System in other cases?

A. Well, I don't know what the technique employed in other systems is, Mr. Condon.

Q. Your Board knew and recognized a very sharp issue here, did it not, between the rights of the preferred to claim sums in excess of $100?

A. They certainly did.

Q. And the position taken by the majority of your Board?

A. They certainly did.

Q. They didn't see fit to give the preferred stockholders who had such a huge stake in this an opportunity to present their views prior to the promulgation of the plan?

A. No, they did not.

Q. All the Board decided was to give them an opportunity to come in and complain, is that right?

A. Well, if I can express it a little differently, I think that they thought from the expressions I heard at the meetings that the preferred stockholders would have a perfectly free opportunity to come in at the hearings and express their views.

Q. And they gave the preferred stockholders the opportunity of battling the resources of the Engineers System in a contest that was unequal, is that the effect of the Board's action here?

Mr. Tucker: I think I ought to object to the characterization of the contest as being unequal.

The Examiner: I think I will sustain the objection to that, Mr. Condon. I don't see any particular justification

for that. Certainly, the preferred stockholders have an equal opportunity with the company here.

Mr. Condon: Mr. Examiner, I wasn't referring to the inequality of the contest here. I was referring to the inequality of the opportunities provided to come in and present their views to the Board, the inequality of opportunity to have counsel come in and express an opinion that might differ, with the greatest respect to Mr. Tucker, and other points of that type. I don't feel that the Board of Directors here are entitled to any encomiums because they have done what the statute requires to give the preferred their day in court.

The Examiner: I think you can accomplish the same thing leaving out your expression as to the unequal opportunities.

Mr. Condon: All right, sir.

The Examiner: We are only answered back and I don't know that we accomplish anything by resorting to language of that type.

Mr. Condon: I shall withdraw the question.

By Mr. Condon:

Q. Mr. Benjamin, Mr. Kanton in his cross-examination interrogated you with respect to how it was that the Board of Engineers arrived at the price of $10 initially for the Gulf States warrants. Do you recollect that general line of inquiry by staff counsel?

A. Yes, I do.

Q. What was the total amount of cash that the Engineers Board felt it would have to raise to retire its preferred stock incident to this proposed plan in the over-all aggregate? Don't mind the odd dollars. And I suggest that it was approximately $36,000,000 or $39,000,000.

A. Well, approximately $39,000,000 preferred stock outstanding and it was estimated that it would be approximately $15,000,000 in the treasury of Engineers by the end of 1945.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. $15,000,000 or $14,000,000?

A. Well, between $14,000,000 and $15,000,000 in cash.

Q. That is near enough. That left to raise approximately $25,000,000?

A. That is right.

Q. Was the reasoning of the Board something like this—that in order to retire the preferred we are going to need $39,000,000 and we have $14,000,000 approximately in cash now and we will have another $1,000,000 by the end of the year so that our actual cash requirement will be $25,000,000 and if we get a bank loan of $6,000,000—that was the initial proposal—and have a little bit less than 2,000,000 shares of Gulf, that fixes the price of $10 a share in round numbers? Isn't that about the way the corporate mind worked on that problem?

A. (No response.)

Q. I am not quarreling about $1,000,000 one way or another. I am just trying to get principles.

A. I think that is right.

Q. So that if I understand it, the Board decided that what it needed to retire the preferred took the cash on hand estimated to be increased by earnings during the year 1945, took the bank loan that it decided that it should get, $6,000,000, and then divided the difference by the total number of shares of Gulf and arrived at the $10 figure?

A. That is right.

Q. Now there was no attempt on the part of the Board to make any study or to have a studied conclusion that that $10 represented the value of that share of Gulf States that would be acquired as a result of the issuance of the warrant?

A. No, that is right.

Q. Was there any effort on the part of the Board to decide prior to September 5 just what a warrant to acquire such a share of stock at that price was actually worth?

A. No. It was felt at the time that there would be sufficient excess over the subscription price to make the warrant of value so that the warrant privilege would be exercised.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. The effect of that answer is that the value of a share of Gulf States stock was in excess of $10; is that right?

A. That is right.

Q. Were there any studies made, analyses, or considerations of that type given to the problem of what actually in truth and in fact a share of Gulf States was worth?

A. Well, this comparison of the four listed stocks contained in Applicant's Exhibit 14 was prepared in the first instance in the spring and that indicated that on the basis of those securities and the prices at which they were selling the Gulf States common stock would probably initially sell for somewhere in the range of $15 to $16, somewhere in there, in any event, at a price which would give a value to the warrant itself.

Q. You have not forgotten, unless I misunderstood, that that was not one of the papers that was before the Board when they made their decision, Mr. Benjamin, is that correct? Do you remember that list that you gave me yesterday?

A. That is right. I don't know that that particular statement was presented to the Board. It may be that Mr. Barnes advised the Board of his consideration of this problem.

Q. Were you ever present when he did?

A. Well, I was present at those meetings, Mr. Condon, and I have tried to the best of my ability to remember everything that transpired at those meetings and I can't say with certainty whether he did or did not make that statement.

Q. At all events, that comparison of those four stocks that you say was initially gotten in the spring was rather a slender substitute for any real attempt on the part of the Board to value Gulf States stock, isn't that so?

A. I don't believe that that would be considered a valuation of the Gulf States stock in the sense that you referred.

Richard N. Benjamin—Cross Examination (Cont'd).

Q. To the extent that Gulf States stock had a value in excess of $11.50, that excess represented something to the common stockholders who received the Gulf States stock and to the preferred group of preferred stockholders who also owned common stock, isn't that a fact?

A. You said represents something of value to those?

Q. Something, yes. I am coming to just what that something is. It represented something to those stockholders?

A. It represented something to the common stockholders, yes sir.

Q. And to the preferred stockholders who owned common?

A. So far as their common stock holdings were concerned, yes.

Q. Now, is it your testimony that at the time the Board adopted this plan it didn't know just what that something amounted to? Is that the effect of your testimony?

A. I think that the Board did not know exactly what this would be worth, Mr. Condon, when the warrant plan was considered; that they felt, so far as I can tell, during those discussions that the warrant would have a value and therefore a warrant plan would be a feasible plan.

Q. And to the extent that this something that these stockholders were going to get was greater, the prospects of the non-exercise of the warrants in question would grow less, isn't that a fair conclusion from the facts?

A. Yes, I think so, as long as there is a substantial value to the warrant that the warrants would undoubtedly be exercised by everyone who was aware of their right. In other words, no one is going to let a right like that lapse.

Q. Yes, and your testimony given under Mr. Kanton's cross-examination was to the effect that the only way you could conceive—I am not quoting—of anyone not exercising the warrant was just not being around to do it.

A. That is right.

Q. Isn't that the effect of what you testified?

A. That is right.

Q. The Board knew it was giving out something valuable, isn't that so?

A. That is right.

Q. Did the Board consider the possibility that the number of warrants that would not be exercised by the common stockholders and by the preferred stockholders who owned common stock would be so fractional and so inconsequential in number that the effect of that would be to deprive the ordinary preferred stockholders from any right to participate in the Gulf States enterprise?

Mr. Tucker: I don't understand your question. I don't see how the witness can understand it.

Mr. Condon: Why don't you let him speak for himself, Mr. Tucker?

Mr. Tucker: All right.

The Examiner: I think the question is perfectly clear, Mr Tucker. It is to me. If Mr. Benjamin doesn't understand it he can so state and the question can be modified or read back to him as he pleases.

The Witness: Will you read it back?

(The record was read.)

The witness: Frankly, I will refer back to the testimony that I have given previously. What I had intended to state at that time was that the only people who would not exercise or sell their rights would be those to whom the matter had not come to their attention for one reason or another. Some common stockholders may not wish to exercise the warrants because of the requirement to put up the cash and it is expected that there will be trading in the warrants and that those would be sold and an opportunity given to preferred stockholders to purchase the warrants. I don't believe the warrants that will not be exercised, to which you referred in your question, would have any effect one way or another. In other words, I don't believe they would be sold, because those are the people who are not aware of the fact that they

have the warrant coming to them, for some reason or other. That is the way I feel about that.

By Mr. Condon:

Q. Let me see if I understand that answer. You are saying that the warrants would not be exercised here only due to the fact that the money was not there to do it, because they were so valuable, but there may be a class of common stockholders that does not like Gulf States?

A. That is right.

Q. And would wish to make a profit by selling their rights because of the valuable donation that they have received from the Board of Directors? Is that the effect of your answer?

A. I think the effect of my answer is that the common stockholder who does not wish to exercise his warrants would sell them to somebody else.

Q. Yes, and the price that those warrants would command will, to a substantial extent, depend upon what that something was over $11.50 that the common stockholders and the preferred stockholders who owned common got from the Board as a result of the plan; isn't that a fact?

A. That is right.

Q. So the ordinary preferred stockholder is faced with either of two contingencies if I am not in error—and you correct me if I am. He either will be unable to buy the warrants or he will have to pay the price to get them, is that right? Is that the lot of the ordinary preferred stockholder here?

A. He will either have to buy them or pay the price to get them? I don't understand that, Mr. Condon.

Q. The first part was he will either not be able to buy them or if he can he will have to pay a price to get them.

A. That is right, unless he has previously bought common stock.

Q. You don't know, you have no idea, have you, how many common stockholders will sell their warrants?

Richard N. Benjamin—Cross Examination (Cont'd)

A. No, sir.

Q. That is a matter of pure speculation?

A. That is right.

Q. If it happens that the common stockholders here felt that Gulf States had prospects and a great future before it, that it was in a good territory, well and capably run by competent executives who were familiar with the utility business, and that the earnings were running upgrade and that the thing looked right rosy, they wouldn't sell, would they?

A. Not if they had the money.

Q. And the group of stockholders who are interested in capital appreciation rather than income taxes are not likely to sell, are they?

A. Well, I don't know about that group, Mr. Condon.

Q. Oh, you don't know about that great big group that is going to put up about 14/22nds of the money, that group of 1,022 stockholders that own 75 or 80 per cent of this stock that were more interested in capital appreciation than they were in paying income taxes on dividends? You have forgotten that group, have you?

A. No, it isn't that I have forgotten the group. I am just wondering what the effect would be on them selling. Your question was they wouldn't want to sell the warrants or they wouldn't want to exercise them?

Q. I am asking you if you think they have planned to sell their rights.

A. If they sold their warrants, they would not obviously acquire the Gulf States common stock and——

Q. (Interposing) And they wouldn't have these tax advantages that are so important, would they, Mr. Benjamin?

Mr. Tucker: I didn't hear that last question. I wish you would keep your voice up just a little bit.

(The question was read.)

Richard N. Benjamin—Cross Examination (Cont'd).

The Witness: Well, if they exercise the warrants and get the Gulf States stock, they will start to get dividends on that Gulf States stock.

The Examiner: I don't think that answers the question, Mr. Benjamin. I think you probably know the answer to the question. The question was, if they sell these warrants, they will have to pay income taxes on their profits, won't they? Isn't that a fact?

The Witness: That is what I am not clear about, Mr. Examiner.

The Examiner: That is the substance of Mr. Condon's question as I see it.

The Witness: I will have to look at Mr. Lynch's opinion. I am not sure of it.

Mr. Condon: Exhibit 15 and 15-A.

(Discussion off the record.)

The Examiner: Let us get back on the record and get back to the pending question.

(The record was read, as follows:

"Q. And they wouldn't have these tax advantages that are so important, would they, Mr. Benjamin?")

The Witness: I think that some of the stockholders who desire to avoid receipt of income and prefer to take a capital gain might well sell their warrants, Mr. Condon.

By Mr. Condon:

Q. How substantial do you think that group would be, Mr. Benjamin?

A. (No response.)

Q. Do you think that would be a great body of this group of 1,000 holders who own 82 per cent or 78 per cent of the stock of Engineers?

Mr. Tucker: Mr. Examiner, I object to the question. It seems to me we are getting into a lot of speculation.

The Examiner: I agree with you.

Mr. Tucker: I don't know how this witness can possibly know.

The Examiner: I agree with you.

Mr. Tucker: He can not possibly know what the motives of 26,000-odd or whatever the number of stockholders is are going to be. I don't see why we can't argue that from the probabilities and speculate on it in our briefs without having the witness try to speculate on that kind of thing.

Mr. Condon: Mr. Tucker, in answer to that we have a situation here where 1,022 stockholders own 74 plus or minus per cent of the common stock according to the exhibits and the testimony. Now we have a very cohesive group that has been talked about by Mr. Barnes in the person of Edwin S. Webster, Jr., and the vice-president of the Stone & Webster interests in Boston and maybe others.

Mr. Tucker: All right. Now if Mr. Barnes was told by those stockholders what they were going to do about this thing and why, I think that would be perfectly proper because I don't think it would be speculation.

Mr. Condon: It is perfectly proper cross-examination to develop whatever facts this witness knows or has knowledge of in the light of the testimony that one of the important considerations of this plan, were tax considerations. There isn't any question about that in the record.

Mr. Tucker: Not a bit.

Mr. Condon: There isn't any question in the record that the tax considerations were designed and calculated to protect and look after the interests of this group of 1,000 stockholders.

Mr. Tucker: That, I don't agree to.

Mr. Condon: I think that that is a fair conclusion.

The Examiner: Mr. Condon, your recent questions have not dealt with facts from this witness. I think Mr. Tucker's objection to it is that you have called on the witness to

make certain suppositions about things that he probably knows nothing about.

Mr. Condon: All right.

The Examiner: Now whether he has discussed this with these stockholders and they have determined or advised him what they are going to do, you have not asked him that.

Mr. Condon: All right. I will withdraw the question.

The Examiner: You have asked him assuming thus and so, what would happen. That calls for pure speculation on the part of this witness.

Mr. Condon: Mr. Examiner, this witness was permitted to testify on direct examination to a group of the most fantastic assumptions that were all based on this witness's determination of what he thought the stockholders would do. I feel that on cross-examination I ought to be able to probe in the same direction. It was developed by Mr. Kanton on cross-examination that a very substantial portion of this witness's testimony about what the common would do and about what the preferred would do was all based on his own judgment without any conversations with any of the preferred stockholders at all. I don't believe that I should be precluded, when it was developed on direct. Mr. Kanton was permitted to do it on his cross-examination. I don't intend to pursue it unduly but I do feel at this point, where the question has come up as to these warrants and what is going to be available for the ordinary preferred stockholders, that we have a right to probe the knowledge of this witness and further perhaps his assumptions if they can be developed. If we can't assume it in this case, perhaps that will have some bearing on the validity of the extent to which the Commission will give any consideration to his other assumptions, which may be more important.

I will withdraw the question but I do feel that I ought not to be kept down unduly where we have precedent in this very proceeding before your Honor, both on direct and on other cross-examination.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Condon:

Q. Now, Mr. Benjamin, you testified in this proceeding that an important consideration in this plan was designed to make it possible for common stockholders or certain of the common stockholders in the higher income brackets to take advantage of the tax opportunities which the Board felt were afforded in the plan. Is that a fair statement?

A. That is right.

Q. The opinion of Mr. Lynch, Exhibits 15-A and B relate in a general way to some of the tax advantages, isn't that true?

A. That is true.

Q. And it was pointed out very definitely to these common stockholders who acquired warrants and then got the Gulf stock, that it would be a tax-free transaction, isn't that so?

A. That is right.

The Examiner: That is, if they exercised the warrants?

Mr. Condon: Yes, if they acquire the stock.

The Examiner: You said got the warrants. I am adding to that if they exercise the warrants it is a tax-free transaction.

Mr. Condon: All right, Mr. Examiner.

By Mr. Condon:

Q. You understood what I meant, Mr. Benjamin?

A. That is right.

Q. And acquired the stock in Gulf?

A. That is right.

Q. Is it your considered opinion that a substantial block of this group who were designed by the plan to benefit by the tax advantages with regard to this Gulf exchange are going to forego those advantages and sell those warrants in the market?

Richard N. Benjamin—Cross Examination (Cont'd)

A. I think it depends on the individual case, Mr. Condon, and I don't know how many of them would want to sell and how many would want to exercise the warrants.

Q. So you have very carefully conceived a very fine technique taxwise to benefit a large group of holders of large blocks of its Engineers stock and you don't have any idea as to whether they are going to be interested in availing themselves of it or not, is that your testimony?

A. It puts the choice up to them as to whether or not they want to avail themselves of it.

Q. Yes. Now you have not forgotten that you told us a little while ago that these stockholders were getting something over $11.50, is that right?

A. That is right.

Q. And to the extent that something is over $11.50, these warrants are going to give these stockholders a chance to make a profit, isn't that so?

A. I think that is right.

Q. Yes. Do you say that you have imposed a burden on that group of stockholders, Mr. Benjamin?

A. (No response.)

Q. What is the answer to that question, Mr. Benjamin?

A. Well, I think it imposes a burden on the common stockholder to be required to put up $11.50 a share, Mr. Condon.

Q. And to get his bait back in a very handsome profit within 10 days thereafter, is that the kind of a burden that your heart bleeds for for these stockholders?

A. When the Engineers common stockholder purchased his common stock originally, Mr. Condon, he thought that he was going to be able to continue out ahead of him, senior securities. Now the situation is such that the senior securities have to be paid off.

Q. They have to be paid off?

A. I believe they do.

Q. That is your understanding of this?

A. My understanding is that certainly the senior obligations have to be paid off, yes, sir, and he is now required to put up this money that he did not think he had to put up when he first bought the Engineers common stock. He has also had an interest in Gulf States common stock through Engineers. Now he is being given the opportunity to buy that common stock but in order to buy it from the company he has to put up enough to pay off the senior obligations.

The Examiner: Mr. Benjamin, may I interject a question? Your statement is that the preferred stock must be paid off. Have you not previously testified that the preferred stock might have been taken care of in other ways than being paid off? I don't know whether you meant that or not.

The Witness: By being paid off I meant that the preferred stock obligation must be taken care of, Mr. Examiner.

The Examiner: You didn't mean then paid off, is that right?

Mr. Condon: Not paid off in cash.

The Witness: Not necessarily paid off in cash, no.

The Examiner: I wanted to clear up the record with respect to that. I didn't know whether that was your conclusion or not.

By Mr. Kanton:

Q. Is that the opinion of all the members of the Board of Directors?

A. Which, Mr. Kanton?

Q. That the senior securities as you have just put it, or the senior obligations, have to be taken care of at this time?

A. Well, it is my understanding that the majority of the Board of Directors believe that this is an involuntary liquidation, Mr. Kanton, and that in an involuntary liquidation the senior securities have to be provided for.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. That wasn't my question. My question was, do all the members of the Board of Directors, with the exception of Mr. Streeter, believe that the senior obligations must be taken care of at this time? Is that Mr. Kellogg's opinion?

A. I think Mr. Kellogg believes, from his letter and conversation and statements that I have heard him make, that this is an involuntary dissolution of Engineers and I am quite certain he feels that the senior securities have to be taken care of.

Q. At this time? Did he say that they have to be taken care of at this time?

Mr. Tucker: You are raising the question about the Supreme Court case?

Mr. Kanton: No. No, I am not. I am not.

Mr. Tucker: That was one objection Mr. Kellogg had.

By Mr. Kanton:

Q. Didn't Mr. Kellogg offer his opinion to the effect that he was not of the mind that the plan should be presented now and that the preferred stock of Engineers could be taken care of?

A. Could I look at Preferred Stockholders' Exhibit——

Q. I am not referring to any Preferred exhibit because it is not in evidence.

A. I am trying to refresh my recollection.

The Examiner: If you want to refer to Mr. Kellogg's letter——

Mr. Kanton: That is entirely up to you. I am not referring to any matter that is not being put in as evidence.

The Witness: May I see a copy of that?

The Examiner: You may see a copy of Mr. Kellogg's letter if you want to refresh your recollection for a minute. That is perfectly all right.

The Witness: Mr. Kellogg said in this letter of July 27 that he did not agree that it might not be possible to pay preferred dividends after Gulf and El Paso are disposed

of, but I didn't understand from that that he thought there was any reason for not continuing with the liquidation of Engineers. Certainly I have gotten entirely the other impression from him.

By Mr. Kanton:

Q. Well, isn't his opinion that Gulf States and El Paso —I am just referring now to your testimony alone—could be disposed of pursuant to your plan and that it is not such an important question, as you put it, to take care of the preferred stock of Engineers at the same time?

A. Well, I would hate to speak for Mr. Kellogg.

Q. I just want your opinion.

A. But I don't believe—my own opinion is that there would be no purpose served in retaining Engineers over Virginia.

Q. But referring back to my question, you don't know the answer. In other words, you don't know whether that is what Mr. Kellogg had in mind?

A. I think Mr. Kellogg had in mind that there would be no purpose served in Engineers' continuing too because he voted for this plan and so far as I know is in entire agreement with it.

Q. Did Mr. Kellogg ever express to you in one form or another that the present structure of Engineers, only with Virginia, could support the preferred stock of Engineers?

A. Well, he makes that statement in this letter, that he thinks that the preferred dividend requirements could be met with Engineers being solely over Virginia.

Q. In other words, outside of your last remark, all the directors except Mr. Streeter are in full accord with the plan as now filed and as amended?

A. That is correct. That is my understanding.

Mr. Kanton: Go ahead.

The Examiner: We will take a short recess at this time.

(Whereupon a short recess was taken after which the hearing was resumed.)

Richard N. Benjamin—Cross Examination (Cont'd)

The Examiner: I believe you were through, Mr. Kanton, when we recessed, were you not?

Mr. Kanton: Yes, sir.

The Examiner: All right, Mr. Condon.

By Mr. Condon:

Q. Mr. Benjamin, coming back to this question I asked you a little while ago, to your best judgment whether or not the common stockholders of Engineers and the preferred stockholders who owned common stock would be expected to exercise their warrants and acquire Gulf stock, did I understand you to say that you felt that you didn't know what they would do or you had no impression of what they would do?

A. I do not know what they will do, Mr. Condon.

Q. Mr. Benjamin, I have before me page 545 of the stenographic transcript and it was the cross-examination of Mr. Barnes by Mr. Kanton. I ask you if you recall this testimony given by Mr. Barnes Thursday and I now read from page 545:

"By Mr. Kanton:

"Q. Mr. Benjamin testified that one of the principal factors considered by the Board of Directors in formulating the present plan was that the present Engineers common stockholders want to continue their interest in the three operating companies, namely, Gulf, El Paso, and Virginia. Do you recall his testimony?

"A. Yes, I do recall his testimony.

"Q. And I take it that is your opinion?

"A. I have so testified this morning.

"Q. And the basis for that opinion is what, sir?

"A. Merely an analysis of what any person's reaction is if you make an investment in a security, particularly a holding company security. You make that investment because you like the character of securities in the portfolio

of that company. Therefore the natural feeling of the owner of the holding company security is that he would like to continue his interest in the properties that constitute that system."

Did you hear Mr. Barnes testify to that effect Thursday?

A. Yes, I did.

Q. Did you testify, as this question indicates, accordingly at a prior date?

A. Yes, sir, I think I did.

Q. Is your opinion different now than what it was when you gave that testimony?

A. No.

Q. Is your opinion now at variance with the testimony of Mr. Barnes?

A. No.

Q. Then what is the answer to the question as to whether you feel in your judgment that these common stockholders of Engineers and the preferred stockholders of Engineers who own common will exercise these warrants and acquire Gulf States stock?

A. Well, I think it is impossible for me to say how many stockholders will exercise the warrants and how many will sell. I would expect that a great many of them would exercise the warrants in order to continue their interest in the operating subsidiaries, but I can't say what that percentage will be or speculate on that percentage. I think that the Board of Directors felt that the common stockholders would like to continue their interest in these operating companies and wanted to give them the opportunity of doing so and if they do not choose to exercise that opportunity they can do one of two things—they can sell their Engineers common stock now——

Q. Common stock?

A. I mean if they didn't want to continue their interest in the Engineers System they could go out and sell their common stock now. If they didn't want to continue their interest in Gulf States but did want to continue it in El Paso

and Virginia, they could sell their warrants in Gulf States. I don't know just what the reaction of each individual stockholder would be. I think that most of them will exercise their warrants, but I don't know.

Q. Now let's come to this common stockholder of Engineers and consider him as well as the preferred stockholder who owns common. Let's assume that he isn't too happy about getting into Gulf States. If he sells his warrants for an amount of something in excess of $11.50 he will have to do it during this 10-day period provided by the plan, isn't that so?

A. That is right.

Q. So to the extent that he makes——

A. Let me make one amendment to that. If there is a when issued market prior to that he could sell it in that time, too.

Q. But it would be within a comparatively short span of time?

A. That is right.

By Mr. Tucker:

Q. Isn't it true that the 10 days have now been made 12?

A. That is right.

By Mr. Condon:

Q. Now you are reasonably familiar with the provisions of the Internal Revenue Code in so far as sales of securities are concerned, aren't you, Mr. Benjamin?

A. In a general way.

Q. Yes, and you know that if he sold that warrant and made a profit of something above $11.50, he might have to report that as a short-term gain, isn't that so?

Mr. Tucker: We have opinions on the tax problem in here. I don't think this witness ought to be asked legal questions of that kind. I object.

Mr. Condon: Mr. Tucker, this witness was asked by you a multiplicity of questions over objection and he was qualified as an expert and this is a very simple problem.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Tucker: I object. I think you are calling for a legal conclusion and we have an opinion of my firm in here as to the tax problems and I think you ought to look to that for the tax problems.

Mr. Kanton: Mr. Examiner, may I make a suggestion that if this question is answered specifically in this tax opinion will Mr. Tucker please point it out? Perhaps we can get the answer that way.

Mr. Tucker: I have no objection to his quoting from the opinion. That is a legal conclusion that is founded on knowledge of the law.

The Examiner: Then your question calls for his conclusions on a legal question, that is, the effect of the income tax on this proposition. By reason of that I sustain Mr. Tucker's objection.

By Mr. Condon:

Q. Have you filled out your own income tax returns, Mr. Benjamin?

A. Yes, I fill out my own.

Q. And you are generally familiar as any laymen would be with the requirements of the Internal Revenue Code where you acquire a security and then sell it within six months, as to what that constitutes, are you not?

A. Yes.

Q. And that is normally a short-term gain, is it not?

A. Well, I don't know. I never had a situation where I acquired a warrant and sold the warrant, so I don't know what the effect is.

Q. This is novel to you?

A. It is, yes sir.

Q. Now is it your impression that that point is covered in Mr. Lynch's opinion, Exhibits 15-A and B?

Mr. Tucker: I object to giving his impression. I think he ought to look at the opinion.

By Mr. Condon:

Q. Please do so, Mr. Benjamin, and point out where that question is answered.

A. (No response.)

Q. Mr. Benjamin, during the noon recess, if you find it convenient, would you look at Mr. Lynch's opinion, being your Exhibits 15-A and B, and be prepared to point out if it is there any reference to the answer to this question, to-wit, assume that a common stockholder of Engineers and a preferred stockholder of Engineers who held common stock decided to dispose of his warrant, whether or not that transaction taxwise would constitute a long-term capital gain or a short-term capital gain or what it would constitute taxwise?

A. I shall be glad to look in Mr. Lynch's opinions and see if I can find an answer to that question.

Q. You testified in effect, Mr. Benjamin, that there was no attempt on the part of the Board to appraise or evaluate the Gulf States common stock or the value of the warrant. Is that correct, incident to the plan?

A. There was no attempt to make an appraisal of the stock except to the extent that was indicated, that it would be in excess of the initial——

Q. $10?

A. In excess of the initial market price of Gulf States over the warrant price.

Q. Is your answer the same with respect to a similar question concerning El Paso and Virginia?

A. Yes.

Q. There were no studies, appraisals, estimates or things of that sort made with respect to breaking down the values of these stocks in these different companies?

A. Well, Mr. Barnes made an estimate of the values of these three securities for his use and I believe that a statement was presented at the meeting of May 24th which indicated at that time the warrant plan contemplated both El Paso and Gulf States and a statement was presented to show the excess over the $10 a share.

Q. I hand you a memorandum bearing date 5/24/45 and ask you if this is the memorandum to which you have just made reference?

A. That is one of the sheets, I think, of the memorandum. I think there were one or two other sheets presented at that time.

Mr. Condon: This is off the record.

(Discussion off the record.)

Mr. Condon: Let's get back on the record, please.

By Mr. Condon:

Q. Mr. Benjamin, in colloquy off the record in which Mr. Barnes was kind enough to participate it appears that there were four sheets prepared for discussion at the meeting on submission to the Board in the latter part of May 1945 relating to the general subject matter of your previous answer. Would you be kind enough to produce those for our inspection at the next session? I understand that the papers are in New York but that they can be made available on Monday.

A. I think I can get them some time Monday.

Q. Or whenever we reconvene. Other than the statements that you have referred to constituting the four sheets identified by Mr. Barnes, there were no other studies made along that line of which you are aware?

A. That is right.

Q. I am asking the question with regard to all three companies.

A. I understand that.

Q. Now you made a statement a little while ago when the Examiner interrogated you with respect to it about paying off the preferred stock. Do you recall that?

A. Yes.

Q. Do you recall that exchange between the Trial Examiner and yourself?

A. I do.

Q. Isn't it a fact that the Board of Directors of Engineers might have given the preferred stock a right to participate in Gulf States by means of the warrant plan, if it had chosen to do so?

Richard N. Benjamin—Cross Examination (Cont'd)

A. I am just trying to see how that would work. I don't know any legal obstacle to that procedure offhand.

Q. You see no objection to it?

A. I wouldn't say that. I see no reason why it could not have been done.

Mr. Kanton: What did you have specifically in mind there, Mr. Condon, the distribution of the Gulf States common and the El Paso common to the preferred stockholders at certain values which were determined to be fair values for those securities, or the distribution of the common stocks of these two companies that I have just mentioned through the same warrant plan that is proposed now for the common stockholders?

Mr. Condon: Well it would be to include that group of preferred stockholders who own no common stock in the over-all right to participate in a continuation of the enterprise by acquiring securities in the subsidiaries.

Mr. Kanton: You mean to say the respective portion of whatever their interest is now in the total enterprise?

Mr. Condon: Yes.

Mr. Kanton: I see.

By Mr. Condon:

Q. Yesterday, Mr. Benjamin, you gave us a list of all the considerations that you could recall and by reference to the minutes of the meetings of the directors and your notes that were contemplated and considered by the Board in arriving at this plan. Do you recall giving that list, including Mr. Tucker's opinion and the contributions, the matter of retention of dividends, and that list? Do you recall that?

A. I think I gave that information to the best of my recollection as to which was based on expressions made by the directors that I could recall.

Q. Yes. Now since your testimony of yesterday have you had occasion to consider your testimony and do you

wish to add to that list? Have you thought of anything other or further than you have already testified?

A. I have not thought of anything additional, Mr. Condon.

Q. Can you state what considerations were given for the loss faced by the preferred stockholders with respect to their investment?

A. You mean by having the preferred stock retired?

Q. Retired at $100.

A. Well, I think my own feeling is that——

Q. (Interposing) I am asking you what the Board did, Mr. Benjamin, please, on that question.

A. I would like to strike that answer then. To the best of my recollection from discussions which I have heard at these meetings I think that the Board felt that since the liquidation of the company was required, that all classes of stockholders including the preferred would receive the amount which they were entitled to receive and that it would require the cessation of the interest of these preferred stockholders and the common stockholders in Engineers.

Q. Mr. Benjamin, my question was whether to your knowledge there were any discussions by the Board with respect to weighing the loss of the preferred stockholders' investment as a result of the proposed payment to them of $100 a share.

A. I don't recall any on that particular point.

Q. Was any consideration given by the Board of Directors to the different dividend rates on the three series of preferred stock in arriving at the price of $100 a share?

A. No, I don't think so.

Q. Do you recall any discussions at the Board meetings suggesting considerations given to the rights and risks of the preferred from an investment value standpoint?

A. Well, not expressed in those terms, Mr. Condon. The only thing I can recall is a discussion of the price at

which the stock was issued and some discussion of the cost of the market prices of that stock during the years.

Q. Other than that?

A. That is all I can recall.

The Examiner: In substance, your testimony is that the Board considered that the preferred stockholders were entitled to receive $100 and accrued dividend and nothing else; and that no other consideration was given as to how that might affect them, is that true?

A. No, I don't think that is true. I think that they took into consideration the other circumstances to which I have referred before.

The Examiner: What other circumstances?

The Witness: The fact that——

The Examiner: That they had only paid $100 or $99.50, as the case might be?

The Witness: That was one of the factors.

The Examiner: And the market value in the past, the market price in the past?

The Witness: And the fact that the company had been required to dispose of many of the enterprises into which it had gone and in fact that the equities had been built up behind the preferred stock, and things of that sort, Mr. Examiner.

The Examiner: But they didn't take into consideration or give any thought at all to the present value of the preferred stock in considering the amount that was to be paid the preferred stockholders?

The Witness: Well, the present market value of the preferred stock that was referred to——

The Examiner: I am not talking about the market value.

The Witness: I don't recall any discussion as to the present value.

The Examiner: I am not talking about the market value. They made no attempt to evaluate the preferred stock?

The Witness: I don't recall any discussion on that point, Mr. Examiner.

The Examiner: They just simply relied on Mr. Tucker's opinion and as I understand the testimony the opinion of the majority of the Board that in any event the preferred stockholders, as a class, were entitled to receive $100 and accrued dividends and no more, is that right?

The Witness: That is right. They thought it was fair to meet the contract provision.

The Examiner: And they did not think it was necessary for them to go into the equitable situation, if you please?

The Witness: No, sir, I wouldn't say that. I think they did consider the equitable consideration. I think Mr. Tucker's opinion went into that quite fully.

The Examiner: Wasn't Mr. Tucker's opinion based largely on the contract right of the preferred stockholder of $100?

The Witness: No, sir. He had several other considerations in that opinion, Mr. Examiner.

The Examiner: He dealt about the losses suffered by the common stockholders?

The Witness: Those were in there, yes sir.

The Examiner: But did he mention in there any losses suffered by the preferred stockholders or that might be suffered by the preferred stockholders in being required to get rid of their investment at this time? He didn't make any mention of that in there, did he?

The Witness: I don't think he said anything about cessation of the investment of the preferred stockholders, if that is what you are referring to.

The Examiner: That is what I am referring to.

The Witness: No, sir.

The Examiner: In other words, they made no attempt at all to arrive at the value of the preferred stock, the investment value of the preferred stock at this time, but relied entirely upon the contract rights to pay them $100 and accrued dividends?

The Witness: No, sir, I don't believe that is the case.

Richard N. Benjamin—Cross Examination (Cont'd)

The Examiner: Did they attempt to evaluate the preferred stock in arriving at the $100? I think your answer was no, isn't that correct?

The Witness: That is correct.

The Examiner: Then how did they give any consideration to anything else?

(No response.)

The Examiner: Let me ask you this before you answer that.

Why did you decide to pay the $5.50 preferred stock $100 and pay the $6 preferred stock $100? Why didn't you make a differentiation between the two?

(No response.)

The Examiner: I am asking if they considered that. That is my question.

The Witness: Mr. Condon asked me the same question, I think exactly the same question. I said they did not consider any difference in the treatment for the three series of preferred stock, so that the only thing——

The Examiner: So that the only thing they gave consideration to then was the contract right as expressed by the charter of the corporation?

The Witness: No, sir. Would you let me——

The Examiner: I wish you would clear that up because it is not clear to me.

Mr. Tucker: My opinion is in the files here as an exhibit and I think it ought to speak for itself. That was one of the considerations according to the exhibit, which is No. 38. There were a lot of other things considered in there besides the contract. In fact, if anybody would take the trouble to read my opinion they would see that I said in that opinion quite frankly that I didn't think that that was the sole consideration. I think the difficulty is that my opinion has not been read, but you have been asking the witness to characterize it. I said that that was one of the considerations and that taking all of the considerations it

seemed to me even in view of the Otis case that it was fair and equitable to pay them $100 and accrued dividends and I say that when you say that I pinned it on the contract alone, you are not properly characterizing my opinion because I did quite the opposite.

The Examiner: Off the record.

(Discussion off the record.)

The Examiner: Back on the record.

The Examiner admits that he has not seen or read a copy of Mr. Tucker's opinion because it was not given to him. A copy has now been handed to him and I will take the opportunity to read it just as soon as I can.

My questions to the witness, Mr. Benjamin, were whether the Board itself at the meetings at which you were present discussed this question of a differentiation between the $5.50 and the $6 preferred stock.

The Witness: To the best of my recollection they did not discuss that point, Mr. Examiner.

The Examiner: They relied then entirely upon Mr. Tucker's opinion or upon their own opinion that the preferred stock was only entitled to their contract rights, is that right?

The Witness: In the light of the circumstances mentioned in Mr. Tucker's opinion and the other circumstances that I have referred to from time to time in my testimony.

The Examiner: I think I have covered that now.

By Mr. Condon:

Q. Mr. Benjamin, following the general line of inquiry of the Trial Examiner, it is a fact, is it not, that there was no consideration given by the Board in your presence to the determination of going concern value for the preferred stock?

A. That is correct. May I add, I think your question included, to the best of my recollection.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Yes. Do you recollect the position taken by Mr. Streeter here?

A. Yes, I do.

Q. Is it not the fact that Mr. Streeter, at or about the time that Mr. Tucker's opinion was submitted to the Board went on record as being against the Plan that was discussed which proposed retiring the preferred stock at par instead of its call price, he felt this was an attempt on the part of the common stockholders to retire the preferred stock at par, while the equity in the properties remained with the common stock? Do you recall his taking that position?

A. I do.

Q. And did he not take the position that he felt that this was not an "involuntary liquidation," as set forth and referred to in the charter of the company?

A. I recall his saying that this was not a liquidation at all. Let me look at that letter, Mr. Condon.

(Letter handed to the witness.)

The Witness: Thank you, Mr. Condon. That refreshes my recollection.

Mr. Streeter did make the statement that he did not consider this to be an "involuntary liquidation."

The Examiner: When he said that refreshes his recollection, he was referring to a memorandum which Mr. Condon handed him, a memorandum of Mr. Streeter's, dated July 26, 1945, as revised July 30, 1945.

By Mr. Condon:

Q. Was it not also Mr. Streeter's position at that meeting that the effect of the proposal to pay the preferred $100 a share was, in effect, merely a partial retirement of outstanding capital stock? I again hand you the memorandum. (handing paper to the witness).

Mr. Kanton: May I suggest that if counsel and the witness are willing, and the Examiner is willing, that this document being referred to between Mr. Condon and Mr.

Benjamin be identified, and perhaps placed in evidence, if they so wish?

Mr. Condon: I will be very glad to do it. I recognize the document as an exhibit might be hearsay, and consequently I didn't wish to offer it at this time. I would be very pleased to identify it as a memorandum.

By Mr. Condon:

Q. Mr. Benjamin, is the document which I now hand you, and which I have already identified by date and by office in response to the Examiner's question, a copy of a memorandum that you recognize as having been prepared by Mr. Streeter, and voicing his expressions of view at or about the time it purports to bear date?

A. Yes.

Mr. Condon: May I have it marked as Preferred Stockholders' Exhibit——

Mr. Tucker: You spoke something about a revision. What is the revision?

Mr. Condon: Revision as of July 30. It so states.

Mr. Tucker: What was the date of the meeting?

Mr. Condon: The 26th or 27th.

Mr. Tucker: So this could not have been anything Mr. Streeter had at the meeting. It is his recollection, frankly, of what he said at the meeting.

Mr. Condon: Are you telling me? I'll take your statement. Were you at the meeting?

Mr. Tucker: Yes, I was at the meeting.

Mr. Condon: Are you suggesting that that does not purport to represent the position taken by Mr. Streeter?

Mr. Tucker: I am only suggesting that it shows on its face that it was revised after the date of the meeting and it could not have been anything that Mr. Streeter had at the meeting under those circumstances.

Mr. Condon: You are arguing from the document. Let us talk to the witness. Let us continue the way I was.

Richard N. Benjamin—Cross Examination (Cont'd)

That brings into focus why I was not offering the document.

May this be marked as Preferred Stockholders' Exhibit 14 for identification, exclusive of the pencil notations which are for the assistance of examining counsel?

Mr. Tucker: May I see the pencil notations?

(Discussion off the record.)

(Preferred Stockholders' Exhibit No. 14 is marked for identification.)

By Mr. Condon:

Q. Mr. Benjamin, to digress a moment, I think I used the term "par value of the preferred stock." This stock is no par value, is it not?

A. That's right.

Q. I meant the price of $100 a share, and I would like the record to so indicate,—that counsel was inaccurate in his characterization.

Coming back to this meeting and your recollection of Mr. Streeter's position, is it a fact Mr. Streeter considered that the proposal was merely a partial retirement of outstanding capital stock and its preferred, of Engineers?

A. He made that statement.

Q. At the meeting?

A. To the best of my recollection he made that statement at the—I'm not sure which meeting, whether it was the July 26th meeting or the September 5th meeting—I think he did make that statement.

Q. At all events, it was made, according to your best recollection, prior to action of the Board in adoption of the Plan?

A. That's right.

Q. Did he also take the position that prior to September 5 and prior to the adoption by the majority of the Board that to retire the preferred stock here at $100 a share in the light of all the circumstances, would create a wind-

fall for the common stockholders at the expense of the preferred stockholders?

A. Yes, I recall his making that statement.

Q. Do you also recollect that he took the position that it was highly inconsistent on the part of Engineers to rely upon the Public Utility Holding Company Act as the authority for the action to pay the preferred off at $100 while continuing to assert in the Supreme Court of the United States that the Act itself was unconstitutional?

A. Yes, I recall his making that statement.

Q. Now, I hand you this memorandum which has been marked Preferred Exhibit 14 for Identification, and ask you to examine it and see if there is anything set forth therein that does not accord with your recollection of the contentions urged by Mr. Streeter prior to the adoption of the Plan on September 5th?

A. I see nothing in this memorandum that was not urged by Mr. Streeter.

Q. Thank you.

Mr. Condon: Do you have any questions about this, Mr. Tucker?

The Examiner: Do you want to offer this now?

Mr. Condon: I don't think it is necessary. I have no objection to offering it. I don't think it adds anything.

Mr. Kanton: I believe, as long as the contents have been put in through the witness, it is not necessary.

The Examiner: It is up to Mr. Condon.

Mr. Condon: I asked the last question to dispel the lingering doubt that apparently was in Mr. Tucker's mind.

By Mr. Condon:

Q. Mr. Benjamin, this document that has been identified as Preferred Stockholders' Exhibit 14 for identification, dated July 26, 1945, and revised July 30, 1945, could you state whether or not to the best of your knowledge, information and belief, that was prepared by Mr. Streeter and sent to Mr. Barnes and the other directors as representing

the position which he planned to take at the time of the vote on the adoption of the proposed plan?

A. That is my understanding.

(Discussion off the record.)

By Mr. Condon:

Q. Now, Mr. Benjamin, coming to your Plan, and more particularly that portion of Part 1 or Step 1 of the Plan that relates to the deposit of $100 per share and accrued dividends, to the date of the deposit, for the extinguishment of the interest of the preferred stock—do you have that provision in mind?

A. Yes, I do.

Q. Do you recall being interrogated by Mr. Kanton as to what protection the preferred stockholders would have, if any,—and I believe in your testimony you said you felt the retention of Virginia stock was all that the preferred stockholders were entitled to and that you had been so advised by counsel.

A. You are speaking now of the protection for payment in addition to the $100?

Q. Yes.

A. I don't recollect the exact phraseology, but the substance is that we believe that the Virginia common stock would provide adequate protection for this differential, yes, sir.

Q. Have you made any estimates as to the maximum amount of this so-called differential that is involved as one of the issues involved this proceeding, more particularly under Step 2 or Part 2?

A. We have considered that this liability, contingent liability, would not exceed $3,204,795 plus the possibility that the Commission might find that interest at some rate would be determined to be payable on that account.

Q. And at what interest did you estimate with regard to that possibility, Mr. Benjamin?

Richard N. Benjamin—Cross Examination (Cont'd)

A: Well, we thought that amount would not exceed six percent.

Q. Over how long a period did you make that estimate?

A. Over how long a period did we estimate that 6 percent might run?

Q. Yes. And on that base might it be applied?

A. Well, the base on which it would be applied is the $3,200,000 figure I just mentioned, approximately, and we thought that it was reasonable to expect that this matter would be settled within a two-year period.

Q. A two-year period?

A. A two or three-year period, somewhere in that neighborhood.

Q. Did the Board give any consideration to the possibility that a preferred stockholder who didn't own common might feel aggrieved at this proposal and refuse to acquiesce in the Board's decision to have a deposit made to cut off his rights, a deposit of $100, and be unwilling to turn in his certificate and might litigate this question and that he might be entitled to his 6 percent if he owned $6 series of the preferred, for this three-year period on the entire amount?

A. The Board gave consideration to the possibility that this plan would be litigated, Mr. Condon. I don't recall that any of the directors passed on this point in the way you outlined as a possibility, except that Mr. Streeter, I believe, did say that some preferred stockholder might object to the splitting of parts 1 and 2 of the Plan.

Q. Mr. Streeter brought out that, did he?

A. I think he did.

Q. When did he bring that up?

A. I think he brought it up at the last meeting on December 15.

Q. When?

A. December 15.

Q. What else did he say with respect to that same general subject matter, if you recall?

A. He said that if the preferred stockholders were successful in that contention, of course it would mean that the company would have to pay preferred dividends on all of the outstanding preferred stock until the matter was settled.

Q. And how much would that estimate, Mr. Benjamin, if it lasted three years? Would you do a little very simple arithmetic?

A. Well, the preferred stock dividends are all of the Engineers' stock outstanding, approximately—well, they actually were for the twelve months ended June 30, $2,119,092, so that if the payment of these dividends continued for two years, it would be $4,200,000.

Q. Three years, and it would be another $2,000,000?

A. That's right.

Q. In other words, Mr. Benjamin, if the Commission should not go along with your plan and should find it unfair and inequitable to leave it in the power of your Board to split what it might consider an obligation, it might happen that if this matter were litigated for two and a half or three years, it might add another four to six million dollars of dividends to your financial calculations? Is that a fair statement?

A. Well, I don't want to confuse, Mr. Condon, the—— You started out by asking me whether Virginia common stock was sufficient protection for the preferred stockholders. This is a little different situation. If parts 1 and 2 of the Plan are not split, then Engineers stays as it is until Part 2 of the Plan is finally settled. It is true that if the Commission does not find it fair and equitable to split 1 and 2, that preferred dividends are likely to go on, will go on; but if Part 1 is acted on separately and a Court order is obtained on that part of the plan, then it is the $3,200,000 figure, I believe, plus interest, which would be the amount against which you would offset the security of the Virginia Electric common stock. You mentioned one other possibility that some preferred stockholder might

not accept the $100, and I assume that was on the assumption that Part 1 of the Plan was split, is that correct? You started off by asking me—

Q. Either way—either it was or was not. It doesn't make any difference so far as my question is concerned. You can make either assumption.

A. If Parts 1 and 2 are not split, then there is no problem, I don't believe, because you have all the assets of Engineers that they have today to secure the preferred stock.

Q. And, in addition to that we have the problem of possibly two or three years' dividends that might range from four to six million dollars in excess of your calculations, depending upon how long the case was litigated, or took; isn't that a fair statement?

A. Well, you say "in excess of my calculations." The calculations I referred to was the premium point. I think we understand each other, though.

Q. That is the $3,200,000, and your calculations from the standpoint of possibilities, if I understand you, went no further than calculating a six percent interest rate on the $3,200,000 which you call the premium point; do I understand you correctly?

A. That is correct—

Q. Now, I am asking you if there are not other and further possibilities, and I am suggesting one, that the Commission should not split Parts 1 and 2, but should find it unfair and inequitable so to do, and should say "Until this question of how much in excess of $100 a preferred stockholder is entitled to receive, that it shall be the duty of Engineers to continue to pay him dividends?

A. That's right.

Q. How much might that amount to? And I ask you if that has been considered in your calculations?

A. Well, that is the annual dividend rate that we have already talked about, and that might, if this dragged on for two or three years, amount to four to six million dollars.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. And in your general financial considerations, that hasn't played any part, and didn't, in the minds of the Board? Isn't that a fair statement?

A. The Board felt that that was not a reasonable possibility.

Q. Were they advised by counsel on that point?

A. That point was discussed with Mr. Tucker.

Q. Did they find any reflection in any written opinion of Mr. Tucker's,—and I am referring to that July 26th opinion, 1945, Mr. Benjamin.

A. I do not believe that that point was covered in Mr. Tucker's opinion, but it was discussed at meetings, to the best of my recollection.

Q. At what meetings—and would you please refer——

Mr. Tucker: Why don't you let him finish. He says "To the best of my recollection"—something, and then you interrupted him.

Mr. Condon: I thought he had finished.

Mr. Tucker: Well, he hasn't.

The Witness: Well, will you read my answer?

(The record was read.)

By Mr. Condon:

Q. Had you finished your answer?

A. No. At the July 26th meeting when the draft of the Plan was put up for the first time in this form, it was explained why we had three parts to the Plan, and the purpose of putting the Part 2,—what is now Part 2 of the Plan, in Part 2, was to segregate this issue, so that Part 1 of the Plan could be carried through promptly and that this issue—they realized there might be and would be some difference of opinion on it—was put in this separate part of the Plan, and to the best of my recollection, that Plan was discussed with Mr. Tucker, and he said that he thought it was reasonable to expect that the Commission and the Court would permit this split, so that I think the directors had that very much in mind.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. You fix that time as the July 26 meeting, or thereabouts?

A. I think that is the first time that split came up, to the best of my recollection.

Q. When Mr. Barnes requested Mr. Tucker for an opinion, did he make that request orally or in writing?

A. I think he made it orally.

Q. Were you present when the request was made?

A. Well, at one of the directors' meetings—I am not sure just which one—I think Mr. Barnes stated that he would ask counsel to prepare an opinion on this whole subject. I am not sure just which meeting that was. I think it was a meeting in the Spring, but I am not sure just which one.

Q. Do you recall the points that Mr. Barnes asked Mr. Tucker to cover in his opinion?

A. Well, I think he asked him to cover primarily at this point the amount payable to the preferred stockholders.

Q. Do you recall whether or not he asked him, either at that time or at this July meeting, to give his opinion concerning the right of the Engineers Company to split this payment into two parts, part that it felt that it should pay now and what it might be called upon to pay at a later date, and not make any provision in the interim for the rights of the preferred stockholders?

A. I think that Mr. Tucker was asked to express his opinion as to the right of the Company to split Parts 1 and 2, and that Mr. Tucker answered that question to the effect that he thought the Company had a right to do it, and that the Commission and the Courts would find it fair and equitable to do so.

The Examiner: That was done orally at a meeting?

The Witness: Yes, sir.

The Examiner: There was no written opinion on that?

The Witness: I don't recall that.

Mr. Kanton: Wasn't there Parts 1, 2 and 3 at that time, Mr. Benjamin?

The Witness: Oh, yes.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Condon:

Q. Now, I gather that, in response to the Examiner's question, that this particular point to which I have just made reference, was brought up at this meeting that you fix as on or about July 26th and that Mr. Tucker's opinion was not written, but it was a spontaneous expression by Mr. Tucker?

A. I don't think it was a spontaneous expression by Mr. Tucker, because I think Mr. Tucker had given consideration to it prior to that time, in connection with working on drafts of the Plan.

Q. Now, had he ever rendered any written opinion on that subject?

A. I don't think so.

Q. He had been working on prior drafts of the Plan; he had been working on them prior to July 26th, hadn't he, when he rendered his opinion?

A. Well, he certainly had been discussing them prior to that time, I think.

Q. You had drafts of that plan in June, didn't you, Mr. Benjamin?

A. Yes, I think we did.

Q. Did anyone bring up the question that some preferred stockholder might contend that he was being deprived of his property without due process of law if that technique were adopted by the Board of Directors and approved by the Commission?

A. No, I don't think so.

Q. Is that a new concept to you in this situation?

A. Yes, it is.

Q. Coming back to this question of securing the preferred stockholders to whatever amount, if any, this Commission may decide the preferred are entitled to receive in excess of $100, you answered Mr. Kanton to the effect that there was no security, is that correct? I think he brought it out in the question of the form of a trust or escrow. I don't mean to quote him.

Richard N. Benjamin—Cross Examination (Cont'd)

A. You mean the money that is actually put up with the Chase?

Q. I am talking about provision to protect the preferred stockholders in the event that the Commission should decide, and that that decision be upheld by the Court, that these preferred stockholders are entitled to something in excess of $100 a share plus accrued dividends, to the date of deposit?

A. Oh, yes.

Q. Do you recollect that line of inquiry by Mr. Kanton?

A. Yes.

Q. I believe he asked you in words or substance why there was no provision made to escrow funds or put something up in trust. Do you recall that?

A. Yes, sir; I do.

Q. Do you recollect that you said that you had been advised by counsel that it wasn't necessary?

A. I am not so clear on that recollection.

Q. What is the fact?

A. My recollection is that Mr. Tucker has told us that it was not necessary to escrow or put cash up in trust, but that the security represented by the Virginia stock would be sufficient protection.

Q. Isn't it the fact, Mr. Benjamin, that there is no statement to that effect in Mr. Tucker's opinion? And I am talking about the Tucker opinion of July 26th.

A. I don't believe that there was anything in his opinion on that.

Q. Didn't anyone have any idea about securing the preferred stockholders against contingencies by having such a trust fund or a sum put up in escrow?

A. I don't recall that anybody raised that question, Mr. Condon.

Q. Mr. Benjamin, I hand you a memorandum dated July 23, 1945, which is just three days before Mr. Tucker's opinion, and I refer you to Step 6, which reads as follows:

Richard N. Benjamin—Cross Examination (Cont'd)

"Engineers will deposit $3,204,890 in escrow to cover any liability for premiums on the retirement of preferred, if such liability is established in final adjudication."

And there is a very nice little pencil mark crossed through it.

Will you examine it and tell us the circumstances of the elimination of that proposal?

A. Well, some of the cases before this Commission,—I think Laclede was one of them——

Q. Laclede Gas Light?

A. I think that was one—it did have a provision for depositing funds in escrow to cover a similar contingent liability; and I believe that this was put in here——

Q. By whom?

A. By someone in the office, our counsel, either Mr. Tucker or Mr. Barnes or myself, in a tentative draft of a plan.

Q. Three days before Mr. Tucker's opinion?

A. This was three days before—just a minute. This original draft was dated July 13 and it is revised on July 23 to remove this step that refers to deposit of funds in escrow.

Q. Yes.

A. And if I could look at the later draft of plans that I furnished you——

Q. Yes sir—I will be very pleased to give them to you.

(Document handed to the witness.)

The Examiner: This memorandum that Mr. Benjamin is looking at,—just what is it?

Mr. Condon: I am going to identify it, Mr. Examiner. I would like the record to show that the memorandum to which I was addressing the witness's attention preliminarily is a memorandum supplied to me by him.

The Examiner: From the records of the Company or from what source?

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Condon: From the records of the Company, bearing date, typed, 7/13/45, and two pencil marks through the "13" and the figures "23" so that it reads 7/23/45 in the upper right-hand corner. And this memorandum is captioned "Engineers Public Service Company, liquidation plan (to be effective not earlier than January 1, 1946)" and consists of two sheets, the second of which is marked "Sheet 3."

I don't suggest that anything has been removed by that. I would just like to note that they are physically clipped and it is undoubtedly a typographical error.

By Mr. Condon:

Q. Mr. Benjamin, what you are looking for is the original draft, I hand that to you now, as being dated July 13, 1945, and bearing your initials under the date.

Would you look at that while you are examining the documents?

A. There were a good many drafts of plans along in this period. Apparently this revision of July 23 removed from the Plan the provision to put up $3,204,000 in escrow to cover liabilities for premiums.

Q. By "premiums", Mr. Benjamin, you mean whatever amount, if any, in excess of $100, this Commission might determine to be fair and equitable to be paid to the preferred; is that right?

A. That is correct. Well, on July 23, as I say, that provision was apparently removed, and to the best of my recollection, the reason it was removed was because it was no longer thought to be necessary to actually put the money up in escrow, that it would be sufficient protection, and would avoid the necessity of raising that much cash, to hold the Virginia common stock as security for that contingent claim.

Q. There was no thought about putting up Virginia common stock in escrow, of course, was there?

A. I can't recall whether that was suggested or not, but I did not believe that it was necessary to do that.

Q. You knew that the Commission had required that in the Laclede Gas Light case, didn't you?

A. Yes.

Q. And that provision was contained in the draft down to the 23rd of July; is that right?

A. That's right.

Q. Who struck it out?

A. Well, I probably did.

Q. You struck that out?

A. I probably struck it out after discussions with other people in the office.

Q. Well, with what other people did you discuss it?

A. Mr. Barnes, and, I think, Mr. Tucker.

Q. Well, is that your impression, that you did discuss it with Mr. Tucker?

A. Yes, that is my impression.

The Examiner: Was this memorandum used at a Board meeting or was it something prepared by the management and considered before the Board meeting?

The Witness: Well, it was prepared prior to the directors' meeting on July 26.

The Examiner: Was the striking out of that paragraph in there discussed with the Board?

The Witness: Well, I don't know that that matter was discussed, Mr. Examiner. I don't recall. I think the subject was discussed as to whether or not it would be sufficient protection to hold the Virginia common stock for the preferred stockholders' contingent claims, and the possibility of an escrow fund may have also been discussed as an alternative, but I don't ever recall anybody saying that they thought that that would not constitute sufficient protection for the preferred stockholders.

The Examiner: That contingency was considered by the Board, though, wasn't it? That is, the possible contingency of having to pay in addition to $100?

The Witness: Oh, yes, yes.

The Examiner: Was it the opinion of the Board that it was so remote that it wasn't necessary to set up a fund for that purpose?

The Witness: Oh, no, that wasn't it, Mr. Examiner.

The Examiner: Just what occurred at the Board, if you recall?

The Witness: My recollection of what transpired was that when the Plan was explained, the directors felt that the keeping of Virginia common stock would be adequate protection against any such claim.

By Mr. Condon:

Q. In other words, the preferred stockholders, to the extent that they were entitled to any excess above were to be reduced to the status of general creditors of Engineers? Is that the import of your answer to the Examiner?

A. (No answer.)

Q. And that, despite the fact that their securities were to be quarantined or insulated and delisted from the Exchange, deprived of negotiability, and all they have left was a lawsuit?

A. That is a pretty long question. Would you read it, please?

(The record was read.)

The Witness: I think that the directors felt—I know I feel that——

By Mr. Condon:

Q. Would you talk about the directors, please, Mr. Benjamin, with no disrespect to you, sir?

A. To the best of my recollection, I think the directors felt that there was such ample protection for the $3,204,000 contingent liability that there would be no question but that the preferred stockholders would be adequately protected.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Kanton:

Q. Is that going to appear upon your pro forma balance sheet as a contingent liability?

A. It already is.

By Mr. Condon:

Q. Did the directors have before them your proposed loan agreement with the Chase Bank at that time?

A. The directors knew that the Plan contemplated a loan. Let me see when that loan agreement was presented.

That loan agreement was presented at the directors' meeting held September 27, 1945.

Q. That was after the Plan was already adopted and filed with the Commission, wasn't it?

A. That's right.

Q. Then the directors couldn't have had in mind the provisions of the loan agreement which barred the sale of Virginia stock to the extent of $3,000,000 unless the proceeds were first applied to retire the bank loan; is that so, Mr. Benjamin?

A. I think that's right. The loan agreement itself wasn't presented until September 27, and I don't recall that that particular provision of the agreement was referred to at any earlier meeting.

Q. And was your answer the same with respect to an additional four and a half million that the company might have to borrow that in turn would have to be reimbursed from the sale of Virginia preferred stock before Virginia stock would be considered to be a free asset again?

Mr. Tucker: You say the sale of Virginia preferred stock?

Mr. Condon: I am sorry. Virginia stock. Thank you, Mr. Tucker.

The Witness: Well, as to the $4,500,000, Mr. Condon, $3,000,000 of that, approximately, could only be borrowed for the purpose of paying this amount we have been discussing, to the stockholders.

Mr. Tucker: You mean by that the $100 plus accrued dividends?

The Witness: No, sir; I mean the excess over $100. In other words, we propose to borrow $3,000,000 now for the purpose of raising funds to pay off $100.

Mr. Tucker: $3,000,000.

The Witness: That is the first $3,000,000. Then there is a second $3,000,000 so, to the extent of the first $3,000,000 the preferred stockholders are receiving that cash.

The second $3,000,000 is for the purpose of paying substantially all of the excess over $100 to the preferred stockholders.

The $1,500,000, just to complete the picture as to where that figure came from, was in case Western Public Service had not been sold, because we had been counting on $1,500,000 from that.

It is expected that that company will be sold this month, so that we won't need that extra $1,500,000.

Mr. Kanton: If that $1,500,000 is acquired from the sale of the Western Public Service, will you need the $3,000,000 on hand in order to pay off the preferred stockholders at $100 a share plus accrued dividends?

The Witness: Yes. In other words, our estimate of the cash at the end of 1945 included the proceeds from Western, and this $1,500,000 was just put in there to safeguard against the possibility it wasn't sold.

[R. p. 843] By Mr. Condon:

Q. Mr. Benjamin, before the luncheon recess we were talking about a memorandum dated 7/13/45 that had the date "13" crossed out and the figures "23" put on it, and it was captioned, "Engineers Public Service Company Liquidation Plan, to be effective not earlier than January 1, 1946."

Would you state from an examination of that document which you sent to me from the files of the company whether

or not that represents a subsequent draft to the memorandum dated 7/13/45, bearing your initials, to which I referred this morning, and which also came from the Engineers' files?

A. Yes, it is the same draft, marked to show certain changes.

Q. Yes.

Mr. Condon: Now, may I have marked as Preferred Stockholders' Exhibit 15A the one memorandum just referred to, bearing date 7/13/45?

Mr. Tucker: For identification?

Mr. Condon: For identification, and I ask that the one dated 7/23/45 be marked 15-B for identification.

The Examiner: Let them be so marked.

(Preferred Stockholders' Exhibits 15-A and 15-B are marked for identification.)

By Mr. Condon:

Q. Mr. Benjamin, you made the statement, referring to that document marked for identification, and I hand you Exhibit 15-B for identification of the preferred stockholders, dated July 23, 1945, and I ask you if that which I have just handed to you is a memorandum indicating the changes that were made on Preferred Stockholders' Exhibit No. 15-A, which is dated July 13, 1945, so that the record will be clear?

A. Yes, that is correct.

Q. Mr. Benjamin, was any notice of amendment No. 4 to the Plan filed here that was adopted on or about December 15, 1945, given to the stockholders of Engineers, either common or preferred?

A. No.

Q. You recognize, do you not, that that amendment No. 4 purports to restrict the rights and privileges of the stockholders, both common and preferred, with respect to substantive rights under the Plan?

A. We discussed the possibility of giving notice and felt that the changes were not such that it would affect the rights of either class of stock adversely.

Q. Did you receive an opinion to that effect?

A. We discussed it with Mr. Tucker, our counsel, and that was his opinion.

Q. That was an oral opinion also?

A. Yes.

Q. Was it discussed at the same time that the stockholders were not to have any right to demand anything other than Virginia stocks from the liquidating trustees as and when they were prepared to wind up their functions as such?

A. That is correct.

Q. This morning we were discussing the question as to whether or not Mr. Lynch's tax opinion, Applicant's Exhibit 15-A in evidence covered the situation with respect to whether or not the sale of a warrant by a common stockholder of Engineers, or a preferred stockholder who owned common stock would be considered tax-law-wise a long term capital gain or otherwise. Do you remember that inquiry?

A. Yes, I do.

Q. And I asked you if you would examine Mr. Lynch's opinion and refer by page and paragraph number, if you would, to the section of the opinion which you feel, if you do, covers the point. Will you do so?

A. Yes. I looked at Mr. Lynch's opinion during the lunch hour and found the following statement on page 8 of Applicant's Exhibit 15-A:

> "For the purpose of determining capital gains and losses on the sale of warrants for the period during which was held the Engineers' stock in respect of which the warrants were issued is to be added to the period during which the warrants were held"

and then it goes on to show that the basis of his opinion is Code Section 117(h)(3).

[R. p. 850] Mr. Condon:

Q. You knew that in connection with its bank loan, did you not, and in the retirement of its prefefred, it was going to pay the premium on that preferred?

A. Yes, I did.

Q. Did your Board know that?

The Examiner: When?

Mr. Condon: At the present time, so far as he knows.

The Witness: I don't know whether they know about that or not, Mr. Condon.

By Mr. Condon:

Q. Was that brought to the attention of the Board by anyone, as far as you know?

A. I don't recall whether it was or not.

Q. With respect to the Engineers' System, the Engineers Public Service Company, it has no bonds outstanding, has it, or debt?

A. That is correct.

Q. Would you say that it was an enterprise that was soundly conceived?

A. Yes, I think so.

Q. And you testified yesterday that it was soundly managed?

A. Yes.

Q. Competent people, not only in the holding company system, but also in its subsidiary operating companies?

A. Yes.

Q. Is it in sound financial condition and is it solvent?

A. Yes, I think it is.

Q. Would you say that the three utility operating subsidiaries were growing enterprises, with good prospects?

Richard N. Benjamin—Cross Examination (Cont'd)

A. Yes, I think the operating subsidiaries have good possibilities of growth. There are certain other factors that you have to keep in mind in connection with that. I think they are sound operating companies.

Q. Before the Public Utility Holding Company Act, there was no thought of liquidation on the part of Engineers, was there?

A. No, I don't think so.

Q. Is it the general impression of the Board that the earnings of the operating subsidiaries will increase? Are they optimistic?

A. I don't know.

Q. You are not able to answer that question?

A. I don't know what the opinion of the Board is as to the future trend of earnings of Engineers and its subsidiaries.

Q. Well, as far as the prognostications are concerned, let us take 1946. Would you say that they were on the upturn, the net earnings?

A. The estimates indicate that for the three operating companies, the balance for common stock and surplus in each case will be larger in 1946 than in 1945.

* * * * *

[R. p. 853] Mr. Condon:

Q. You heard Mr. Barnes testify, I think, on cross-examination, with respect to a possible refunding of the Engineers' preferred stock ex—the existence of the Public Utility Holding Company Act?

A. Well, I heard him testify that he thought the refunding could be done on the basis of present market conditions, ex—the Public Utility Holding Company Act.

Q. Was there any exploration with respect to the possibility in that regard in this case, Mr. Benjamin, as far as you know of?

A. You mean any time limit?

Richard N. Benjamin—Cross Examination (Cont'd).

Q. No, no. I mean, did you explore that possibility here?

Mr. Tucker: You say "ex—the Act". We have the Act.

Mr. Condon: I am just asking him if he explored the possibility of what rate it might have been refunded, Mr. Tucker.

The Witness: I have not personally, but I think Mr. Barnes has.

By Mr. Condon:

Q. Inclusive of the Act, there is no present danger of any default or bankruptcy or financial misfortune that faces the Engineers' System, as far as you know, or the company in particular?

A. No.

Q. It is a solvent, sound, going concern?

A. Yes.

[R. p. 856] By Mr. Condon:

Q. Mr. Benjamin, in response to questions propounded to you by staff counsel, you gave some testimony with respect to the matters of freezes, more particularly concerning Virginia and more particularly a 1944 freeze and a 1945 freeze.

A. Yes, sir; I did.

Q. If my memory serves me correctly, the 1944 freeze was $55,000 a month or thereabouts and it ends in or about the month of September, 1946, is that right, this year?

A. (No answer.)

Q. I have here the fifth supplemental announcement, and certainly in one page it will give us the whole picture. Will you look at that, if you will?

A. The first $55,000 a month freeze in the case of Virginia runs out 25 calendar months after September, 1944, which is approximately October, 1946.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. That is this coming October?

A. Yes, sir.

Q. Of this year?

A. That is correct.

Q. All right. Now, will you tell us about the second freeze, its amount and expiration date, approximately?

A. The second freeze is at the rate of $75,000 a month and it runs for 116 months after September, 1944. That is a period of nine years and eight months after September, 1944.

Q. That would run into some time in 1954?

A. May, 1954.

Q. Now, I have handed to you what purports to be a copy of a fifth supplemental indenture dated March 1, 1945, captioned "Virginia Electric and Power Company, to Chase National Bank of the City of New York, Trustee, relating to an issue of First and Refunding Mortgage Bonds, Series E, 2¾ percent, due March 1, 1975, and supplementing and modifying indenture dated November 1, 1935, as heretofore supplemented and modified."

A. (Examines.)

Q. I ask you if this is a copy of the document that I have identified that you supplied me with from the files of Engineers.

A. Yes.

Q. Now, I address your attention particularly to page 67, page 68, and the first two lines of page 69, more particularly article designated 4, captioned "Additional covenants of the Company," and I ask you whether or not that paragraph is the section of the indenture relating to the freezes with respect to which you have just testified?

A. Yes, it is.

Mr. Condon: I offer that in evidence, with the right on the part of any counsel to offer the balance of the document if they feel that it is relevant and material to the issue.

Mr. Tucker: No objection.

Richard N. Benjamin—Cross Examination (Cont'd)

The Examiner: That will be received in evidence as Preferred Stockholders' Exhibit No. 16.

(Preferred Stockholders' Exhibit 16 is received in evidence.)

[R. p. 861] By Mr. Condon:

Q. You also indicated, or testified that freezes pertaining and relating to Gulf and El Paso—am I correct?

A. Yes, sir.

Q. Would you state as precisely as you can for the record, the facts with regard to the freezes of those two companies?

A. First, taking up Gulf States, there is a freeze of $18,190 a month for the first 120 full months after October 31, 1944.

That is a period of ten years, so that that freeze would expire approximately in November of 1954.

In addition, there is a further restriction on the payment of common dividends. Common dividends may not be paid in an amount in excess of 75 percent of the net income available for dividends on the common stock if, after giving effect thereto, the aggregate of the following: (1) common stock capital account, (2) earned surplus account, and (3) capital surplus account, is less than 25 percent of the aggregate of (a) the principal amount of then outstanding debt, (b) preferred stock capital account, excluding premiums and assessments on capital stock account, (c) common stock capital account, (d) earned surplus account, and (e) capital surplus account.

Q. With respect to those two so-called freezes, is the first freeze coincident to a financial transaction affecting Gulf? If it is, will you state the facts pertaining to it?

A. Yes, it is.

In October, 1944, Gulf States issued 120,000 shares of $4.40 dividend preferred stock, partly in exchange for former Series of the preferred stock and partly sold for cash.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Will you please continue, Mr. Benjamin.

A. That is all.

Q. Have you finished?

A. Yes, sir.

Q. With respect to the sale of 120,000 shares of $4.40 preferred stock, will you state for the record what number of shares were sold for cash and the amount thereof, and what number were used in exchange for the outstanding preferred theretofore existing?

A. Yes, I would be glad to.

68,855 shares of the old preferred stock, and by that term I mean the $6 dividend and the $5.50 dividend preferred stock, being 68.86 percent of the 99,994 shares outstanding, were deposited for exchange.

The underwriters purchased the balance, namely, 51,145 shares of the new preferred stock.

Q. Was there any premium on that stock?

A. That stock was sold to the public at $106 a share.

Q. With respect to the old $6 dividend and the $5.50 dividend preferred stocks of Gulf, did that require the payment of any premium by the company?

A. The shares that were not exchanged were redeemed and the voluntary redemption premium paid.

Q. What did that amount to?

A. In the case of the $6 preferred stock it was $110 per share, the voluntary redemption price, and in the case of the $5.50 preferred stock, $108 per share.

Q. Were those transactions effectuated, you say, in the Fall of 1944?

A. That is right.

Q. Mr. Benjamin, in regard to the restriction on the payment of common dividends, would you state briefly the circumstances of that restriction and when it runs out? I am talking about Gulf, of course.

A. The limitation on it in which the 75 percent figure is used, remains so long as any shares of the new preferred stock remain outstanding. That is correct, there is no limit on that.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Kanton:

Q. Isn't there a time limit to the extent that if and when this present series of $4.40 preferred stock is refunded, that that restriction will be eliminated?

A. I think that is correct. So long as any of these particular shares are outstanding—to be absolutely certain of that I would like to check the charter. Do we have a copy of it?

Q. It is in the record.

A. The charter says that so long as there are any shares of the preferred stock are outstanding,—and the $4.40 preferred stock is the first series of it—so I would think so long as there is any preferred stock outstanding, that would apply.

Q. Of this particular series?

The Examiner: He said of any series.

The Witness: No, no. Of any series.

By Mr. Kanton:

Q. But if the Company wished to call this series of $4.40 preferred stock and issue an entirely different series, this restriction would not apply?

Mr. Tucker: It would have to go further than that. Mr. Benjamin is pointing out that we would have to amend the charter and set up a new class of preferred stock in order to get rid of this provision, because it applies to any series of preferred stock as it is now set up in the charter.

Mr. Kanton: That is correct.

The Witness: It is my understanding that the charter could be amended in the event all this particular series was redeemed.

Mr. Kanton: That is what I wanted.

By Mr. Condon:

Q. Now, Mr. Benjamin, would you be kind enough to give us the factual data of a comparable character with regard to El Paso?

A. In the case of El Paso Electric Company, the restriction on the payment of common dividends is that dividends can only be paid out of earnings accumulated since December 31, 1939, after deducting past maturities of the principal amount of the note issued at the time of the issuance of the initial 15,000 shares of $4.50 dividend preferred stock.

The amount of that note was $1,000,000 and it was payable, according to its terms, $70,000 on each June 1 and December 1 in each calendar year from 1941 to 1946 inclusive, and on June 1, 1947, and $90,000 on November 1, 1947, so that that freeze would run out November 1, 1947.

Q. In other words, you have paid down over 80 percent of that note to date in round figures?

A. The entire note has actually been paid but the freeze works in accordance with the terms of the original note.

Q. Would you state briefly the circumstances of the issuance of the 15,000 shares of $4.50 series of preferred stock of El Paso in 1941?

A. On January 7, 1941, I believe was the closing date in connection with the sale of $6,500,000 of First Mortgage Bonds, Series A, 3¼ percent, due November 1, 1970, and 15,000 shares of $4.50 dividend preferred stock of El Paso Electric Company.

These securities were sold to the public and the proceeds used to redeem Series A 5 percent bonds due 1950 in the amount of $8,000,000, to redeem 7,785 shares of preferred stock bearing a dividend rate of $6, and at the same time a $1,000,000 note was issued.

Q. What did the $6,500,000 First Mortgage Series A 3¼ percent bonds yield to El Paso? They were sold above par, were they not?

A. They were sold at a price to the Company of 104¼ and sold to the public at 106.

Q. Now, tell us a litle bit about your retirement of your 7,785 shares of $6 preferred stock. Did that carry a premium too?

Richard N. Benjamin—Cross Examination (Cont'd)

A. That was redeemed at the call price of $110 per share.

Q. That was done in what year, you say?

A. 1941.

Q. Have you fully and fairly stated for the record all the facts that you know of or about concerning the freezes of these three companies?

A. Well, there is only one other thing I would like to point out, and that is that there are really two freezes in existence on the Virginia Company. You asked me about the one in the fifth supplemental indenture, but I think it is necessary to keep in mind the freeze that was established by the merger agreement dated April 1, 1944.

Q. Well, is that an additional freeze, Mr. Benjamin, or is there a certain amount of overlapping there?

A. Well, there is a considerable amount of overlapping.

Q. Would you state the facts as briefly as you can for the record?

A. The merger freeze, April 1, 1944——

Q. By "the merger freeze" you mean the union between the Virginia Company and the Virginia Public Service?

A. Virginia Public Service. It provides that earnings available for the common stock, beginning with the period October 1, 1943, are available, less certain specified deductions. Now, the $55,000 a month and the $75,000 a month deductions were first put on by this freeze and they ran eleven months, when the next freeze was put on.

Q. You mean they ran concurrently?

A. No, sir; they were in existence eleven months before the fifth supplemental freeze was put on. There are some differences in the deductions, the principal one being that there is deducted from operating revenues for the purpose of the fifth supplemental freeze the cost of electricity purchased and rentals paid, in one of the calculations.

Under the fifth supplemental freeze the earnings available for the payment of dividends begin to accrue October 1, 1944, instead of October 1, 1943, as was the case in the other freeze.

Just to give you an idea of how they have worked out up to this point, under the so-called merger freeze, there was a balance through September 30th, 1945 of $1,997,000.

Q. Balance of what, Mr. Benjamin?

A. Balance available for common dividends.

Q. All right.

A. And under the fifth supplemental freeze there was a balance available of $1,628,905, a difference of some $360,000.

Q. Do you care to make any other or further statement of an explanatory character or do you feel that the record in its present state sets forth the information concerning these freezes regarding these three companies?

A. I think the record sets it forth correctly.

Q. There is no freeze on Engineers earnings, is there?

A. No, sir.

Q. Mr. Benjamin, I hand you a photo print of your exhibit 30 and ask you to examine it, if you will, and I ask you to state for the record with respect to your freeze testimony and translating it in the aggregate for the Virginia, the Gulf and the El Paso companies, what amounts of your aggregate consolidated figures, being the sum of $24,552,162.60 was represented by freeze income, approximately?

A. I will be glad to. Just a moment.

(Examines papers.)

As of June 30, 1945, Gulf States had $608,000 of free earned surplus.

At the same date, El Paso Electric Company had $284,000, and at the same date Virginia Electric and Power Company had $1,886,000, a total of $2,778,000.

At the same date Engineers Public Service Company had earned surplus of $7,095,000 against which there was no dividend freeze.

Q. If I understand your testimony correctly and my arithmetic is reasonably accurate, Mr. Benjamin, it would appear then that the aggregate of free earned surplus of

the parent company and its three subsidiaries equalled approximately $9,800,000 in round figures?

A. That is correct.

Q. And that the frozen earnings that were retained would represent the difference between that approximately $10,000,000 and the $24,952,000 figure, or approximately $14,952,000, is that substantially accurate?

A. Just one other problem here, and that is—that is accurate as to Engineers, Virginia, Gulf States and El Paso, but this applicant's exhibit contains a reference to the Western Public Service Company (Delaware) and that amount is $204,213, and there is no freeze against that company.

The Examiner: You say this Applicant's Exhibit. What is the number?

The Witness: Applicant's Exhibit No. 30—I'm sorry. I think you ought to add $204,000 to that.

I would like to point out that these freezes have not been in existence all the way back. I don't know just what effect that would have. In other words, it is possible that some of these amounts shown for the earlier years might have been paid out in dividends if the directors desired to do so, but those figures that I gave you are the latest ones that I have.

By Mr. Condon:

Q. Other than the $204,000 amount for the Western Public Service which I find to be included in your consolidated figure of $24,552,000, were my summarizations arithmetically substantially correct?

A. Yes.

Q. Mr. Benjamin, you were giving us figures as of June 30, 1945; is that correct?

A. Yes, sir.

Q. What effect, if any, does this payment of the $5,100,000 on these serial notes or prepayment, so far as Virginia is concerned, have on this exhibit?

A. I don't quite understand your question. Do you mean what effect would it have on the balances available for common stock had this note been paid off earlier? Because this is an historical record of the amounts accruing to the Engineers common stockholders. Or do you mean how much of a reduction in interest charges would be made by the payment of the bank loan?

Q. Well, will there be any effect on the free earned surplus of Virginia as a result of this payment?

A. I don't believe it would affect the freeze at all, Mr. Condon.

Q. It would not?

A. No.

Q. Do you know whether or not the directors contemplated or have contemplated making a capital contribution to Virginia from Engineers incident to the refunding of the outstanding notes rather than refunding them? By the notes, I mean the serial notes of the Virginia company.

A. You mean the $5,100,000 that has been paid off?

Q. I am talking about the prospective balance that is to be prospectively refunded.

A. I haven't heard any suggestion that would be done.

Q. Would you see any objection to that?

A. To Engineers making a capital contribution to Virginia rather than refunding the notes themselves?

Q. So that Virginia could use the money to refund the notes.

A. Could use the money so they would not have to refund the notes?

Q. Pay off the notes, retire the notes, to be more accurate.

A. Well, I haven't heard any suggestion as to that. I think Virginia is capable of refunding the notes on the basis of its own credit, and I don't see any reason why Engineers should make that contribution.

Q. Regardless of the necessity, do you see any objection to it, to put some of that spare cash to work if the directors wanted to do it?

Richard N. Benjamin—Cross Examination (Cont'd)

A. In the light of the pending plan, I would say that there would be an objection to making that contribution.

Q. Apart from the plan, Mr. Benjamin.

A. That would be a pretty low rate for Engineers to get on the contribution it made, I should think. In other words, if the only purpose of it was to avoid having Virginia borrow for a 10-year period on bank loans at low interest rate, I should think it would be preferable to have Virginia make the borrowing.

Q. Have you no objection to it that you can see except that the directors mightn't want to do it?

A. I think it is an entirely possible transaction, Mr. Condon. It could be done if the directors thought it advisable to do so.

Q. The directors of the Board of Engineers have made contribution or contributions in the past to Virginia, haven't they?

A. Yes, they have.

Q. In what amounts and on what dates? A. There was a contribution made in connection with the merger of Virginia Public Service.

Q. Was that the contribution that was originally planned at $4,000,000 and thereafter reduced to $2,500,000? A. Well, I am not sure of the answer to that question. Let me state the circumstances.

Q. If you will.

A. Engineers contributed to the capital of Virginia $1,500,000 in cash in 1938 and $1,000,000 in cash in 1941. In connection with the merger in 1944 the Engineers purchased the common stock of Virginia Public Service for $2,500,000 and also a claim that Virginia Public Service had and took in place of that additional shares of common stock of Virginia and also made a cash contribution of $2,500,000.

Q. A total of $5,000,000 in the aggregate?

A. Yes, sir.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. That adds up, if my arithmetic is correct, contributions of $7,500,000 in a period of approximately seven years?

A. That's right.

Q. Will you give us the data, if you have it available, with regard to contributions to Gulf?

A. In 1938 the Gulf States Utilities Company, Baton Rouge Electric Company, and Louisiana Steam Generating Corporation were combined. Engineers contributed the capital stocks of Baton Rouge Electric Company and Louisiana Steam Generating Corporation to Gulf States Utilities Company and purchased from Baton Rouge Electric Company just prior to that transaction the bus properties of that company. Now, the amounts——

Q. Approximately.

A. I will have to look them up.

The Examiner: We will take a short recess.

(Whereupon a short recess was taken after which the hearing was resumed.)

The Witness: I now have the information you requested, Mr. Condon. The amount of the contribution made by Engineers to Gulf States in 1938 was $4,101,000.

By Mr. Condon:

Q. Any subsequent to that?

A. No.

Q. Would you give us the same information with respect to El Paso, please?

A. In 1941, at the time of this—I guess it was in December 1940, just prior to this financing, El Paso Electric Company (Delaware), contributed the capital stock of Mesilla Valley Electric Company to El Paso Electric Company (Texas).

Q. Is that all?

Richard N. Benjamin—Cross Examination (Cont'd)

A. That is all, except that Engineers contributed approximately $1,000,000 to El Paso (Delaware) just prior to the time of its dissolution.

Q. Can you give us a dollar value as far as you can on that Mesilla Valley stock?

A. Yes, the book value of that contribution was $848,000.

Mr. Tucker: You understood him to say that wasn't made by Engineers? You aren't including those, are you?

Mr. Condon: Perhaps I am.

Mr. Tucker: I want to make sure. He said it was expressly made by El Paso (Delaware).

Mr. Condon: A wholly-owned subsidiary of Engineers.

The Witness: Well, at that time Engineers owned well over 90 per cent of the common stock.

Mr. Kanton: Wouldn't it be best to explain in the record here that El Paso at that time was not directly owned by Engineers but was held through El Paso of Delaware?

The Witness: Well, let me make a little further statement. In 1940 Engineers owned over 90 per cent of the common stock of El Paso Electric Company (Delaware). El Paso Electric Company (Delaware) owned all of the common stock of El Paso Electric Company (Texas), El Paso and Juarez Traction Company, Mesilla Valley Electric Company. El Paso (Delaware) was the company that made the contribution to El Paso (Texas).

* * * * *

[R. p. 877] By Mr. Kanton:

Q. It is a fact, is it not, but for the decision of the majority of the Board of Directors there is no necessity for eliminating the preferred stock at this time? In other words, other methods might have been employed to provide for the preferred stockholders than the method contemplated by the plan?

A. I think I have stated before in answer to your questions that there are other methods that could be used, and when you ask whether there is no necessity for eliminating

the preferred stock at this time, if it hadn't been for the action of the Board of Directors, there would be no plan and presumably the preferred stock would not be eliminated at this time.

Q. In other words, the effect of what the majority of the Board did was to anticipate turning over the enterprise to the common stockholders and to deprive the preferred stockholders of the benefit of any participation in the continuing enterprise?

A. Well, you say anticipate. Bear in mind this whole situation. This plan will not be carried out unless the Supreme Court rules adversely to the company's petition in the Section 11(b)(1) case. If they do rule adversely to the company, the company will be forced to dispose of Gulf States and El Paso. So that to the extent you say anticipate, I think that this so far is preliminary to action which will have to be taken if an adverse ruling is received from the Supreme Court.

Q. Are you suggesting that the directors would have to pay off the preferred stock if an adverse ruling is encountered by the Engineers Company from the Supreme Court?

A. Well, I meant to state that the Engineers preferred stock would have to be provided for, not necessarily paid off in cash, in the event that Engineers was liquidated.

By Mr. Condon:

Q. Well, isn't it a fact that what the Board of Directors of Engineers has done here was merely to decide voluntarily that this was the way they wished to eliminate the preferred stock from the picture?

Mr. Tucker: Just a minute, before you answer that. I am not so sure that that isn't asking for a legal conclusion of the witness.

Mr. Condon: I think it is a very practical conclusion, voluntary.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Tucker: I think it is a legal conclusion, whether this is a voluntary act. There have been plenty of decisions that an 11(e) plan——

Mr. Condon: I wasn't talking about voluntary or involuntary vis-a-vis the act. I am talking about a voluntary decision as to how to dispose of the preferred stock.

Mr. Tucker: Make it clear.

Mr. Condon: I thought the witness understood it. If he didn't, I am sure he does now, Mr. Tucker.

The Witness: I think that this plan was chosen by the directors as a method by which the company could comply with the order of this Commission if upheld by the Supreme Court. There were other methods but they chose this method.

* * * * *

[R. p. 881] By Mr. Condon:

Q. Are the tax consequences of what you call a purchase and what you have described as an exchange the same, in your opinion?

Mr. Tucker: I object.

The Examiner: I will sustain the objection on that.

By Mr. Condon:

Q. Have you been advised by tax counsel, Mr. Benjamin, with respect to whether or not there is a difference?

A. Well, I have seen the opinion of Mr. Lynch which stated that the exchange of preferred stock with the warrant for Gulf States common stock is a non-taxable exchange so far as the preferred stockholder is concerned. I am not entirely clear as to what the tax effect of it is or what Mr. Lynch has advised as to the tax effect of acquiring the Gulf States stock for cash.

* * * * *

Richard N. Benjamin—Cross Examination (Cont'd)

[R. p. 886] By Mr. Condon:

Q. With respect to this matter of the proposed deposit by the company with Chase Bank, if I understand your plan correctly, when that deposit is made with the Chase Bank by Engineers and five days' notice given, the preferred stocks become frozen and non-negotiable; is that correct?

A. I don't know whether they would be non-negotiable or not, Mr. Condon. It is my understanding that the transfer books would be closed on those securities on the day of deposit, and certainly there wouldn't be—I don't believe there would be any more trading in the securities on the Stock Exchange.

Q. As a matter of fact, your plan anticipates applications to delist the three series of preferred from the Exchange, isn't that so?

A. That's right.

Q. As contradistinguished from that situation, the Engineers common stock will remain actively marketed, will it not?

A. Certainly.

Q. You are not going to move to strike or delist that, are you, during this period that may ensue from the time of deposit until this matter is finally wound up?

A. No.

Q. And the fortunate stockholders who exercise their warrants will only get a new share of Gulf stock that you are going to promptly list on the New York Stock Exchange, are you?

A. Yes.

Q. And the poor preferred stockholder will not have any market, will he, for his security if he doesn't choose to come in and accept the $100 that you have deposited for him in the Chase Bank?

A. Well, the preferred stockholder is getting his capital back, Mr. Condon, and he can——

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Would you please answer if he has a market?

A. He has no market, no listing market.

Q. Has he any market, listed or unlisted?

A. I don't know whether it is a negotiable security or not. It seems to me it has a value that a person might be able to realize on if someone else wished to purchase it.

Q. Have you considered, and has the Board considered, the plight of the preferred stockholder who may not wish to acquiesce in the decision of the majority of the Board and take his $100, what he is to do in the next year or two or three that you have mentioned?

A. The Board is aware of the fact that the preferred stockholder is entitled to receive the $100 per share. I don't know whether they have considered the possibility of a person not coming in to get the $100.

Q. As far as you know that was never considered by the Board?

A. So far as I know, I don't recall any discussion on that.

(Formal matter relating to adjournment omitted.)

Hearing on January 7, 1946

RICHARD N. BENJAMIN

* * * * *

[R. p. 894]

Cross Examination (Resumed)

By Mr. Condon:

Q. Did the management employ the same degree of skill and give as much attention and consideration to the problem of making a fair estimate for the year 1946 as they have in prior years, and did they follow the same procedure?

A. That is my understanding, Mr. Condon.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Kanton:

Q. Does it appear to you that these estimates for 1946 are reasonably sound estimates?

A. May I have that question again?

(The question is read.)

The Witness: These estimates were prepared in the first instance by the operating personnel of the company, and so far as I know are sound estimates.

By Mr. Kanton:

Q. And they have been reviewed by the management of Engineers?

A. They have been reviewed by the management of Engineers.

Q. And that has been the practice in the Engineers System ever since it has been in existence?

A. I do not know how far back it goes, Mr. Kanton, but so far as I know that has been the practice in the Engineers for many years.

Q. At least since you have been a member?

A. At least since I have been with the organization, yes, sir.

Q. Do you think these estimates are as accurate as estimates can be expected to be?

A. I think so, Mr. Kanton.

Q. These estimates are, in effect, the operating budget estimates, are they not, for the three operating companies of Engineers?

A. That is correct.

Q. With respect to your operating budget estimates in the past for each particular year following that for which they have been made, can you tell me how they have been in the past, as far as the management of Engineers being a prognosticator of future earnings?

Richard N. Benjamin—Cross Examination (Cont'd)

A. You mean how accurate the estimates have been in the past compared with the actual results?

Q. That is correct.

A. I couldn't answer that question without going back and actually comparing the estimates with the actual, Mr. Kanton. In recent years the effect of the very high rate of excess profits taxes has served to minimize any variation between the estimates and the actual results so far as final balances are concerned.

Q. Aside from the excess profits tax, how are they stacked up?

A. The only estimates that I have compared recently with actual are ones that were put in at the request of the Public Utilities Division some years back, I think just about the time when we were first entering the war, and I recall that two of the major companies, El Paso and Gulf States, were reasonably close to the estimate of operating revenues. Virginia was somewhat further off, but I can't tell you with any degree of certainty just how those estimates compared with the actual in the past.

Q. May I ask you this question, Mr. Benjamin: We will take a luncheon recess sometime today, and could you during that time just glance at the operating budgets as estimated by the utilities companies and the management, say, from 1940 up to the present year, and compare them with actual earnings, et cetera, and give me your opinion as to how these prognostications by the management of Engineers have stacked up with their operating budgets for the next proceeding year?

A. I will attempt to do that, Mr. Kanton.

The Examiner: Is there any objection to this exhibit that has been offered?

Mr. Scheetz: No objection.

The Examiner: Hearing none, it will be received as Applicant's Exhibit 63.

[R. p. 897]

By Mr. Tucker:

Q. Mr. Benjamin, I hand you three sheets, and will you generally describe them with reference to the statement that you made in connection with Exhibit No. 63 so far as the 1946 estimates are concerned. Say what they are.

A. The first of these statements is marked "El Paso Electric Company, Estimated Income Statement, Year 1946, and Income Statement, Year 1945, last two months estimated." The 1946 column contains the same figures as are contained in the Exhibit 63 with respect to 1946 and represents the estimate for such income for that year.

Mr. Tucker: I would like to offer that exhibit as Applicant's Exhibit No. 65.

The Examiner: Any objection?

Hearing none, the exhibit will be received as Applicant's Exhibit 65.

(Applicant's Exhibit No. 65 is received in evidence.)

By Mr. Tucker:

Q. Will you describe the next statement that I hand you?

A. The next statement is headed "Gulf States Utilities Company, Estimated Income Statement for the Year 1946 and Pro Forma Income Statement for the Year 1945, last two months estimated." Pro forma refers to footnote A which states as follows: "Excludes reduction of $1,254,290 due to accelerated amortization of emergency facilities."

The column 1946 gives the management's estimate of income for the year 1946 and contains the same figures as are shown in Applicant's Exhibit 63 relating to 1946.

Q. And the estimates that you made with reference to it in that connection apply also to this estimate so far as Gulf States is concerned?

A. That is correct.

Mr. Tucker: I offer that statement as Applicant's Exhibit No. 66.

Richard N. Benjamin—Direct Examination (Cont'd)

By Mr. Tucker:

Q. Will you describe the next one I handed you?

A. The next one is headed "Virginia Electric & Power Company, Estimated Income Statement Year 1946 and Pro Forma Income Statement Year 1945 as per adjustments indicated in footnotes and excluding transportation operations for three months ended March 31, 1945 (last two months estimated)."

Q. Did you mention the name of the company?

A. Virginia Electric & Power Company. The column headed 1946 contains the management's estimate of income for the year 1946 and the same figures appear as are contained on Applicant's Exhibit 63 relative to 1946 estimated income. These figures in Applicant's Exhibit 63 are contained on page 5 thereof.

Mr. Tucker: I offer this as Applicant's Exhibit No. 67.

By Mr. Condon:

Q. Mr. Benjamin, I understand that Applicant's Exhibits 65, 66 and 67 were prepared by the operating heads of the several companies you have mentioned with respect to which the statement purports to represent pro forma income for 1945 and estimated for 1946?

A. That is correct.

Q. And they have each and all been reviewed by your management?

A. That is correct.

Q. And are the facts to the best of your knowledge, information, and belief as set forth therein, subject to your reservation with regard to the estimated features of the three statements, true and correct?

A. Yes, they are.

The Examiner: Hearing no objection, they will be received as Applicant's Exhibits 66 and 67, Gulf States being No. 66 and Virginia Electric & Power No. 67.

(Applicant's Exhibits Nos. 66 and 67 are received in evidence.)

Mr. Tucker: I want to be sure, Mr. Examiner, that No. 65 was actually received. I understand that is a fact?

The Examiner: Yes, that was received in the record separately from 66 and 67.

Mr. Tucker: All right. Then that is all for the moment.

The Examiner: Mr. Condon, you may proceed.

Mr. Condon: May it please the Examiner, you no doubt will remember the colloquy of counsel that took place at a prior hearing with respect to Exhibits 65, 66, and 67 and page 5 of Exhibit 63, Applicant's exhibits. I think the record should show that by agreement of all counsel and with the approval of the Examiner, in view of the fact that the data submitted represents the estimates as testified to by Mr. Benjamin, that counsel not cross-examine with respect thereto.

The Examiner: I understand that is agreeable to other counsel, and it is so ordered.

Mr. Kanton: That is right so far as I am concerned.

But the material contained in the exhibits mentioned by Mr. Condon is still subject to being included in the record and to be given whatever value or consideration may be given by the Commission.

Mr. Condon: That is true.

Mr. Scheetz: I agree.

Mr. Condon: Mr. Examiner, at the last session of court I was interrogating Mr. Benjamin with respect to a memorandum dated July 26, 1945, and revised July 30, 1945, and I was requested either by Mr. Barnes or Mr. Tucker—and I don't know whether it got into the record—to ascertain from Mr. Streeter if he had a copy of his memorandum of July 26. I agreed to do so, and I did. I reached him on the telephone on Saturday night at his home and he didn't have any files or papers, but he said that his best recollection is that he was leaving at that time to go on a holiday, that he wrote a longhand letter to Mr. Barnes of which he kept no copy. He asked Mr. Barnes to have his memorandum, which I believe to be this revised memorandum, typed and sent

to the other directors, which I understand from Mr. Benjamin's testimony he did. I regret to say that Mr. Streeter does not have any copy of the July 26, 1945, original memorandum.

At this time in view of the fact that I interrogated Mr. Benjamin with respect to it, and in view of the fact that I am not too satisfied with the state of the record with regard to the contents of this memorandum having been before the directors, I offer it now in evidence, not as proof of any of the facts contained therein or as proof of any of the conclusions set forth, but merely to show Mr. Streeter's position as recorded in this memorandum as having been before the Board prior to September 5, and for no other purpose.

Mr. Kanton: Prior to and including?

Mr. Condon: Prior to and including September 5.

Mr. Tucker: I have no objection to its receipt for that purpose, and if it will avoid any embarrassment, I would like to say on the record that I am not particularly concerned because the original memorandum is not available for the reason I was present at the meeting myself and this, I think, substantially reports the position that he took at the meeting, and I don't think the other is particularly important and I will make no point about it.

The Examiner: Understanding there is no objection, that will be received as Preferred Stockholders' Exhibit No. 17.

Mr. Tucker: For the purposes mentioned.

Mr. Condon: For the limited purposes mentioned.

(Preferred Stockholders' Exhibit No. 17 is received in evidence.)

Richard N. Benjamin—Cross Examination

Cross Examination (Resumed)

[R. p. 902] By Mr. Condon:

Q. Mr. Benjamin, do you recall whether or not the directors made any estimate as to the number of warrants for the acquisition of Gulf States stock that might be available for the purchase by preferred stockholders who owned no common?

A. I am quite sure that they made no such estimate.

Q. As I understand from your testimony at a prior session, it was the determination of the Board not to apply for the when issued trading rights on the New York Stock Exchange to the warrants?

A. No, sir; that hasn't been put up to the Board yet. This development of difficulty has occurred since the last meeting of the Board so the Board had not considered that question. The question is still not entirely answered because I haven't been able to talk to Mr. Laufer.

Mr. Tucker: Mr. Laufer is who?

The Witness: He is in the Trading and Exchange Division of this Commission.

Based on advice received from the New York Stock Exchange Commission, I think that when issued trading properly would not be permitted under the circumstances where the Engineers Board would have the right to withhold the mailing of warrants.

By Mr. Condon:

Q. With respect to that problem, if it be a fact that no applicaton is made for when issued trading privileges of the warrants, what consideration have you given as to how, if at all, a preferred stockholder of Engineers owning no common might hope to acquire a warrant if one were available?

A. I think that there might be an over-the-counter market in this when issued trading. I am not sure as to

what the rules of the Commission would be as affecting that type of transaction, and I can't say whether or not there would be an over-the-counter market.

Q. Would that require a special application to the Commission for the purpose of conducting a market in those warrants?

A. No, I don't believe there is any provision for Commission approval in connection with over-the-counter trading other than the general regulation that the Commission has over all brokers and dealers.

Q. That would increase the difficulties of a preferred stockholder of Engineers owning no common, would it not, in knowing about market prices and knowing where to buy if the warrants were available and so on?

A. He would not have the benefit of a listed market with published quotations in the daily press, but there frequently are just as good markets in the over-the-counter market.

Q. In other words, he would have to try and keep abreast of the market of those warrants and through what we call sheets, Mr. Benjamin.

A. Either through the sheets or through contact with his own broker.

Q. You testified several times with respect to an essential objective of the Board of Engineers to retain for the common stockholders their interest in the three companies, the operating companies. Do you recall giving that testimony in general?

A. Yes, I do.

Q. Can you tell us what considerations, if any, were given by the management or by the Board as to the matter of future stock control by the common stockholders of Engineers over those three companies, anticipating the final conclusion of these proceedings before this Commission with respect to the plan?

A. Well, if I understand your question to mean what considerations did the directors of Engineers give to the

persons or groups, or something of that sort, who control the three operating subsidiaries—is that the point of your question?

Q. Where the future control of those three operating subsidiaries, to-wit, Virginia, Gulf, and El Paso, might reasonably be expected to lie upon the completion of these proceedings.

A. I don't recall any discussion on that point, Mr. London. I assume that the directors—I guess I shouldn't make any assumption as to what they had in mind, but the effect of stock distribution would be to have the present common stockholders continue their interest in it, and I don't believe the discussions went any further than that. I don't recall any.

Q. Do you recall testifying that a group of the common stockholders of Engineers, including those common stockholders of Engineers who also own preferred stock, would put up approximately $14,000,000 of the $22,000,000 that might be realized from the sale of the Gulf States warrants? Do you recall giving that testimony in general?

A. Yes.

Q. Do you recall how large a group that you estimated would put up that $14,000,000, or how small the group was—let me put it that way.

A. So far as number of stockholders were concerned?

Q. Yes.

A. That figure of approximately $14,000,000 to which you have just referred I believe had reference to the holders of over 500 shares, and Applicant's Exhibit 16 shows that 338 stockholders of record owned 72.54 per cent of the total common stock of Engineers.

Q. In other words, Mr. Benjamin, if I understand your testimony, in that Exhibit 16 of yours to which you have made reference, 338 stockholders out of a total of 13,391 will put up 14/22 of the money, if they decide so to do, to acquire the Gulf States stock. Is that a fair statement?

A. Well, that is the result that would take place if all of these stockholders exercised their warrants.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Kanton:

Q. That number of 338, doesn't that include Street names and brokers?

A. Oh, yes, it does. We have an exhibit in here which shows the 50 largest holders in brokerage names, and I think it would be well to point out that these 338 stockholders, so-called, are 338 record holders, and in many cases one record holder may represent many stockholders who own the beneficial interest.

By Mr. Condon:

Q. They would only report the number of stockholders owning over 500 shares; isn't that so, Mr. Benjamin?

A. That's right. Now, let me see if I understand your question. It would only show the number of record holders owning over 500 shares; that's right.

Q. Let us assume, for the sake of this question, that this group of 338 stockholders, plus or minus, felt that it was economically advantageous to exercise the warrants and acquire the Gulf States stock; it might happen that this comparatively small group would wind up in ownership of approximately 65 per cent to 68 per cent, if my arithmetic is correct, of the total outstanding shares of Gulf?

A. Somewhere in that neighborhood.

Q. When I said small group, you knew I meant a small number; I didn't mean in amount or dollars, dollar value.

A. I understand that.

Q. Was any consideration given to the same type of calculation that we have been indulging in here with regard to future control of El Paso, assuming that the plan were consummated and there was the distribution in partial liquidation of your 1/5 shares of El Paso to the common stockholders, how that would leave the control of El Paso.

A. Well, I think a pro rata distribution of that sort, Mr. Condon, would be bound to result in the same proportionate interest as is now held.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. You testified in response to one of Mr. Kanton's questions that if it should happen that this Commission or a court should determine that the preferred stockholders here were entitled to more than a hundred plus accumulated dividends to the day of deposit, that it might be necessary to sell some Virginia stock to make up the required amount, or testimony to that general effect. Do you recall that?

A. Just a minute. Will you read that question?

(The question is read.)

The Witness: I remember testifying to the effect that if the bank loan, additional bank loan, which was made to make this payment to the preferred stockholders had not been paid off by the termination of the three-year period, that it probably would be necessary to sell some shares of Virginia common stock to liquidate that bank loan.

By Mr. Condon:

Q. As I recall it, you testified that to that extent it would be cutting off the participation by the common stockholders in that stock of the Virginia Company which you considered an important element of the plan. Do you recall giving that testimony?

A. Yes, I do.

Q. When you say that if the bank loan hadn't been paid off prior to the time that a decision became essential with regard to whether or not Virginia stock should be sold, you mean if the time had not arrived where enough income had been generated from Virginia and received by Engineers to accomplish that objective; is that correct?

A. That's right.

Q. And if that objective had not been achieved and it finally became essential for Engineers to make a decision with respect to Virginia stock, is it not a fact that consideration was given to the possibility of disposing of Engineers stock through a warrant method the same as you have done with the Gulf States stock?

Richard N. Benjamin—Cross Examination (Cont'd)

A. You mean Virginia stock?

Q. Virginia stock. By the warrant method as you have done or planned to do here with Gulf.

A. You ask whether consideration was given to that warrant method?

Q. Yes.

A. Well, I recall some suggestion having been made, and it is not clear to me just who made the suggestion that Virginia stock be sold under warrants to obviate the necessity for the bank loan. I don't recall any similar suggestion being made as to the sale of what I think everyone has considered would be a very small amount of stock to pay off what is expected to be a small balance in the bank loan. In other words, I know I have always thought that at the end of the three-year period the bank loan would be at a small principal amount and therefore it probably would be better to dispose of these few shares by an outright sale to the public.

Q. In other words, the number of shares that would be required to be sold to the public would be so inconsequential in the aggregate compared with the entire block of Virginia shares that would be distributed to the common stockholders of Engineers, that it would be expeditious to just sell them without getting the money from the common stockholders of Engineers?

A. That has been my understanding of it.

Q. But if that block of stock of Virginia that had to be sold was more substantial than you envisioned, would you see any objection to the plan of having the Engineers Board give the opportunity to the Engineers common stockholders by warrant method to acquire the requisite Engineers stock as you have done with the Gulf States stock at the end of the three-year period?

A. You mean barring legal considerations, by which I mean that this plan does not contemplate the issuance of any warrants, and I don't know what the status would be if the Court had approved the plan and the plan had been

in operation. I think disposition of interests by warrants would be a feasible method of doing it if the amount involved were large enough.

Q. And the effect of that would be to keep the same relative proportion of percentage control in Virginia as you have testified would exist in cases of the Gulf and El Paso?

A. Yes, in so far as the stockholders wanted to continue that interest.

Q. You were interrogated by staff counsel with respect to why it was that the Board chose the warrant method of disposing of Gulf States stock instead of having some competitive bidding, or something to that effect, to dispose of it in a block to raise money; and do you recall whether or not you gave any testimony as to whether or not such competitive bidding would yield a higher aggregate sum to Engineers on an over-all basis than this method of warrant disposition?

A. Yes, I believe I said that to the extent that the warrant itself had any value, it might be reasonably expected that a group of underwriters would be willing to purchase the stock at a price in excess representing the value of this warrant, less whatever commission the underwriting group thought that they were entitled to by reason of taking the risk of purchasing this block of stock.

Q. Approximately how many warrants will there be in round figures here?

A. Well, to be exact 1,999,968.

Q. Can you say approximately 2,000,000 warrants? Would that be near enough?

A. In speaking of warrants I mean rights because one warrant may represent——

Q. Two million rights approximately?

A. Approximately 2,000,000 rights.

Q. If those rights had an interest of "X," and putting aside for the moment the matter of commissions, to the extent that "X" represented a dollar or multiple thereof,

the Engineers Public Service Company could receive from underwriters or a group of underwriters an amount in excess of the amount expected from its shareholders in cash and quickly and with a minimum of trouble. Is that a fair statement?

A. Well, I don't know that I can go along with the "minimum of trouble," but I think such a sale could be accomplished.

Q. And if a right was worth $2, they might anticipate an extra $4,000,000—and I am putting aside the commissions and other items of expense that might be coincident with such an undertaking—is that correct?

A. I think that is right.

Q. If a right was worth four, there might be an additional 8,000,000; is that so?

A. That's right.

Q. Do you have any idea what the underwriting commission or the underwriting expense would be for such a plan?

A. Just a minute.

The Examiner: We will take a short recess.

(Short recess.)

Mr. Condon: Will you read the question?

(The question is read.)

The Witness: It is difficult to estimate what commission an underwriting group would seek on an issue of this sort. I have before me a copy of statement marked "Financial data on security issues of Electric and Gas Utilities for the period from January 1, 1945, to June 30, 1495," issued by this Commission. In this release there are four common stock issues.

Mr. Tucker: Do you want to identify that by release number?

The Witness: It doesn't have a release number. Namely, Laclede Gas Light Company common stock, $4 par, which

was sold to the public at $5 a share. On that issue the underwriters took a spread of .560, which is approximately 11 per cent.

By Mr. Condon:

Q. Is that item 95 of that memorandum that you are talking about?

A. Yes, it is.

Q. All right.

A. The next item is No. 102, which is the Lake Superior District Power Company common stock, which was sold to the public at $22.50 a share, and on which the underwriters took a spread of $1.34, which is approximately 6 per cent of the public offering price.

The next on the list is 106, Mobile Gas Service Corporation common stock, which was sold to the public at $17 per share on which the underwriters took a spread of 0.971, or approximately 5.7 per cent of the offering price.

The last item on the list, 108, is Pacific Gas & Electric common stock, which was sold at $38.25 a share to the public and the underwriters had a spread of 1.483, or approximately 3.9 per cent of the public offering price.

Q. Are you familiar with those companies, Mr. Benjamin, sufficiently to express your view as to which of those companies, if any, are comparable to the situation with respect to Gulf?

Mr. Tucker: You mean most comparable, nearest to it.

Mr. Condon: Yes.

The Witness: Well, Laclede is a gas company, and so is Mobile. I don't know a thing about Lake Superior District Power Company, so that the only one that seems to be comparable is P. G. & E.

By Mr. Condon:

Q. Do you think that Laclede is fairly comparable to the Gulf situation from your knowledge of the Laclede Gas Light Company, or do you have any knowledge about it?

Richard N. Benjamin—Cross Examination (Cont'd)

A. I don't have any knowledge about Laclede Gas Light Company on the basis of which to make any comparison between the two.

Q. Do you have any knowledge or enough knowledge to express an opinion with regard to P. G. & E. and its comparability in a general way to the Gulf situation?

A. Well, I haven't made any comparison between the two companies, Mr. Condon, so I can't tell. It would be foolish to make any guess as to how comparable these companies are. I do know that Pacific Gas & Electric has a substantial electric business, but I don't know the proportion of gas to electric, nor a good many other factors in the picture.

By Mr. Kanton:

Q. Exhibit 14, which refers to Houston Lighting & Power Company, Idaho Power Company, Indianapolis Power & Light Company, Tampa Electric Company, and which companies the management of Engineers thought worthy of comparison for the purposes that this exhibit was put in, do you know offhand—I haven't checked this, Mr. Benjamin—whether any of these companies recently had any financings?

A. Well, Idaho Power and Houston Lighting & Power were both sold at competitive bidding. All of Idaho Power Company stock was sold that way, to my understanding, and approximately half of Houston Lighting & Power stock was sold in that fashion.

Q. Could you give us the same percentage figures, if you have them available, comparable to the questions that Mr. Condon just asked you with reference to the common stock financings appearing on the Commission release referred to above?

(Discussion off the record.)

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Condon:

Q. You have no idea of what the cost, underwriting cost, was in connection with the Idaho Power and Houston Lighting & Power sales?

A. No, but they can readily be ascertained from the releases of this Commission issued in connection with them.

Q. Was any attempt made on the part of the Board or the management of Engineers to ascertain what the underwriting expense would be on Gulf?

A. Not to my knowledge.

Q. Are you able to draw any conclusions from the figures that you have just recited as set forth on this release of the Commission as to what a fair underwriting expense might be for a sale of approximately 2,000,000 shares of Gulf?

A. I would rather not do it, Mr. Condon, until I had more information.

Q. Well, we will defer that line of inquiry for the time being. What additional information, Mr. Benjamin, would you need in order to express a fair statement?

A. Well, I would like to look at the most recent offerings and see what the underwriting commissions would be. Of course, that is not any guarantee of what the spread would be in this particular case, but it might give some clue as to the general scope of the range.

Q. Well, to come back for a moment to the same problem, the highest percentage cost that you have mentioned here was Laclede Gas Light common and that ran at 11 per cent, and applying that to 2,000,000 shares of Gulf, the underwriting expense would approximate $2,100,000 in figures, $2,200,000?

A. No, it would be 11 per cent of whatever the public offering price would be on that stock, Mr. Condon, so that if you took an offering price of $16 a share, it would be $1,760,000.

Q. You take $11.50 a share?

A. Oh, I see what you mean. If the public offering price were $11.50 a share?

Q. Yes, a little over $2,200,000, in round figures.

A. I am sorry, that previous figure I gave was wrong. If you took $11.50 a share for the full amount of Gulf States common stock, the total proceeds would be in the neighborhood of $22,000,000, roughly, and 10 per cent would be $2,200,000, and another 1 per cent would be $220,000.

Q. It is not terribly far in excess of $2,200,000, is that a fair statement? We have been taking a figure of $2,000,000. I am not trying to pin you down to the fine points of arithmetic, just getting principles here.

Now, that was the highest percentage figure I think you mentioned, 11 per cent, isn't that so?

A. That is right.

Q. The lowest was the Pacific Gas & Electric of 1.483, and let us call that 1.5 for the facility of calculation then.

A. You are speaking in the latter case of dollars. It is 3.9 per cent in percentages.

Q. 3.9? I am sorry. Make it 4 per cent?

A. Yes, sir.

Q. Now, would you permit me to do the same arithmetic and correct me if I am in error. Assuming the price of 11.50 and assuming the same approximately 2,000,000 shares, your expense for underwriting would approximate something less than $1,000,000?

A. That is correct.

Mr. Tucker: Now you are starting to talk about expense of underwriting. Of course, Mr. Benjamin's testimony relates only to spread and not to the expense involved in the transaction.

The Witness: That is right.

Mr. Condon: I am talking about the underwriting expense, meaning the fee that would be charged by the underwriters.

Mr. Tucker: Just so that it is clear. You used the expression "expense" and that is something in addition.

Mr. Condon: Yes.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Condon:

Q. Now, to the extent that the Company decided to place a value on the Gulf States stock in excess of $11.50 a share in their bargainings here or in their offerings to underwriters, the underwriting expense, as we have just defined it for the record would be increased percentage-wise accordingly; is that right?

A. That is correct. You speak of bargaining with the underwriters. I don't want to quibble. You mean the offers they would be willing to accept from underwriters?

Q. Correct. Now, is it a fair statement to say that taking the highest percentage of 11 per cent that you have mentioned, that for every dollar of sales price in excess of $11.50 the Engineers Company would get 89 per cent of that excess—and I am putting aside, as I told you before the money or expenses or the expenses for whatever they may be of the mechanical carrying out of the undertaking.

A. In other words, every dollar of increased sales price with 11 per cent commission, the management would get 89 cents—that is right.

Q. Comparing it to the Pacific Gas & Electric, they would get 96 cents of every dollar of sales price in excess of $11.50?

A. That is right.

Q. I believe you testified that if the Commission were to permit the directors of Engineers to resolve themselves into a group of trustees in liquidation that the Engineers Company in liquidation have the privilege of filing consolidated returns with Virginia during the period of such trusteeship?

A. I believe Mr. Ratcliffe testified to that, but that is my understanding.

Q. Yes, and there was no time limit on that under the Internal Revenue Code, as you understand it?

A. Well, I will have to fall back on Mr. Ratcliffe's testimony. As I recall it, he stated that a company in dissolu-

tion had the same status as an existing corporation for the purpose of filing consolidated returns, and I don't know whether that three-year period in Delaware affects that or not, Mr. Condon.

Q. You were not advised as to that?

A. I have not checked that point with him.

Q. Assume for the purpose of this question, if you will, that the Commission does permit the Board to resolve itself into a group of Trustees, as anticipated by Amendment No. 4, and assume further that the Company, under the aegis of these Trustees, files consolidated returns with Virginia, have you estimated what the tax advantage to Virginia would be as a result of filing those returns, based upon your estimated income for the year 1946?

A. It is my understanding that Virginia Electric and Power Company would not receive any benefit from filing these consolidated returns, but that the only benefit which would be received in 1946 under the assumption that Engineers is a holding company over Virginia is a credit of approximately $100,000 due to the ability of the group to deduct Engineers' own expenses of approximately $132,000.

Q. Well, Mr. Benjamin, are you under the impression that Virginia would have no advantage of filing these consolidated returns because of the loss carry-overs of Engineers from Puget Sound?

A. Well, I can't go into any detail on the tax phase of it, Mr. Condon. I am sorry, but my understanding is that they do not gain any advantage in the saving of taxes from this consolidation during 1946 after Engineers is dissolved.

Q. Well, coming out of the advantages from Engineers' standpoint, you have mentioned the credit of $100,000 or thereabouts of Engineers' expenses that would be eliminated, as testified to in substance, by either Mr. Leighton or Mr. Ratcliffe—do you call that?

A. I don't recall whether they put that figure——

Q. $101,000 comes to my mind. I am not certain. I don't have the point of the record before me.

A. Yes, I recall that statement was made, that there would be a saving,—yes, sir.

Q. And that was $100,000 ex-estimated expenses of $132,000?

A. I don't know just what you mean "ex."

Q. What were the total estimated expenses of Engineers?

A. $132,000.

Q. Now, if I understand your testimony correctly—and if I understand one of your exhibits to which it refers correctly, that $132,000 estimate was the pro forma estimated expense of Engineers, assuming that steps 1 and 2 of the Plan now before this Commission had been concluded?

A. That is right.

By Mr. Kanton:

Q. Isn't it true, Mr. Benjamin, that during this three-year period, if either Engineers or Virginia realizes a capital gain, either one of them can offset it against the capital loss realized from the sale of Puget in 1944?

A. That is my understanding, Mr. Kanton. I believe Mr. Ratcliffe testified to the effect that under this plan that would not be necessary to avail himself of.

Q. Well, there is the possibility in this three years, that Virginia may have a capital gain, which they could offset by a capital loss, if Engineers and Virginia were filing consolidated returns?

Q. Yes, but it is also my understanding that under this Plan there would not be any tax payable anyway, if some of the Virginia common stock was sold during the period.

Q. I am not necessarily referring to Virginia common stock.

Mr. Condon: He is talking about capital assets.

By Mr. Kanton:

Q. Isn't that correct on that basis, Mr. Benjamin?

A. Well, I really would rather not answer that question affirmatively, Mr. Kanton—I am not sure.

Q. Can you answer that question now, Mr. Benjamin?

A. It is my understanding that capital gains realized by Virginia during the next few years could be applied against Engineers' capital loss in Puget.

Q. That is, if Engineers and Virginia are still filing a consolidated return?

A. That is correct.

Q. And that is for a five-year period from the time of the loss taken, which was 1944?

A. That is my understanding.

By Mr. Condon:

Q. Now, are you aware of the fact that if these consolidated returns are filed by Engineers and Virginia, what the effect of that will be upon the dividends declared by Virginia to Engineers, taxwise?

A. If the consolidated returns are continued to be filed?

Q. Yes.

A. It is my understanding that dividends paid by Virginia to Engineers would not be taxable.

Q. So that whatever earnings are generated from Virginia to Engineers during this period will come in to Engineers tax free, isn't that a fact?

A. That is my understanding.

Q. Now, there is a 2 per cent tax or penalty on Engineers for filing the return on a consolidated basis, is that not so, Mr. Benjamin?

A. I believe that is correct.

Q. So would you not say that there was a great advantage to Engineers' stockholders to have Engineers continue in that relationship as long as it was possible to so continue it, in view of the fact that $100,000 out of $132,000 of estimated or pro forma Engineers' expenses would be absorbed and all the dividends received by Engineers from

Virginia will come into it tax free with the exception of the 2 per cent penalty for filing consolidated returns?

A. Well, I don't believe that the $101,000 figure is an advantage if you have to spend $132,000 to get that advantage.

Q. Mr. Benjamin, that isn't my question.

Mr. Condon: (To the reporter) Will you please re-read it and see if we can't get a more direct answer?

(The question was read by the reporter.)

The Witness: No, I don't think so.

By Mr. Condon:

Q. Is the reason for your answer the difference between $101,000 and $132,000?

A. That is one of the reasons, Mr. Condon.

Q. Have you made any calculation as to the difference in taxes to the stockholders of Engineers and more particularly this rather small group of stockholders of Engineers, this 338 plus or minus group, as to whether or not the dividends coming from Virginia went to Engineers tax free with the exception of the 2 per cent penalty, or whether the dividends from Engineers was divided up among that group to the extent of approximately 65 per cent and became taxable in their hands, at ordinary income rates?

A. Well, I don't believe you can keep a corporation alive for the sole purpose of withholding dividends from the common stockholders. I think that, as I testified before, in response to several of Mr. Kanton's questions, the common stockholders to get a collateral tax advantage from the continuation of engineers during——

Q. I don't wish to interrupt you, Mr. Benjamin. My question was if you had made any calculations as to the difference, in the way of taxes?

A. I am sorry. I have not.

Q. You have a spread of $31,000 in that expense on the pro forma basis, if I understand that correctly?

A. That is correct.

Q. Are there other reasons why you feel it is desirable at the present time to make a change?

A. Well, I feel that, as my previous answer was an attempt to spell out that reason, I don't believe there is any justification for keeping Engineers alive for that purpose. I think it would have to have a business purpose for being kept alive, and I don't believe Engineers has such business purpose for being kept alive, other than the paying off of its obligations.

Q. Now, Mr. Benjamin, do you recall the Release of this Commission in the Western Public Service case? It is one of the Commission's exhibits, wherein the Commission made the statement in words or substance that "We note the statements of Engineers that they do not plan to liquidate Engineers." Do you recall that statement?

A. Yes, I do.

Q. Do you have in mind the letter that Mr. Kellogg wrote Mr. Barnes, in which he took Mr. Tucker to task in a most genteel way for suggesting that there might not be enough income coming up into the Engineers' treasury to take care of the preferred stock?

A. That is correct. I would like to make one further statement with reference to your previous question, however.

As I recall that Western case, Engineers preferred stock case, the testimony was to the effect that Engineers would not be liquidated within the near future because of savings contemplated from consolidated returns.

Q. Mr. Benjamin, would you let me direct your attention to page 11 of that release, and you watch me and see if I read the sentence from the opinion of the Commission correctly.

The Examiner: Which release is this, Mr. Condon?

Mr. Condon: This is Release No. 4114. It is in evidence.

The Examiner: That is Commission's Exhibit No. 5.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Condon:

Q. (Continuing) "We take note also of Engineers' argument that the pending Section 11 proceedings is not likely to result in the 'liquidation' of Engineers, and that even if it does, the proper standard for the adjustment of rights of preferred stockholders is not the liquidation preference to which they would be entitled on a voluntary liquidation, liquidation in bankruptcy or a bankruptcy reorganization proceeding, but the fair value of their expectations in the absence of any such proceeding, taking into account their liquidation preferences as but one of many factors."

Have I read that correctly?

A. You certainly have.

Q. There was nothing said in there about immediate future or anything else, was there?

A. No, sir.

Mr. Tucker: Mr. Benjamin was talking about the testimony in the case. Maybe the testimony in the case is not fairly summarized there. I don't think it appears here whether it was or whether it was not. I presume it was, but there may have been a time limit.

Mr. Condon: I have no objection, Mr. Tucker, if you wish to show the testimony. I was relying on an exhibit here that is in evidence, and it was a finding of the Commission. I am assuming that the findings of the Commission are accurate. If you wish to challenge that, I am sure that I have no objection, if you wish to do it, to show whatever the fact is.

(Discussion off the record.)

Mr. Kanton: Just to try to clear up the facts as to what happened in that Western case, I am looking at page 15 of Mr. Tucker's brief, which is contained in File No. 70-453. He has a heading there which says, "The pending 11(b) proceeding is unlikely to result in a liquidation of Engineers."

The paragraph right under that reads:

"At the present time it would seem to us very doubtful that the Commission, quite irrespective of the problem of distribution as between the preferred and common stockholders, will wish to see Engineers liquidated in connection with the pending proceeding under Section 11."

Mr. Tucker: I don't like these partial quotations, without the context and I don't think they are fair. It may be perfectly fair but I want to know what were the reasons and I think it ought to go into the record in the same connection.

Mr. Kanton: I think you are quite correct. The first thing you gave as the reason was the filing of consolidated returns, because of the excess profits tax that was in existence at that time. The second reason you gave is that it is difficult to believe that the Commission would wish to insist upon a sale by Engineers under the present acutely depressed market conditions.

The third reason you gave was that it cannot, at the present time—that is, then—be assumed that Engineers might not be permitted to use funds derived from the disposition of some of its present subsidiaries to acquire additional properties, which would fit into an integrated system.

Then you concluded and said, in view of these factors it seems fair to say that the possibility that the Commission will regard the liquidaton of Engineers as a desirable end is at present quite remote.

Mr. Tucker: I still think that is a perfectly sound statement.

* * * * *

[R. p. 933] By Mr. Kanton:

Q. Do you recall the sentence that Mr. Condon just read to you from page 11 of Commission Release No. 4114, Mr. Benjamin?

A. Yes.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Tucker: Well, now, I object, just as a matter of orderly procedure, to a continuation of that matter.

Mr. Kanton: It isn't a continuation of that matter, Mr. Tucker. Just let me finish.

Mr. Tucker: It is obviously a continuation of it.

The Examiner: Let's see what Mr. Kanton has in mind first, Mr. Tucker.

Mr. Tucker: All right.

Mr. Kanton: I have in mind this, Mr. Examiner—Mr. Barnes and Mr. Benjamin have made a statement several times in the record that in all the considerations given to any filing of a Section 11(e) Plan before this Commission by the management of Engineers, that they have always considered the payment of $100 per share plus accrued dividends, to the preferred stockholders of Engineers to be the fair and equitable evaluation of their rights. I think we are all agreed on that.

Now, my only purpose in referring again to this sentence is to find out this,—at the time that this particular Western case appeared before this Commission, it was the position of Engineers' management that it wouldn't be fair to pay $100 per share plus accrued dividends, but whatever the fair value was, whether it was $60, $70 or $80, and in reference to that I would just like to refresh the witness's mind and even Mr. Tucker's mind as to certain statements made in his brief in that proceeding.

The Examiner: Put your question to the witness.

By Mr. Kanton:

Q. Mr. Benjamin, do you recall the proceeding in the Western Public Service Company matter before this Commission?

A. I do.

Q. Do you recall the brief of Mr. Tucker filed in that proceeding?

A. I have read it.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. On page 8 of said brief, which is contained in File No. 70-453——

The Examiner: (Interposing) Mr. Kanton, may I interrupt you there? Couldn't you accomplish that without quoting from the brief, and ask Mr. Benjamin if the Company at any other time considered giving the preferred stockholders any amount other than $100 and dividends?

Mr. Kanton: I did. I am just trying now to refresh his recollection.

The Examiner: What is his answer to that?

Mr. Kanton: His answer was "No" and I believe that there may have been some mistake.

The Examiner: That must have been some time ago. It wasn't recently.

Mr. Kanton: Well, it was several times. I have cross-examined Mr. Barnes and Mr. Benjamin.

The Examiner: All right. Put the question to him again now and let us see what his answer is.

By Mr. Kanton:

Q. Mr. Benjamin, in the consideration by the management of any Section 11(e) Plan filed before this Commission, did the management of Engineers always consider the payment of $100 a share plus accrued dividends to be the fair and equitable equivalent of the rights of the preferred stockholders of Engineers?

A. I think that in any Section 11(e) Plan that the management always contemplated the payment of $100 per share and accrued dividends to the preferred stockholders.

Q. Now, I just referred you to page 8 of Mr. Tucker's brief in the matter of the Western Public Service Company, and I would just like to quote a few pertinent passages beginning there.

A. May I go back on that question for one minute, that you just asked me?

Q. Yes, sir.

Richard N. Benjamin—Cross Examination (Cont'd)

A. Any Section 11(e) Plan that required the preferred stockholders to take certain securities, there was the 11(e) Plan in the El Paso Natural Gas case that varied from that, but that was a voluntary exchange offer to the preferred stockholders.

By Mr. Condon:

Q. That is the case, Mr. Benjamin, where they were going to get part cash and part securities?

A. That is right.

Q. I believe you testified the aggregate of what they would receive would be worth less than $100?

A. That is right.

By Mr. Tucker:

Q. Was that, as you recollect, an 11(e) Plan?

A. It was.

Q. The El Paso Natural Gas exchange for preferred stock?

A. I think it was.

By Mr. Kanton:

Q. Do you recall in this brief, Mr. Benjamin, that on page 8 there is an opening statement with certain remarks that were made therein to the following effect:

> "Effect of proposed purchase upon Section 11 Proceedings."

Now, the second paragraph thereunder reads as follows:

> "We contend, (1), whether or not Engineers is to be eventually liquidated as a result of the operation of Section 11, the proper standard for the adjustment of the rights of the preferred stockholders is not their liquidation preference as to which they would be entitled on a voluntary liqui-

> dation, in a liquidation in bankruptcy or in a bankruptcy reorganization proceeding, but the fair value of their expectations in the absence of any such proceeding, taking into account their liquidatoin preferences as but one of many factors."

Then, the fourth contention reads as follows, on page 9:

> "A cash distribution to preferred stockholders in partial liquidation would be inequitable, without some adjustment of their liquidation preference," etc., "since they are not fairly entitled to receive the full present liquidation preference of their shares, such a partial liquidation adjustment is not practical on a voluntary basis."

Then, on page 10 there is another opening statement made by Mr. Tucker which reads:

> "The contract preferences of preferred stocks on liquidation do not furnish a fair standard for the treatment of preferred stockholders in a reorganization, necessitated solely by Section 11."

Do you recall that?

A. Yes.

Q. Now, in the light of those statements, is it still your firm belief that Engineers or its management never took the position to pay the preferred stockholders of Engineers only $100 a share plus accrued dividends; or did they, during this time, when this case was before this Commission, say that it would be fair and equitable to pay them some sum less, if that were the fair value?

A. Well, it is my understanding of the Western case that that was purely a voluntary purchase program on the part of Engineers and that the preferred stockholders who desired to take advantage of that bid in the market could do so.

Q. I think that is a fair statement, but you did not answer my question, Mr. Benjamin.

I have repeated my question many times off the record and on the record. Is it true, in the light of what I have just read, that Engineers at the time of this proceeding said that it would be fair and equitable to pay the preferred stockholders less than $100 per share plus accrued dividends?

A. I think the directors felt at that time that it would have been fair to pay them less than $100 if they were willing to accept it themselves, but not to force them to take anything less than that.

That is the distinction that I draw between the two situations.

Q. I am talking about a Section 11(e) Proceeding, as I read here, and the paying off of all the preferred.

Would it have been fair at that time, in the minds of the Board of Directors to pay $100 per share plus accrued dividends?

A. I don't believe the Board of Directors would have filed an 11(e) Plan at that time which would have contemplated the payment of $100 a share and accrued dividends to the preferred stockholders.

Q. Why not?

A. Because on the basis of market conditions at that time, and on the basis that there were certain advantages in retaining Engineers which have been cited, the balance left for the common stockholder would have been very, very small.

Q. If the fair value were determined to be a lesser amount, and that was determined to be satisfactory to the Engineers' management, would they have filed it at that time?

A. Will you repeat that?

(The question was read by the reporter.)

Mr. Tucker: I object. I don't see how this witness can possibly say what the Engineers' management would have done at that time.

Mr. Kanton: I think that is a proper objection to my question. The only reason I asked the question is that the witness still has not answered my whole question that I asked originally.

Mr. Tucker: Then ask him another.

Mr. Kanton: I will ask him the same question.

By Mr. Kanton:

Q. In the light of the remarks I read from Mr. Tucker's brief and that I quoted to you, was it the position taken at that time, whether by Mr. Tucker or the Engineers' management, that it would not have been fair to pay the Engineers' preferred stockholders $100 per share plus accrued dividends in a Section 11(e) Proceeding?

A. Let me see. Let me see that (indicating).

(Discussion off the record.)

The Examiner: All right, Mr. Benjamin,—you may answer.

Mr. Condon: Mr. Examiner, may I ask to have that question re-read?

The Examiner: Will the reporter read the question?

(The question was read.)

The Witness: I think that was Mr. Tucker's position at that time, in the light of the circumstances at that time, Mr. Kanton.

By Mr. Kanton:

Q. Was that your position too?

A. I think that if an 11(e) Plan had been filed at that time by the management, that my position would have been the same as Mr. Tucker's.

Richard N. Benjamin—Cross Examination. (Cont'd)

Q. Do you know if Mr. Tucker discussed his position, so-called, with the Board of Directors of Engineers at that time on this particular point?

A. On this particular point to which you refer?

Q. Yes, sir.

A. I do not recall that he did. I remember Mr. Barnes testifying in an earlier session that he felt that the Board of Directors would not have approved a Section 11(e) Plan for filing that contemplated the payment of any less.

Q. Do you recall Mr. Barnes also testifying that he would not have gone along with such a plan providing for the payment of less than $100 per share plus accrued dividends?

A. Providing for the payment of less?

Q. Yes. In other words, so far, from what we have been able to gather, it has only been the opinion of Mr. Tucker and your opinion that that would have happened, is that correct?

A. Well, I don't want you to misunderstand my position. I said that if an 11(e) Plan had been filed at that time, that would have been the situation. I don't know that I would have been in favor of filing an 11(e) Plan at that particular time, Mr. Kanton.

Q. Referring to page 536 of the record, we find that in answer to a question that I asked Mr. Barnes on cross-examination along this same line that I am asking you, he said that it would not be fair to pay the voluntary or involuntary liquidation price when the stock was selling at 60, that it was Mr. Tucker's opinion, and that it was Mr. Barnes' opinion. You, I think, just testified that it would also have been your opinion?

A. That is right.

Q. And you say it would not have been the opinion of the Board of Directors at that time?

A. I don't know what their opinion would have been, Mr. Kanton. I recall Mr. Barnes testifying that that would

have been their position. All I know is that any over-all 11(e) plan that was ever discussed with the Board, to my knowledge, that contemplated the ultimate liquidation of Engineers had a provision in it for the payment of not less or more than $100 a share and accrued dividends.

Q. At the time of this proceeding, I take it, when Engineers' position was placed before this Commission in reference to this Western case, the management, so-called, of Engineers, comprising Mr. Barnes and yourself, as represented by counsel, Mr. Tucker, did take the position that it would not be fair to pay $100 per share plus accrued dividends?

A. That position was taken in reference to the standards that should be applied in a Section 11(e) Plan. That is my understanding, Mr. Kanton.

* * * * *

[R. p. 945] By Mr. Condon:

Q. Mr. Benjamin, is it a fair statement to say that at the time last September 5 when the directors decided to pay the $100 a share to the preferred stockholders of Engineers that they did not have before them any graphs, charts, or data with respect to future earnings or prospective earnings of Virginia, Gulf, and El Paso?

A. That is correct.

Q. Would you say that it was also a fair statement that it was the intent and purpose of the majority of the Board of Directors of Engineers to retain all future interests and increments in the enterprise for the common stockholders?

A. All future——

Q. Interests and increments.

A. Yes.

Q. I believe you testified, first, this Commission has never directed Engineers to liquidate and, second, that the Board of Engineers might have decided to liquidate the Engineers Company voluntarily; is that correct?

A. Yes.

Mr. Tucker: The Board of Directors? Did you say the Board of Directors might have decided?

The Witness: By that I assume you mean initiate action to cause the stockholders to voluntarily liquidate, yes.

By Mr. Condon:

Q. I believe you also testified that the Board of Engineers might have chosen to give the preferred stockholders a stake in the subsidiary companies had they so desired?

A. Yes, I think I testified that they could have chosen other methods to meet the obligation of the preferred stock other than pay them in cash.

Q. In other words, the effect of what you are saying is that the Board of Directors of Engineers chose this method as a means of limiting the preferred as to the receipt of $100 and accumulated dividends to the date of deposit?

A. I think that is right. In other words, the method followed by the plan provides for the payment in cash of the amount you stated and therefore limits them to that amount, yes, sir.

Q. The effect, Mr. Benjamin, of the Board's action in this respect would be to deprive the preferred stockholders of Engineers of any prospect of participating in the enterprise, its future earnings, and prospects.

A. So far as this plan is concerned, yes.

Q. They will have no further interest in the going concern activities of Virginia, Gulf States, and El Paso?

A. That is correct.

Q. Mr. Benjamin, at one point in your testimony, more particularly page 286——

The Examiner: Off the record.

(Discussion off the record.)

The Examiner: Mr. Benjamin, do you want to amend your answer in line with the off-the-record discussion as to

the possible other interests that the preferred stockholders might have other than receiving cash for their stock?

The Witness: Not as preferred stockholders, Mr. Examiner; the preferred stockholders who own common stock or acquire warrants will have the right to make that exchange but only because they own this common stock or buy the warrants.

By Mr. Condon:

Q. Mr. Benjamin, I have before me page 286 of the record of your testimony, and I would like to direct your attention to the part of your answer that commences at the fourth line from the top of that page:

> "Now, in order to protect his interests you ask the stockholders to put up $11.50 per share. It is true he gets his Gulf States common stock, but the only reason he gets it is because he puts up the money to get it."

Will you examine that answer that you gave and see if you wish the record to stand that the only reason that the common stockholder gets it—meaning Gulf States stock—is because he puts up the money to get it? Is that a fair statement?

A. Well, he gets the stock because he is a common stockholder of Engineers and the only way in which he can get it is to put up the $11.50 per share.

Q. Isn't it a fair statement to say, Mr. Benjamin, that the real reason why he is getting that Gulf States stock is because he is a common stockholder and in addition puts up $11.50 a share?

A. That's right.

Q. Isn't the important element there the fact that he is a common stockholder or a preferred stockholder who holds common stock?

A. I think the important reason is because he is a common stockholder.

Q. Yes. Now, you concede, do you not, that the Engineers Company could get more money in the aggregate for the shares that are being turned over to the common stockholders of Engineers and the preferred stockholders who own common stock?

A. I think, based on present market conditions, that the company could get more than that.

Q. There was no provision in the plan whereby the preferred stockholders who own no common are to be afforded such a privilege?

A. That's right.

Q. Do you recollect being interrogated by Mr. Kanton with respect to how, if at all, assuming an automatic amendment to the plan pursuant to step 4 or amendment 4, which amendment would be made subject to the reservation of Engineers to protest and to litigate—as to how the plan would get into court if the Engineers Company chose not to have it go to court? Whether it is your testimony or Mr. Barnes', at the moment I am not clear, but do you recollect being present when that testimony was given by either yourself or Mr. Barnes?

A. Yes, I recollect it. I am not too clear as to who gave the testimony or just the detail of it.

Q. You are cognizant, then, of the existence of the line of inquiry?

A. Yes.

Q. Suppose this Commission disallowed that portion of the plan that contemplated a deposit of $100 and accrued dividends and fixed an amount in excess of $100 and accrued dividends and provided that the plan be amended necessitating an additional deposit in excess of $100 plus accrued dividends that was more than your Board of Engineers felt that it wished to pay.

Mr. Kanton: May I make a suggestion? You are not saying that the Commission directed that the plan be amended?

Mr. Condon: The Commission found that it was unfavorable and inequitable not to provide that an additional sum in excess of $100 plus accrued dividends to the date of deposit, and that that anticipates an amount that the Board of Directors of Engineers was unwilling to accept. Has the Board given any consideration as to how, if at all, the plan as filed could be enforced by a United States District Court unless Engineers decided to accept that additional amount and seek court enforcement.

The Examiner: I am just wondering if, after all, that isn't a legal question. Mr. Tucker would have to decide whether or not this witness can answer that. If your question is if the Board gave consideration to that, he can answer it, but I don't think he can answer what they might do.

Mr. Condon: I was merely asking if the Board considered that problem.

Mr. Tucker: I was watching very carefully to see that he didn't get over the boundary on that score.

The Witness: If I understand the situation you describe, you are asking if the Commission found it unfair and inequitable ot approve Part 1 of the plan as now filed but stated Part 1 of the plan, which is the section that provides for this deposit, would have to be amended so as to provide for a larger payment, I don't believe the Board gave consideration to that possibility. That is a new thought to me certainly. I have never considered that possibility.

By Mr. Condon:

Q. Don't you think that is an important consideration, Mr. Benjamin, from the standpoint of the preferred stockholders here?

Richard N. Benjamin—Cross Examination (Cont'd)

A. Well, I think the preferred stockholders might well be interested in that possibility. It seems to me that the effect of that is to merge Parts 1 and 2 of the plan. It seems to me if the Commission felt that Part 1 of the plan was unfair and inequitable, they were not—I am not clear on that at all. I think that the preferred stockholders would be interested in having that done if the amount met with their approval.

Q. Isn't it a fact that that indicates to you in fairness the close interrelationship between steps 1 and 2 of the plan?

A. Well, there is no question but that Parts 1 and 2 of the plan are filed as one plan, and we have gone into the reasons as to why there were two parts to the plan. In order to expedite Part 1, Part 2 was set aside so that it could be dealt with separately, and it was considered possible that that would take longer to settle than Part 1 of the plan. The two parts are interrelated because they are part of one plan.

Q. Can't you see in the question I asked you previously the necessity for this Commission to make a decision on point 2 before it can find that point or step 1 is fair and equitable to the preferred stockholders in the light of the point that you say had not been considered by the directors?

A. No, I don't think so. I think that if the preferred stockholders receive immediately their $100 per share plus accrued dividends, that it is fair and equitable to pay them that amount at this time, and that the matter of the excess payment could be settled under Part 2 of the plan. I think that has been done in other cases before this Commission and I think it is fair to do it.

Q. Let us come back to my initial question: Suppose the Commission should find it unfair and inequitable to permit the preferred stockholders to be paid $100—and I am omitting accrued dividends to the date of deposit in this line of inquiry, if you will not object——

Mr. Tucker: You are omitting it but you are assuming you are saying it every time?

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Condon: Omitting it for the purpose of this inquiry only.

By Mr. Condon:

Q. —that the $5 preferred should receive $105, in other words $5 a share in excess of $100, and the other two series $10 a share, omitting again for the purpose of this line of inquiry the dividends to the date of deposit—now, is it your idea that this plan anticipates that the Engineers would then put $100 on deposit with the Chase Bank and then have a plan which could not be enforced in the District Court except with the acquiescence of the Engineers Company?

The Witness: May I have that question read?

(The question is read.)

The Witness: It is my idea of the situation that such a finding on the part of the Commission, that it would be unfair and inequitable to pay less than the figures you mentioned, $105, $110, would result in an automatic amendment of Part 2 of the plan. That was my understanding of the purpose of Part 2 of the plan. Engineers would not be able to put up $100 per share until the Court had approved Part 1 of the plan, and my understanding is that Engineers would be committed to going ahead with Part 2 of the plan if such an event took place.

By Mr. Condon:

Q. Let us stop at that. You say they are committed to go ahead by the plan. Committed by what?

A. That has been my understanding. I would like to discuss the matter with my counsel for a moment.

Q. Would you be kind enough to refer to the plan and discuss the matter with your counsel, because I think that is the important feature of our problem at this stage in the cross-examination.

* * * * * *

Richard N. Benjamin—Cross Examination (Cont'd)

[R. p. 978] By Mr. Condon:

Q. Coming to El Paso Natural Gas, Mr. Benjamin, do you recollect giving some testimony concerning that?

A. Yes, I do.

Q. Did the Engineers ever take up or apply to this Commission with regard to the trusteeship of Judge Shearn, concerning the shares of stock in El Paso Natural Gas?

Mr. Kanton: May I have that question read?

(The question was read.)

The Witness: Yes, they did.

By Mr. Condon:

Q. You testified here on direct examination that the Engineers Company made a trusteeship of the stock options with respect to the right to purchase El Paso Natural Gas stock or gave that testimony in substance, did you not?

A. That is right.

Q. Did the Engineers' Company execute a declaration of trust to Judge Shearn?

A. Yes, they did.

Q. Did the Engineers select Judge Shearn as trustee?

A. Yes, I think they did.

Q. Was the matter of the form of Trust instrument and its terms fixed by Engineers?

A. Well, I don't know how the terms were fixed, Mr. Condon. I wasn't with Engineers at the time.

Q. But you were there with Engineers during a part of this so-called trusteeship of the El Paso Natural Gas stock, Mr. Benjamin?

A. That is right.

Q. Do you know whether or not the choice of time of sale of El Paso Natural Gas that resulted from the exercise of the option and the sales price thereof was left to the discretion of Judge Shearn by the Engineers Company?

* * * * *

[R. p. 981] The Witness: It is my understanding that under the terms of the trust agreement any sale had to be approved by Engineers.

By Mr. Condon:

Q. Who put up the money for Mr. Shearn as trustee to exercise his option and so acquire the stock of El Paso Natural Gas?

A. Engineers Public Service.

Q. Was that done on a take-down basis, Mr. Benjamin?

A. Well, all of the options were exercised at one time. Is that the prrport of your question?

Q. I don't know what the fact is.

A. Yes, they were all exercised at one time.

Q. And the money flowed from Engineers to Judge Shearn as trustee and he, in turn, applied it to the purchase of the stock?

A. That is my understanding, although I am not familiar with the detail of that particular transaction.

Q. Now, you say that the matter of purchase, and the price was subject to approval or veto power or some such thought by the Engineers Company?

A. I was referring to the sales.

Q. Just the sales—not the purchase price,—but was that fixed in the option?

A. The option was one that Engineers held and they assigned the option to Judge Shearn and furnished him with the money, I believe, to exercise the option.

Q. Who made the decision, if you know, to exercise the option?

A. Oh, I don't know—I assume it was the Engineers, Board of Directors, but I don't know.

Q. As I believe you testified, there was no SEC order on that transaction?

A. No, that was before Engineers registered as a holding company.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Was it known at the time, or was the Engineers Company advised that it was a violation of Section 4 of the Act to participate in that transaction?

(Discussion off the record.)

The Examiner: On the record. Are you objecting to that question?

Mr. Kanton: I object to that question, Mr. Examiner, on the ground that it calls for a legal conclusion from this witness and on the further ground that it has occurred previous to the time that Engineers was a registered holding company and previous to the time that this witness was a member of the management of Engineers.

The Examiner: I will overrule your objection and let him answer whether it was a violation of Section 4. The question wasn't whether it was a violation. He was asked if Engineers was advised that it was a violation.

Now, Mr. Benjamin——?

Mr. Kanton: I want to take an exception to your ruling, Mr. Examiner.

The Examiner: Give Mr. Kanton an exception.

The Witness: I was not advised by counsel that this acquisition was a violation of the Holding Company Act.

The Examiner: The question wasn't were you advised by counsel. Were you advised by anybody?

The Witness: It was my understanding, or it has been my understanding that this acquisition by the trustee was——

The Examiner (Interposing) That isn't the question. The question is, were you advised by anybody that it was in violation of Section 4. You can answer that Yes or No.

The Witness: No.

By Mr. Condon:

Q. Do you know whether or not the Engineers Company was advised from anything that has come to your attention since you came with the Company?

A. When you say "this", you mean the acquisition by Judge Shearn of the stock of El Paso Natural Gas, sir?

Q. Under the circumstances under which they acquired it.

A. No.

Q. No opinion was ever rendered to that effect?

A. That it was a violation—no, sir.

Q. Was any opinion rendered to the contrary so far as you know?

The Examiner: One minute. I think his answer was that the Engineers was not advised at all in the matter.

Wasn't that your answer, Mr. Benjamin?

The Witness: I do not know what legal advice Engineers received in connectnion with the establishment of this trust and the acquisition of these shares.

By Mr. Condon:

Q. Do you know whether or not the Engineers made any attempt to sell its option, rather than transfer or assign it to Judge Shearn as trustee?

A. No.

Q. Have you examined the files of Engineers and familiarized yourself with this transaction sufficiently to say with a reasonable degree of certainty that no such attempt was made?

A. No, I couldn't answer that.

The Examiner: Wait a minute. Your answer then is "No", that you have not examined the files sufficiently to answer the question?

The Witness: Yes, sir.

By Mr. Condon:

Q. Could you refer to page 207 of the transcript of your testimony under examination by Mr. Tucker—and I refer you specifically to about the last eight or ten lines from the bottom of the page.

Richard N. Benjamin—Cross Examination (Cont'd)

Do you recall being asked by Mr. Tucker in words or substance whether or not Engineers had been advised that it was illegal for Engineers to hold that stock in El Paso Natural Gas Company?

A. Yes.

Q. Was that the subject of a written opinion?

A. No, I don't believe so.

Q. Did you so testify at page 207 of the record?

A. Whether it was written or not?

Q. No, no,—that Engineers received an opinion or advice that it could not acquire the stock or continue to hold the stock?

A. Well, what this refers to is whether Engineers could continue to hold the stock under the Holding Company Act.

Q. And you were advised that it could not?

A. That is right.

Q. Does that refresh your recollection as to whether at any time Engineers was advised that it was illegal to acquire the stock?

A. Well, it was my understanding that Engineers Public Service Company could not hold this stock and I assumed that it had been acquired legally, because I knew that we had counsel at the time that the agreement was entered into.

Q. Did you come across anything in the records of Engineers, Mr. Benjamin, to show why this complicated device of trusteeship was resorted to in 1936 rather than having Engineers exercise the option itself?

A. What was that again?

(The question was read by the reporter.)

By Mr. Condon:

Q. And acquire the stock directly at that time?

A. I don't recall any specific document as to that, Mr. Condon.

(Discussion off the record.)

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Condon:

Q. Mr. Benjamin, I asked you before with respect to any application with respect to this Judge Shearn trusteeship arrangement having been made. I ask you again whether or not any formal application was made by Engineers, as far as you know, to this Commission, with respect to that trusteeship and the matters thereunto appertaining?

A. I don't know what transpired at that time, Mr. Condon. I don't recollect seeing any formal application in the files of the Company in connection with that, but I don't know what did happen at that time.

Mr. Tucker: Could I just help out?

I am willing to stipulate that there was no formal application, if that will help you any. There could not have been, because we were not a registered holding company, and there was no basis upon which we could have made such a formal application.

Will that satisfy you?

(Discussion off the record.)

Mr. Scheetz: My statement on that would be that I have no objection to such a stipulation if Mr. Condon and Mr. Tucker wish to so stipulate; my position being that the whole line of testimony on El Paso Natural Gas is irrelevant and that I am content with my exception, although I do think that Mr. Condon is within his rights.

The Examiner: All right, Mr. Condon. You may proceed.

By Mr. Condon:

Q. Just one final question in connection with that same subject matter, Mr. Benjamin.

Who fixed the period of five years of Judge Shearn's trusteeship, if you know?

A. I don't know.

(Formal matter relating to overnight adjournment omitted.)

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TRANSCRIPT OF RECORD

(Pages 858a to 1304a)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 226

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 227

THOMAS W. STREETER, ET AL., PETITIONERS,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 243

THE HOME INSURANCE COMPANY AND TRADESMENS NATIONAL BANK AND TRUST COMPANY, PETITIONERS,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 266

CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, PETITIONERS,

vs.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR CERTIORARI FILED: AUGUST 16, 1948 (Nos. 226 and 227).
AUGUST 24, 1948 (No. 243).
SEPTEMBER 8, 1948 (No. 266).

CERTIORARI GRANTED OCTOBER 25, 1948.

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

Nos. 9428, 9435, 9440.

IN THE MATTER

of

ENGINEERS PUBLIC SERVICE COMPANY

ON APPEAL FROM ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE, DATED MAY 29, 1945.

JOINT APPENDIX.

THOMAS W. STREETER, *et al.*,
THE HOME INSURANCE COMPANY, *et al.*,
SECURITIES AND EXCHANGE COMMISSION,
Appellants.

VOLUME III.

Excerpts from the Testimony in the Hearings Before the Securities and Exchange Commission (Cont'd).

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Parkhill Press, Inc., 22 Thomas St., New York, N. Y., U. S. A.

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* * * * *

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RICHARD N. BENJAMIN

resumed the stand and testified further as follows:

The Witness: Might I make a statement in response to some questions that Mr. Kanton asked me to get the answer to?

The Examiner: Yes. Go right ahead, Mr. Benjamin.

The Witness: Referring to Applicant's Exhibit No. 63, Mr. Kanton asked me to furnish him with certain calculations, the first of which is on page 1 of that exhibit, times Engineers preferred dividend earned, 2.57. The same calculation, excluding dividends from El Paso Electric Company in excess of $375,000 a year, in order to reflect the fact that there was an unusually large dividend from El Paso during 1945, gives a figure of 2.20.

Cross Examination (Resumed)

By Mr. Kanton:

Q. Excuse me, Mr. Benjamin, have you made the computation including the dividend for El Paso?

A. Yes, that was the first figure. That is 2.57.

Referring now to page 2, which is the consolidated income statements, times Engineers preferred dividend earned, 2.77.

Referring to page 4, which is the 1946 estimated, parent company, times Engineers preferred dividend earned—2.03.

Turning to page 5, which is the consolidated for 1946 estimated, times Engineers preferred dividend earned—3.39.

In addition, Mr. Kanton, and I believe Mr. Condon also, asked me to make a comparison of the estimates for the three operating companies with the actual results for those

companies for the years 1940 through 1945. I have that information in pencil form here with the exception of the 1945 estimate and actual for Virginia.

Q. I just wanted a general observation, Mr. Benjamin.

By Mr. Condon:

Q. Mr. Benjamin, are you including the estimates for the fiscal years?

A. Yes, sir.

Q. Thank you.

A. It is pretty hard to generalize on these results, Mr. Kanton, because the variations in particular years are fairly wide. In some years the estimates were very close to the final results and in other years they were not so close.

By Mr. Kanton:

Q. What years were they close?

A. I could give you the percent differential between the estimate and the actual very quickly for all these three companies.

Q. By that, you mean the first estimate made at the beginning of the year, not the one that were made to bring it up to date during the year in question, is that correct?

A. That is correct.

I have two comparisons here, one of the operating revenue estimate and the other of the balance for common estimate. If you would like, I would be glad to read off the percentage differentials on these companies.

Q. All right.

A. Taking El Paso first, and the operating revenues by years, the actual exceeded the estimate by the following percentages during those years:

4.2 percent.

Q. What year is that?

A. 1940. 1941, 10.1 percent; 1942, 4.6; 1943, 10.3; 1944, .8; 1945, 3.9.

Richard N. Benjamin—Cross Examination (Cont'd)

The balance for common, the actual exceeded the estimate by the following percentages:

1940, 17 percent; 1941, 11.4 percent; 1942, the estimate exceeded the actual by 7.4 percent; 1943, the actual exceeded the estimate 7.3 percent; 1944, 28 percent; 1945, 1.5 percent.

The Examiner: Those last two years, the actual was in excess of the estimate?

The Witness: Yes, sir, the last three years.

The Examiner: All right.

The Witness: Gulf States, taking first operating revenues, the estimate exceeded the actual by 1.6 percent in 1940. 1941, the actual exceeded the estimate by 4.5 percent; 1942, the estimate exceeded the actual by 6.1 percent; 1943, the actual exceeded the estimate by 6.3 percent; 1944, the actual exceeded the estimate 3.6 percent; 1945, the actual exceeded the estimate by 1.2 percent.

The balance for common in 1940, the estimate exceeded the actual by 10.0 percent; 1941, the estimate exceeded the actual by 30.2 percent; 1942, the estimate exceeded the actual by 2.7 percent; 1943, the actual exceeded the estimate by 4. percent; 1944, actual exceeded the estimate by 15.6 percent; 1945, the actual exceeded the estimate by 25.2 percent.

Virginia, in 1940, operating revenues, actual exceeded the estimate 3.6 percent; 1941, the actual exceeded the estimate 5.4 percent; 1942, actual exceeded estimate, 8.9 percent; 1943, actual exceeded estimate, 4.2 percent; 1944, actual exceeded estimate by 30.8 percent. I might add there that that was the year in which Virginia Public Service was merged. 1945 is not available.

By Mr. Condon:

Q. Didn't you have estimates for 1945?

A. I might explain that. We have the estimate and we have the actual operating revenues, but the accountants are still working on the income statement for 1945, so we do not have the balance for common.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Have you applied to your estimate made in January or February of 1945 your pro forma earnings figures for 1945, with the last two months estimated, and can you give us an estimate with regard to that?

A. I will be able to later in the day.

Q. Thank you.

A. The balance for common, the actual exceeded the estimate by 5.4 percent in 1940; in 1941, the estimate exceeded the actual by 20.1 percent; in 1942, the actual exceeded the estimate by 12.4 percent; 1943, the actual exceeded the estimate by 18.8 percent; 1944, which was the merger year, the actual exceeded the estimate by 24 percent. I hope to have the information on 1945 later.

By Mr. Kanton:

Q. Mr. Benjamin, after reading all those figures, I would like to go back to my original question.

Looking at these figures, what is your general observation with reference to the comparisons made as to whether such estimates have been good, excellent, or just fair?

A. I think they illustrate as to any particular year that the variations may be quite marked from the estimates.

Q. Were those variations brought about by the excess profits tax during that period?

A. In some cases they were brought about by the effect of taxes. In other cases, for instance, the $2,500,000 increase over the estimate in the operating revenues of Virginia for the year 1942 is brought about largely by uncontemplated increase in transportation revenues.

By Mr. Tucker:

Q. Due to the war?

A. Due to the war, that is correct.

By Mr. Kanton:

Q. Would you say, excluding the variable of the excess profits tax, that your estimates for the next succeeding

year were either good, excellent or fair? Did you take that into consideration, Mr. Benjamin?

A. Well, I know that the effect of the excess profits tax was to minimize any variations between the estimated net operating revenues and the actual because so much of the balance went in increased Federal income taxes.

There are uncertainties at the present time as there were uncertainties when each one of these estimates was made up, and I should say that they indicate to me that they are as good estimates as you can reasonably expect people to make.

Q. What do you mean, "as good"? Do you mean they are good, they are fair, or they are very good? Have you ever looked at other estimates made by other holding companies of their operating companies in order to know whether your estimates are better or not as good as others made?

A. No, I have not done that. I have not compared them with other utility systems' estimates.

Q. Well, then, your general observation is, I take it, that you don't know whether the predictions of the management of Engineers have been any good, is that correct?

A. All I can tell you are the results. In some years the results were very close and in other years, due to factors that were unknown at the time the estimates were made, they were fairly far off.

Q. Well, laying aside the unknown factors, which probably include for the most part the excess profits tax, would you not say that your estimates have been very good on the whole?

A. If you can except the unknown factors, yes.

Q. And excepting the unknown factors, would you say in your opinion, looking at these figures which you have just given us, and taking them for what they are, worth, that they are sound estimates made by a management doing this year in and year out, that these estimates are either,

again, good, excellent or fair? I would like your opinion on that question.

A. Well, I think they are good estimates, Mr. Kanton, if you can except the unknown factors that are not known at the time that the estimates are made, and that accounts for some of these large differentiations—factors that were not known at the time that the estimate was made. You never know when you make an estimate, of course, what those factors are. You find out during the year.

By Mr. Condon:

Q. And that works both ways, doesn't it, Mr. Benjamin?

A. Certainly.

By Mr. Kanton:

Q. Taking the El Paso operating revenue for the year 1944, when the actual exceeded the estimate by only .8 of 1 percent——

A. I think that was very good.

Q. What?

A. I think that was a very good estimate.

Q. Was there any reason why that estimate might have been very good, as compared to the estimate over the actual for Gulf on the balance for common during the year 1940? Was there, in other words, an unknown factor in the Gulf situation that you didn't contemplate, whereas in the El Paso situation in the year of 1944 which I have referred to, that didn't come about? Can you check your records for that, Mr. Benjamin?

A. In 1940, the estimate included an estimate for Federal income taxes—and this is Gulf States I am talking about—of $566,000. It developed that the actual taxes for the year were $681,000, which was a difference of $115,000. That was because of an increase in the rate of tax from 18 percent to 24 per cent.

Richard N. Benjamin—Cross Examination (Cont'd)

Now the dollar difference between the balance for the common and estimated was $226,000, of which $115,000 was due to that one factor.

Q. Outside of the Federal income taxes, excess profits taxes, et al. in this period, would you say that your estimates for operating revenues and expenses were on a conservative basis?

A. Well, based on the figures for these companies which covered a period during the war when business was increasing—and by business I mean operating revenues were increasing at a very rapid rate—the estimates were not as optimistic as the actual results showed, because business was increasing at that rate. Now when you get into other periods, when business is falling off, I don't know what the results would be; but taking this six-year period that we are discussing here, there are only two instances when the operating revenues were less than the estimate.

Q. What about the operating expenses? How did they size up?

A. Well, the only information I have here is the balance for common which is, after all charges and preferred dividends. In those cases the variations were more marked.

In the case of Gulf States, there were three years in which the balance for common was less than the actual and three years in which it was more.

In El Paso, there was one year when it was less, and in Virginia there was one year when it was less.

Q. On an over-all basis, aside from the general income taxes, just looking at the operating revenues and the operating expenses and the balance for common, and on that basis alone, would you say that the estimates made by the Engineers' management and its operating personnel were fairly reliable estimates and of a conservative nature?

A. I wouldn't like to go any further than to say that they were pretty good estimates.

Q. Would you say they were conservative?

A. Well, I——

Richard N. Benjamin—Cross Examination (Cont'd)

Q. As you just testified, have not the operating revenues exceeded your estimates for those years?

A. Yes, but as I pointed out these were years when operating revenues were increasing at a very rapid rate, and I suppose to the extent that the estimater did not get over-optimistic, they were in the middle of the road or conservative. I think they represented an attempt not to be swayed too much by over-optimism or pessimism.

Q. Well, the management had that factor in mind, that there was a war in progress and that perhaps operating revenues were going up, and instead of just jumping ahead they applied the conservative approach as borne out by the figures that you have just given for the record?

A. That is right. They estimated increases in operating revenues, which were not quite as great as the actual.

Mr. Kanton: That is all.

By Mr. Condon:

Q. Mr. Benjamin, you have before you column representations setting forth in a general way the substance of your testimony with respect to this subject-matter?

A. Yes, I have.

Q. Would you look at your six-year figures of operating revenues for El Paso and proceeding in a horizontal direction from left to right, is it not a fair statement that in each of the six years the estimates of the management as to gross revenues of El Paso were in each and every instance exceeded by the actual revenues, that the actual revenues did exceed the estimates made by the management for those six years?

A. That is right.

Q. Have you computed the degree or percentage of conservatism for the six-year period as an average?

A. No, I have not.

Q. Would you add, if you will, forgetting the fractions beyond the decimal points in each instance the 4, the 10, the 4, the 10, the 1 and the 3, and see if that does not suggest

to you on a six-year average that the management was conservative in computing the total operating revenues by something in excess of 5 percent a year?

A. That is correct.

Q. And that is disregarding the fractional additions and putting the most favorable of interpretations on the degree of conservatism possible in that respect, is that not true, Mr. Benjamin?

A. That is correct.

Q. Would you make the same calculation, if you please, with regard to the estimates vis-a-vis actual operating revenues in a horizontal way for Gulf States, and with respect to that I ask you if the estimates of the management were not on the conservative side to the extent of about 1.5 percent.

A. That is roughly 1.1 per cent.

Q. Now, assuming for the purpose of this question that your Virginia figure for 1945 as to the estimates of gross revenues or operating reveues vis-a-vis actual revenues involves no percentage variation whatever, just eliminate that from the calculation and reducing the number of years to five, is it not a fact that the management was conservative in its estimates by something approximating 10 percent on a five-year average, including in that, however, a very substantial under-estimate due in 1944 to the merger?

A. That is correct.

Q. Now, would you follow the same general method of procedure as far as El Paso is concerned, and proceeding in a horizontal way for your balance for common dividends, starting with the 17 percent excess over estimate for 1940 and continuing over to 1945, and let us have the percentage of conservatism of the management on a six-year basis?

A. It is something slightly under 10 percent.

Q. On the conservative side on a six-year average?

A. That is right.

Q. Now would you repeat the same process with respect to the balance for common as far as Gulf States is con-

cerned, as that indicates something less than one-half of one percent on the conservative side, isn't that so, Mr. Benjamin, on a six-year average?

A. On a six-year average, there is practically no difference.

Q. Well, just a shade on the conservative side, isn't that a fair statement?

A. I think that is right.

Q. Now you correct me if I am wrong. I am only doing a little mental arithmetic.

A. This is so close, I think you have to put the fractions in to be absolutely sure.

Q. Now, we are really getting down to fine points, aren't we? I have been giving you the breaks on the fractions here every time, have I not, Mr. Benjamin?

Mr. Tucker: I object.

Mr. Condon: I don't mean that in an offensive way.

Mr. Tucker: All right. I am afraid it might be misunderstood.

Mr. Condon: I have been asking him to ignore the fractions, which would only increase the degree of conservatism to the extent of the fractional additions for the number of years involved during the periods.

The Examiner: Are you moving to strike out this observation, Mr. Tucker?

Mr. Tucker: No. With that explanation, I am perfectly willing that the witness should answer it. He has already answered it in substance.

The Witness: It is about 1 percent on the conservative side.

By Mr. Condon:

Q. Would you make the same calculation, if you will, and the same basic assumption as far as Virginia is concerned, assuming that the estimate made in January or February of 1945 for the Virginia balance for common

equals the actual, and just reduce the period of years to a five-year average. That will give you something a little bit better than 6 percent on the average, on the side of conservatism, would it not?

A. I think it is near 8 per cent, Mr. Condon.

Q. I will accept your figures.

Now, let us go back. I have five items in your testimony that I think you might explain, if you will. You will note that the balance for common, actual, was 7.4 percent below estimates for the year 1942, if my rough-hewn notes are anywhere near accurate. Will you check that for the El Paso Company?

A. 7.4 percent, that is right.

Q. Could you state for the record, if there be a reason, the circumstances relating to the minus quantity there?

A. That was due primarily, I think, to an increase in tax rates which increased taxes $197,000 over the estimate.

Q. And that inaccuracy, if there be one, was due to the failure on the part of the directors, if there be a failure, in not knowing what percentage rates would be applied under the Revenue Act of 1942 by Congress to the revenues of the Company, is that right?

A. That is right.

Q. Other than that, are you conscious of any inaccuracy in the estimate with respect to the balance for common?

A. Not any other substantial item.

Q. Other than that one item, it appears that in the entire estimate of estimated operating revenues, vis a vis the actual revenues, that the balance for common, actual, versus estimated balance for common, that that was the only inaccuracy for the entire six-year period with respect to El Paso. Am I correct in that?

A. It was the only inaccuracy on the down side, Mr. Condon.

Q. Yes.

Richard N. Benjamin—Cross Examination (Cont'd)

A. But 1944, for example, showed a 28 percent increase over the estimate that was due to some non-recurring items that were not known at the time the estimate was made.

Q. I was talking on the side of conservatism, Mr. Benjamin. Am I correct in my statement?

A. You are correct as far as that goes.

Q. Would you look at the Gulf States figures. We see a minus figure for the year 1941, in other words, the operating estimates exceeded the actual by 1.6 percent, is that correct?

Mr. Kanton: Are you talking about operating revenues or balance for common?

Mr. Condon: I am talking about the operating estimates.

The Witness: 6.1 percent.

By Mr. Condon:

Q. Is that 1940, Mr. Benjamin?

A. 1942, weren't you talking about?

Q. I was talking about 1940.

A. You were right, then. I am sorry to have confused the record. It is 1.6 percent for 1940, that is right.

Q. You say that that was a pretty small over-estimate, wouldn't you?

A. I think that is a very close estimate.

Q. Considering the volume of business done by Gulf States in that year?

A. Yes.

Q. That is pretty close to a bullseye, isn't it?

A. I think so.

Q. Now will you look at the only other error, if it be one, which appears in the year 1942, wherein the management over-estimated the operating revenues by 6.1 per cent, if my figures are correct.

A. That is right.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Would you say that that was occasioned by the same circumstances, to wit, the impact of the Revenue Act of 1942?

A. No. That is the operating revenues, which is before taxes, and I have been advised that that was due to a war condition that arose at that time.

Q. What was that condition?

A. It was due to a reduction in the activities of the oil industry because of the torpedoing of tankers at that time. It was prior to the time the pipe lines had been constructed. Therefore, the operating revenues fell off, and one of the reasons they fell off was because of that.

Q. Now, with the exception of the years 1940, when there was an over-estimate of 1.6 per cent, and 1942, when there was an over-estimate of 6.1 per cent for the reasons that you have just stated, in the other four years the board was on the conservative side, as you testified; is that right?

A. That is right.

Q. Will you look at the balance for common on Gulf States and explain the reason for the over-estimate to the following extent—in 1940 of 7.9 percent; in 1941 of 30.2 percent, and in 1942 of 2.7 percent, if my figures are correct.

A. Yes. I think I already gave Mr. Kanton the information on 1940. That was the case when the Federal taxes were off by $115,000 due to an increase in tax rates. In 1941, there was an estimated Federal income tax of $907,000. and an actual of $1,625,000, or an increase of $718,000 in taxes, which is larger than this $570,000 excess of the estimate over the actual. In 1942, there was no particular explanation. That is pretty close to the estimate really.

Q. Now as to 1941, the extra $718,000 was due to an increase in tax rates, was it, enacted by an amendment to the Revenue Act of 1940 by Congress in the year 1941 made applicable to revenues for the calendar year 1941?

A. I am not clear when it was enacted, but I assume that it was enacted after the estimate was made.

Q. Is that a fair statement?

Richard N. Benjamin—Cross Examination (Cont'd)

A. Yes.

Q. Will you look, if you will, at the Virginia balance for common and there I see but one instance, to wit, 1941, where the balance for common did not exceed actually what the management estimated it should be. Would you tell us, if you know, the reason for that situation, or could you relate it taxwise to the same circumstances as I have just mentioned to you for the same year with respect to Gulf States?

A. There was $1,500,000 increase in taxes over the estimate due to this same tax law that we were just discussing.

Q. Would you say it fair then that that accounted for the bulk of this over-estimate?

A. Yes, I think so. The over-estimate was only $669,000.

Q. Is it not a fact, Mr. Benjamin, that for the last years —1943, 1944, and 1945—in no case was there any instance of over-estimate by the management?

A. That is correct.

Mr. Condon: That is all I have on that point.

The Witness: Mr. Kanton asked me to furnish him with a statement showing the percent of earnings of El Paso Electric Company available for dividends on the common stock, after taking into account the freeze, which had been paid out in dividends.

During the year 1940, 50.9 percent was paid out. During the year 1941, 63.8 percent; and for the two years cumulative, 1940 and 1941, 58.5 percent. In 1942, 73.4 percent, and for the three years cumulative, 62.9 percent.

For the year 1943, 83.7 percent; cumulative for the four years, 68.6 percent.

For the year 1944, 16.3 percent; cumulative for the five-year period, 56.7 percent.

For the year 1945, 190.4 percent; cumulative for the six-year period, 83.1 percent.

* * * * * * *

[R. p. 1034] Mr. Tucker: Of the transcript of the testimony in the case of the Western Public Service Company and

Richard N. Benjamin—Cross Examination (Cont'd)

Engineers Public Service Company, Docket No. 70-453, the hearing held in Philadelphia on March 22nd, 1942, I would like included in the matter mentioned the following:

Page 105, excluding the first ten lines;
The whole of page 106;
The whole of page 107;
The whole of page 108;
The whole of page 109;
The whole of page 110;
The whole of page 111;
The whole of page 112 excluding the last eight lines;
The first seven lines on page 113;
The whole of page 121 excluding the first five lines;
The whole of page 122;
The whole of page 123;
The whole of page 124 excluding the last 12 lines;
The whole of page 125 excluding the first 2 lines;
The whole of page 126;
The whole of page 127;
The whole of page 128;
The whole of page 129;
The whole of page 130 excluding the last 6 lines;
The last three lines on page 142;
The whole of page 143;
The first five lines on page 144;
The whole of page 151 excluding the first 8 lines;
The first 4 lines on page 152.

Mr. Condon: Mr. Tucker, could I ask that these be taken up one at a time because I think we may have to have different conditions that we would like to urge or that I would like to urge with respect to the receipt or the incorporation of some that might not apply to the others.

Mr. Tucker: By taking them up "one at a time" you mean for me to stop here so far as the transcript is concerned?

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Condon: If you have finished what you would like to incorporate by reference from the transscript, then I would like to make this statement.

Mr. Tucker: I have finished what I want from the transcript.

Mr. Condon: Well, I do not feel that it is necessary or proper that we assent to this incorporation, I do not object to it on condition that the portions of the transcript so incorporated by reference shall be deemed as evidence in this proceeding and the questions and answers as though they had been propounded to Mr. Barnes as a witness before you, Mr. Examiner, in this particular matter.

I think a different rule will have to apply to the documents that Mr. Tucker plans to offer from now on.

Mr. Tucker: If I understand what you mean by that, I accept it. You mean that you would like them incorporated just as though they had been asked questions and answered in this proceeding?

Mr. Condon: As though Mr. Barnes were asked the questions that are set forth and as though he made the answers that are referred to in his testimony in a proceeding before Mr. MacCullen.

Mr. Tucker: I accept that condition.

* * * * *

[R. p. 1054] The Examiner: On the record. I am going to overrule your motion, Mr. Kanton, and yours, Mr. Scheetz; and grant the offer as made, that the pages as enumerated by Mr. Tucker will be incorporated for all purposes and that the pages enumerated by Mr. Tucker from the oral argument and from the brief will be incorporated for the limited purposes expressed by him.

(The incorporation by reference, as above set forth, is noted.)

Mr. Scheetz: I was not aware, Mr. Examiner, that I made any motion. I simply made a comment on why I thought the evidence was relevant.

Richard N. Benjamin—Cross Examination (Cont'd)

The Examiner: I think the record will show your position, so I don't think anything further need be said.

You may proceed with your cross-examination, Mr. Condon.

(Formal caption omitted.)

By Mr. Condon:

Q. Mr. Benjamin, just before the recess you gave testimony of some financial data concerning El Paso Electric that was requested by Mr. Kanton, and you had prepared a statement of percentage of earnings of El Paso Electric available for dividends on the common after taking into account the freeze or freezes, as you testified?

A. That is right.

Q. In order to bring your testimony into focus here, where you said "paid out in dividends" in 1940, 50.9 per cent, if I understood your testimony correctly, will you assume a hypothetical figure of $100,000 of earnings of El Paso and let us assume for this calculation that $25,000 of that $100,000 represented a sum that would have to be retained because of the freeze. Does that 50.9 per cent mean that what would be available for dividends would be 50.9 per cent of $75,000?

A. 50.9 per cent would be the per cent of the $75,000 paid out in dividends.

Q. And your testimony then with respect to the several percentages in the different years in question can be applied to that example in the same way?

A. That is correct.

Q. Now you said this morning that you were going to secure a comparison of the estimate of the Engineers board of gross earnings and balance for common, testimony with respect to which you gave concerning Virginia with the exception of the year 1945 compared with actual figures for 1945, with the last two months thereof estimated.

Richard N. Benjamin—Cross Examination (Cont'd)

Would you now state, if you have those figures, what the percentage variation was in the Virginia figures, estimated operating revenues, with the actual?

A. I have obtained from the Virginia Electric directors' report the estimate that was made for 1945 earnings. The operating revenues estimated were $40,830,000. Comparing that with the figure shown in Applicant's Exhibit 67, I find the figure of $40,425,000 for the 12 months 1945, with the last two months estimated. That is a difference of $405,000 excess of the estimate over the actual.

The balance for common stock was estimated in the last year of $5,167,100. This compares with a figure of $4,023,000 in Applicant's Exhibit No. 67. In order to make the two figures comparable, there should be added to that latter figure $1,170,000, which is the tax reduction due to special amortization during 1945, which was not included in the estimated figure; so that the difference between the two figures on comparable bases is only $26,000.

The estimate does include the $1,170,000, but the actual does not. In order to make the two figures comparable we should make that adjustment and find a difference of $26,000, which is an excess of the actual over the estimate.

Q. In other words, looking at the balance for common, the directors again erred, if at all, on the conservative side by $26,000?

A. That is right.

Q. In other words, there was $26,000 more actually available on the balance for common than they estimated?

A. That is right.

Q. And on an estimate of $5,167,000, what percentage margin of error in that calculation is involved?

A. One-half of one per cent.

Q. Looking at your operating figures, am I correct in saying that the margin of inaccuracy there was slightly under one per cent?

A. Approximately, right.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Would you say that it was possible for human beings engaged in matters of this magnitude to come much closer in their prognostications, Mr. Benjamin?

A. I certainly wouldn't expect them to.

By Mr. Kanton:

Q. Mr. Benjamin, you gave us the percentage of earnings available for dividends for El Paso from 1940 to 1945 and the average paid out after the freeze for this six-year period came out to 83.1 per cent. Is that correct?

A. That is correct.

Q. Now if we look at Applicant's Exhibit No. 63, page 4 thereof, we find under the statement marked "Income, dividends from El Paso", for the year 1946, an estimated figure of $375,000.

Could you tell me approximately what percentage of earnings will be available for dividends based on your estimates for El Paso for 1946?

(No response.)

Q. Mr. Benjamin, you realize that my question is that I want that percentage figure over and above the freeze?

A. That is right. I was trying to determine what the freeze would be in 1946.

The balance shown on page 5 of Applicant's Exhibit 63 for El Paso available for the common stock is $633,400, against which there would be a freeze of $140,000; so that there would be a balance over and above the freeze of $493,000, so $375,000 would be approximately 76 per cent.

Q. That is approximately what Engineers has been taking up from Virginia and Gulf States and will be approximately what they expect to take up next year, is that correct, Mr. Benjamin, percentagewise?

A. I think in that general neighborhood.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Condon:

Q. Mr. Benjamin, do you recall some colloquy either on or off the record between yourself, Mr. Barnes, and myself concerning the questions which I asked you with respect to testimony given by Mr. Barnes concerning some financial compilations and the data prepared by the management and submitted by the management to the board of directors of Engineers in or about the latter part of May, 1945, at a meeting of the board?

A. I do.

Q. Do you recall Mr. Barnes stating either on or off the record that it was his impression that there were four sheets which had been prepared and submitted to the board?

A. I do, yes.

Q. I now hand you four sheets, the first one being dated 5/24/45 in pencil, with the date 5/23/45 in type, the 23 being stricken, the first one being captioned "Plan of liquidation, Engineers Public Service Company;" the second sheet being captioned "Engineers Public Service Company and subsidiary companies development plan;" the third sheet bearing the same caption and the fourth sheet likewise bearing the same caption. I ask you if, to the best of your knowledge, information and belief those are the four sheets to which reference was made?

A. Yes, I think they were.

Mr. Condon: May I ask that these four sheets be marked as a single exhibit, Preferred Stockholders' Exhibit 18 for identification?

The Examiner: Let the document be so marked for identification.

(Preferred Stockholders' Exhibit 18 was marked for identification.)

By Mr. Condon:

Q. Mr. Benjamin, will you state briefly for the record who prepared Preferred Stockholders' Exhibit 18 for identification and the circumstances of the preparation?

Richard N. Benjamin—Cross Examination (Cont'd)

A. I think Mr. Barnes prepared these statements or that they were prepared at his request.

Q. From the records of the company in so far as they refer to figures and data?

A. Oh, I assume so.

Q. And they were submitted to the board?

A. To the best of my recollection they were, Mr. Condon.

Q. Was there any discussion with respect to those that comes to your mind?

A. No, I don't recall any discussion on them. To the best of my recollection Mr. Barnes explained them, but I don't know about discussion.

Q. You have no reason to doubt the accuracy of the figures, the calculations, set forth in those memoranda?

A. No.

Q. Now you were referring to certain estimates of independent analysts concerning asset value of one or more of the operating companies of the Engineers system. Do you recall that?

A. Yes, I do.

Q. You had a black book that you were kind enough to let me have and examine, and it contained a number of such estimates?

A. Yes.

Q. I draw your attention specifically to the fourth sheet of this Exhibit 18 for identification, wherein are set forth references to Carl M. Loeb, Rhoades & Company, Ira Haupt & Company, and Bear, Stearns & Company; and ask you if those are three of the estimates of independent analysts which you made reference to?

A. Yes, those were three of the estimates. I am not sure that all of them are in this black book, but those are certainly three of the estimates that were looked at.

Q. Thank you. Mr. Benjamin, did the Engineers Public Service Company ever have an appraisal made of the Vir-

ginia Company, an engineering appraisal, and, if so, will you state when?

A. I believe there was an appraisal made many years ago, Mr. Condon, and the only recent one I know about is the one made for the properties of the Virginia Public Service Company, of which I furnished you a copy.

Q. And that is the appraisal of Slaughter, Seville & Blackburn on a portion of the Virginia Public Service property that has been marked for identification?

A. That is right.

Q. Was there any other appraisal that you know of except this old appraisal?

A. Of the Virginia Electric property itself?

Q. Yes.

A. There was one other of the Virginia Public Service. Stone & Webster Engineering made one at approximately the same time that Slaughter, Seville & Blackburn made their first appraisal.

Q. Can you fix the time approximately on that, roughly?

A. Well, roughly, I think it was within the last five years. Reference to the Slaughter report, I think, would show the date.

Q. Was it more or less contemporaneous with the Slaughter report?

A. I think it was, and I think the results were approximately the same, in other words, the values.

Q. They reached about the same conclusions?

A. I think that is right.

Q. Was there an old appraisal on the Virginia Electric & Power Company?

A. Virginia Electric & Power?

Q. Yes, prior to the Slaughter appraisal.

A. There was an old one, I think.

Q. Could you fix the date of that?

A. I think it was in the neighborhood of around 1925 or somewhere around there.

Q. Quite a long time ago?

A. Yes, sir.

Q. Was that at or about the time of the incorporation of the Engineers Company?

A. Engineers was incorporated about that time, yes, sir.

Q. Who made that appraisal, if you recall? Was that a Stone & Webster appraisal also?

A. I think the appraisal was made by this Blackburn firm at that time, but the information concerning that is contained in the prospectus of the Virginia Company issued in connection with the merger.

Q. Do I understand that that early appraisal was brought down to date by additions to property and plant account and subtraction from depreciation, amortization, retirement, etc., and it was brought down pretty much to 1944?

A. I think that that was done in that same prospectus to which I referred.

Q. And those proceedings were before this Commission, were they?

A. Oh, yes.

Q. Mr. Benjamin, have you ever had in the Engineers System while you have been connected with it, with respect to the Virginia, the Gulf and the El Paso properties, any rate proceeding initiated by a regulatory body?

A. Not to the best of my knowledge.

Q. In your annual statements which are in evidence in this proceeding, reference from time to time has been made to the matter of rate adjustments. Would you state for the record in a general way just how these rate matters have been handled by the Engineers management in the absence of any such proceedings initiated by regulatory bodies?

A. The customary practice of the Engineers subsidiaries to the best of my knowledge has been to confer with the State authorities and work out on a voluntary basis

rate reductions when conditions permit such reductions; and the companies have followed a policy of making such reductions at intervals from time to time.

Q. In more or less round table discussions?

A. I think that is the way it is usually handled, Mr. Condon.

Q. Have you participated in those?

A. No, I have not.

Q. Mr. Benjamin, I hand you your Exhibit No. 29 and I ask you to state briefly just how you prepared that exhibit, which is captioned "Engineers Public Service Company, Incorporated, average market price of preferred stocks based on total transactions on the New York Stock Exchange." Do you have a copy of that before you?

A. Yes, I do. The way this exhibit was prepared was to take, for example, for the purpose of illustration, the $5 stock for the year 1928. There were 41,000 shares of that stock sold on the New York Stock Exchange.

Q. In what year?

A. 1928. We took the average monthly low of that stock, took the monthly low for each month during the year and averaged it, and in that case obtained a figure of 93.45 as the average monthly low. We did the same thing with the high and got a figure of 98.30, and then averaged those two figures. We multiplied that by the number of shares sold and obtained a yearly average sale of $3,930,875. We did the same thing for each year through the first half of 1938. That was labeled the conversion period.

During that period 341,900 shares were sold, and the yearly average sales totaled $20,835,626, which gave an average figure for the period of $60.94.

We did the same thing for the so-called post-conversion period and obtained an average of $80.30.

By Mr. Kanton:

Q. The past conversion period covers what?

Richard N. Benjamin—Cross Examination (Cont'd).

A. Beginning July 1, 1938, through the first ten months of 1945. During that period we arrived at the figure of $80.30 and the average for the entire period was $67.16.

We did the same thing for the other two periods.

By Mr. Condon:

Q. What was the purpose of your preparing this memorandum in this exhibit, Mr. Benjamin?

A. The only purpose that I know of for which this exhibit was prepared was to show what on the average the stock had been traded at, at what prices, during the period during which it was outstanding.

Q. If I recall your testimony, this was not one of the comparatively few exhibits of yours that was before the board of directors of Engineers at the time that they adopted the Plan?

Mr. Tucker: I object to the characterization. I think that is a question for argument.

The Examiner: I will sustain the objection.

Mr. Tucker: I don't object to your saying that it was not one of those that was before the board, but this characterization is unfair.

Mr. Condon: Do you feel that the characterization in this instance is unfair, Mr. Tucker?

Mr. Tucker: I think it is purely a question of argument and I think those things ought to be said on argument and not asked of the witness.

Mr. Condon: I will amend my question by the elimination of the two words "comparatively few".

By Mr. Condon:

Q. I ask you the same question and ask you for your answer, Mr. Benjamin.

A. No, this was not presented to the board prior to September 5, 1945.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Do you really believe that this presents a fair picture to the Commission with respect to the preferred stock?

A. Well, I certainly wouldn't want to put in an exhibit, Mr. Condon, that didn't present a fair picture. I think this presents a fair picture of what happened in these securities over the period, and that is the only purpose I had of putting it in.

Q. You reached back into the past, back into 1928, and brought it down over this period, carried it through the depression, the impact of the Holding Company Act so-called, and you feel that this exhibit has connotations from which this Commission can draw certain conclusions as to what subject?

A. I think it illustrates somewhat the same thing as the charts that show the course of the preferred stock in the market over this period. This gives an average price at which the securities were traded and it may be of interest to the Commission.

Q. What does it add to your graphs?

A. I think the only thing it adds is to show the average over the period, Mr. Condon.

Q. Mr. Benjamin, I hand you Applicant's Exhibit 45, or if you have it before you, will you please examine it?

A. I do have it.

Q. It is captioned "Engineers Public Service Company, common stock balances as of June 30, 1945." It is my understanding that that represents common stock standing in the name of brokers or brokerage firms as of that date. Is that correct?

A. That is right.

Q. Can you tell us whether or not you have put on your list of 50 largest common stockholders the brokerage houses whose names appear on Applicant's Exhibit 45 in the amounts or the number of shares set forth as being in the name of those brokerage firms or financial houses as set forth in Exhibit 45?

A. When you speak of the 50 largest holders, you are referring to Applicant's Exhibit 44?

Q. Yes.

A. There was no attempt to eliminate from the 50 largest holders any brokers' names, so that this list of 50 largest holders does include brokers who held stock of record.

Q. Was there any attempt made to ascertain from those brokers or financial houses listed on Exhibit 45 as to the actual holders of those stocks?

A. No.

Q. No beneficial owners?

A. No, we have not.

Q. Mr. Benjamin, I hand you a photostatic copy of a document bearing the following capition: "Engineers Public Service Company certificate of amendment of certificate of incorporation, proof of February 13, 1945," the original of which I think you supplied me with at my request; and I ask if you will state the circumstances of the preparation of that proposed amendment to your charter, if you know them?

A. At a meeting of the directors of Engineers held February 2nd, 1945, the directors authorized, subject to the sale of Savannah securities, the use of $7,849,000 of cash to make a payment in partial liquidation of $20 per share on all of the shares of preferred stock of this company, and it was the purpose of the preparation of this certificate of amendment to carry out that plan.

Later on, in fact later that same month, the directors authorized the officers to retire shares rather than to follow this procedure of paydown.

Q. Would you be kind enough to tell me, Mr. Benjamin, at that meeting on February 2, 1945, just what plan the directors decided upon in greater detail than a partial liquidation of $20 per share? How was that to be carried out? Tell us what you recall about it, and I wish you would

refer to the minutes of that meeting if you need to refresh your recollection.

A. I don't have the minutes before me, but I have a note here as to the action taken at that meeting. The proposal was to make a payment in partial liquidation of $20 per share for all of the shares of the preferred stock, with a 20 per cent reduction in the dividend rate and a $20 reduction in the redemption price and liquidating value of each of the shares.

Q. And this document to which I have just referred you was an amendment to your certificate of incorporation in line with that general purpose?

A. Yes, I think it was.

The Examiner: Mr. Condon, you referred to an amendment to the certificate of incorporation. I am assuming that you mean a proposed amendment?

Mr. Condon: That is what I referred to.

The Examiner: It was not actually an amendment?

Mr. Condon: No, sir. I had identified this as a certificate of amendment, proof of February 13, 1945. I did not intend to suggest that the amendment had been carried through. I thought Mr. Benjamin understood that.

By Mr. Condon:

Q. Did you not, Mr. Benjamin?

A. Yes.

The Examiner: I wanted the record to show that it was a proposed amendment and not an actual amendment.

Let us take a short recess.

(A short recess was had.)

The Examiner: All right, Mr. Condon.

By Mr. Condon:

Q. Mr. Benjamin, who drew this proposed certificate of amendment?

Richard N. Benjamin—Cross Examination (Cont'd)

A. Mr. Tucker.

Q. Are you aware of the fact that at various places at points in this amended certificate of Engineers that new insertions and new paragraphs appear that are quite different in form as well as in substance from those presently contained in the actual certificate of incorporation of Engineers?

A. Yes, the provisions are different.

Q. Will you be kind enough to look at page 12 of your draft, and more particularly a new paragraph, Roman numeral VII, captioned "Return of preferred stock capital." Do you have that before you?

A. Yes.

Q. When did Mr. Tucker prepare this proposed certificate of amendment to the charter of Engineers? At or about the date it purports to bear, about February 13, 1945?

(No response.)

Q. I draw your attention to the statement at the top, which says "Proof of February 13, 1945."

Mr. Tucker: Mr. Examiner, I am the last person in the world to try to restrict anybody on cross-examination so long as I think it is within the bounds of reason, but this cross-examination relates to a subject that I think the witness will say never reached the point even of specific consideration of an actual plan to go to the board of directors.

From what has been said on the record it seems to me that it is perfectly clear that on the issues of this case as to whether or not this Part 1 or Part 2, whatever you please, is a fair and equitable plan, it has no bearing on the subject. I think it is just a waste of valuable time, and I object to the whole line of testimony.

The Examiner: What is the purpose of the questions, Mr. Condon?

Mr. Condon: Mr. Examiner, the testimony is clear that on February 2, 1945, the directors of Engineers adopted a resolution to use nearly $8,000,000 in cash to make a partial

payment in liquidation of $20 a share for the Engineers' preferred stock. That was adopted and approved by the board of directors. As part of the action generated by that resolution was prepared this draft of an amended certificate of incorporation, and I am going to show with respect to this particular paragraph that somebody must have felt that when the stockholders acquired their preferred stock they didn't bargain in the light of the Public Utility Holding Company Act of 1935 at all, because this new section or Article VII on page 12 specifically refers to an entirely different method of treatment, as I would like to show by reading paragraph VII.

It is captioned "Return of preferred stock capital."

The Examiner: Let me ask you this, Mr. Condon, before you go any further.

Mr. Condon: Yes.

The Examiner: Was this proposed amendment ever offered to the board or considered by the board?

Mr. Condon: Well, it clearly appears that the board started on a course of action here, and I want to show that this document anticipates the payment of $20 a share and the reduction——

Mr. Tucker: (interposing) Excuse me. Could I interrupt just a moment? I object to this going on the record.

Mr. Condon: Mr. Tucker made a statement, and I am answering his statement as to why it is relevant and material and perfectly proper cross-examination.

The Examiner: I am asking you if this proposed amendment was ever submitted to or considered by the board. Can you answer that?

Mr. Condon: I don't know that yet, Mr. Examiner. I asked Mr. Benjamin to supply me with matters relating to former plans, minutes of the board of directors, and other things; and I came across this resolution of February 2, 1945, to which he has testified, whereby the board decided to initiate the action to use $8,000,000 in cash to make a partial payment in liquidation of $20 a share.

Richard N. Benjamin—Cross Examination (Cont'd)

Now I want to show that pursuant to that resolution there was prepared an amendment to the charter which clearly shows that at that time, in February, 1945, it was not understood that the stockholders had contracted with the idea of the Public Utility Holding Company Act in mind, but a whole new section was incorporated in this amendment which was designed to permit the board to do exactly what it did on the 5th of September, 1945, by changes in the charter.

The Examiner: That was something that Mr. Tucker himself might have had in mind or might have given consideration to or might have thought of at that time, but does that bind the company that he did that in his office? I can't see that it does.

Mr. Condon: You have had a statement here by Mr. Tucker today that when they choose him as counsel they are bound by what he does.

The Examiner: Now wait a minute.

Mr. Tucker: I object to that statement with regard to me. I never made such a statement and I never would make such a statement.

Mr. Condon: Mr. Tucker, did you say—

The Examiner: One minute. I think the record is perfectly clear on that. The record is perfectly clear to me and I think it is perfectly clear to the Commission that when Mr. Tucker gets on his feet here and says that as counsel, "I bind the company to do so and so", that is one thing; but when Mr. Tucker does something in his office entirely separate and apart from a hearing or entirely separate and apart from a board meeting, I think it is an entirely different situation.

Mr. Condon: Mr. Examiner, I feel that where the testimony shows that the board acted and directed that certain procedure be followed, that steps pursuant to the resolution of the board are perfectly proper whether they are done and executed by counsel for the company. This is an important change in this charter because it envisions exactly

what is going to happen here if the Commission approves this Plan, to wit, that when the preferred stockholder gets $100 at the liquidation preference, all these other things go out, and that by amending the charter in that respect and inserting a new paragraph, we have a right to show and to argue therefrom that there was nothing whatever in the minds of the stockholders originally when they contracted with the Company with respect to the liquidating preference with regard to the holding company at all.

The Examiner: All right, Mr. Kanton.

Mr. Kanton: I would just like to ask a question of Mr. Tucker that would perhaps clear up this whole matter. I am not going into the merits of what you and Mr. Condon were arguing, but, Mr. Tucker, I would like to know if, under Delaware law, a charter amendment of the type under question now could be accomplished unless it was approved by a majority of the preferred stockholders as well as a majority of the common stockholders.

Mr. Tucker: I think so. I think it could be arrived at or accomplished by a Section 11 proceeding before this Commission, under which the Federal power would override the State law.

Mr. Kanton: You mean as part of a Section 11 proceeding?

Mr. Tucker: As part of a Section 11(e) plan, as something that we would submit voluntarily and hope to get the stockholders to approve, both common and preferred, a majority of them. I don't think it was within the bounds of reason——

Mr. Kanton: Off the record a minute, please.

(Discussion off the record.)

Mr. Tucker: With respect to this particular proposed amendment that I am objecting to evidence with respect to on the ground that it has no bearing on these issues, the board of directors did pass that resolution. I was consulted about it, to the best of my recollection, after the resolution was adopted, but I won't bind myself as to that.

In any event, I endeavored to sit down and in a charter amendment which could be incorporated as an exhibit to a Section 11(e) plan, if one was ever drafted for the purpose, what the thing would look like.

If it is not in the record, it can be very easily put in the record that we never did get to drafting an 11(e) plan with respect to that particular document. That particular document never came to the attention of the board of directors. Soon after that document was prepared we prepared another amendment—maybe you have not got that; I don't know. Maybe it didn't get to proof form, but we were working on preliminary things to see if we could arrive at something that would work this thing out.

What bearing, I repeat, has that kind of an intermediate thing that never did get to the board of directors for approval? What bearing does that kind of thing that never was made the subject of an application down here have on the fairness and equitableness of this plan?

I still urge my objection.

Mr. Condon: Mr. Examiner, we have in evidence Mr. Tucker's opinion, Applicant's Exhibit 38, upon which the board acted. Here is a document drawn by Mr. Tucker from which it can be fairly argued that he recognized the necessity for a charter amendment under the facts as here presented to this Commission before this Company could pay $100 and no more to the preferred stock. I wish to argue that when a corporation drafts a certificate of incorporation and thereafter amends or purports to amend the certificate in a certain way, it places a construction on its own organic law which has evidentiary value for this Commission in these proceedings, and this is a recognition by Mr. Tucker that the charter as presently constituted and in effect and in evidence in this proceeding is wholly inadequate and was never calculated to cover the kind of a situation presented to this Commission or this amendment under the new section would not have been required at all.

Richard N. Benjamin—Cross-Examination (Cont'd)

I feel that we should be permitted to develop that through this witness with respect to this particular paragraph because of its importance.

The Examiner: In view of the fact that this proposed amendment was never submitted to the board, I cannot see that it is official in any sense of the word and I cannot see that it has any bearing at all on the fairness and equitableness of the present plan. I therefore sustain Mr. Tucker's objection.

Mr. Condon: I respectfully except.

The Examiner: I will grant you an exception.

Mr. Condon: I would like to have this document which I have identified marked for identification as Preferred Stockholders' Exhibit No. 19 for identification, exclusive of the pencil notations which are counsel's.

The Examiner: Let it be so marked.

(Preferred Stockholders' Exhibit 19 was marked for identification.)

Mr. Condon: I respectfully except to the Examiner's ruling, and at this time I would like to make an offer of proof on the record with respect to paragraph VII appearing on page 12, page 13, and the first 2 lines on page 14. In lieu of my reading that new article into the record, I ask leave for the stenographer to copy it physically into the record as part of my formal offer of proof.

The Examiner: If there is no objection to that, it will be done.

Mr. Tucker: I don't think so, but just let me see. I am preparing amendments, preparing plans——

I haven't any objection that it be incorporated in the record as part of Mr. Condon's offer of proof.

(The Paragraph VII referred to is as follows:)

"VII. Return of Preferred Stock Capital. This Corporation may at its option, as expressed by resolution of its Board of Directors, at any time or from time to time,

pay to the holders of the shares of all series of the preferred stock, without distinction between series, out of net earnings or earned surplus of this Corporation or from surplus created by a reduction in capital of this Corporation or otherwise, amounts in partial liquidation of, and as a return of capital represented by, the preferred stock, to an aggregate amount not exceeding any cash from time to time available to the Corporation which in the opinion of the Board of Directors cannot, because of the provisions contained in the Public Utility Holding Company Act of 1935, be advantageously used in the business of this Corporation. If and when such payments to the holders of the preferred stock shall aggregate $100 a share, such payment shall be deemed to be in complete liquidation and discharge of the preferred stock, and upon the making of the final payment in the manner hereinafter provided and provision for any dividends accrued and in arrears upon such preferred stock, all rights of the holders of the shares of preferred stock as stockholders of this Corporation shall cease and determine; and this Corporation shall, as a condition to the right of the holders of any shares of preferred stock to receive any such final payment, require the surrender for cancellation of the certificate representing such shares. The term "unreturned capital" in respect of any shares of preferred stock, as used in this Article Fourth, shall be deemed to be the sum of $100 per share, less the amount of any payment or the aggregate of any payments made in respect of such share as in this Paragraph VII provided for. Notice of any such proposed payment in respect of the preferred stock shall be given by this Corporation by mailing (to the extent permitted by law), a copy of such notice at least thirty days prior to the date fixed for such payment to the holders of record of shares of preferred stock at their addresses, respectively, appearing on the books of this corporation. On or prior to any date fixed for such payment, this Corporation shall deposit in trust with a solvent bank or trust company doing busi-

ness in the Borough of Manhattan, City and State of New York or the City of Boston, Commonwealth of Massachusetts, funds sufficient for such payment, and from and after the date fixed for such payment, such deposit having been made by this Corporation, the amount of any such payment shall be deemed to have been made to the holders of the preferred stock and the unreturned capital represented by each share of such preferred stock reduced accordingly. This Corporation shall not, however, have the right to make any payment in partial liquidation of the preferred stock pursuant to this Paragraph VII unless full cumulative dividends on the preferred stock accrued or in arrears to the date fixed for such payment shall have been paid or declared and set apart for payment.

"This Corporation shall require as a condition precedent to the receipt by the holder of any share of preferred stock of any payment in partial liquidation thereof and return of capital thereon, pursuant to this Paragraph VII, the surrender of the certificate representing such share in exchange for a new certificate reflecting such payment and indicating the amount of unreturned capital in respect of such share and the amount per annum of the preferential dividend upon such share after giving effect to such payment, and other changes resulting from such payment, as contemplated by this Paragraph VII; and this Corporation may withhold the payment of further dividends on such shares pending such exchange."

By Mr. Condon:

Q. Now, Mr. Benjamin, is it your impression that that document was never submitted to any of the directors of Engineers Public Service?

A. Other than any of the directors who happened also to be in the offices of the company, some of them may have seen that.

Q. Is it your impression that that was never submitted to Mr. Streeter?

Richard N. Benjamin—Cross Examination (Cont'd)

A. I don't recall that it was.

Q. Is that your best recollection?

A. That is my best recollection.

Q. What about Mr. Kellogg?

A. I don't believe he ever saw it, to my knowledge anyway.

Q. Are you aware of the fact that from the minutes of the Engineers board after February 2nd there was nothing whatever said about any rescinding of that resolution to which you have just made reference to use the $7,849,000 plus or minus to make a payment in partial liquidation on the preferred stock?

A. Well, it is my understanding that the resolution adopted at the February 27 meeting, 1945, superseded the February 2nd resolution and it is possible that that February 2nd resolution was never formally rescinded, but it was my understanding that that was the purpose of the directors in voting this resolution on February 27.

Q. Was the resolution on February 2 about this $7,800,000 ever rescinded formally or informally on your records, Mr. Benjamin?

Mr. Tucker: I object. That calls for a legal question purely and simply. It is whether it is a revocation by implication, a repeal by implication.

Mr. Condon: I am asking the Secretary of the Company, Mr. Tucker, to point it out in the records.

Mr. Tucker: You were asking him for a legal conclusion. If you would like to read the question back, I will see whether that isn't true.

By Mr. Condon:

Q. Will you restrict your answer to what the records show, Mr. Benjamin?

Mr. Tucker: Then I withdraw my objection under those condition.

The Examiner: Read the question back.

Richard N. Benjamin—Cross Examination (Cont'd)

(The reporter read as follows:)

"Q. Was the resolution on February 2 about this $7,800,000 ever rescinded formally or informally on your records, Mr. Benjamin?"

Mr. Tucker: You are confining yourself to what the records show and not drawing a conclusion as to whether it was rescinded or wasn't, Mr. Benjamin? I don't know that the witness knows about the legal effect of a revocation by implication, and I think that is involved.

By Mr. Condon:

Q. Is there anything on the records, Mr. Benjamin, that you have before you or know about that refers to the rescission of that resolution?

A. In so many words?

The Examiner: Well, expressly.

The Witness: Expressly?

The Examiner: Was it expressly revoked?

The Witness: I don't have the minutes of that meeting before me, but I do have a summary of the minutes of that meeting, and the summary makes no reference to a vote which, by its words, states that the previous resolution to which you referred was rescinded.

* * * * *

[R. p. 1086] By Mr. Condon:

Q. Mr. Benjamin, you have given some testimony with respect to the matter of a pension plan in so far as appertaining and relating to the Virginia Company and provision made for faithful retainers of the transportation company.

You stated that the Treasury Department had disallowed the deduction during the calendar year 1945, and stated that it had to be pro rated over a ten year period, if my memory is correct. Is that so?

A. That is right, they said that you couldn't deduct it all in the year 1945, but only a tenth of it.

Q. Yes, and I asked you whether or not that suggested to you that the total over-all single premium cost of $1,342,000 was to be divided by ten or whether there would be any less figure on a pro rated ten-year basis. You promised to get us the data with respect to it. If you have done so, will you state the fact for the record?

A. Yes, I will be glad to.

The bid of the insurance company for this amount of insurance was $958,469. The difference between that figure and the $1,342,000 was the amount in cash proposed to be paid to these employees to reimburse them for their own income tax liability.

I made a further check to see about how much this would cost annually—it is pretty difficult to figure because during the early part of the period all these people would not be on the pension roll, but the maximum amount in any one year, in other words, if all of these employees went all at once, it is estimated that it would cost $85,978 a year. The best estimate is that that would be the maximum and that this payment would run off in about twenty years, of course, reducing in the latter years as the pensioners died.

Q. Yes, what proportion of the annual charges would be really tax dollars, Mr. Benjamin, based upon the rates of 1946 as you estimate them to apply?

A. Well, the 38 percent rate would apply to this $85,000 payment, so that would give a tax credit of approximately $32,000 which would make the net cost of this maximum figure somewhere in the neighborhood of $50,000.

Q. Have you reflected that cost in your estimate for 1946 on Exhibit 63?

A. I don't know whether it is in there or not. I doubt very much whether that expense is in there, because this matter just came up. We just received a ruling quite recently.

Q. In all events, the amount involved would not substantially affect the result?

A. No, it is small.

Richard N. Benjamin—Cross Examination (Cont'd)

(Discussion off the record.)

Mr. Condon: Mr. Examiner, at this time I would like to offer in evidence Preferred Stockholders' Exhibit 12 for identification, as Preferred Stockholders' Exhibit 12, for the limited purpose of showing the attitude and ideas of Mr. Kellogg as expressed in his letter to Mr. Barnes on July 27th, 1945, and not as proof of any of the facts set forth or contained therein, or not in support of the conclusions which he asserts.

For that limited purpose, I would like to have that document in evidence.

The Examiner: No objection?

Mr. Tucker: No objection on that condition.

The Examiner: Frankly, the Trial Examiner has some doubt as to the materiality of Exhibits 12 and 14, but 14 is already in and there is no objection to 12. There has been no objection raised to this, therefore I will admit it; but I do want the record to show that I have some doubt as to the materiality of it.

Preferred Stockholders' Exhibit 12 will be received in the record.

(Preferred Stockholders' Exhibit No. 12 is received in evidence.)

Mr. Condon: Now, as part of the same transaction and again for the limited and restricted purpose, i. e. not as proof of any of the facts contained therein or not being bound by any of the conclusions set forth therein, but merely to show the attitude of Mr. Barnes, I would like to offer as Preferred Stockholders' Exhibit No. 12-A the reply of Mr. Barnes to Mr. Kellogg, dated July 31, 1945.

Mr. Kanton: May I make this suggestion, Mr. Condon? Wouldn't it be advisable to present these two documents to the witness Benjamin in order for him to determine whether they are true and exact copies of the originals?

Mr. Condon: He gave them to me as such.

The Examiner: There is no proof of record that that is so, other than as to 12. I think he did identify that.

By Mr. Condon:

Q. Mr. Benjamin, you have heard the colloquy of counsel. Isn't it a fact that you did send these documents to me as far as you recall and that they represent true and correct copies of the originals, to the best of your knowledge, information and belief?

A. Yes, sir.

The Examiner: No objection?

(No response.)

The Examiner: The Trial Examiner makes the same comment with respect to 12-A that he did to 12 and 14.

However, there is no objection, so it will be received in the record as Preferred Stockholders' Exhibit 12-A.

(Preferred Stockholders' Exhibit No. 12-A is received in evidence.)

Mr. Tucker: I may want to supplement both of those things by Mr. Barnes, but maybe that isn't material at this time.

By Mr. Condon:

Q. Mr. Benjamin, I think it is a fair statement, is it not, that the Board of Directors of Engineers were quite conscious as to the existence of this problem as to how much the preferred stockholders were to get?

A. Yes.

Q. As a matter of fact, that was the one item in the Plan that occasioned the most discussion and concern?

A. I think that is right.

Q. Did the Board understand that that problem would involve questions both of fact and of law?

A. (No answer.)

Richard N. Benjamin—Cross Examination (Cont'd)

Q. As far as you know?

Mr. Tucker: Oh, I object I object. That is a legal conclusion directed to the mind of a layman.

Mr. Condon: I think that this witness can state what he heard at the directors' meetings, if he did.

Mr. Tucker: Why don't you ask him that, then, what he heard that had a bearing on that subject?

The Examiner: I will sustain the objection to the question as it is now.

By Mr. Condon:

Q. Mr. Benjamin, did you hear any conversations at directors' meetings which suggested that there would be problems of fact involved in the determination of the rights of the preferred stockholders here?

A. Well, I heard many discussions, Mr. Condon. I can't state whether they were expressed in those terms. I don't recall anybody saying that there were questions of fact involved, although I know that the directors did discuss many facts in connection with their consideration of the problem, such as the ones that we have talked about during this hearing.

Q. Do you recall any discussions by the directors as to what would have to be shown by the preferred stockholders to entitle them to more than $100, if anything?

A. What type of proof would have to be put in by the preferred stockholders?

Q. Yes.

A. Well, I recall Mr. Streeter's comments and remarks as to what his opinion was concerning the rights of the preferred stockholders, that this was not a liquidation and things of that sort, and I assumed from that that the directors understood that that might be one type of proof that the preferred stockholders would attempt to make at the hearing.

Q. Did the majority of the Board go into that at all? And see what proof was available to support such a contention?

Richard N. Benjamin—Cross Examination (Cont'd)

The Examiner: Before you answer that, in your previous answer you said you heard Mr. Streeter make some comments to this not being a liquidation. Did you mean that, or not an involuntary liquidation or a voluntary liquidation?

The Witness: No. I have heard Mr. Streeter say that he didn't consider this a liquidation at all.

The Examiner: All right. You may answer the question.

Will you read the question.

(The question was read.)

The Witness: The majority of the Board heard Mr. Streeter's comments and some of them expressed themselves as being in disagreement with that position, but I don't know that any discussion took place as to the type of proof that would be introduced.

By Mr. Condon:

Q. Now, the majority of the Board knew that the amount involved was something in excess of $3,000,000, did it not, so far as you know?

A. I think they did.

Q. And they knew that the problem was a difficult one?

A. I think they did.

Q. Did the majority of the Board recognize its importance to the preferred stockholders?

A. Yes, I think they did.

Q. Did the majority of the Board have in mind that step 1 of the Plan contemplated a cutting off of dividends during the litigation period if the Plan were approved in that form by the Commission?

A. When you speak of the "litigation" do you mean litigation of Part 1 of the Plan or litigation of Part 2?

Q. Both.

A. I think they realized that the preferred stock would receive $100 per share and would receive no further divi-

Richard N. Benjamin—Cross Examination (Cont'd)

dends if Part 1 of the Plan were approved separately from Part 2, and that Part 2 at the same time might be litigated. That was clear, I think.

Q. Did the Board discuss the possibility that the preferred stockholders would need an expert to show the going concern value or the fair value of this preferred stock, the going concern value ex—the provisions of the Public Utility Holding Company Act of 1935?

A. I don't recall that there was any discussion of that point. The only comment I recall that Mr. Streeter made in that connection was that he didn't think that there would be much proof needed at the hearing, that it was a matter for the Commission. I believe he said he thought it was a matter of law. That is the best of my recollection.

Q. You are not suggesting that Mr. Streeter said that he thought the preferred stockholders shouldn't be protected by the Commission?

A. No, no, not at all. I was just talking about the only reference that I recall as to the type of evidence that the preferred stockholders might need at the hearing.

Q. Isn't it the fact that he had the impression in the summer of 1945 or the early Fall that it was essentially a matter of legal argument and nothing else?

A. I think he felt that way about it.

Q. And the other directors shared his view, is that right?

A. Well, I am getting a little confused here as to just what you are directing your question to. If you are talking about the proof at the hearing, that is one thing; but I think the directors of the Company felt that the plan was fair and I don't believe they discussed in any great detail the method or the actual proof that would be presented at the hearing.

* * * * *

[R. p. 1106] By Mr. Scheetz:

Q. Mr. Benjamin, so that you and I will understand each other, when I use the term "management", I mean to

refer to the executive officers of Engineers, and when I refer to the directors I mean to refer to them as a body, including those officers who are directors, and if occasion arises to differentiate between the majority of the Board and individual directors, we will do so.

A. All right.

Q. If you will keep me straight on that, I will keep you straight.

There is testimony that Virginia contemplates a refunding of its bank loan at a lower interest rate. Are there pending any plans for the refunding of any of the other debt securities or preferred stock of Virginia, Gulf States, or El Paso?

A. No, there are not.

Q. Have there been any conversations on any such refunding looking to the future?

A. No, not recently, Mr. Scheetz.

Q. Had the merger feature, that is the feature which provided for a possible merger between Virginia and Engineers, been retained in the present plan, would there have been any refunding or exchange offered for the Virginia preferred in connection with any such merger?

A. I don't believe so. There was no discussion as to that possibility.

Q. Exhibits 26, 27, and 28 of Engineers furnish the volume of trading for the three series of Engineers preferred stocks up through 1944. Have you the volume of trading for those three series for 1945?

A. Yes, I have obtained that information.

Q. Will you give it first for the entire year and then if you have the figures for the first eight months of 1945, and then for the last four months?

A. In the $6 stock, there were 5,580 shares traded on the New York Stock Exchange during 1945. In the $5.50 stock, 15,890 shares were traded; and in the $5 stock, 17,430 shares.

Richard N. Benjamin—Cross Examination (Cont'd)

For the period prior to September 1, 1945, there were 3,230 shares of $6 stock; 11,900 shares of $5.50; and 11,580 shares of $5 stock.

For the last four months of the year, there were 2,350 shares of $6 stock; 3,990 shares of $5.50 stock; and 5,850 shares of $5 stock traded on the New York Stock Exchange.

Q. In response to my request yesterday, have you ascertained the volume of trading in the common stock of Engineers comparable to that given for the preferred stocks in Exhibits 26, 27, and 28?

A. Yes, I have that information from 1930 through 1945.

Q. Will you state it here?

A. During 1930, 555,500 shares of common stock were traded on the New York Stock Exchange.

1931, 24,700 shares
1932, 38,000 shares
1933, 104,600 shares
1934, 41,200 shares
1935, 68,600 shares
1936, 103,700 shares
1937, 78,000 shares
1938, 980,100 shares
1939, 1,442,800 shares
1940, 535,600 shares
1941, 289,500 shares
1942, 239,600 shares
1943, 1,236,800 shares
1944, 1,446,900 shares
1945, 1,217,200 shares

Q. Do you have it split for the first eight months and the last four months of 1945?

A. Yes. For the first eight months of 1945, the figure was 872,900 and the balance for the last four months of the year was 344,300.

Q. Was was the source of your information?

A. This information for the trading in the common stock on the New York Stock Exchange was obtained from the Bank and Quotation Record.

Q. And for the preferred stock?

A. I believe that information was obtained from the Commercial and Financial Chronicle.

Q. Will you please turn to Engineers' Exhibit 14?

A. Yes, I have that.

Q. There is shown the average times earnings ratios of four selected companies on various bases, ranging from a low of 13.18 on one basis to a high of 16.82 on another basis. The averages range from a low of 14.44 to a high of 16.04. Is that not correct?

A. That is correct.

Q. As I understand it, Exhibit 14 is intended to show that the value of the Gulf States common stock would at least reach into the levels of those ratios, is that correct?

A. Will you read that again, please?

(Question read.)

By Mr. Scheetz:

Q. If we are using a times earnings factor.

A. Yes.

Q. It was not, however, intended to indicate a maximum ceiling or that a higher ratio must not be applicable to Gulf States, was it?

A. That is correct.

Q. Will you please turn to Engineers' Exhibit 47, Schedule D-2, which sets forth income statements for the years 1939 through 1944 for Gulf States.

Now, yesterday when you were comparing earnings experience with earnings forecasts for Virginia, Gulf States, and El Paso, you brought out that the operating revenues and that income available for common dividends for Gulf States for 1942 had been depressed because of the effect of submarine warfare on the oil industry in that area. Can you give us any estimate of the effect on operating revenues for that year dollarwise resulting from that depression in the oil industry?

Richard N. Benjamin—Cross Examination (Cont'd)

A. The only indication I have of the effect of that particular item is that the companies' estimate for operating revenues for that year was $13,395,000 and the actual operating revenues were $12,572,000; so that there was a difference of $823,000 between the estimate and the actual.

I can't say just how much of that differential was due to the factor that you refer to, but I believe that a substantial portion of it was.

Q. Do the operating revenues for the other years set forth in Schedule D-2 reflect any abnormality not already covered by the footnotes or your testimony which, as I recall, covered the unexpected rate of increases due to the war?

A. I can't think of any other unusual events.

Q. Will you please answer the same questions as to the Virginia revenues as shown on Schedule D-1 of Exhibit 47?

A. I don't know of any unusual factors that were not either referred to in my testimony yesterday or covered by the footnotes to Schedule D-1.

Q. Will you do the same for El Paso as shown on Schedule D-3 of Exhibit 47?

A. I think the same general factors referred to in connection with Virginia apply to some extent to El Paso, namely, the effect of the war on the transportation and other business of the company. Other than those, I don't see anything unusual. I don't know of anything unusual that is not referred to in the footnotes and the testimony.

Q. Will you now turn to Schedule A, Page 1, of Exhibit 47. There appears on that page the following footnote: "Redemption premiums up to $3,204,795 may be payable to the preferred stockholders if the Securities and Exchange Commission and the courts so determine. It is the opinion of company counsel that no such redemption premium is payable."

Now that note, as phrased seems to me to be predicated on the contingent payment of a redemption premium as if on a voluntary call for redemption without regard for any

other theory on which an additional payment may be made to the preferred. Does it have that connotation to you?

A. I think so.

Mr. Tucker: Just a moment. Would you read that question and answer back to me, Mr. Reporter?

(Question and answer read.)

The Witness: Could I continue that answer a little further?

Mr. Scheetz: Perhaps you might wait until I have asked you the next question.

The Witness: All right.

By Mr. Scheetz:

Q. At Pages 821 and 822 of the notes of testimony, in response to a question as to the estimated maximum amount of the differential which may be payable under Part 2 of the plan, you said in substance, "We have considered that this contingent liability would not exceed $3,204,795 plus the possibility of interest." I might say that that is not an exact quotation but I will show you just the testimony in just a moment if you wish to see it.

At Page 834 on this same subject, Mr. Condon asked you whether your reference to "premium" meant whatever amount, if any, in excess of $100 the Commission might determine to be fair and equitable to be paid to the preferred, and you replied, "That is correct."

Do you wish to see those references?

A. No, I recall that testimony.

Q. Now, in view of your testimony, should not the footnote in Schedule A of Exhibit 47 and any similar footnotes, if there are any in any of Engineers' exhibits, be revised to show that that item is intended to cover the estimated maximum contingent liability under Part 2 on any theory that might ultimately prevail?

A. I think that this amount that is referred to as a contingent liability, which is the amount of the redemption

premiums on the three series of preferred stock, the amount that has been considered by the directors of the company—all of the directors of the company—to be the maximum amount which would be payable to the preferred stockholders with the exception that some interest might be allowed on that amount.

I think it would be more accurate to state that this has reference to the amount, if any, allowed or found by the Commission and the courts to be the amount over $100. per share and accrued dividends which it would be fair and equitable to pay to the preferred stockholders.

The Examiner: Is that based on the theory that in no event would the company be liable to pay more than their redemption price on the preferred stock as shown by the charter in the event of a voluntary liquidation?

The Witness: That is right.

By Mr. Scheetz:

Q. Have you completed your answer?

A. Yes.

Q. At the session on January 4, 1946, you testified about an authorization by the Engineers' Board adopted February 2, 1945, to pay $20 per share on the preferred stock.

A. That is correct.

Q. The testimony appears at the foot of Page 713, at the top of Page 714, and also on Page 718 of the notes of testimony. On Page 714 you make the statement that there was to be a 20 per cent reduction in the redemption price and liquidating value of each share, and that the officers were directed to formulate plans in connection therewith.

Will you refer to that?

Mr. Tucker: Will you wait just a moment before you answer that question?

Are you going into that proposed amendment that Mr. Condon attempted to talk about yesterday?

Mr. Condon: And was precluded from doing so.

Richard N. Benjamin—Cross Examination (Cont'd).

Mr. Scheetz: Not yet, Mr. Tucker. I will come to a question which I think will raise that question, but I think that the next few questions——

Mr. Tucker: I am inquiring your purpose of going into it to see if I want to make the same objection I made to Mr. Condon.

Mr. Scheetz: I don't want to preclude you but I think if you will let me ask a few more questions you will still have the same opportunity to do that.

By Mr. Scheetz:

Q. Now, let me direct your attention to some further questions and answers on Page 714:

"By Mr. Condon:

"Q. Now, did I understand you to say that one of the facets of that plan was to reduce by $20 the voluntary redemption price to the extent of $20 for each series?

"A. That was the suggestion at that time, yes, sir.

"Mr. Tucker: Wait a minute. The voluntary redemption; is that what you asked?

"The Witness: That is right.

"Mr. Condon: That is what Mr. Benjamin testified to and what he stated and I believe to be the fact. Am I wrong?

"Mr. Tucker: All right."

By Mr. Scheetz:

Q. Now, that statement is not clear to me. Suppose $20 were paid under the proposed plan, what would be the resulting position of a share of preferred if later there were an involuntary redemption or a voluntary redemption?

Mr. Tucker: Now, just a moment before you answer that question.

Richard N. Benjamin—Cross Examination (Cont'd)

Are you going to attempt to do anything more in this connection than to clarify the record?

Mr. Scheetz: That is all, Mr. Tucker.

Mr. Tucker: All right, I have no objection for that purpose.

A. This plan, as I recall it, contemplated a $20 reduction in the voluntary redemption price, and by that I mean in the case of the $6 stock, a reduction from $110 a share to $90 a share; and a reduction in the liquidating value of the same amount, which would reduce the liquidating value from $100 a share to $80 a share, and if subsequently to the first $20 payment the Board decided to redeem voluntarily the remaining amount of the preferred stock, the voluntary redemption price of $90 a share would have been paid.

If there were subsequent payments in partial liquidation of $20 per share four different times, so that the entire amount would be paid off, the plan contemplated that that would involve the elimination of the preferred stock and no premium would be payable.

By Mr. Scheetz:

Q. May I interrupt you there? Suppose that payments had been made in a total of $80. That would leave a residual of $30, wouldn't it?

A. On a voluntary basis, yes, sir.

Q. And the door was never closed to a voluntary redemption as long as there was something left to be paid on the stated value of the preferred?

A. That is right.

Mr. Scheetz: Now, Mr. Tucker, in this next question maybe I encroach on that field. If you think I am——

Mr. Tucker: I am watching you.

By Mr. Scheetz:

Q. Yesterday you heard Mr. Condon make an offer of proof of a proposed amendment to the Engineers' charter

designed to provide for such partial payments. The document was identified as Preferred Stockholders' Exhibit No. 19 and I believe that the offer was confined to Section VII of Division A beginning on Page 12 of that Exhibit 19 for identification.

Division A of Part 4 of the Engineers' charter, Applicant's Exhibit 33 in this proceeding, deals with voluntary redemption features of the preferred.

A. You are referring to the present charter?

Q. Yes.

A. What was that question?

(Question read as follows: "Division A of Part 4 of the Engineers' charter, Applicant's Exhibit 33 in this proceeding, deals with voluntary redemption features of the preferred.")

The Witness: If that is Division A of Article IV, Subparagraph IV deals with that.

By Mr. Scheetz:

Q. Did the proposed amendment as drafted, Preferred Stockholders' Exhibit 19 for identification, include an amendment to that portion of the Engineers' charter dealing with voluntary redemption?

Mr. Scheetz: That is the only question I am going to ask him.

Mr. Tucker: You are still fairly on a clarification of the record. I don't think I ought to object. After all, it is in the record and if it isn't clear it ought to be made clear.

(Discussion off the record.)

Mr. Condon: May I say on the record, Mr. Scheetz, that I had planned to go into the entire problem presented by Exhibit 19 for identification and I restricted my offer to that one article in my offer of proof because it had been developed preliminarily in the examination of Mr. Benjamin. I was mindful of the ruling of the Examiner that I was not to be permitted to continue the examination and I took an exception.

Richard N. Benjamin—Cross Examination (Cont'd)

At a later time I may very well renew my offer either through another witness or otherwise.

The Examiner: Read the last question.

(Question read.)

A. Yes.

By Mr. Scheetz:

Q. I gather from your testimony that you have participated extensively in the development of the recommendations made by the management to the directors with respect to various plans, including the plan which is the subject of this proceeding?

A. Yes, I think that is correct.

Q. And also in the preparation of such documents as were presented to the directors and the exhibits introduced by Engineers in this proceeding?

A. Yes, I did.

Q. Would it be correct to say that you acted as something of a clearing house in the work of preparation and correlating material and ideas so far as the staff work is concerned?

A. I think that is correct.

Q. Were you working in close association with Mr. Tucker and his staff?

A. Yes, I was.

Q. When did the idea of an ultimate merger of Engineers and Virginia first come up so far as you know?

(Discussion off the record.)

A. I believe that this suggestion was first considered in July, 1945.

By Mr. Scheetz:

Q. Who originated it?

A. I believe it arose by reason of suggestions made by tax counsel in Mudge, Stern, Williams & Tucker.

Q. Were any drafts of any merger agreements prepared to implement this idea?

A. No.

Q. At Page 578 of the notes of testimony there appears this statement by Mr. Barnes in answer to a question—"If the distribution of the Virginia stock to Engineers' stockholders in final liquidation had been a taxable transaction, I think we would have stuck to the merger route, in order to avoid such tax liability.

"Q. Then would you say the over-riding weight, then, was the change in tax circumstances?

"A. I think so."

Then there is a reference to the ideas of the staff of the Commission.

I don't know whether you can answer this question, but if you feel that you can I would like you to: If, prior to the time that Engineers files a certificate of dissolution under Part 1 of the plan it developed for any reason that the distribution of Virginia stock to Engineers' common stockholders would be taxable or that there would be a substantial risk that it would be held taxable, do you think that the management and the directors would revive the merger idea as a feature of the plan?

A. Will you read that back, please?

(Question read.)

A. I think the tax feature is so important that that might happen, Mr. Scheetz.

Q. If the merger idea had been carried out or is ever revived and is carried out, since Virginia Electric & Power Company is an operating utility operating in the State of Virginia, I assume that Engineers would have been merged into Virginia and the resulting corporation would be a Virginia corporation. Is that correct?

A. That is my understanding.

Q. Well, from your experience with the Virginia law, the Virginia Merger Law, don't you think that that is almost a certainty?

A. Yes.

Q. Would it be correct to say that the management and the directors were fully acquainted with the appraisal provisions under the merger provisions of the Virginia Corporation Law?

A. I think they were advised of those provisions in connection with the Virginia merger with Virginia Public Service, but I think certainly the management was aware of those provisions and I think the directors probably were.

Q. Is it your conception that this possible claim of the preferred stockholders covered by Part 2 would be disposed of prior to any such merger or might it be dealt with in any such merger?

A. Will you repeat that question, please?

(Question read.)

A. Well, the only place where that merger alternative was originally was in Part 3 of the plan, which has now been eliminated.

Under the present plan, there is no merger provided for so that I don't understand the purport of your question.

Q. I was trying to find out in your thinking about any such proposed merger how you proposed to handle this possible claim of the preferred or whether the merger wouldn't occur until after that was disposed of.

A. The merger would not have occurred until after the preferred stock had been liquidated.

By Mr. Kanton:

Q. Isn't it true, Mr. Benjamin, that at the time the Engineers filed the original plan which contained Parts 1, 2, and 3, and the merger possibility was discussed, that the management had in mind that by the consummation of Part 1 and the paying off of the preferred stockholders of $100 a share plus accrued dividends, that amount there under Part 1 would take away whatever rights the preferred stock-

holders might have not only under the appraisal statutes of the Virginia, but also under the appraisal statutes of the Delaware law?

A. Well, I think the effect of paying off the preferred stock under Part 1 of the plan would be to eliminate that as a stock of Engineers, except for the one remaining right that was specified in Part 1 of the plan.

Q. And that was the consideration also of the management before the original plan was filed, not only your consideration but also their consideration, and that had been discussed as such?

A. Well, I recall some discussion about the merger statutes and the appraisal right in Virginia but it was my understanding and I think the understanding of the other people who discussed it——

Q. Meaning the management?

A. Meaning the management—that those appraisal statutes would be inapplicable in so far as the preferred stockholders were concerned, that is right.

Q. Because of the reasons we have just discussed?

A. That is right.

By Mr. Scheetz:

Q. Now, I direct your attention to Engineers' Exhibit No. 33, which is the charter of Engineers, Page 10, where there appears the following sentence near the foot of the page—"A consolidation or merger of this corporation with any other corporation or corporations shall not be regarded as a liquidation, dissolution, or winding up of this corporation within the meaning of this paragraph, III, provided such consolidation or merger does not substantially impair the rights and preferences of the preferred stock."

Was that provision actively in the minds of the management so far as you know during the period when the merger provision was being sponsored?

A. You mean when the merger plan was first suggested?

Q. And throughout that period.

A. No, I don't believe it was.

Q. Who first suggested Amendment No. 4?

A. I brought up that suggestion.

Q. Did this provision in the Engineers' charter to which I first alluded ever come up for discussion in connection with it?

A. Yes, it did.

Q. When?

A. I don't recall the exact date, Mr. Scheetz.

Q. Was it after this plan was filed?

A. Oh, yes. It was after the plan was filed.

Q. Was it after the hearing on November 20?

A. I think it was.

Q. You heard Mr. Barnes testify that the Holding Company Act operated to depress prices for Engineers' preferred stock?

A. Yes, I did. The effect, I believe, is the way you summarized it. I heard him testify that without the Holding Company Act he believed that at the present time the preferred stock would sell slightly in excess of its call price.

Q. So that a necessary deduction from that statement is that it operates to depress the price of the preferred stock?

A. Yes.

Q. Would it in your opinion be correct to say that the Act has had that effect on the prices of holding company stocks ever since its adoption and caused a lag in their appreciation marketwise; a lag behind other stocks not affected by any such condition?

Mr. Kanton: Do you mean also, Mr. Scheetz, bonds, preferred stocks, and common stocks; or are you only specifically referring to preferred stocks again?

Mr. Scheetz: My question was directed to preferreds. I think that it would probably apply to others, but that is my question at the moment.

A. Well, I think that perhaps the reason the Engineers' preferred stock—I can't answer for preferred stocks of all holding companies in general—is selling below the call price is because of the uncertainties as to the amount the preferred stock would receive in this proceeding.

By Mr. Scheetz:

Q. And that was because of the impact of Section 11?

A. Yes.

Q. And that that factor has been operative since the Holding Company Act has been adopted?

A. Well, I think that factor has been operative. I think the time of accomplishment has been more uncertain up until recently.

Q. Well, how far back do you think it was operative?

A. I think it has been one of the considerations in the picture and there were other factors that were taken into consideration too.

Q. It is one of the considerations that have operated right along?

A. The Holding Company Act, I think so.

By Mr. Kanton:

Q. Am I to understand by your answer to Mr. Scheetz' question along this line that the Holding Company Act has held down the preferred stock of Engineers and, if so, to what extent?

The Examiner: You mean held down the market price of the preferred stock?

Mr. Kanton: I am referring to the market price only, Mr. Examiner.

A. Well, I think Mr. Barnes' testimony was to the effect that if it were not for the Holding Company Act he believes it would sell slightly above the call price; therefore, I assume that the only factor that holds it down is the Holding Company Act.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Kanton: Will you read my question again, Mr. Reporter?

(Question read.)

The Witness: Well, I think it has held it down to the extent as indicated by the market prices.

By Mr. Kanton:

Q. Let us take from the period of 1942, when the preferred stocks were selling around 60. Was the Holding Company Act holding down the preferred stock any more at that time than it is today when the preferred stocks are selling just below their call prices? Is that the summation of your testimony?

A. Will you read that again?

(Question read.)

A. No, I think that when the stock was selling at the price you mentioned of 60 that that reflected the market appraisal of the value of the stock at that time.

(Discussion off the record.)

By Mr. Scheetz:

Q. Now, Mr. Benjamin, coming back to the cross-examination where I left it, I was endeavoring to direct your attention to the entire period during which the Holding Company Act has been in effect and not just the period when the preferred stocks were selling above $100.

At a hearing on March 20, 1942, in Commission Docket No. 70-453, at Page 149 of the notes of testimony, there appears the following question and answer by Mr. Barnes. The question is by Mr. Lester of the Commission staff:

"Q. Do you think that oppressive regulation has brought about the present market or our war with the Axis?

"A. If you are referring now to utility securities, which is what I have in mind, I think if you will look at the financial indexes of utility, industrial, and railroad securities, you will find that their progress departs radically in trend

dating back to the time of the passage of the Public Utility Holding Company Act."

Then, passing over an interruption, the witness continued, "And I think that trend reflects the public's reaction to the effect of the passage and the regulation which has ensued from the passage of the Public Utility Holding Company Act."

Are you in accord with that view? Assuming that the question is directed to common stocks, do you think that is a correct statement?

A. Well, I didn't make the comparisons that Mr. Barnes referred to in that testimony myself and I hesitate to say that I agree with his conclusions, although I certainly have the utmost confidence in any judgment conclusions that Mr. Barnes makes.

I do think that certainly as respect to common stocks of holding companies, one reason for their fluctuation has been the uncertainties raised in the investors' minds as to what is going to happen under the Holding Company Act.

Q. Do you agree that that operated to some extent in the period when the Engineers' preferred stock was selling at less than $100?

A. Yes, I think so.

Q. Did the management and directors anticipate an appreciation in the value of Engineers' portfolio securities, that is, Gulf States, Virginia, El Paso, and Western Public Service, as of 1942?

(Discussion off the record.)

(Reporter read pending question.)

A. I think Mr. Barnes testified at that time that he thought that the market for public utility securities was unduly depressed and therefore I assume from that that he did anticipate an increase.

The Examiner: The question was as to the directors. What was their view on the subject, and not the view of Mr. Barnes particularly. Was there any discussion at any of

the directors' meetings, or did you get any other opinion? I think that is what Mr. Scheetz is after.

Isn't that correct?

Mr. Scheetz: That is correct.

The Witness: I just don't recall what the directors' discussions were on that subject in 1942.

By Mr. Scheetz:

Q. Is it not correct that the company wished to defer the filing of a Section 11(e) plan during the period when the prices for the portfolio securities appeared to be depressed, and another reason, of course, was the pending United States Supreme Court decision?

A. Will you read that again, please?

(Question read.)

A. Yes, I think that is a fair statement.

Q. Have you finished?

A. Yes.

Q. Is it correct to say that the improvement in the market for utility common stocks has made the present warrant plan feasible?

A. You mean as compared to 1942?

Q. Yes.

A. It has certainly made the warrant plan easier of accomplishment. I am not sure that the warrant plan could not have been used in 1942. I have not thought much about that possibility.

The Examiner: Mr. Benjamin, if the common stock of Gulf States had been selling around 6, could you put through the present plan?

The Witness: No, sir. In order to have the warrant plan operative, I think there has to be an excess of the market value over the warrant price.

The Examiner: Wasn't that the substance of Mr. Scheetz' question? That conditions existed in 1942 made the present plan unfeasible, but that it is feasible now be-

cause the market price of Gulf States common has exceeded the offering price on the warrants? Isn't that correct?

The Witness: I think that is right.

The Examiner: I think that is the substance of the question.

Mr. Scheetz: That is correct.

By Mr. Scheetz:

Q. Now, I understand from the testimony that the management and the directors by reason of the current high individual income tax rates, in fact the high rates that have been existing these past years, and their experience with the recent policy of withholding dividends on common stock, felt relatively free to utilize future earnings to help eliminate the preferred stocks, to help pay off the preferred stocks; is that correct?

A. I think that the management and possibly the directors too realized what the effect would be on the large stockholders in withholding dividends; but I think the primary reason for withholding dividends was to accumulate in the system the funds to take care of the preferred stock.

Q. Well, now, generally speaking, did not the management and the directors feel that the common stockholders would be content with a policy of withholding dividends on the common stock during this period?

A. I think so. There were relatively few complaints.

Q. And did not the management and directors feel free to lean heavily on that factor in designing plans to meet Section 11 problems?

A. Well, this is just a matter of my own opinion as to what the directors think, but I think they would have followed this same policy regardless of the tax law, Mr. Scheetz.

Q. Well, they didn't anticipate any very great objection from the common stockholders to such a policy?

A. That is right.

Q. Or any substantial objection?

A. I think that is right.

Q. In view of their experience with them?

A. That is right.

Q. Do you regard it desirable or an advantage to a corporation that its securities, particularly its debt securities and its preferred stocks, have a high investment rating?

A. Yes.

Q. A high investment rating makes for good relations with those securityholders, doesn't it?

A. Yes.

Q. Would you say that it enabled a company to take advantage of the changes in the money rates when they occur, by refunding operations?

A. Yes.

Q. Would it be true to say that generally speaking the better the investment rating, the more promptly such refunding operations can be undertaken?

A. I don't know just what you mean by that.

Q. Well, as money rates go down, is it not correct that a company with a high investment rating can move in on that new money market or lower rates more quickly than one which is not so well heeled financially?

A. I think that is true.

Q. When such a company takes advantage of refunding at lower rates, that, of course, increases the leverage for the common stockholders, doesn't it?

A. It increases the balance, yes.

Q. Mr. Barnes testified that if the Holding Company Act were repealed that a refunding of preferred at a lower dividend rate could be accomplished. I think I am correct in stating his testimony. Do you recollect that?

A. I recall that he said that he thought it could be accomplished at the present time.

Q. The accumulation of earnings on one hand would help that operation by reducing the amount to be refunded, wouldn't it?

A. That is right; yes.

Q. Would that tend to make it possible to refund it at a lower dividend rate by reason of the smaller amount to be refunded?

A. I think it would have that tendency.

Q. Is it reasonable to suppose that Engineers would include an exchange over to the present preferred in any such refunding operation?

A. Well, that is certainly one of the methods of accomplishing it and I think that is a possibility, having the balance of the shares underwritten.

Q. With Mr. Kanton's prompting, may I not ask you if such an exchange offer was included in the recent refunding of the Gulf States preferred?

A. That is right. One of the considerations there was to retain the local holders so far as possible.

The Examiner: We will take a short recess.

(Whereupon, a short recess was taken, after which the hearing was resumed.)

The Examiner: Let the hearing come to order.

By Mr. Scheetz:

Q. Mr. Benjamin, as I understand it, the management and I believe at least a majority of the directors considered the low price at which the Engineers preferred had been selling as one of the reasons and considerations for not paying the preferred more than $100 plus accrued dividends under the plan. Is that correct?

A. You mean over the life of the preferred stock issue over the past years?

Q. That is right.

A. I think they had that fact in mind, Mr. Scheetz.

Q. There is also testimony on behalf of Engineers, and I think you gave it, that the directors regard that the warrant plan was something of a burden on the common stockholders, to raise the funds?

A. That is right.

Q. Would not that burden have existed if a warrant plan had been promulgated several years ago?

A. Yes, I think so.

Q. So that during this period of appreciation that burden has been deferred, has it not? Well, obviously it has, hasn't it?

A. That is right.

Q. Of course, during that period the preferred stockholders were receiving their dividends on the preferred?

A. That is right.

Q. Is it your thought that the receipt of those dividends at existing rates was a compensation, of course, to them during the period in which the preferred stockholder continued to hold his preferred?

A. That is right.

Q. And if he didn't like that, I suppose your answer would be that he could sell his stock and invest in something else?

A. That is right.

Q. In which event a new group of stockholders would come in at the higher prices that are now prevailing?

A. That is right.

Q. If you were to buy a common stock of a company in the market below the lowest issue price for common stock of that company and thereafter received a capital distribution not derived from any earnings which had been withheld in excess of the issue price, would you regard it as a windfall?

A. Read that one again.

(The pending question was read by the reporter.)

A. I think no matter what appreciation I received in a common stock that I purchased I would regard it as certainly a very happy outcome of my investment. I think when you buy a common stock you hope that that is what is going to happen.

Q. That is one of the reasons you buy it?

A. That is right.

Q. If you were to buy a preferred stock at less than the issue price and later received a redemption price in excess of the issue price, that is a premium that you might get on a call, would you regard that as a windfall?

A. Well, there again, if I purchased a preferred stock at less than the issue price and the preferred stock were redeemed, I would be very well satisfied with that investment. One of the factors that I think you are bound to take in mind when you buy a preferred stock is what the voluntary redemption price is, and you also should take into account what the price would be if the company were involuntary liquidated.

Q. Certainly. Now, addressing your attention to the preference common plan about which you testified, as I understand that plan it was contemplated that there would be a vertical split of the enterprise and that the Engineers preferred would receive a preference common stock to be paid off out of earnings. Is that a proper brief description of that plan?

A. Will you read that again?

(The reporter read the pending question.)

By Mr. Scheetz:

Q. When I say a vertical split, I mean into three parts supported by Virginia, Gulf States, and El Paso respectively.

A. That is right.

Q. Under that plan, the preferred would have been retained in the picture until there could have been enough earnings accumulated to pay them off?

A. That is right.

Q. When that plan was under consideration, did the management ever consider including a redemption premium or a higher liquidating value for those preference common stocks, something comparable to the redemption premium on the preferred stock?

A. I don't think so.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. And that notwithstanding the fact that the preferred was expected to stay in the enterprise until the earnings could be accumulated to pay it off?

A. That is right.

Q. Will you turn to Mr. Tucker's opinion, Engineers' Exhibit No. 38, Page 5?

According from Page 5, there appears the following statement, "Although, as will appear, I am unable with assurance to advise you that the premium is not payable, I have no hesitancy in advising you, as directors, I think you should, for your own protection, take the position that the premiums are not payable. This is so because if you should, as a Board voluntarily pay the premium and it should later, as the law on the subject develops further, be determined that premiums were not payable, it is possible that you might incur liability to the common stockholders on the ground of waste of assets."

What did that mean to you at the time the opinion was received?

A. That meant to me that Mr. Tucker could not advise definitely that the final determination of this question would be that the premium was not payable; but that he felt that the directors should, for their own protection, take the position that they are not payable.

Q. Just to keep the record straight at that point, when you refer to premiums, are you again thinking of whatever additional amount might be paid on the preferred, whether it would arise by a voluntary redemption undertaken by the Board or some other theory? Is that correct?

A. Will you read that again?

(The reporter read the pending question.)

A. Yes, I think so.

Q. Was that portion of Mr. Tucker's opinion debated by the directors?

A. I don't believe there was very much discussion on that point at the meeting. I know Mr. Kellogg mentioned

that in his letter to Mr. Barnes, but that letter was sent out the day after the directors' meeting.

By Mr. Kanton:

Q. Would you read Mr. Kellogg's statement to that effect, Mr. Benjamin?

A. Yes, I would be glad to.

By Mr. Scheetz:

Q. You are reading from Preferred Stockholders' Exhibit No. 12, are you?

A. Yes, I am. IIa of this letter reads, "The veiled threat of personal loss to directors if they awarded more than $100 a share to the preferred stock seems to me entirely improper. The Board should honestly apply their best judgment to the case without fear that their good faith would be questioned."

Mr. Tucker: In that same connection, would you like to get in Mr. Barnes' reply on that same point?

The Witness: Mr. Barnes, in his reply, which is Preferred Stockholders' Exhibit No. 12-A, made this statement under II, "In reference to your comment IIa, in regard to Bill Tucker's memorandum to the directors of July 26, it seems to me that if, as you point out in I(3) there is any doubt as to whether the preferred stockholders are entitled to a premium, the directors would be guilty of wasting the assets if they voluntarily paid the premium, since once the preferred stockholders have been paid there would be no way in which the cash could be recovered for the common stockholders if it were later determined that the preferred stockholders were not legally entitled to such a payment. Under such circumstances I should think that a common stockholder might have proper grounds for suit against the directors, particularly if the company's counsel had advised the directors before their action that he had grave doubts as to whether the premium was legally payable."

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Scheetz:

Q. Have you finished that?

A. Yes.

Q. Now had that idea come to your attention before it appeared in Mr. Tucker's opinion of July 26, 1945?

A. Had this idea come to my attention before then?

Q. Yes.

A. I don't think so; certainly not in these terms. What I mean by that is that I realized that if the stock were once voluntarily called, there would be no further problem or recourse.

Q. In view of Mr. Kellogg's letter of July 27, 1945, Preferred Stockholders' Exhibit 12, does that refresh your recollection in any way as to the discussion or as to the debate among the directors about that point?

A. I think that Mr. Kellogg did not raise that point at the September 5 meeting. I can't be sure of it but I don't recall that he did.

The discussion at that meeting to the best of my recollection had to do with the directors' expression of opinion as to what the fair treatment of both classes of stockholders was.

Q. In connection with that portion of Mr. Tucker's opinion, was there any discussion heard by you or participated in by you between the officers or any of the directors with regard to the Article IV, Division C, Part IV of Engineers' charter, Applicant's Exhibit No. 33, dealing with the indemnification of directors and officers?

A. I don't recall any discussion on that article either among the members of the management or the members of the Board of Directors; that is, to be sure I have that, that is IV of Division C you are referring to?

Q. Yes, and I have in mind particularly the provision which I am paraphrasing, and that provides that no future director or officer shall be liable for action taken or had in good faith, which is required, authorized, or approved by

any orders issued pursuant to the public utility holding company act of 1935, and the provisions relevant to that.

A. I don't recall any discussion on that.

Q. Having in mind Mr. Tucker's thought about the personal risk to the directors, did you, as one of the officers of the company, feel free to make or join in any recommendation to pay anything more to the preferred if you had entertained any such thoughts did you not feel that operated as a limitation on anything that you might do?

Mr. Tucker: You say "that operated". What operated?

Mr. Scheetz: Your opinion with respect to the personal risks of the directors.

The Witness: Will you read that again?

(The reporter read the pending question.)

A. Just to be sure I get what you have in mind, Mr. Scheetz, I am a little bit puzzled by your question.

By Mr. Scheetz:

Q. Perhaps I can state the question another way. Did you not feel that self-protection by the directors under this opinion compelled a treatment which would not result in the payment of more than the voluntary payment or proposal on the part of the directors to pay more than $100 plus accrued dividends to the preferred?

A. I don't know that I thought at the time that this would compel the directors to take this position, Mr. Scheetz. I think that when counsel gives advice of this character certainly that is one of the considerations that the directors should keep in mind.

Q. Well, now, assuming and without binding yourself or me or anybody, that you personally happened to think that something more should be paid to the preferred, would you have felt free to make that recommendation and urge the directors to do that in the face of that opinion?

A. I certainly, if I had that feeling, would not urge directors to find it fair and equitable to pay $100 per share.

What I am attempting to say is that I think that if I personally were in that position and felt that this consideration was a vital consideration, I would not state it as my opinion as a director that the plan was fair and equitable.

Q. Yes, but that wasn't my question. I am not trying to ask you to say that $100 was a fair and equitable amount if you thought that something more was fair and equitable. I am directing your attention to this proposition.

Assume that you, as an officer, thought that something more ought to be paid, would you feel that you could urge the directors to adopt a proposal to pay more in any amount that they might fix in view of this opinion?

A. No, I don't believe I would.

Q. If you did, wouldn't you feel that you would be confronted with this opinion which pointed out the personal risk to the directors if they did so?

A. Read that back again, please.

(The reporter read the pending question.)

A. Yes.

By Mr. Scheetz:

Q. We know from the record that the directors have at no time fixed and have not indicated that they thought anything more should be paid to the preferred. Did the directors ever consider a plan whereby it would be provided that if the Commission found that something additional were to be paid to the preferred stockholders, that the plan would then automatically be amended to provide for such payment without prejudice to either the preferred stockholders or the common stockholders to contest the amount and the propriety or non-propriety of such payment, with the company remaining in a neutral position and merely supplying the data whereby that additional amount, if any, could be determined?

A. That is a pretty long question but I understand the effect of it is whether or not the Board ever considered

taking no position on this problem and permitting the Commission to settle the problem for them. That question was discussed and I believe—I am not clear as to who brought up the suggestion, but I believe it was Mr. Coonley who stated that he thought that the directors had a responsibility to determine this question to the best of their ability and thought that the Engineers Board should take the position on this matter, and the other directors agreed with him.

By Mr. Condon:

Q. Except Mr. Streeter?

A. I think Mr. Streeter was opposed to the plan in any event, so that his objection was over-all. I don't know about on that particular point.

Mr. Scheetz: Mr. Examiner, to the surprise of everybody, I think I am probably through, although there may be a few more questions which I will want to ask when I have had an opportunity to read the notes.

The Examiner: All right, Mr. Kanton, suppose you proceed then, if you have any further cross-examination.

By Mr. Kanton:

Q. Just following up this latter line by Mr. Scheetz, if the Commission were to issue an opinion that more than $100 per share plus accrued dividends were payable to the preferred stock, do you think that would overcome any so-called personal liability upon the directors if they subsequently acquiesced and filed an amendment to the effect that an amount over $100 per share was payable?

A. I am not a lawyer, Mr. Kanton. I don't know.

The Examiner: I was going to say that I thought the question probably called for a legal conclusion and I questioned whether the witness could answer it.

By Mr. Kanton:

Q. Do you recall, Mr. Benjamin, while Mr. Condon was cross-examining you I think the day before that I asked

you a question as to whether the capital loss sustained by Engineers from the sale of Puget in the sum of $31,000,000 could be offset in the five-year period subsequent to that sale by either Engineers or any of its subsidiaries with which it filed a consolidated return? I specifically asked you as to whether any Virginia capital gain could be offset by this capital loss sustained through the sale of Puget and I believe you answered me that it could. Is that correct?

A. That is my recollection.

Q. In other words, during the three-year period subsequent to the so-called dissolution of Engineers, on the assumption that this plan is consummated, any capital gain that Engineers or Virginia is entitled to can be offset against that capital loss?

A. That is my understanding.

Q. Do you know if any operational gain by Virginia during this five-year period can be offset against this capital loss by Puget?

A. I don't know, Mr. Kanton.

Mr. Kanton: Well, in the light of that, Mr. Examiner, I would suggest that an exhibit number be reserved, and if I may suggest Applicant's Exhibit No. 68, for an opinion by Mr. Lynch from the firm of Mudge, Stern, Williams & Tucker.

Mr. Tucker: Mr. Lynch is no longer a member of my firm, so you will have to put it in the firm if you want.

Mr. Kanton: All right. With that amendment, to the firm, expressing an opinion by a competent tax counsel of that firm showing whether any capital gain or operational gain by either Virginia or Engineers can be offset with the capital loss suffered by reason of the sale of Puget in the sum of $31,000,000.

* * * * *

[R. p. 1152] (Applicant's Exhibit No. 68 is reserved as noted.)

Richard N. Benjamin—Cross Examination (Cont'd)

The Examiner: You may proceed, Mr. Kanton.

By Mr. Kanton:

Q. Referring to Exhibit 63, Mr. Benjamin, Page 5 thereof, and looking at the tabulations under Gulf States and El Paso, as I understand it this estimate included Gulf and El Paso for the year 1946, as if they were to continue in the Engineers Public Service Company system. Is that correct?

A. Yes, that is correct.

Q. Is it true, Mr. Benjamin, that Gulf States in the past has not filed a consolidated return with Engineers?

A. That is correct.

Q. But El Paso has?

A. I don't believe it has.

Q. But they will for 1945?

A. In 1946.

Q. For 1945?

A. That is right.

Q. But as far as Gulf States is concerned, there will not be any consolidated return filed for 1945?

A. With Engineers, that is right.

Q. In your opinion, what do you think the tax effect would be on El Paso if El Paso were not assumed to be continued in the Engineers system? Do you think it would be appreciable or small?

A. What was that again?

(The reporter read the pending question.)

A. This estimate of income and expenses for El Paso was prepared on the basis of El Paso filing a separate return, so that if El Paso is not in the Engineers system that state of facts would apply.

By Mr. Kanton:

Q. That is your estimate?

A. That is correct.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Does that also apply to Gulf States?

A. Yes.

Q. Does it also apply to Virginia or is Virginia on a consolidated basis?

A. Virginia is also calculated on a separate basis.

(Discussion off the record.)

By Mr. Kanton:

Q. Looking at this Page 5 of Exhibit 63, Mr. Benjamin, could you tell me in your opinion what you would estimate to be the reasonable and foreseeable earnings for Gulf?

A. No, I couldn't give you an estimate as to that, Mr. Kanton.

Q. Did any of the management or the Board of Directors seek such a determination before they filed this plan? Did they consider such a factor?

Mr. Condon: I think he has already testified that nothing like that was done. That is in the record at least twice.

Mr. Kanton: Yes, I know.

By Mr. Kanton:

Q. Do you know if Mr. Barnes has ever made any estimate of the reasonable, foreseeable earnings of any of the operating companies of Engineers?

(No response.)

Q. Do you know the answer, Mr. Benjamin?

A. No, I don't.

Mr. Kanton: That is all I have, Mr. Examiner.

The Examiner: All right, Mr. Condon.

By Mr. Condon:

Q. You were testifying this morning about the question of possible liability of directors in the event that they decided to pay out an amount in excess of $100 per share to

the preferred in the event that it should be finally ascertained that the preferred was only entitled to $100. Do you recall that general line of inquiry?

A. Yes, I do.

Q. As I understand it, Part I or Step 1 of the plan anticipates a request to this Commission for approval of a deposit of $100 in trust?

A. That is right.

Q. Giving to a preferred stockholder the right to take that $100?

A. That is right.

Q. Now, apart from the interpretation placed by your Board on this transaction as an involuntary liquidation, what was there before the Board of Directors on September 5 to show that a share of preferred stock was entitled to even $100?

A. Will you read that?

(The reporter read the pending question.)

(No response.)

By Mr. Condon:

Q. Does that trouble you a little, Mr. Benjamin?

Mr. Tucker: Evidently he is searching his recollection.

Mr. Condon: That is quite right.

The Witness: You make the exception of involuntary liquidation in the question?

Mr. Condon: I did, that is right.

The Witness: I think that the directors looked first to the contract, which is the exception that you made, and then viewed that contract in the light of the other circumstances that we have discussed at this hearing and I don't know of anything, any starting point, so to speak, other than the contract, Mr. Condon.

By Mr. Condon:

Q. So that if this Part 1 of the plan which permits the deposit of $100 for this share of preferred stock should be

permitted under the deposit made and the shareholder get his $100 and if on this state of the record the Commission should find that the going concern value or the fair value of a share of preferred was $90 a share, it would have countenanced on this application an excess payment of $10 a share to the preferred stockholder who would have gotten no money, is that the fact?

A. Will you read that one again?

(The reporter read the pending question.)

A. If the Commission found that it was fair and equitable to pay $90 a share, then they would not approve Part I of the plan and no payment to the preferred stockholders would be made. I think it is fair to say that the directors didn't contemplate that possibility.

By Mr. Condon:

Q. The effect of what you are testifying to now is that it is vital for this Commission to determine what the fair and the going concern value of a share of preferred stock is before it permits that deposit, isn't that so?

A. Read that again, please.

(The reporter read the pending question.)

A. I think the Commission would undoubtedly consider, in connection with the payment of the $100, the contract and the present condition of the Engineers system in order to approve Part I of the plan.

By Mr. Condon:

Q. Are you finished, Mr. Benjamin?

A. Yes.

Q. Isn't the effect of that testimony or that answer simply this: That the Commission has got to decide the fair value or the going concern value of a share of preferred stock before it can permit this Step 1 to become effective?

A. I think it would have to decide that the preferred stock was entitled to receive at least $100 a share, yes.

The Examiner: That is before anything could be paid to the common stockholders?

The Witness: Preferred stockholders, yes, sir.

Mr. Condon: Preferred stockholders.

The Examiner: That the preferred stockholders would be entitled to receive at least $100 per share before anything could be paid to the common stockholders.

Mr. Condon: That isn't my point, Mr. Examiner.

Mr. Kanton: The common stock isn't involved here. That isn't a reorganization to that extent, Mr. Examiner.

As we understand the plan as filed, the common stockholders are to have the trustees continue the estate of Engineers over Virginia for a period of three years and thereupon, at that time, the common stockholders of Engineers will have distributed to them the common stock of Virginia.

The Examiner: That is true enough, but before the Commission could find that the preferred stockholders would receive less than $100 per share, they would have to find that there were not sufficient assets to make any distribution to the common stockholders, isn't that the position?

Mr. Condon: That may be a position, but that was not my point, Mr. Examiner. My point developed by the answer of the witness is simply this: That before the Commission could permit the deposit of $100 and its withdrawal by a preferred stockholder, the Commission will have to determine, based upon all the evidence in the entire record, whether or not a share of preferred stock on a going concern value basis or a fair value basis is worth at least $100.

By Mr. Condon:

Q. Isn't that so, Mr. Benjamin?

A. I think the Commission would certainly have to determine whether the preferred stock was entitled to receive at least $100 in the light of all the circumstances, yes, sir.

Q. And that is going to involve a consideration of going concern value or fair value of a share of preferred stock from the facts presented here, is it not, Mr. Benjamin, by this Commission?

A. Will you read that question, please?

(The reporter read the pending question.)

A. I think they would consider the fair value in arriving at that decision.

By Mr. Condon:

Q. Wouldn't that be necessary, in your judgment?

A. I think it would be necessary at least to the point to satisfy themselves that that value will permit this payment of $100.

Q. You were interrogated with respect to the market appraisal of the value of the stock at different times by Mr. Scheetz. He started, as I recall it, with the time of the adoption of the Holding Company Act in 1935.

I ask you, isn't it fair to say that even prior to 1935, during the period that followed closely upon the Federal Trade Commission inquiry into the holding company systems, and that while the Holding Company Act legislation was in contemplation those elements also played a part in the elements of uncertainty to which you testified and which you testified existed subsequent to 1935?

A. Well, I don't know the answer to that, Mr. Condon. That was a long time ago. The only information I have here is this chart to show Engineers common stock quotations from January 1, 1930 to date. That is Exhibit No. 13. That shows that the market prices of Engineers common went down materially and that, of course, was the period of general depression anyway; so that I just can't answer that question.

Q. All right. You have testified that the Holding Company Act had exercised a certain amount of uncertainty,

over the market values of common stock. Isn't it a fair statement for you to include a similar element of uncertainty with respect to the preferred stocks of public utility holding companies?

A. Well, of course, the preferred stock had the prior position and I wouldn't expect that that would be affected as much by any means as the common stock; in other words, it seems to me one of the largest questions in the minds of a person purchasing common stock of a holding company was what its actual treatment would be.

Q. Don't you think that the same observation might fairly be made with respect to the preferred stock?

A. If there is some doubt about it, yes.

Q. There still is, isn't there, Mr. Benjamin?

A. Yes, there still is.

By Mr. Kanton:

Q. What do you mean by "treatment"?

A. What the ultimate participation of the common stockholders would be.

Q. Wouldn't that depend on the assets and earnings of a particular company and not so much on the treatment that it was accorded under the Act, other than perhaps where a particular company was in conflict with Section 11 of the Act?

A. That is right.

By Mr. Condon:

Q. Now, one final question, Mr. Benjamin. Do you recall reading Mr. Tucker's opinion dated December 11, 1945, which is Preferred Stockholders' Exhibit 13 for identification?

A. Yes, I do.

Q. That is dated the 11th of December?

A. That is right.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. And that was just three or four days before the adoption by your Board of Amendment 4 which suggested dissolution of Engineers; is that right?

A. That is right.

Q. Did you hear Mr. Barnes testify that there were two impelling reasons why that was done; the first was that it no longer appeared that there would be any substantial tax advantage gained from a merger and the second, the suggestions, if I may use that term, made by certain members of the staff of the Commission with respect to dissolution vis a vis merger?

A. Yes, I did.

Q. Was there any other reason that played an important part in the decision of the Board with respect to liquidation of Engineers, so-called, leaving the matter open to a further decision by the common stockholders of Engineers?

Mr. Tucker: May I ask that that be read? I missed it.

(The pending question was read by the reporter.)

A. In his opinion to which you refer Mr. Tucker states this reason, and I think that is one of the reasons that the directors considered——

By Mr. Condon:

Q. Are you looking at Page 5?

A. I am looking at Page 4.

Q. All right.

A. Where he states as follows: Furthermore, it would seem to me that the presentation of the considerations from which it will be determined whether the preferred stockholders of Engineers should be granted in connection with the retirement of their preferred stock any amount in addition to $100 per share plus accrued dividends will be more clearly brought into focus if the merger suggested should be abandoned entirely and the dissolution of Engineers as a corporate entity incorporated into Part 1 of the plan.

Now, that meant to me that it would eliminate from consideration by every one who is considering the present plan the possibility of a variation in method of dissolution or merger at the time at which such a dissolution or merger would take place.

In other words, it would put into Part 1 definitely and finally the method at the time of dissolution of Engineers.

Q. Mr. Benjamin, is the effect of what you are saying by reference to Mr. Tucker's opinion, that it would take away the argument of the preferred stockholders if the merger provision remained in the plan that they might be entitled to an appraisal under either Virginia or Delaware law?

A. It would certainly eliminate that question.

Q. Isn't that one of the important reasons the amendment was made, Mr. Benjamin?

A. I think one of the important reasons the amendment was made was to eliminate the discussion of a possible means of terminating the Engineers enterprise as such from the plan entirely.

The Examiner: I don't think that answers the question, Mr. Benjamin.

Mr. Condon: May we have the question read?

The Examiner: Mr. Condon asked you if that was one of the important reasons that was considered. Can you answer that?

The Witness: I thought I said it was.

The Examiner: I think the question was, was that not one of the important things that was considered. You have not answered that.

(The last question and answer were read.)

By Mr. Condon:

Q. Did you answer that?

A. I thought I did.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Condon: May I have his answer read.

(The answer was read.)

By Mr. Condon:

Q. Wasn't it done, Mr. Benjamin, in the hopes of steering the Commission away from any determination on the fair value or the going concern value of the preferred stock and to have this question decided solely as a matter of law if that were possible?

A. No, I don't think so, Mr. Condon. I think that this merger route was suggested primarily for tax reasons, and when it developed that the tax advantage was no longer there it was eliminated, and that elimination had the effect, I think, of making unnecessary discussions in connection with it.

I mean, in other words, the Plan now provides for an out and out dissolution and there is nothing left up in the air as to just how that dissolution is going to take place.

Q. Are you suggesting that the Board of Engineers can't amend the plan, as it did in Step 4th and revive a merger plan?

A. No, I am not suggesting that it couldn't be done. It could be done, but if it were done it would have to be done before any action is taken under Part 1 of the Plan.

Q. Where do you find that in your Plan, Mr. Benjamin? Point that out to me, will you?

Mr. Tucker: When you say "that", it isn't clear to me what you mean by "that".

Mr. Condon: Will you read Mr. Benjamin's statement, please?

(The record is read.)

The Witness: Perhaps I ought to go a little further in my answer. By "any action taken under the Plan" I meant by having Part 1 of the Plan consummated, and one of the steps in Part 1 of the Plan is to file this certificate

of dissolution. I think that is the place in the Plan. Certainly, it is where I thought you would find that result.

By Mr. Condon:

Q. I believe you said this amendment No. 4 was taken without stockholder action?

A. You mean Amendment No. 4 does not provide for stockholder action?

Q. It was taken without stockholder action.

A. That is right.

Q. And it does not anticipate stockholder action?

A. That is right.

Q. Was there any attempt to comply, so far as you know, with the requirements of Delaware Law with respect to the dissolution of a Delaware Corporation?

A. No.

Q. Did you give three days' notice of this meeting for the purpose of voting on dissolution, to each of your directors?

A. No.

Q. Have you given notice within ten days after the adoption of this resolution, to your stockholders, common and preferred?

A. No.

Q. Have you published this notice of intention to dissolve once a week for three weeks, the first three weeks next succeeding the adoption of your resolution?

A. No.

Q. And you plan to consummate this without the consent or approval of either class of stock, common or preferred, is that right?

A. That is right.

Q. In violation of the Delaware Law?

A. Well, I——

Mr. Tucker: I object. That is a legal question, purely.

Mr. Condon: I think that is a proper question here.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Tucker: I don't think it is a proper question at all. I think it involves a legal answer.

The Examiner: I will sustain the objection because I think it does call for a legal answer. It may be that they can accomplish this under Section 11 of the Act without reference to the Delaware Law at all.

Mr. Tucker: Right.

The Examiner: I don't think this witness is in a position to answer that, Mr. Condon.

Mr. Condon: It may be that they can't, also, Mr. Examiner.

The Examiner: I still say that it calls for a legal conclusion. I still doubt if this witness is able to answer.

Mr. Tucker: I object to it also as being absolutely unnecessary. The plan itself says it can be done without director or stockholder action on the plan. Look at it.

Mr. Condon: I have that data.

Mr. Tucker: And you have just told us what the Delaware law is.

* * * * * *

[R. p. 1168] The Examiner: Is there any further cross examination?

By Mr. Kanton:

Q. On Amendment 4, Mr. Benjamin, do you recall that Mr. Barnes testified on cross-examination that one of the reasons, or one of the main reasons that Amendment 4 was filed when it was filed was, as he stated on page 578:

"If the distribution of the Virginia stock to Engineers' stockholders in final liquidation had been a taxable transaction, I think we would have stuck to the merger route in order to avoid such tax liability."

I asked him the following question, "Then, would you say the overriding weight then was the change in tax circumstances?"

His answer was: "I think so. That, and to meet the ideas of the staff and the Commission."

We gather from that—and I think it is your opinion that the main reason Amendment 4 was filed was because of the tax effects?

A. That is my understanding.

Q. Isn't it true with reference to the staff, that those ideas had been discussed with you or the management long prior to the time of the filing of the original plan?

[R. p. 1170] By Mr. Kanton:

Q. My question was simply this—wasn't that matter discussed previous to the filing of the original Plan?

A. Yes.

Mr. Kanton: That is all.

Re-direct Examination

[R. p. 1171] By Mr. Tucker:

Q. Mr. Benjamin, this morning, and I will state merely enough to bring your mind to what we want to talk about, you were asked something that indicated whether or not the directors had anything before them that would lead the directors to believe that even $100 was proper to be paid to the preferred stockholders—do you recall that testimony?

A. Yes, I do.

Q. Do you wish now to expand your answer in connection with that?

A. Well, at various times during my testimony I have been asked what the directors had before them in consideration of this whole problem, and to the best of my ability I have tried to state what documents and papers and considerations they had before them at the time they reached the conclusion they did reach.

I pointed out, for example, that the directors are generally familiar with the financial structure of Engineers, they are familiar with the market quotations of the stock, both preferred and common, in the market, and they have had presented to them, among other things, the statements that were marked yesterday as having been presented to them at the May 24th meeting.

Included in those statements were analyses of three investment or brokerage firms, in New York, which showed a substantial excess of value over the amount of the preferred stock outstanding.

By Mr. Condon:

Q. When you say "marked", Mr. Benjamin, do you mean marked for identification?

A. I think that was the status of it. I am not sure whether they were actually marked, or whether they were offered as Preferred Stockholders' exhibits.

By Mr. Tucker:

Q. Had you finished when Mr. Condon asked you his question?

A. Yes.

Q. That is the best of your recollection at the moment?

A. Yes, sir.

Q. Isn't it true, and did you include in your answer without having it read back, that they had present before them at every meeting of the Board the current financial income statements, and that kind of thing?

A. Yes, I have so testified.

Q. What is contained in those little black books that were put before the directors was current financial information which was placed before them?

A. Those statements ordinarily contained the monthly published report of the Engineers and its subsidiaries and for the latest period, and also preliminary figures which are

not available for publication. They contained considerable detail concerning such earnings.

Q. If you were a director and had the information that you now have told us about before you, you would have no hesitancy about coming to the conclusion that the payment of anything like $90 to the preferred stockholders would have been unfair, would you?

A. No, I would have no hesitancy.

Mr. Condon: May I have that question and answer re-read, please?

(The record was read.)

The Witness: I would have no hesitancy in saying that the preferred stockholders were entitled to at least $100 a share.

By Mr. Tucker:

Q. Now, Mr. Benjamin, at page 807 of the transcript you were being cross-examined as to why the directors didn't include the preferred stockholders in the warrant plan. My recollection of that, when your were asked that question, is that you said something in substance like this—You said, first, that you saw no legal obstacles to such a plan and then,—and I quote now, "I see no reason why it could not have been done."

Now, I ask you if you care to expand that answer.

A. That answer was intended to state that I saw no mechanical reason why that type of transaction could not have been carried out. I didn't mean to imply by that answer that I thought it would be a fair and equitable way of filing a plan or that the directors had that thought in mind. I understood Mr. Condon's question merely to cover the fact whether it was a possibility that that could have been done.

Q. It is true that Section 11 provides—and if anybody thinks that this is a legal conclusion they can object and you needn't answer—for voluntary plans,—you can file any

doggoned kind of a plan you want under it—is that your understanding?

The Examiner: Strike the "doggoned."

Mr. Condon: I think that that is very characteristic, Mr. Examiner. I think that we might call this that kind of a plan.

The Examiner: Let it go in the record if he wants it in.

By Mr. Tucker:

Q. Under (e) you can file any kind of a plan,—isn't that your understanding,—that you want?

A. That is my understanding.

Q. And then the Commission has to decide whether it is "fair and equitable?"

That is my understanding.

Q. I will try to get this reference to the transcript correct, at page 860 you are testifying in connection with the savings under the refunding of Series B, C and D bonds of Virginia through the issuance of new bonds.

I think the record will show, and you will remember, you said that it resulted in a savings of $396,635, is that correct, Mr. Benjamin?

A. That is right.

Q. Now, do you wish to amplify that statement?

A. Well, I understood the question to inquire as to what the gross savings were in connection with that refinancing. Of course, that was before taxes, and the pro forma statement which was included in the prospectus at that time showed that the balance for common stock and surplus had been increased, as a result of that financing, by $37,083.

Q. So that your figure of $394,635 was a gross figure?

A. That is right.

Q. Before taxes?

A. That is right.

Q. And the figure you just gave is the net figure after taxes?

Richard N. Benjamin—Re-direct Examination (Cont'd)

A. That is right.

Q. And amortization?

A. That is right.

Mr. Tucker: My recollection is that there was a reservation of a number 53 for this exhibit, and this statement that I am now about to present is headed "Virginia Electric and Power Company, estimated income statement for the year 1945, excluding transportation operations for three months ended 3/31/45 (last two months estimated) and pro forma income statement year 1944, giving estimated effect as at January 1, 1944 as to merger and sale of transportation properties."

The Examiner: Applicant's Exhibit 53 was reserved for that statement.

Mr. Tucker: I now present for the record Applicant's Exhibit No. 53.

The Examiner: Is there any objection?

* * * * *

[R. p. 1178] Mr. Condon: Who prepared this, Mr. Tucker?

Mr. Tucker: Ask the witness, will you?

The Witness: Now, this statement was prepared by Mr. Leighton in New York.

By Mr. Tucker:

Q. With the assistance of our auditors, is that right?

A. Yes, he was assisted by Lybrand, Ross Brothers and Montgomery, in connection with its preparation.

By Mr. Condon:

Q. Would you be able to state for the record the theory upon which this statement was prepared?

A. It is my understanding that this statement reflects the results of discussions between representatives of Lybrand and Mr. Leighton and Mr. Werntz, of this Commission's staff.

Q. Are you aware of the differences of opinion that existed between your auditors and Mr. Leighton on the one hand and Mr. Werntz on the other as to the theory of this document?

A. (No answer)

Q. I draw your attention to the item of taxes.

A. Yes. There has been a difference of opinion which arose in the first instance in our Virginia Electric and Power Company refinancing of last year.

The principal difference, as I understand it, between the auditors and the Commission is the method of treatment of the tax item.

Q. Would you amplify that for the record, if you will, and explain the two concepts or approaches?

A. I would like to amplify the previous statement. It is my understanding that Mr. Leighton and a representative of Lybrand discussed with Mr. Werntz the problems involved in connection with the recent accounting release No. 53 as applied to the Virginia Electric and Power Company situation; and that after some discussions, this statement was prepared in New York, and it is my understanding that they believe that this set-up is satisfactory.

Q. To whom?

A. To the Commission.

The Examiner: You mean by "satisfactory" that it applies to the accounting regulation?

By Mr. Kanton:

Q. That it will be satisfactory to the Commission, is that correct?

A. That is correct.

By Mr. Condon:

Q. Now, continuing with your explanation of the differences in view between the auditors and Mr. Leighton on

the one hand, and presumably the accounting division of this Commission on the other——

Mr. Tucker: You are laying a basis for saying whether you want to object to it or not?

Mr. Condon: Yes, sir; these are preliminary questions on the question of whether or not I wish to object to the document.

Mr. Tucker: All right.

The Examiner: All right. Proceed, Mr. Condon.

The Witness: The Company and its auditors would have preferred, in this particular statement, for example, to have included $3,939,677 under the item "Federal Taxes" on this income, against which a figure of $623,000 now appears, in order to show what the normal tax would have been, based on the revenue received during that year, and then that amount would have been reflected lower down so that you would arrive at the same balance applicable to common stock.

The Commission's opinion stated that the Commission felt that the taxes should be shown on the basis that they were actually paid during the year, without any attempt to reflect a normal rate of tax on that income.

By Mr. Tucker:

Q. Now, Mr. Benjamin, you referred there to $3,939,677. Wouldn't the same general remark that you made with respect to that apply also to the item above, $2,367,940?

A. Yes. The Company and their auditors would prefer to show that item above gross income. Here it is shown above net income, in accordance with the Commission's opinion.

By Mr. Condon:

Q. Are there any other variations in philosophy, so to speak, than you have mentioned?

A. No, I think that is all.

Richard N. Benjamin—Re-direct Examination (Cont'd)

Q. Have your annual statements, which are in evidence, been prepared upon the theory that you say it is preferred by Mr. Leighton and your auditors?

A. The published reports reflect the opinion of Mr. Leighton and Lybrand.

Q. And would be on a different theory than is set forth in the Exhibit 53, is that right?

A. That is right.

Q. So that, to the extent that Exhibit 53 varies from the theory of preparation of your annual reports, it will have to be viewed in that light?

A. That is right.

Q. Can you state why it was impossible to have the same data prepared for years prior to 1944 as requested by staff counsel?

A. Well, that was due to the difficulty of giving effect to the sale of the transportation properties, and the merger in previous years.

Q. Well, aren't the considerations to both of those matters given in connection with the preparation of Exhibit 53?

A. Well, that is right. They were included in Exhibit 53, but this exhibit covers only the year of the merger and the sale of the transportation properties, and not the prior years.

Q. Would there be any reason why this statement for three or four years prior to 1944 could not be prepared on the same theory as requested by Mr. Kanton, now that this has been set up in its present form?

A. Well, I understand from Mr. Leighton that this matter was put up to him when Mr. Kanton's request was first made and he said that he thought it would be impossible to go back into those earlier years and make up these statements giving effect to those changes.

Q. Well, he has covered the two most difficult years, hasn't he? The years 1944 and 1945, the years of the merger and the disposal of the transportation properties?

A. I understand that the principal reason the treasurer's department was able to furnish the figures for 1944 was that a great amount of work had been done in connection with the registration statement, at which time a pro forma statement was put in, and, that as to previous years it would be very difficult, if not impossible, to calculate taxes on the basis of these companies,—Virginia Public Service and the Virginia Electric being in the consolidated return, figuring the capitalization that would have been outstanding on Virginia Public Service, for example, during that period.

During most of those years Virginia Public Service didn't pay any dividends on the preferred stock, but if it had been combined with Virginia Electric, it might well have paid the preferred dividends.

The payment of those dividends entitled the Company to a tax credit.

In addition, there were allocations of expense between transportation and electric departments, so that Mr. Leighton's conclusion was that it could not be prepared.

Q. All right. You are not suggesting that this statement has the approval of the Commission, or any employee of the Commission, are you, Mr. Benjamin?

A. No, I am not.

The Examiner: Now, have you any objection, Mr. Condon?

Mr. Condon: Subject to Mr. Benjamin's explanation, I don't object.

The Examiner: Have you any objection, Mr. Kanton?

Mr. Kanton: No.

The Examiner: Mr. Scheetz, have you any objection?

Mr. Scheetz: I have no objection.

The Examiner: There being no objection, it will be received as Applicant's Exhibit No. 53.

(Applicant's Exhibit No. 53 is received in evidence.)

By Mr. Tucker:

Q. This is clearly direct testimony, this question:

Richard N. Benjamin—Re-direct Examination (Cont'd)

Mr. Benjamin, have you had prepared an exhibit showing historically the investment in subsidiaries of Engineers, and what has happened to them?

A. Yes, I have.

Q. Was this statement prepared, Mr. Benjamin, by you or under your supervision?

A. It was prepared at my direction, Mr. Tucker.

Q. Do you believe it to be accurate?

A. I do.

Mr. Tucker: The statement referred to is entitled "Engineers Public Service Company, Incorporated, Investment in Subsidiary Companies," and I now offer it as Applicant's Exhibit No. 69.

Mr. Condon: For what purpose, Mr. Tucker?

Mr. Tucker: For showing generally the fairness and equitableness of the Plan that is pending before the Commission in this proceeding.

Mr. Condon: How does this show it? Would you explain?

Mr. Tucker: I don't think that needs any explanation. I have no explanation to make.

The Examiner: Is there any objection?

Mr. Scheetz: Yes, I object.

Mr. Condon: I object to it on the grounds that it is irrelevant and immaterial to any issue before this Commission at the present time.

Mr. Scheetz: Mr. Examiner, the basis of my objection is that I believe that it is an extension of the line of testimony which was introduced with respect to the El Paso Natural Gas Company, and if that be one of the purposes, as I believe it is, I certainly object to it as irrelevant.

Mr. Kanton: Mr. Examiner, just having received a copy and not having had an opportunity to examine it or members of the staff examine it—looking at its face value, this exhibit, as proposed to be entered into evidence by Mr. Tucker leaves a lot of questions to be answered,—just looking at it.

I think before I would object I would like to ask Mr. Tucker if he expects to offer any explanation of this exhibit, either through the witness or himself?

Mr. Tucker: Does the Examiner have one of these?

The Examiner: Yes, I have.

Mr. Tucker: I have a feeling that in a record of this character, where so much historical evidence has been put in, that bringing together in one exhibit the story about the investments in these various companies, and what has happened to them will be helpful to the Commission in considering this Plan.

I think it is material and eminently relevant and I don't, myself, see that it needs any further explanation.

You are dealing with a plan here, now, which is offering something for the preferred stock, leaving something for the common stock.

The Commission's duty is to determine whether, under all the circumstances in connection with this Company, that have any relevancy, that plan is fair and equitable.

I, myself, think that the Commission would welcome that kind of an exhibit in that connection.

Mr. Kanton: Could you tell me the basis of the investments, as stated here in the first column of figures, whether it is cost or book value?

Mr. Tucker: Ask the witness.

Mr. Kanton: I didn't know you were going to ask him.

Mr. Tucker: It is perfectly all right. I have offered it, and your questions now go to whether you want to object and I think you can properly ask him at this time, to see whether you want to object, what the basis of the statement is.

The Witness: Book value.

The Examiner: Wait a minute — was that question asked?

Mr. Kanton: I have now directed the question to the witness.

The Examiner: He says "Book value."

Richard N. Benjamin—Re-direct Examination (Cont'd)

By Mr. Kanton:

Q. What do you mean by "book value", Mr. Benjamin?

A. It is the amount shown on the books of Engineers as its investment in these subsidiary companies.

The Examiner: Do you mean by that the cost to Engineers of these securities?

The Witness: Yes, that reflects the cost to Engineers.

By Mr. Kanton:

Q. How was that cost determined, Mr. Benjamin?

A. That was determined on the basis of securities issued or cash paid for these common stocks and preferred stocks.

By Mr. Tucker:

Q. Taking the securities issues as of their value at the time of issuance?

A. That is my understanding.

By Mr. Kanton:

Q. Is that also the same reasoning reflected in the headings entitled "Sold" "Balance" and "Additions"? Does that mean that it is sold for cash or securities?

A. The elimination of that much investment from Engineers' books.

Now, in the case of Puget Sound, the largest item in there, for example, that was the sale of the balance of the stock that Engineers received under reorganization.

By Mr. Tucker:

Q. In other words, the figures under the column "Sold" don't attempt to go into what you sold the items for?

A. That is right.

Q. But merely to take out of the investment column what the values therein stated were, namely, the book values, that particular item, is that right?

A. That is right.

Richard N. Benjamin—Re-direct Examination (Cont'd)

By Mr. Kanton:

Q. Looking at Puget Sound Power & Light Company, which you just referred to, does that $34,097,000 approximately reflect the investment of Engineers as of August 31, 1935?

A. Yes.

Q. How much did you get for Puget, Mr. Benjamin?

A. Oh, it was less than $1,000,000.

Q. Was that worth over $1,000,000 in 1935?

A. I don't know what the value was in 1935.

Q. How can you say there is a reduction from August 31, 1935 to December 31, 1945 of $34,000,000 in assets?

A. Well, this is simply in investments, Mr. Kanton, book value.

Q. It had nothing to do with value, then?

The Examiner: Well, that is also true of the amounts shown under "investments" as of August 31, 1945. That has nothing to do with value?

The Witness: That is right.

The Examiner: That is merely the amount that you carried it on the books at?

The Witness: That is right.

The Examiner: And your "Sold" column doesn't represent cash received or property received, but simply represents where you have disposed of the property, the elimination of that item from your investment account on the books?

The Witness: That is right.

By Mr. Tucker:

Q. And the next column reflects the balance after the elimination?

A. That is right.

Q. And the next column reflects the additions since that time?

A. That is right.

Q. And the last column reflects the book investments of Engineers at the moment in all of its remaining properties?

A. That is right.

By Mr. Kanton:

Q. Mr. Benjamin, between these dates, you have now sold approximately half of your assets, have you not, as reflected in the $95,884,000 and the $54,321,000, is that correct?

A. Between what figures, please?

Oh, I see what you mean. We have sold 59 per cent of the investments, based entirely on book values.

Q. Based on values, not book values, or is it based on book values?

A. It is based on the book investment that Engineers has, the book costs.

Q. Based on real values, how much have you sold during this period, Mr. Benjamin?

A. I don't know.

Q. Would you say approximately ten per cent?

A. I wouldn't guess any, Mr. Kanton.

Q. Nowheres near fifty per cent, would you say?

A. I wouldn't think it would amount to as much as that.

Q. As much as what?

A. Fifty per cent.

Q. It is closer to ten per cent, wouldn't you say?

A. I would rather not guess at it, Mr. Kanton.

Q. Could you estimate that or could you figure it, if you have the time and the opportunity?

A. That would involve a valuation as of August 31, 1935 and as of this latter date. That would be a very lengthy job.

Q. Can't you give me a rough figure? I think you are fully acquainted with the system and what has been going on in the last eight years, Mr. Benjamin?

Richard N. Benjamin—Re-direct Examination (Cont'd)

A. I would rather not give that estimate just now, Mr. Kanton.

Mr. Kanton: Mr. Examiner, based on the witness's answers, I would like to state now that this exhibit is misleading because it does not show the proceeds of all the sales and the present values. As it now stands, if it is left in the record as it is, it would be misleading to somebody who may read it.

Mr. Condon: I would like to supplement by a few additional questions, if I may, my objection.

The Examiner: All right.

By Mr. Condon:

Q. Are you familiar with the organization of Engineers back in 1925?

A. 35?

Q. 1925.

A. Only from reference to records of the Company.

Q. Are you familiar with the facts and circumstances whereby, on August 31, 1935, the investments appearing in column fashion, vertical-wise, the second column from the lefthand side of the page, acquired those book costs, and the circumstances surrounding each?

A. I am familiar in a general way from my reference to the records of the Company, with the bases on which the securities were acquired. I cannot give you the details of them at the moment, but they can be obtained.

Q. Are you aware of the existence of any restatement or revaluation of any of the underlying assets as set forth in that proposed exhibit, at or about the time of acquisition by Engineers?

A. Read the question, please.

(The question was read.)

A. I can't give you any specific instances of that, Mr. Condon.

Richard N. Benjamin—Re-direct Examination (Cont'd)

By Mr. Condon:

Q. Are you under the impression that there was no such situation with respect to the acquisition of any of these properties?

A. You are speaking of revaluations of the operating companies?

Q. Write-ups, Mr. Benjamin.

A. On the books of the operating companies?

Q. On the books of Engineers.

A. Well, there was a write-up made in 1928 in the case of Virginia, but I think that the footnote (e) shows that that was taken out of this calculation.

Q. Is that the only instance of a write-up that you are aware of?

A. Yes.

Q. Are you familiar with the consideration paid by Engineers incident to the acquisition of the various common stocks set forth on the proposed exhibit?

A. Familiar with the what?

Q. Considerations given by Engineers incident to the acquisition of the common stocks set forth on the exhibit.

A. I can't give you that information at the moment. I could obtain it.

Q. Do you know whether or not some of the common stocks were acquired in exchange for Engineers' stock?

A. Yes, I think they were.

Q. Do you know to what extent?

A. I do not have that information,—no.

Mr. Condon: Mr. Examiner, I think it affirmatively appears, in addition to this document being irrelevant and immaterial to our inquiry, that it is an incompetent document on the ground that the proper foundation has not been laid for it, and this witness, with the greatest respect to Mr. Benjamin, is unable, with a reasonable degree of accuracy to give the requisite data to support the competency of the document.

The Examiner: Mr. Tucker, do you have anything further to say?

Mr. Tucker: I don't agree with that statement. I suppose that is natural.

Mr. Condon: As to what?

Mr. Tucker: I said I don't agree with that statement, but I suppose that is natural.

The Examiner will bear in mind that this Plan arises under Section 11 of the Act and that one of the things that has to be considered by the Commission in connection with this Plan, which has been filed under Section 11(e) is this: —and it is the same quotation that I made the other day from Section 11(e):

> "If, after notice and opportunity for hearing, the Commission shall find such plan as submitted or as modified necessary to effectuate the provisions of sub-section (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan."

Now, we digress just a second to answer Mr. Scheetz. He says that this is a continuation of the El Paso Natural Gas picture and the so-called "sacrifices" of the common stockholders in connection therewith or preferred and common stockholders, if you please, because if we had gotten more for it it would have benefitted the preferred too.

That is clearly not the kind of document this is, because it doesn't even show what these things were sold for. It is an attempt to show historically, under this language of the Act "necessary to effectuate the provisions of subsection (b)" the extent to which, under the operation and impact of this Act Engineers has complied up to date.

Now, I say for that purpose this exhibit is an enlightening exhibit to the Commission. They might well have a different attitude, that this Company had been sitting still and doing nothing about complying with the Act; but we have gone this far, and we think it is fair and equitable that

the Commission should have visually presented to them the extent to which we have done it already, so that they may fairly consider whether the effect of the balance is to carry out sub-section (b).

Mr. Scheetz: The statement addressed to my objection, I believe.

I get the import from Mr. Tucker's statement that it is important to show the Commission compliance to date under Section 11, for the purpose of determining the fairness of the Plan. I suppose that conversely—and I think Mr. Tucker gave some indication of this, if they had not complied in this way, that the Commission would be disposed to take some other attitude toward the fairness and equitableness of the plan. At least, I gathered that from Mr. Tucker's statement here.

It doesn't seem to me that that is the basis for qualifying an exhibit. I simply had the expectation that Mr. Tucker was going to argue from this exhibit that this indicates that substantial losses were sustained and sacrifices made—and whether or not the exact dollar mark is in there, it does seem to me that it constitutes some indication in that direction, and that is the part of it that I objected to.

If it was purely an historical explanation of something that had happened, and was not to be used for the purpose of augmenting the argument about sacrifices of the common stockholder, I would have no objection.

Mr. Condon: Mr. Examiner, as I listened to Mr. Tucker, I gathered that he tendered the document for the limited and restricted purpose of bringing home to the attention of the Commission how cooperative Engineers Company had been in disposing of the companies it had been directed to dispose of, and as a corollary of that attempt it was hoped, as a collateral advantage, to have the Commission assume that the Engineers' System was 59 percent dismembered, which is the total under the so-called "sold" column.

Now, Mr. Kanton asked Mr. Benjamin whether that represented anything like a fair proportion or percentage

on a valuation basis or any other basis of that portion of the Engineers' system that was disposed of pursuant to the direction of the Commission.

If Mr. Tucker hopes to derive any advantage from that totalization, I say the document is grossly misleading and should be denied admission on that ground.

If it is merely to bring home to the Commission what steps have been taken with regard to disposal of subsidiaries, and collateral systems or interests, I feel that it is entirely unnecessary.

This Commission knows equally as well as Mr. Tucker just what the Engineers system has done and has not done with regard to compliance, and I feel that the document should be denied admission for any purpose.

The Examiner: Generally, in Section 11(e) proceedings it has been the policy to admit evidence which, in other cases, perhaps, wouldn't be considered at all.

Mr. Tucker has stated that his prime purpose in offering this exhibit is to be of assistance to the Commission in determining whether or not the Plan which they have proposed was fair and equitable.

If I was satisfied in my mind that this statement was fair on its face and could be construed properly by anyone who read it, I might have a different attitude toward it, but it is perfectly clear to me from the statements which have been made by counsel and from the testimony of Mr. Benjamin that the statement is grossly misleading, and instead of being of assistance to the Commission I am afraid it might mislead the Commission in its proper determination.

For that reason I will sustain the objections to the offer of the exhibit.

Mr. Tucker: Will the Examiner save my exception?

The Examiner: Yes.

Mr. Tucker: I have no further re-direct or direct evidence to offer at this time.

The Examiner: Gentlemen, if you are through with Mr. Benjamin now, we will excuse him.

Mr. Condon: When Mr. Scheetz is finished, I have one question.

Mr. Tucker: Mr. Examiner, I would like to make an offer of proof of this as an exhibit, basing my offer of proof, if I may, on the statements with respect to it which have been made by Mr. Benjamin on examination of counsel.

Mr. Condon: I am sorry—I was talking to staff counsel and I am afraid I didn't hear Mr. Tucker.

The Examiner: Let the reporter read the statement. Mr. Tucker merely stated that he was making an offer of proof of this now for the reasons which he had stated and Mr. Benjamin's testimony.

(The record was read.)

Mr. Condon: May I note an objection to the offer of proof on the ground that no proper foundation has been laid for the offer, on the ground that the data to which reference has been made in the offer is incompetent and has been clearly so established by the testimony of the witness Benjamin; and hence the offer of proof should be denied.

Mr. Tucker: Do you mean that the offer of proof should be denied?

Mr. Condon: That is what I said, Mr. Tucker.

The Examiner: Wait a minute. Off the record.

(Discussion off the record.)

The Examiner: Back on the record.

I will overrule your objection and permit Mr. Tucker to make his offer of proof, anyway.

Mr. Tucker: For the purposes of my offer of proof, I would like that statement that I just handed to the reporter marked for identification as Applicants' Exhibit No. 69.

The Examiner: Let it be so marked.

(Applicant's Exhibit No. 69 is marked for identification.)

Mr. Scheetz: Mr. Examiner, it is understood, of course, that the objections previously made now apply to the exhibit as offered?

The Examiner: That is true, yes, sir.

Mr. Condon: And my exception is noted?

The Examiner: Yes.

Mr. Tucker: You say the exhibit is offered? Marking it for identification is the basis of my offer of proof.

Mr. Schoetz: Well, the substance of your offer of proof.

Mr. Tucker: All right.

* * * * *

[R. p. 1201.] By Mr. Condon:

Q. Mr. Benjamin, Mr. Tucker asked you a question if you were a director, and you were, first, generally familiar with the financial affairs of the Engineers System and, second, familiar with the market quotations of the preferred stock and, third, familiar with the contents of the statements marked as Preferred Stockholders' Exhibit 18 for Identification, containing the analyses of the three financial houses to which you made reference, and, fourth, had been currently advised with respect to the financial information, earnings data, and so on, that it would be your opinion that the preferred stock was worth at least $100.

Did you give that testimony?

A. I think I said that it would be my opinion that the preferred stockholders would be entitled to receive at least $100 a share, Mr. Condon.

Q. Now, is that expression on your part based upon a conscious study of going-concern value of the preferred stock or the fair value of the preferred stock or its intrinsic value in a going concern, or is it because of the provision in the Charter?

A. It is because I think that, based on those statements, there would be sufficient value in the Engineers' picture to make that payment to the preferred stockholders, in accordance with the charter provision.

Q. Would there be anything else in the Engineers' picture that might suggest the payment of more than $100 to the preferred stock ex what you consider the charter limitations?

A. I think it has been testified here by Mr. Barnes,—and I agree with his testimony,—that ex the Act, the preferred stock would be refunded, based on present market conditions; therefore, I think it follows that the value of that, ex the Holding Company Act, would be in that neighborhood of the call price.

Q. $105 and $110?

A. That is right.

* * * * *

DONALD C. BARNES

previously sworn, is recalled, and was examined and testified further as follows:

Cross Examination

[R. p. 1203.] By Mr. Kanton:

Q. Mr. Barnes, earlier in this hearing, when I first cross-examined Mr. Benjamin, I asked him a question as to whether the sale of the assets of Gulf States had ever been considered by the Board of Directors, or whether any direct offers or offers of an indirect nature were ever received by you or any members of the Board.

As I recall—and I think the record will show—he deferred to you for the answer to that question.

I would appreciate if you could give me that answer at this time, Mr. Barnes.

A. Yes, I shall be glad to.

On April 30, 1945, the President of an adjacent holding company system phoned me and asked me if we would care to discuss the sale to them of Gulf States Utility Company which, in his opinion, would fit into an integrated system with their properties.

I told him that we were not disposed to sell our interest in any of our more important subsidiaries, because we felt that our stockholders would be better off if we could carry out our liquidating holding company plan, which we had filed informally with the Securities and Exchange Com-

mission staff in September, 1943, and as to which we were waiting for the staff to advise their attitude.

Q. Was that the President of the New Orleans Public Service Company or the President of the Louisiana Power and Light Company, Mr. Barnes?

A. I would rather not name the President unless you insist on it.

Q. No, I don't insist, sir. I leave it entirely within your discretion.

A. Well, I think it was a confidential approach on his part and I don't know how much he would like to have publicity given to it.

Q. As I understand your last remark, no effort was made to enter into any form of negotiations for the sale of the Gulf States, so that no prices were discussed, etc. Is that correct?

A. That is correct. That was the full extent of our discussion.

Q. I take it that that was the only direct communication made with you or with any of the other members of the Board of Directors that you know of, for the sale of the assets of Gulf States?

A. That is correct.

Q. And that covers a period of how long, sir?

The last five years? Is that correct?

A. Since I have been connected with Engineers Public Service Company,—the last eight years.

Q. Did you communicate the receipt of that offer to your Board of Directors?

A. I think I did tell them of it.

Q. What was their reaction, Mr. Barnes?

A. I think they agreed with me that it would be in the interests of our stockholders to not sell the physical assets or the securities.

Q. When you say "in the interest of our stockholders" are you referring to your common stockholders?

A. No, I am referring to the Engineers Public Service Company, not the common stockholders, particularly.

Q. But I take it that you mean both preferred and common stockholders?

A. That is correct.

Q. Did the Board of Directors consider whether a price could be received for those properties in excess of the $21,000,000 or $22,000,000 that you now expect to receive from the sale of warrants if this Plan is consummated?

The Examiner: One minute. By the sale of warrants—you are selling common stock. Do you mean on the exercise of the warrants?

(Discussion off the record.)

By Mr. Kanton:

Q. Subject to the Examiner's correction of my question, could you answer me, Mr Barnes?

A. Well, I would like to make this preliminary statement—I don't think that you can construe the proposal under the Plan to dispose of Gulf States through the issuance of warrants to the common stockholders to be comparable in any way to a sale to outside interests, because Engineers Public Service Company common stockholders have the full interest in Gulf States common stock.

Now, I think the short-cut of what this Plan contemplates is that the Company, in effect, is assessing its common stockholders $11.50 a share in order to provide the balance of the funds required to take care of the redemption of senior securities, and to the extent that common stockholders are not able to pay that assessment they have the opportunity to sell their proportionate interest in the Gulf States common stock.

Q. On an over-all basis, I am assuming this to be your statement—you think, and the Board of Directors think that it would be to the advantage of the common stockholders, to give them an opportunity to retain their interests

in Gulf States rather than to sell Gulf States, no matter what the price may be over and above $22,000,000?

A. That has been the fundamental principle that the Board has followed ever since 1941, when we first discussed the various alternative methods by which we might have compliance with Section 11.

Q. Why do you feel that it would be worth more to the present group of common stockholders than it would be to anyone else?

A. I don't think that it would necessarily be worth more to the present group of common stockholders than anyone else, but I think they are entitled to the right to decide whether or not they want to continue their interest in Gulf States, or whether they prefer to sell it.

I might go on to extend that answer by pointing out one of the reasons why I feel that way, and I think why the directors feel that way.

Take, for example, the experience of National Power & Light Company in connection with the disposal of their property in Houston, Houston Lighting & Power Company.

There, the National Power & Light Company first attempted to make an exchange offer with their preferred stockholders. They offered, in the first instance, one and seven-eighths shares of Houston common for each share of National Preferred.

That offer didn't go well and they amended the offer and subsequently offered two shares and still the offer was not acceptable to a great number of Preferred stockholders. Finally, National Power & Light Company made a public offering of the balance of the common stock and it was sold at a public sale.

At that time, as I recall it, they received about $50 a share. The Company itself received about $51 or $52 a share—I have forgotten the exact figures. That was approximately the basis on which they were offering the exchange, if you took National Power & Light at its involuntary redemption price of $100 a share.

That was back in 1941 and 1942. Since that time Houston Lighting and Power stock has gone up, I think, as high as 86, and the last time I looked at it it was selling at 83.

Now, had the National Power & Light Company adopted a three-holding company plan, or a liquidating holding company plan, such as we proposed, or a warrant plan, their common stockholders would have had a continuing interest in Houston Lighting and Power Company and would have realized this capital gain that the purchasers of the common stock of Houston have realized since that time.

Q. Of course during this period from 1941 to 1945, if the market had gone down instead of up, the converse would have been true, would it not?

A. That is correct. But I think that is a chance that the common stockholder ought to be allowed to take for himself.

Q. Well, if you speak of the common stockholder taking a chance for himself, which common stockholders have you spoken to that have expressed the wish to be able to be in a position to exercise these rights, on this particular point?

A. I have not spoken to any common stockholders as to that point.

Q. Well then, what is the basis for your assumption that the common stockholders wish to continue, if you have not spoken to any of them?

A. The basis of my assumption is purely an analysis of what an intelligent investor should prefer to do. It is based on our discussions in meetings of the Board of Directors when we were trying to select what plan we would follow in an effort to provide the most fair and equitable method of disposing of the assets to comply with the Holding Company Act.

Q. Was that also tied in in your considerations of the tax advantages?

A. That is correct; throughout our discussions, we have endeavored to develop the plan that would be the fairest and most equitable plan for all of our security holders.

Donald C. Barnes—Cross Examination (Cont'd)

Q. Well, in this overall consideration, then, in giving the common stockholders the opportunity to either continue in the Gulf States enterprise or not, did the Board of Directors in such consideration also have in mind that these common stockholders of Engineers would possibly be foregoing an increment to the extent that any amount—say four or five million dollars—could be received over and above the approximately $22,000,000 that will be received from the exercise of the warrants?

A. No. Because that is not a fact.

Q. What is the fact, Mr. Barnes?

A. They have the full equity interest in Gulf States common stock. They lose nothing whatever between the amount that is raised by warrant subscriptions. They get the Gulf States common stock. All that they have done is to put up $11.50 a share to pay off the senior securities. They have the full value of the common stock after having put that money up to pay off the senior securities. It is just like your putting up $2,000 to pay off the mortgage on your home; you have still got your home.

The Examiner: Your position, Mr. Barnes, is that if the stockholder does not want to go on with the plan, he would not lose anything, because he could dispose of his warrant and realize the difference between approximately $22,000,000 that will be received from the exercise of the warrants, and the amount which the property might bring if sold outside; is that correct?

The Witness: That is correct, Mr. Examiner.

By Mr. Kanton:

Q. Well, did the Board of Directors and the management also consider that if you could get this extra amount of four or five or perhaps six million dollars that that could be used instead of the loan of $3,000,000 or any excess necessary to pay off the preferred stockholders?

A. If the Gulf States stock was sold outright?

Donald C. Barnes—Cross Examination (Cont'd)

Q. Yes.

A. Yes, they did consider that.

Q. And what was their observation, Mr. Barnes, as you recall it?

A. Well, they did not think that it was desirable to sell the Gulf States common stock, for the reason that I have explained.

Q. On that point, yes; but what was their rationalization as to the point of raising this additional amount to pay off the preferred to the extent of $3,000,000 or any other amount that may be needed.

A. Well, you are speaking now of their consideration as to whether the subscription price under the warrant should not be increased so as to avoid the necessity of a bank loan.

Q. That is one facet of it, or, as I say, selling it outright and getting the money immediately.

A. Well, I have answered the question as to selling it outright, telling you the reason why directors did not think that was a desirable course to follow. Now do you want me to go on with the other "facet" as you call it?

Q. If you will.

A. They felt that $10 per share even was a considerable assessment to be putting on our common stockholders to pay off the senior securities. They had felt from the beginning—and when I say the beginning, I mean from 1941—that the best way from the standpoint of the common stockholder was to retire this senior preferred stock by allowing it to be done out of earnings. Well, it became apparent that that could not be done, and then they decided to go ahead with the warrant plan and pay it off with cash. They felt that the assessment of $10 a share would be as large a burden as they should put on the common stockholders, and therefore they contemplated at that time a $6,000,000 bank loan. Then that plan was discussed with the staff, as I have testified I think, and the staff urged that we revise the plan to eliminate any bank loan.

After further discussion in the Board, we concluded that we would go halfway, and we would, instead of having a $6,000,000 bank loan, ask the stockholders to put up $1.50 additional for their warrant price, and reduce the bank loan $3,000,000 by getting $3,000,000 additional from the common stockholders.

Q. I think you have given us this explanation before, Mr. Barnes.

Getting back to my original line of inquiry. Turning now to El Paso, were any offers received for the sale of the assets of El Paso recently?

A. Well, you know in El Paso that we negotiated with the city of El Paso.

Q. We have that in the record. But I was wondering: since that negotiation, have any offers been directed to your attention or to any of the members of the Board of Directors?

A. Yes, a president of another holding company system, not the one who spoke to me in reference to Gulf, asked me if we would be interested in discussing the sale of El Paso to his system. And I gave him the same reply in substance as that in the case of Gulf States.

Q. When was this, Mr. Barnes?

A. When was it? Well, I can not place the date exactly, but it was subsequent, as I recall it, to the negotiations for the sale to the City of El Paso. And as I recall it, that was in the fall of 1943. I should say that this approach came perhaps within six to 12 months from that time.

Q. And that is the only one that has been received?

A. That is the only one that I have had.

* * * * * *

[R. p. 1215] By Mr. Scheetz:

Q. Mr. Barnes, for the purpose of my cross-examination, I will again use the reference to management to mean officers and directors within the Board as such. Were you present during my cross-examination of Mr. Benjamin today?

A. I think I was present during most of it.

Q. Do you recall a line of inquiry on my part as to the retention or the withholding of dividends on the common stock during recent years for the purpose of furthering solution of the Section 11 problems of Engineers?

A. Yes, I do.

Q. And do you recall my asking the ultimate question to Mr. Benjamin as to whether or not the management and the directors did not feel free to lean heavily on that factor or policy of withholding dividends, and so on? What would be your answer to that question?

A. I think it is covered by statements in the Annual Report. We have told the stockholders in the Annual Report each year that the reason we were not paying common dividends was because of the uncertainties in connection with what would have to be done under the Public Utility Holding Company Act, and the stockholders received that intelligently, and we have had very few complaints. Therefore, we have felt perfectly justified in following that procedure.

Q. Do you regard it as desirable and of advantage to a corporation as to securities that particularly its senior securities have a higher rating; and do you agree that the higher that rating the sooner the company can take advantage of interest rates in refunding and refinancing?

A. It can if it continues in business.

Q. Yes, of course; but making that assumption.

A. Yes. That is a little contrary to the situation with which we are faced.

Q. Now directing your attention to Mr. Tucker's opinion, Exhibit 38——

The Examiner: Off the record.

(Discussion off the record.)

The Examiner: Back on the record.

Donald C. Barnes—Cross Examination (Cont'd)

By Mr. Scheetz:

Q. I show you Applicant's Exhibit No. 38, page 5, with the statement of Mr. Tucker there with respect to the possible personal risk which directors ran if they furthered or sponsored a plan which would pay more than 100 plus accrued interest to the preferred stockholder. You are acquainted with that?

A. I am acquainted with it.

Q. And you heard my question in that respect to Mr. Benjamin this morning?

A. I did.

Q. And you heard his answer?

A. Yes, I heard his answer.

Q. And you have that answer in mind?

A. Well, not specifically; just generally.

Q. Well, may we assume that your position with respect to that portion of Mr. Tucker's opinion is fully set forth in preferred stockholders' Exhibit 12-A, which is your letter to Mr. Kellogg dated July 31, 1945, more particularly under paragraph II?

A. Yes. I would like to supplement that by saying that in my opinion no director took the action that he did because of any fear of suit if he had taken any other action.

Q. Well, were you able to erase from your mind that portion of Mr. Tucker's opinion in consideration of this problem?

A. I was able to erase it, because in my mind I had decided that it was fair and equitable to pay the preferred stockholders $100 a share and no more.

Q. Before that question had ever been raised?

A. That is correct.

Q. Now this morning, in my questions to Mr. Benjamin, I asked him whether in his opinion the impact of the Holding Company Act tended to depress the prices of Engineers preferred during the earlier period; that is, the period prior to the time when it was selling at $100 and upwards. And

I quoted some testimony given by you in Docket 70-453 at page 149, to 151, I believe. Were you present when I was interrogating him on that subject?

A. Yes, I was.

Q. Now when I undertook to interrogate Mr. Benjamin on that, I was personally under the impression that your testimony there related to preferred stock. And before I ask you any questions, I will give you my reasons so that you will have an opportunity to say what you did mean if I am wrong.

As I analyze these notes, the line of inquiry began at page 148, when staff counsel asked you that if you were not an official of Engineers and owned preferred stock, would you sell it. And further down on that page, you made an answer to another question:

"A. Because I have considerable faith in the utility industry. I believe the pendulum is going to swing. I think we are going to be relieved of the present regulation, which I think has affected unduly and adversely the market value for all securities, and I think those who have patience and will ride their investment through are going to come out well in the end."

Now I do not want to skip anything that is important, and if I do you correct me.

Further on the question was asked:

"Q. Do you think that oppressive regulation has brought about the present market, or our war with the axis?

"A. If you are referring now to utility securities, which is what I have in mind, I think if you will look at the financial indices of utility, industrial and railroad securities, you will find that their progress departs radically in trend dating back to the time of the passage of the Public Utility Holding Company Act."

Mr. Kanton: Is the record clear now that Mr. Scheetz is reading from Docket No. 70-453?

The Examiner: Yes, Mr. Scheetz mentioned that at the beginning.

Donald C. Barnes—Cross Examination (Cont'd)

By Mr. Scheetz:

Q. Continuing over on page 150:

"And I think that trend reflects the public's reaction to the effect of the passage and the regulation which has ensued from the passage of the Public Utility Holding Company Act."

Now I think you will discern from that testimony why I assumed that you were making the statement with reference to preferred stock as well as other stock. Was I wrong in that respect?

A. No, I think I had preferred stock in mind, although these utility indices that are spoken of are indices of common stock and not indices of preferred stock.

Q. Well then, is it your opinion that the prices of Engineers preferred stock during the period, say, 1942 and '43, were depressed to any extent by impact of the Public Utility Holding Company Act?

A. Yes, I think they were—to this extent, Mr. Scheetz: Until the preferred stockholder knew what he was going to wind up with after the Section 11 requirements had been complied with, there was an uncertainty that made it difficult for him to determine what the value of his investment was going to be. Some companies had adopted one stock plan, and the preferred stockholders did not know what percentage interest in the enterprise he was going to get. Therefore, he was uncertain as to what the value of his securities was going to be. That affects adversely market value.

I think when you get to a point where it is fairly definite in the investor's mind as to what the disposition is going to be, and that the disposition is going to be a liquidation, and it is apparent to the investor that in liquidation the company has sufficient assets so that they can be sure that the preferred stockholders will get their involuntary redemption price, then if the market for the stock and for other stock is depressed below 100, I think the existence of

the Public Utility Holding Company Act and the assumption that an imminent liquidation is coming along to give the stockholders $100 a share, would tend to increase the price of the preferred stock that might otherwise be selling at less than that amount. I think if you go on to a period where the market has carried the stock above 100, and there is still the uncertainty as to what is going to be done in such a liquidation plan—that is, what the Commission is going to find is fair and equitable—the market will reflect less than the value that it would reflect excluding the Public Utility Holding Company Act. And that is the situation that I see presently in our preferred stock, as evidenced by my testimony that "ex" the Public Utility Holding Company Act today I think our stock would be selling at slightly over the voluntary redemption price.

Mr. Kanton: Are you using the word "liquidation" advisedly as part of your expression? You do not mean that Engineers was always going to liquidate and that the investor always had in mind that a liquidation was going to take place in a legal sense; is that the idea?

The Witness: I do not think the investors knew what was going to happen, whether it was going to be a liquidation or whether Engineers were going to continue on.

Mr. Kanton: But you meant liquidation in a general sense; something perhaps could remain, and Engineers might remain; is that correct?

The Witness: And I told you in my cross-examination several days ago, to my mind a liquidation is when we are disposing of properties in connection with the Section 11 proceeding.

Mr. Kanton: And is that what you had in mind in answer to Mr. Scheetz's question; just as to that general term as it is used?

The Witness: I think I used the word liquidation several times. I would not want to say now what the application was each time that I used it. When I spoke of the

fact that when the investor knows that the company is going to be liquidated—and by that I mean dissolved——

Mr. Kanton: Well, in the present situation you have the Engineers common stockholder giving up his Engineers common stock for perhaps a span of time, common stock in the three operating companies; namely, Virginia, Gulf States, and El Paso. You did not mean liquidation in that sense, did you?

The Witness: I think that is just the sense in which I did mean it the last time.

Mr. Kanton: Did you not mean in your mind liquidation of Engineers as a corporate entity, the way you are posing this plan before the Commission?

The Witness: Yes, and I do not see the distinction between that and the other situation you were trying to describe to me.

Mr. Kanton: It may be a legal distinction, but I just wanted to clarify that point for the record, Mr. Barnes.

* * * * *

[R. p. 1224]

Re-direct Examination

By Mr. Tucker:

Q. Mr. Barnes, has the management of Engineers given any consideration to the acquisition of any additional property in the area of the Virginia Company?

A. Well, I do not know what you mean by "have they given any consideration". At one time we considered the possibility of acquiring Carolina Power & Light Company, for example.

Q. Well, would you tell us why you did not do it?

A. Yes. Because we felt that in all probability the Commission would not permit such an acquisition.

Mr. Kanton: Where is that property located, Mr. Barnes?

The Witness: It is in North and South Carolina adjacent to the Virginia Company. We have an interconnection there with the Carolina Power & Light.

Donald C. Barnes—Re-direct Examination (Cont'd)

By Mr. Tucker:

Q. And there has been some testimony brought out on cross-examination—I think by Mr. Condon of Mr. Benjamin—with respect to the fact that the North American Company, in connection with its preferred stock, was either arranging to or had provided for its redemption on a voluntary redemption premium over $100 per share; do you recall that testimony?

A. Yes, I do recall it.

Q. Have you any information that would differentiate that picture from the situation in which you find yourself?

A. Yes. It is my understanding that the North American Company is not in a position to go through forthwith with a liquidation in compliance with the Section 11 provisions. They have certain litigation pending which I understand prevents them from adopting an 11(e) plan to comply with the divestment requirements of Section 11. It is quite conceivable that they have figured that during the interval between now and the time when such a plan could be made effective, they will save more in the difference between their dividend charges and the interest charges on the security on the note to be issued, to provide the cash to retire their preferred stock, sufficient to more than pay the amount of the premium on voluntary call.

Q. Now at transcript page 529, you gave some testimony with respect to conversations that you had with stockholders of Engineers with reference to their feeling toward the present plan, or substantially the present plan. I recall that, among others, you spoke about conferring with Mr. James Orr. Do you recall that testimony?

A. I do recall it.

Q. Is Mr. Orr connected with some investment company?

A. Mr. Orr is president of Railway & Light Securities Company.

Q. Have you, since the time that that testimony was given, checked with Mr. Orr to see whether his interest is to some extent at least in preferred stock?

Donald C. Barnes—Re-direct Examination (Cont'd)

A. Yes. Railway & Light Securities Company own approximately 4,000 shares of Engineers preferred stock.

Mr. Kanton: How much common do they own, Mr. Barnes?

The Witness: Railway & Light Securities Company do not own any common stock, but I think it is fair to say that Mr. Orr is an investment counsellor and many of his clients have very substantial interests in Engineers common stock.

By Mr. Tucker:

Q. Now after you sent your reply to Mr. Kellogg—and by "your reply," I mean preferred stock Exhibit 12-A—did you have some conversations with Mr. Kellogg with reference to that general subject matter?

A. Yes, we did.

Q. And at that time, in the light of his letter and your reply, did he state whether he was satisfied or not satisfied with the plan?

A. He stated that he was entirely satisfied with it, withdrew all his objections, and when the plan came up for action at the September meeting, he voted for it.

Q. Now, Mr. Barnes, could you, without going into too much detail, give us your idea as to the value of the Virginia common stock at the present time; and I ask you this question in the light of some questions that Mr. Condon asked with reference to—if I may use the expression—the protection of the preferred stockholders?

Mr. Condon: Is this question restricted to that point, or are we going into the question of the valuation of Virginia common stock? Is this an over-all question as predicated and directed solely to the matter of security and protection, or is this a detailed valuation question with respect to the Virginia stock as an asset of Engineers Public Service?

Mr. Tucker: Yes, the purpose of it is to develop what Mr. Barnes' idea of the value of that is at the present moment, and what the market analysts have found to be

the value at the moment, or recently. Have you any objection?

Mr. Condon: Well, I do not know until I hear the testimony.

The Witness: As a preliminary to that, I think it might be of interest to put in the record values that have been published by various security houses representing analyses by their investment analysts. And I will read off the valuations that have come to our attention: The latest one was one dated December 3, 1945 by Paine, Webber, Jackson & Curtis, in which they found what they call a low valuation of $78,015,000, and a high valuation of $88,417,000. The next is a valuation published in Barrons National Business and Financial Weekly, under date of September 17th, in which they place a valuation of $75,000,000.

The Examiner: That is in 1945, I assume?

The Witness: That was 1945. And all of these are in the year 1945.

The next is the valuation published by Argus Research, September 14th, in the amount of $57,270,000.

The next is the valuation published by Security Supervisors on the 9th of August, and the amount was $70,000,000.

The next is published by Duff & Phelps on July 5th, and the amount of that valuation was $70,000,000.

The next is a valuation by Ira Haupt & Company, published April 1945, the valuation on a low basis being $46,000,000, and on a high basis $47,200,000.

Mr. Kanton: What was that date, Mr. Barnes?

Mr. Condon: That was April 30th.

The Witness: The next was a valuation published by Bear, Stearns & Company April 20th, in which the low valuation was placed at $62,700,000, and the high valuation at $76,000,000.

From my knowledge of the Virginia property and my knowledge of its earnings performance, I am prepared to state that Virginia Electric & Power Company common stock owned by Engineers Public Service Company is worth not less than $65,000,000.

Donald C. Barnes—Re-direct Examination (Cont'd)

Mr. Tucker: I have no further questions.

The Examiner: Any further cross-examination?

(Discussion off the record.)

The Witness: Mr. Kanton has called my attention to a discrepancy in the valuation as found by Ira Haupt & Company. The valuation should be, instead of $46,000,000 for the low and $47,200,000 for the high, $70,000,000 for the low and $72,000,000 for the high. The error came about in computation that I made last night in using the earnings per share of Virginia stock instead of the earnings per share of Engineers stock, equivalent shares of Engineers stock.

Mr. Kanton: Mr. Barnes, you put a lower limit on your estimate for the Virginia stock of 65,000,000. What would your upper limit be, sir?

The Witness: I do not care to put an upper limit on it. I have not gone to the extent of attempting to determine that.

Mr. Kanton: If someone were to offer you or the management or the Board of Directors say $90,000,000 for Virginia, do you think it possible that consideration would be given to such an offer, and that the properties would be sold?

The Witness: I do not like to make a commitment offhand, but I would be interested in getting such an offer if you know of anybody that wants to make it.

Mr. Kanton: Well, would you be interested in receiving an offer of $30,000,000 for the Gulf property?

The Witness: No, I do not think I would.

Mr. Kanton: Would you be interested in an offer of $35,000,000 for the Gulf property?

The Witness: I would be interested in getting such an offer.

Mr. Kanton: What offer would you be interested in receiving for the El Paso property generally?

The Witness: Well, we entered into a contract to sell that property to the City of El Paso for an amount that meant a little over $9,000,000, as I recall it, to Engineers.

Donald C. Barnes—Re-cross Examination

Mr. Kanton: So on an over all basis for any of these operating properties, if you or the management or the Board of Directors received an offer which you considered to be fair and reasonable, there is a good possibility that such an offer would or could be accepted for any of the three operating properties?

The Witness: I do not believe that the directors would be disposed to sell them, unless it was an unreasonable offer.

Mr. Kanton: You mean unreasonably high?

The Witness: That is right.

Mr. Kanton: Above what they were worth?

The Witness: That is right.

Mr. Kanton: But if they were reasonably high and you could receive a good margin of profit over what the properties originally cost, you would not sell?

The Witness: That is right.

The Examiner: Any further questions?

Mr. Condon?

[R. p. 1231.]

Re-Cross Examination

By Mr. Condon:

Q. I just wanted to ask one or two questions, Mr. Barnes.

Is it fair to say and will the record indicate that you have been physically present in the hearing room at all of the times Mr. Benjamin was testifying, both under examination by Kanton, Mr. Scheetz, and myself, with the possible exception of a very brief interlude when you might have been getting a drink of water; and that you are aware of his testimony given under such examination?

A. That is correct, Mr. Condon.

* * * * *

Hearing on January 30, 1946.

* * * * *

[R. p. 1273]

Mr. Tucker: At page 1152 of the transcript, Exhibit No. 68 was reserved for an opinion of my firm on Federal taxes. This was in supplement to a previous exhibit which had been submitted. It seems that there were two such opinions previously filed as Exhibit 15-A and 15-B, and for this supplement opinion there was reserved Exhibit No. 68, and I now offer it.

The Examiner: Hearing no objection, that will be received as Applicant's Exhibit No. 68.

(Applicant's Exhibit No. 68 was received in evidence.)

* * * * *

[R. p. 1274]

J. C. LEIGHTON

was recalled as a witness and, having been previously sworn, testified as follows:

Direct Examination

By Mr. Tucker:

Q. Mr. Leighton, have you previously testified in these proceedings?

A. I have.

Q. There has been testimony in these proceedings to the effect that since the filing on September 10, 1945, of the Engineers Plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for divestment of assets and related matters, Virginia Electric and Power Company paid off $5,100,000 principal amount of its notes payable and that the proposed payment of $1,342,000 to certain former transportation employees of Virginia will not be made as contemplated. Also, since the filing of the aforesaid Plan, Virginia has elected to terminate the em-

gency period with respect to emergency facilities as of September 30, 1945, following the proclamation issued September 29, 1945, by the President of the United States ending the emergency period which election will result in computing the amortization deduction over a shortened period. Do you have with you a statement showing the estimated effect of these items on the financial condition of Engineers and its subsidiaries?

A. Yes. I have a statement entitled Engineers Public Service Company (Incorporated) and Subsidiary Companies Pro Forma Balance Sheet Consolidated as at June 30, 1945, Giving Estimated Effect to (A) Sale of Investment in The Western Public Service Company, Operations for the period July 1 to December 31, 1945 of Engineers and Virginia, Tax Adjustments by Virginia Resulting from Loss Claimed on Sale of Transportation Properties and Accelerated Amortization of War Facilities due to Termination of War Emergency Period, Payment on December 31, 1945 of $5,100,000 Notes Payable of Virginia Prior to Maturity and Miscellaneous Adjustments, and (B) the Consummation of Parts I and II of the Plan. This statement is a revision of Schedule A of Applicant's Exhibit No. 9 and also a revision of the explanatory notes contained on Schedule B of Applicant's Exhibit No. 7 and gives effect to the items you have mentioned.

Q. Was this statement prepared under your supervision and do you believe it to be correct?

A. It was so prepared and I believe it to be correct.

Mr. Tucker: At this time I desire to offer the statement to which the witness has referred. It will be Exhibit, I understand, No. 71.

The Examiner: Is there any objection? Hearing no objection, that will be received as Applicant's Exhibit No. 71.

(Applicant's Exhibit No. 71 was received in evidence.)

By Mr. Tucker:

Q. Will you explain briefly the changes in the accounts between those shown on Applicant's Exhibit No. 71 and the similar accounts shown on Schedule A of Applicant's Exhibit No. 9?

A. On the assets side of balance sheet cash in banks and on hand shows a decrease of $3,758,000. This difference represents the payment of $5,100,000 on the Virginia notes and the retention of $1,342,000 which Virginia had contemplated paying out in December, 1945 under a proposed plan for the purchase of pension annuities for certain former transportation employees of Virginia which plan was abandoned because of an unfavorable ruling by the Treasury Department in respect of the treatment for tax purposes of the cost of the annuities. Other deferred debits increased $1,986,093 representing (1) claim for refund in the amount of $1,009,750 filed with the United States Treasury Department equal to payment made on March 15, 1945 at the time tentative 1944 consolidated returns of Engineers and affiliated corporations were filed. I have already testified in this case that the final consolidated returns for 1944 filed in August 1945 did not show any excess profits tax or income tax due from the affiliated group—and (2) claim for refund in the amount of $976,343 to be filed with the Treasury Department covering over-payment of Federal income taxes for prior years due to the increased amortization deductions allowable with respect to emergency facilities resulting from the shortened emergency period.

On the liabilities side notes payable shows a decrease of $5,100,000 as already explained. Taxes accrued shows a decrease of $1,883,055. This decrease represents a net reduction in estimated Federal income tax liability for 1945 consisting of reductions in tax of $3,030,465 comprising (1) $2,769,677 (including $39,021 of savings from filing consolidated returns) due to the increased amortization deduction in respect of emergency facilities because of the shortened amortization period and (2) $260,788 representing

additional savings from filing consolidated returns, less an increase in tax of $1,147,410 representing the tax reduction applicable to the cost of purchasing pension annuities which would have obtained had the proposed plan for the purchase of such pension annuity contracts for certain former transportation employees of Virginia been consummated.

Other current liabilities decreased $127,764 due to reduction in estimated Federal taxes applicable to the operations of Citizens Rapid Transit Corporation, the capital stock of which was sold by Virginia on March 31, 1945.

Other reserves increased $194,590 due to abandonment of the proposed plan for purchase of pension annuities for certain former transportation employees of Virginia estimated to have cost $1,342,000 with an offsetting reduction in Federal income taxes of $1,147,410.

Earned surplus since May 31, 1938, parent company portion shows an increase of $5,133,188. The items making up this increase are as previously explained: (1) a reduction of $3,030,465 in the estimated Federal income tax liability for the year 1945; plus (2) refund claims aggregating $1,986,093 included in Other Deferred Debits for overpayment of prior years Federal income taxes; plus (3) $127,764 representing an adjustment of the provision included in Other Current Liabilities in Schedule A of Applicant's Exhibit 9 for Federal income taxes of Citizens' Rapid Transit Corporation; less $11,134 representing the adjustment for minority interest in respect of the foregoing items.

This does, I believe, explain the increases and decreases between Applicant's Exhibit No. 71 and Schedule A of Applicant's Exhibit No. 9.

Q. Have you any further statement you would like to make?

A. Yes, I have. I would like to refer to Page 499 of the transcript and make a correction in one statement that was made by Mr. S. E. Ratcliffe, an Assistant Treasurer of the Company, while he was testifying in this proceeding. Mr.

Ratcliffe was under cross-examination by Mr. Condon and the following questions and answers were submitted:

"Q. What part of the loss would be included in connection with the sale of Gulf States stock?

"A. Whatever the tax gain is that results from the sale of the Gulf State stock.

"Q. Do you know what that is and have you any idea?

"A. It is substantially the credit to Surplus in these entries.

"Approximately?

"A. That is true.

"Q. Do you know how much it is approximately? Approximately $2,000,000?

"A. That is correct."

We have had occasion since this testimony to refer to certain of the Federal income tax returns of Engineers Public Service Company in which are detailed the tax cost to Engineers of the 280,000 shares of common stock of Gulf States Utilities Company. This tax cost is $12,839,697.88 compared with the book cost of $19,914,346.83. Accordingly while the credit to Earned Surplus as set forth on Applicant's Exhibit No. 71, which I have just entered into the record, is $2,050,285, the Federal tax gain would be slightly in excess of $9,000,000 rather than the $2,000,000 used by Mr. Ratcliffe in his answer to Mr. Condon. This substantial change in the tax cost from that originally used by Mr. Ratcliffe is brought about by the fact that in January, 1938 under a plan of liquidation the assets of Eastern Texas Electric Company (Delaware) were transferred to Engineers Public Service Company as a non-taxable transaction. Therefore, for Federal income tax purposes the cost to Eastern Texas Electric Company (Delaware) of its investment in common stock of Gulf States Utilities Company, plus additional contributions made by Engineers in August, 1938, is the real tax cost at the present time to Engineers Public Service Company. Mr. Ratcliffe is in Richmond,

Virginia, at the present time working on details which have to do with filing the 1945 Federal income tax return for Engineers Public Service Company and affiliated Companies, and is, therefore, not available to make this correction in his testimony. He is in agreement with the figures that I have now submitted as being the tax cost of the Gulf States Utilities Company common stock to Engineers.

Mr. Tucker: That is all.

The Examiner: Any cross-examination, Mr. Kanton?

Mr. Kanton: I have none at this time, Mr. Examiner.

Mr. Condon: I have a question or two.

Cross Examination

By Mr. Condon:

Q. Mr. Leighton, will you be kind enough to state briefly for the record the circumstances of the error in Mr. Ratcliffe's testimony being drawn to the attention of the Engineers' management?

A. Yes, sir; I would be glad to. Mr. Martenson of Arthur Andersen & Company telephoned me at your request as to the tax cost of Gulf States stock, El Paso stock and Virginia Electric Power Company stock to Engineers. In looking at that tax cost in the record, I ran across this difference between what Mr. Ratcliffe put in and what I now have submitted.

Q. You understood that the firm of Arthur Andersen & Company was acting for the preferred stockholders?

A. What is that?

Q. You understood that Arthur Andersen & Company were advising the preferred stockholders?

A. I surely did.

Q. In order to complete the record in connection with your amendment to Mr. Ratcliffe's testimony, I hand you pages 499 and 500 of the record and ask you if you would continue as though you were Mr. Ratcliffe and make whatever changes you feel to be appropriate in his answers with

respect to the amount of net tax savings that would result from increasing the gain from $2,000,000 to $9,000,000.

A. The record shows that Mr. Condon asked this question:

"Q. Now, what will the tax savings be? Will that be the amount?

"A. It would be 25 percent of $2,000,000."

The correct answer should have been "25 percent of $9,000,000."

The question is: "Using $9,000,000 as a base, the net tax savings would be approximately $2,250,000," instead of $500,000.

Q. Other than that change, Mr. Leighton, do you feel with that phase of the transaction the record is now complete?

A. Well, down below you raise the question as to what amount should be applied to the $31,000,000, and of course, instead of $2,000,000 that should be $9,000,000, leaving $22,000,000 still available for capital gains.

Q. By "still available" you mean there will be a net loss carry-over of approximately $22,000,000 that could be used and employed during the next five years as an offset against capital gains.

A. That is correct.

Mr. Tucker: You said in answer to Mr. Condon's question it would be five years which it would be carried back. Doesn't that five years run from some time in 1944, so that from now it is approximately three years?

The Witness: Of course it is five years from the date the transaction took place.

Mr. Tucker: Speaking from now it is three and not five years?

The Witness: That is correct.

Mr. Tucker: I have no further questions.

[R. p. 1287]

RICHARD N. BENJAMIN,

was recalled as a witness and, having been previously sworn, testified further as follows:

Cross Examination

By Mr. Condon:

Q. Mr. Benjamin, do you recall being interrogated by me with respect to the minutes of a meeting of the board of directors of Engineers Public Service Company that took place on or about February 2, 1945?

A. Yes, I remember.

Q. I hand you a memorandum supplied to me by Mr. Streeter, which refers to certain happenings at the meeting of your board held on January 24, 1946, and ask you if you will state as briefly as you can for the record, either by reference to this memorandum which I now hand you or from memory, what action, if any, was taken by the board on that day with respect to the resolutions of the board on February 2, 1945?

A. At this meeting held on January 24, 1946, the directors were reminded of resolutions adopted at the February 2 meeting to which you refer and also the February 27 meeting with reference to the use of certain cash of the company in connection with, so far as the February 2 meeting was concerned, a proposed pay-down on the preferred stock, and in connection with the February 27 meeting, proposed plan to retire shares of preferred stock at $100. These resolutions had never been formally rescinded from the record, although the funds contemplated to be used for this purpose were under the present plan to be used otherwise. Therefore it was suggested that the resolutions be formally rescinded from the record in order to clarify the record on this point, and that action was taken at this meeting.

Mr. Tucker: When you say "this meeting", what meeting?

Richard N. Benjamin—Cross Examination (Cont'd)

The Witness: The January 24 meeting.

By Mr. Condon:

Q. Would you state what amount of cash has been available for use by the Engineers Company from February 2, 1945 date pursuant to that resolution down to the 24th of January, 1946?

A. Well, there has been a substantial amount of cash, much of which came from the sale of the Savannah Company securities. I can't recall at the moment what the date of the sale of that Savannah stock was.

Q. About the winter or early spring of 1945, in the amount of $3,300,000—would that be the approximate sum?

A. Yes, that is about right.

Mr. Scheetz: When you say the late winter in 1945, you mean the end of the calendar year 1945?

Mr. Condon: I meant the late winter of 1944-1945, or, to-wit, in or about the month of March 1945, Mr. Benjamin.

The Witness: That is what I understood you to mean.

By Mr. Condon:

Q. What amount of cash, if you recall, in round figures, was available on or about February 2, 1945, which date preceded the receipt of the avails from the sale of Savannah?

A. I think I could get that information if I could look at the meeting folder for that date.

Q. Please do.

A. At the end of December 1944, Engineers had $3,762,239 in cash and $2,200,000 in temporary cash investments.

Q. Would that approximate $6,000,000 shy a few thousand dollars?

A. That's right.

Q. Then you would add to that this $3,300,000 or $3,400,000 from the Savannah sale?

A. That's right.

Q. And that increased the amount, say, as of March 1945 to something like $9,000,000?

A. That is correct.

Q. What is the cash amount available today, Mr. Benjamin?

A. Well, including the proceeds which we expect to receive tomorrow from the Western Public Service Company, we will have approximately, in round figures, $14,000,000 will be available. At the end of December 1945 Engineers had, in round figures, $6,000,000 of cash and $7,150,000 in temporary cash investments, and we expect to get approximately $1,500,000 from the Western Public Service, so that we would have in excess of $14,000,000.

Q. Have you got the consolidated figure for your cash?

A. I do not know the answer to that question, but we will attempt to get the information and furnish it to you after the noon recess.

Q. Was there anything to prevent the Engineers using the $9,000,000 that it had, say, from early March 1945 on the pay-down plan that was anticipated in general would be carried out by the Board resolutions of February 2 and February 27, 1945?

A. No, I think that could have been accomplished by the filing of an appropriate plan with the Commission, Mr. Condon.

Q. Mr. Benjamin, I hand you a copy of a memorandum dated May 22, 1945, captioned "Engineers Public Service Company, Plan for Divestment of Gulf States Utility Company and El Paso Electric Company and liquidation of Engineers Public Service Company," and ask your if you would examine that and tell me its origin in a general way?

A. This memorandum was prepared in our office for the purpose of setting forth the so-called preference common plan that we have discussed before.

Q. Had it ever been considered by the directors?

A. There was a meeting of the Board of Directors on May 24, 1945, so that this draft was prepared prior to that.

I don't believe that this plan had been discussed with the Board prior to that, but it might have been discussed generally as one of the types of plans.

Q. Isn't that a fact, to your best recollection, Mr. Benjamin, it was?

A. That's right.

Mr. Condon: I would like to have the document identified and request that it be marked Preferred Stockholders' Exhibit No. 20 for identification.

The Examiner: Let it be so marked.

(The document referred to is marked as Preferred Stockholders' Exhibit No. 20 for identification.)

By Mr. Condon:

Q. Mr. Benjamin, would you take Preferred Stockholders' Exhibit 20 for identification and state you submitted that to me at my request from the files of the company?

A. Yes, I did.

Q. Would you examine the first page of that, and I ask you to run through the arithmetic very quickly of the provision made for each share of the Engineers preferred stock under the proposal being considered then, and ask you if it is not the fact that a sum slightly in excess of $100 was provided for each share of the preferred stock of Engineers Public Service?

A. This proposed plan provided for the payment of $35 in cash for each share of Engineers preferred stock, and the delivery of two-fifths of a share of no par Engineers preferred which would be the equivalent of $40 in capital account; two-fifths of a share of $50 Gulf States preference common, which would be $20 in par; and one-tenth of a share of $50 par of El Paso preference common, which would be an additional $5 par. That total is $100.

Now, in addition to that, there was considered at that time as a means of simplifying the preference common stock of these companies in lieu of having a $5, $5.50, and $6

preference common stock, or the equivalent of that, an adjustment for dividends on the $5.50 stock and the $6 stock. In the case of the $5.50 stock, each share would get 87½ cents in cash and each share of the $6 stock would get $1.75 in cash.

I don't recall at the moment the detail computation of how those figures were arrived at, but that was the purpose of those adjustments.

Q. Mr. Benjamin, I am not quite clear, and I wonder if you will help me. You say this was considered as a means of simplifying the situation with regard to the common stock or the preference common?

A. No sir, simplifying the situation with respect to the preference common stock that was to go to the preferred stockholders. In other words, the new preference common stock would bear a dividend rate of 5 per cent per annum. Now, it would not change the dividend rights of the $5 stock to get a 5 per cent dividend stock in return, but it would change the rights of the $5.50 and the $6 to get a 5 per cent; therefore, the thought at the time was that if a cash adjustment could be given at the time the plan went into effect to equalize that dividend, that it would make it unnecessary to have a $5, a $5.50, and a $6 preference common stock.

Q. Well, you say to equalize—do you mean compensate?

A. That's right. In other words, it fit in with the contemplated length of time that it was thought that it would take to pay out this preference common stock

By Mr. Kanton:

Q. What contemplated time was that, Mr. Benjamin?

A. I don't recall the exact time. I think it was in the neighborhood of seven or eight years.

Q. To pay off the preferred stock?

A. To pay off the preference common stocks and preferred stock.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. You thought a differential of 87½ cents for the $5.50 preferred and $1.75 for the $6 preferred is to take care of these particular preferred series during the seven or eight-year period? Is that the way it was determined?

A. That's right; that is the way it was determined.

Q. Do you have any figures before you to show how that determination was made?

Mr. Tucker: Mr. Examiner, if this kind of examination is going to take a very long time, it would seem to me that I ought to object to it. I don't see the relevancy of prior plans to the fairness and equitableness of the plan that is before this Commission at this time. This record shows that they were turning out plans up there in Engineers' office with the productivity of rabbits, and if we are going to take each one of them and discuss it as though it were an issue in this case, it would seem to me we have got an interminable time-consuming element here. I would like to ask Mr. Condon what relevancy he thinks this has to the fairness of the present plan.

Mr. Condon: Mr. Tucker, I have examined a good many drafts of these plans——

Mr. Tucker: So have I.

Mr. Condon: Not quite as numerous as the descendants of this rabbit to which you have made reference; but I have selected from this one two points that I thought material to this inquiry. First, as to this point, it is the only instance that I have found where provision was made by the Engineers Board for payment to the preferred stock in excess of $100. That is point 1.

Mr. Tucker: Wait a minute. You say reference made by Engineers Board. It just isn't true.

Mr. Condon: Mr. Tucker, I didn't interrupt you. I would like to complete my statement, if I may. There is another point that I think I would like to call Mr. Benjamin's attention, because it appears to be slightly at variance with what I understood to be his testimony, and I am sure he would like to clarify it. If you have something to say about me

being in error, I feel you might address your remarks to the Examiner and let me have an opportunity to be heard on the record.

Mr. Tucker: We can use up more time than you use up asking the questions, and I am only interested in speeding the thing up and keeping it relevant. Let us see how long it goes on. I withdraw my objection for the moment.

Mr. Kanton: There is a pending question, Mr. Examiner, which Mr. Benjamin, during the discussion between Mr. Tucker and Mr. Condon, advised me that he can give me the answer at this time.

The Examiner: All right, Mr. Benjamin.

The Witness: Mr. Kanton asked what the basis was for arriving at the $1.75. To the best of my recollection at that time it was contemplated that it would take about seven years to pay out the preference common stock. The difference between the $5 rate and the $6 rate is $1 per year, or a total of $7. The percent of the amount proposed to be received by the Engineers preferred stockholder in Gulf States preference common and El Paso preference common was 25 per cent. In other words, they were to get $25 of the total $100 in Gulf States preference common and El Paso preference common. One-fourth of $7 is $1.75. This gave no effect to the fact that this preference common stock would be paid down gradually over this period. In other words, that would be the full differential of the dividend rate over a seven-year period.

By Mr. Kanton:

Q. Let me see if I understand you: At the time this plan was contemplated here and it was to be set up with these preference common securities fom the different subsidiary operating companies, would the $6 preferred stock at the beginning receive a 6 per cent return as provided in its original contract as a preferred stockholder of Engineers?

A. The $6 preferred stockholder would get part cash, and as to that cash there would be no further return.

Richard N. Benjamin—Cross Examination (Cont'd)

Q. Did you assume a 6 per cent return on that cash?

A. I didn't assume any return on the cash because we were paying them in cash.

Q. All right. To that extent the 6 per cent dividend would not be paid?

A. That's right.

Q. Will you continue, please?

A. Then he would get $40 in Engineers preferred which would have a 6 per cent dividend on it. He would get $25 in Gulf and El Paso preference common, which would have a 5 per cent rate, and the $1.75 was the suggested amount to compensate him for the difference on that $25.

Q. Just $1.75 in cash per year?

A. No, one payment of $1.75. In other words, he would get an immediate payment of $1.75, whereas if he received a 6 per cent stock, he would have gotten $1. He would have gotten $1.75 over the seven-year period and longer, if the stock wasn't paid out, but if the guess was right, about seven years, why then he would get $1.75 over the period. In other words, he would get the $1.75 at the beginning of the period instead of over the period.

Q. If the guess was wrong, he wouldn't be getting——

A. That's right. Bear in mind, Mr. Kanton, this was just a suggestion and was put down as such. It never was discussed in any great detail with anyone, so far as I know.

Q. Would you say of all the plans that were considered by the Board of Directors of Engineers, this is the only one that contemplated and gave recognition to a differential between the three series of preferred stocks?

The Examiner: Just a moment. Read that question.

(The question is read.)

The Examiner: As I recall Mr. Benjamin's testimony, he has not testified that this plan was ever considered by the Board. That is my recollection of his testimony.

Mr. Kanton: Well, if that is correct, I will amend my question to the extent of the plan being considered by the management of Engineers.

The Witness: I think that is right. I don't recall any.

Richard N. Benjamin—Cross Examination (Cont'd)

By Mr. Condon:

Q. Is it a fact, Mr. Benjamin, that the present plan gives reflection to no such element?

A. That is correct.

Q. Mr. Benjamin, I haven't checked your testimony in detail, but would you let me have Exhibit 20 for identification.

Do you recall being asked whether or not under the preference common plan the preferred stockholders were to have any rights to vote, and I think your answer was that your recollection was that they did not. Do you recall being asked a question like that in substance and making a comparable answer in effect?

A. Well, I don't recall that question. Mr. Kanton advises me that I made that answer to him, and therefore I must have made it.

Q. I might state that that accords with my recollection of your testimony as well.

Would you look at page 2 of this Exhibit 20 for identification, which I hand you, and see whether that refreshes your memory with respect to that subject matter?

A. Yes, this contains a statement that each share of preference common stock and common stock would have one vote per share.

Q. Is it fair to say that it was contemplated that that right to vote was to continue during this seven-year period that you say was estimated to liquidate out these preferred shares?

A. That is right.

Q. Is it also fair to state that your present plan gives no reflection to any rights on the part of the preferred to vote during any period subsequent to the filing of your proposed certification of dissolution?

A. That's right.

Richard N. Benjamin—Cross Examination (Cont'd)

[R. p. 1314]

Mr. Condon: I offer in evidence the release of the Securities and Exchange Commission No. 5738, Holding Company Act of 1935, marked for release Friday, April 20, 1945, and the order of this Commission with respect thereto, dated the 18th of April, 1945, captioned "In the Matters of Engineers Public Service Company, File No. 70-1034 and Donner Estates, Incorporated, File No. 31-532," being the findings and opinions and order of this Commission in that matter.

* * * * *

[R. p. 1318]

The Examiner: Mr. Tucker, I will overrule your objection and admit this as Preferred Stockholders Exhibit No. 24 and allow you an exception if you so wish.

Mr. Tucker: I would like an exception.

* * * * *

[R. p. 1319] Mr. Condon: I offer Holding Company Act Release No. 1945 for release February 29, 1940, in the matter of Engineers Public Service Company and subsidiary companies.

The Examiner: That involves what?

Mr. Condon: That involves hearing pursuant to Section 11(b)(1) of the Act with respect to Engineers, El Paso, Western, and various other subsidiaries, and represents the release of this Commission bearing date 28th of February, 1940. It shows the location of the properties and other matters of historical character.

Mr. Tucker: May I see it, please?

Mr. Condon: Yes.

Mr. Tucker: I think that could have been more accurately described as a notice and order for hearing under Section 11(b)(1) case that was brought by the Commission.

The Examiner: Do you have any objection, Mr. Tucker?

Mr. Tucker: I think we will waste more time and probably do more harm as far as expedition is concerned, so I don't object.

Richard N. Benjamin—Cross Examination (Cont'd).

The Examiner: That will be received as Preferred Stockholders Exhibit No. 25.

(Preferred Stockholders' Exhibit No. 25 is received in evidence.)

By Mr. Condon:

Q. Mr. Benjamin, I hand you Preferred Stockholders Exhibit No. 13 for identification, and ask you if that is the supplementary legal opinion rendered by Mr. Tucker on or about December 11, 1945, to the Board of Directors of Engineers?

A. Yes, it is.

Mr. Condon: I offer that in evidence not as proof of any of the facts set forth therein or substantiation of his conclusions, but merely to show the opinion rendered by Mr. Tucker upon which the board acted on or about that time.

The Examiner: Any objection?

Mr. Tucker: No objection.

The Examiner: That will be received as Preferred Stockholders Exhibit No. 13.

(Preferred Stockholders' Exhibit No. 13 is received in evidence.)

By Mr. Condon:

Q. I hand you Preferred Stockholders' Exhibit No. 18 for identification, and ask you if it is not a fact that this is one of a series of documents referred to by Mr. Barnes in his testimony as having been submitted to the board on or about May, 1945?

A. That is right.

Mr. Condon: I offer the fourth sheet of that document in evidence with leave to any of the other counsel to offer any of the other remaining portions of it if they so desire.

Mr. Tucker: I wouldn't have any objection if you put the whole business in. I object to just Page 4, because I think it is meaningless.

Mr. Condon: May the entire document be received and marked?

The Examiner: I understand there is no objection to that, and it will be received as Preferred Stockholders Exhibit No. 18.

(Preferred Stockholders' Exhibit No. 18 is received in evidence.)

Mr. Condon: Mr. Examiner, I would like to respectfully call your attention to the fact that on the fourth sheet of that exhibit No. 18, reference is made to so-called analyses or appraisals of three firms with respect to the securities of the Engineers system.

By Mr. Condon:

Q. Mr. Benjamin, I hand you herewith from the files of the Engineers Company the following memoranda, being reports or appraisals or estimates made by financial houses referring to the stock of the Engineers and subsidiaries as follows:

From Ira Haupt & Company, bearing date April, 1945, captioned "Engineers Public Service Company, Post-war Potentialities" and ask you if that is from the files of the Engineers Company.

A. Yes, it is.

Mr. Condon: May that be marked Preferred Stockholders' Exhibit 26-A?

The Examiner: Let it be marked.

(The document above referred to was marked Preferred Stockholders' Exhibit No. 26-A for identification.)

By Mr. Condon:

Q. I hand you an appraisal dated May 14, 1945, to which is appended appraisal dated May, 1945, captioned "An appraisal of Engineers Public Service", of preferred

stock and common stock, and ask you if that came from the files of Engineers likewise?

A. I am not sure whether this one came from our files, but it appears to be the same as one used in our office prior to the May 24 meeting.

Q. Mr. Benjamin, I draw your attention to Preferred Stockholders Exhibit 18, more particularly page 4, wherein it appears that your Board of Directors considered estimates of independent analysts Carl M. Loeb, Rhoades & Company, for Virginia, Gulf States, and El Paso. I ask you to compare this exhibit with the exhibit marked for idenfification and tell us if that is not the analysis for study referred to in the exhibit?

A. I am sure it is.

The Examiner: You have not had it marked for identification.

Mr. Condon: I ask that it be marked as Exhibit 26-B for identification.

The Examiner: It will be so marked as Preferred Stockholders' Exhibit 26-B.

(Preferred Stockholders' Exhibit 26-B was marked for identification.)

Mr. Tucker: You are offering these reports as marked for identification, these appraisals by independent houses, and not as evidence?

Mr. Condon: And for no other purpose. I plan after these are identified to show these actual analyses by the three houses which are referred to in this Exhibit 18 and to supplement them by additional analyses and to offer the group for specific and limited purpose not of proof of any of the facts, not as to the correctness of any of the conclusions, but for the specific and limited idea of showing the estimates of independent analysts and with regard to three of them apparently before the Board of Directors in May, 1945.

The Examiner: Let us get the third one in and then you can make your offer.

By Mr. Condon:

Q. I hand you, Mr. Benjamin, an analysis of Duff & Phelps, captioned "Bulletin, Engineers Public Service Company, date, July 5, 1945", and ask you if that came from your files?

A. Yes, it did.

Mr. Condon: I ask that it be marked for identification as Preferred Stockholders Exhibit 26-C.

The Examiner: Let that be so marked.

(Preferred Stockholders Exhibit 26-C was marked for identification.)

By Mr. Condon:

Q. I ask you the same question with respect to an analysis of Engineers Public Service prepared by the Securities Supervisors, dated August 8, 1945.

A. Yes, this came from our files.

Mr. Condon: May it be marked for identification as Exhibit 26-D.

The Examiner: Let it be so marked.

(Preferred Stockholders Exhibit 26-D was marked for identification.)

By Mr. Condon:

Q. I hand you an analysis of Schwabacher & Company, undated, with a card attached which is physically affixed to it, bearing date of November, 1945, and ask you if that would approximately fix the time, and did that come from your files, or copied from your files?

A. Well, copies came from my files. I don't know about this card attached to it.

Q. Could you fix the time approximately?

A. November, 1945.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Condon: May I have that marked?

The Examiner: Let that be marked as Preferred Stockholders Exhibit 26-E, for identification.

(Preferred Stockholders Exhibit 26-E was marked for identification.)

By Mr. Condon:

Q. I hand you an analysis by Paine, Webber, Jackson & Curtis, dated December 3, 1945, and ask you the same question with respect to it.

A. The answer is the same. The date on this is December 3, 1945.

Mr. Condon: May that be marked for identification?

The Examiner: Let that be marked for identification as Preferred Stockholders Exhibit 26-F.

(Preferred Stockholders 26-F was marked for identification.)

By Mr. Condon:

Q. I hand you an analysis of Duff & Phelps on Engineers Public Service dated January 16, 1946.

A. Yes, I furnished that to you this morning.

Mr. Condon: I ask that be marked for identification.

The Examiner: Let that be marked for identification as Preferred Stockholders Exhibit 26-G.

(Preferred Stockholders 26-G was marked for identification.)

By Mr. Condon:

Q. Mr. Benjamin, I hand you a preliminary report on Engineers Public Service Company common stock prepared by Bear, Stearns & Company, which bears the pencil legend April 20, 1945, and ask you the same questions with respect to it.

A. The answers are the same.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Condon: May that be marked for identification.

The Examiner: Let that be marked for identification as Preferred Stockholders Exhibit 26-H.

(Preferred Stockholders Exhibit 26-H was marked for identification.)

By Mr. Condon:

Q. Mr. Benjamin, I believe you identified among this group of documents for identification the estimates of the independent analysts, three in number, referred to on Preferred Stockholders Exhibit 18 in evidence, being the analysis of Carl M. Loeb, Rhoades & Company, Ira Haupt & Company, and Bear, Stearns & Company?

A. Yes.

Q. Are the other items not referred to thereon items that came from your files as representing material, estimates of independent analysts from the files of Engineers Public Service, and representing information in the possession of the management?

A. Yes.

Mr. Condon: I offer them in evidence for the limited and restricted purposes which I stated a moment ago and for no other reason.

The Examiner: Is there any objection?

Mr. Tucker: No objection. He says he offers them. I think he ought to identify them.

The Examiner: I assume, Mr. Condon means Preferred Stockholders Exhibits 26-A through 26-H, inclusive.

Mr. Tucker: No objection for the limited purpose mentioned.

Mr. Scheetz: Mr. Examiner, in matters where I have appeared for holding companies I have always taken the position that material of this kind should not be admitted because there is no opportunity to cross-examine the authors. In view of the testimony which has been given that this data was before the management of Engineers and the directors, if that is the testimony——

Mr. Tucker: Some of it at least.

Mr. Scheetz: —at least before the management, I particularly refer to some of them in Exhibit 18, I think they are relevant, but I would not like to be understood as reversing the position which I have taken and will continue to take as to such reports.

The Examiner: I understand there is no objection, and they will be received in the record as Preferred Stockholders Exhibits 26-A, 26-B, 26-C, 26-D, 26-E, 26-F, 26-G and 26-H, respectively.

(Preferred Stockholders Exhibits 26-A to 26-H, inclusive, were received in evidence.)

Mr. Tucker: Mr. Examiner, I suppose it is fundamental here that the management also recognizes the infirmities in these reports that you mentioned, that we have no basis of knowing how they arrived at them, no privilege of cross-examination. We don't know what material they used to get their answers from, and they are nothing more than and will be used for nothing more than street appraisals for what street appraisals usually would be used.

Mr. Condon: That is correct, Mr. Tucker.

My associate calls attention to the fact I omitted a supplement to the Carl M. Loeb, Rhoades & Company appraisal dated November 17, 1945. I do not know whether this was in the files of Engineers or not, but I would like to offer it in evidence for the limited and restricted purpose which I have stated and for no other reason.

Mr. Tucker: And which I have stated.

The Examiner: That will be received as Preferred Stockholders Exhibit 26-I.

(Preferred Stockholders Exhibit 26-I was received in evidence.)

The Examiner: The understanding is that all these exhibits are received for the limited purposes stated.

Richard N. Benjamin—Cross Examination (Cont'd)

Mr. Condon: Mr. Examiner, I have before me, and I will supply counsel with copies, data which has been prepared at my direction in my office by one of the junior attorneys from the Commercial & Financial Chronicle with respect to the low and high sales prices of the preferred stocks of the $5, $5.50, and $6 series, from September 10, 1945, down to the week ending January 14, 1946. This material prior to the date of September 10 is in evidence as one of the applicant's exhibits and this merely brings the data down to date. I believe it to be correct, and I offer it subject to verification and checking if there be any inaccuracies, which I will be very glad to correct.

Mr. Tucker: There is no objection to that.

The Examiner: That will be received as Preferred Stockholders Exhibit No. 27.

(Preferred Stockholders Exhibit 27 was received in evidence.)

* * * * *

[R. p. 1342]

RICHARD N. BENJAMIN,

previously sworn, resumed his testimony:

The Witness: Could I make a short statement first?

Mr. Condon asked me for some information this morning, and I now have it.

The amount of cash on hand in Engineers and its subsidiaries as of December 31, 1945, was $15,445,015. That includes the $1,500,000 cash expected to be received tomorrow from the sale of Western Public Service.

In addition, there were cash items of $10,069,400 or a total of $25,514,415.

* * * * *

[R. p. 1347]

RALPH E. BADGER,

called as a witness by and on behalf of the Preferred Stockholders, and having been first duly sworn, was examined and testified as follows:

Direct Examination

. . . . . .

[R. p. 1348] Mr. Condon: Mr. Examiner, I have before me a statement of Dr. Badger's with respect to his educational background, his professional activities, both in the pedagogical way as well as in a professional way as an author, investment adviser, his activities extending over a period of many years, appraising securities, with a list of cases in which he has appeared and testified or advised as an expert in various tribunals and in a general way outlining his qualifications as an expert.

In view of the concession, I offer this statement in evidence, with a copy to counsel, and ask that it be marked, reserving the right, however, if the occasion presents itself, to expand this very brief statement with respect to his background and qualifications.

That may not be necessary, but I wouldn't want to be foreclosed from so doing, and may that be marked as Preferred Stockholders' Exhibit 28 in evidence.

Mr. Tucker: No objection.

The Examiner: I understand that there is no objection and that will be received as Preferred Stockholders' Exhibit 28.

(Preferred Stockholders' Exhibit No. 28 is received in evidence.)

. . . . . .

[R. p. 1350] Q. Dr. Badger, were you on or about the 30th day of December, 1945, retained by me, as counsel for certain preferred stockholders, to make certain studies and analyses concerning the fair investment value or the going concern

value or the intrinsic value of the three series of preferred stocks of the Engineers Public Service Company?

A. I was.

Q. Were you requested by me to make your studies and analyses without regard to the Plan of Divestment of Engineers Public Service Company filed in these proceedings, under Section 11(b) of the Public Utility Holding Company Act of 1935?

A. I was.

Q. Have you examined certain exhibits received in evidence in these proceedings in connection with your studies?

A. Yes, sir.

Q. Is it the fact that the following Applicant's Exhibits were considered by you, to wit:

Applicant's Exhibits 1, 2, 3, 4, 9, 11, 12, 13, 14, 15, 26, 27, 28, 29, 30, 33, 37-A to 37-T, all inclusive, 38, 39, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 63, 65, 66 and 67,—and this morning, Applicant's Exhibit Number 71?

A. That is correct.

Q. Have you also examined, in connection with your studies, the joint merger agreement of Virginia Electric & Power Company and the Virginia Public Service Company, dated April 1, 1944, the fifth supplemental indenture, Virginia Electric & Power Company to the Chase National Bank, dated March 1, 1945?

Mr. Tucker: Could I ask you, Mr. Condon, are those last things that you have been talking about, the merger agreement, and so forth, are they exhibits?

Mr. Condon: No. You may recall that the extracts from the documents were offered in evidence, copied into the record physically by Mr. Benjamin at the time Mr. Benjamin was on the witness stand.

Mr. Tucker: Then it is the extracts that the Doctor is referring to, I assume?

Mr. Condon: Why, yes, and the entire document, and if you want it in evidence, we will be very glad to put it in evidence. I am not at all sure that it is necessary that there be admitted or received everything that Dr. Badger con-

sidered. I am having him identify the documents and if, on cross-examination, you feel you want anything, I am sure you will have the opportunity of developing that.

The Witness: I don't recall this, but these two I have examined.

Mr. Tucker: I think it would be well to get on the record what he is referring to.

Mr. Condon: That was 22, which was stricken from the question.

By Mr. Condon:

Q. By reference to your lists of data, what other records and documents and exhibits did you consider in connection with your studies?

A. Specifically I had available the annual reports of a number of the subsidiary companies of Engineers Public Service, Gulf States Utilities for the years 1933 to 1943, El Paso Electric Company for the years 1935 to 1944, reports of the Virginia Electric & Power Company for the years 1935 to 1944, annual reports of Puget Sound Power & Light for the years 1938 to 1941, annual reports of Western Public Service Company for the years 1936 to 1940, and a number of Securities and Exchange Commission releases.

Q. Would you identify those by release number?

A. Numbers 2897, 2791, 3230, 3245, 3845, 3796, 4255, 4114, 4559, 4997, 5499, 5568, 5738, 5814, 6176, 6258, 6280, and Release 5021.

Mr. Tucker: All of those relate to Engineers Public Service Company matters? Was Engineers Public Service Company a party to all of those releases?

The Witness: They in all cases did not refer to Engineers Public Service. Some of the releases referred to decisions in cases that had certain questions at issue that were in one degree or another comparable with the questions at issue in this case and I examined the decisions in those cases to ascertain whether or not there was any relationship

between the problem which I found to exist here in valuation and the problems that existed in those other cases.

By Mr. Condon:

Q. Now, Dr. Badger, is it a fact that there was supplied to you a complete and detailed list of all of the Applicant's exhibits received in evidence in this case?

A. There was supplied to me a list of the Applicant's exhibits received in evidence up to today, that is, at hearings up to today, and I was present today at the time subsequent exhibits, if any, have been received in evidence.

Q. Now, is it also the fact that you examined portions of the testimony of Mr. Benjamin and Mr. Barnes and certain extracts of the testimony explaining Applicant's Exhibits 62, 65, 66 and 67?

A. Yes.

Q. Now, did you consider this data in connection with the preparation of your report?

A. I did, yes sir. Necessarily there was a certain amount of that data that may have been more related to value in this case than other parts of the data, but I nevertheless examined it all and utilized that examination in arriving at my estimates of value.

Q. Now, in a general way would you say it was fair to state that you familiarized yourself with the general history and background of the Engineers system to the extent necessary for you to reach a fair conclusion as to the valuation of these three issues of preferred?

A. Yes, sir.

Q. Would you also say that in a general way you familiarized yourself with the proceedings relating and pertaining to the Engineers system before the Securities and Exchange Commission and to the same extent and for the same purpose?

The Witness: Would you read that question?

(The question is read.)

The Witness: Yes, sir.

Ralph E. Badger—Direct Examination (Cont'd)

By Mr. Condon:

Q. Now, have you also examined the plan that was filed and the four amendments relating thereto?

A. Yes, sir.

Q. Do you have before you your original report?

A. Yes, sir.

Mr. Condon: Mr. Examiner, may I have the original report produced by the witness marked for identification as Preferred Stockholders' Exhibit 29 for identification?

The Examiner: Let that be marked as Preferred Stockholders' Exhibit No. 29 for identification.

(The document referred to is marked as Preferred Stockholders' Exhibit No. 29 for identification.)

By Mr. Condon:

Q. Dr. Badger, I return to you the original report which you have just identified, marked as Preferred Stockholders' Exhibit No. 29 for identification, and ask you if that report represents the result of the studies which you have made between December 30, 1945 and the present time?

A. Yes, sir.

Q. Would you look at the caption page, if you will, and I ask you as of what date your valuations speak?

A. This valuation was set as at January 15, 1946, but I believe I can say conclusively that I know of no change that has taken place since that date that would affect my appraisals or values.

Q. I notice, Dr. Badger, that this report bears date January 24, 1946. Can you tell us what that date purports to represent?

A. That was the date on which I completed the final dictation of the report.

* * * * *

[R. p. 1357] Q. Now, would you turn to your report, Exhibit 29 for identification, and I ask you to state whether or not

in that report you have defined in a general way fair value and going concern value?

A. Yes. I have given my concept of the term.

Q. Will you look at page 4, please?

A. Yes. Would you like to have me read that?

Q. No, that is not necessary. I would just like to have you point out, if you will, in response to a few questions, the places in your report where the general subject matters of your studies are set forth, just to assist counsel in placing it in the report itself.

Now, is it fair to say that your definition of fair value is what you understand to be the term as used by this Commission and the courts?

A. So far as I am able to interpret it it is, yes sir.

Q. Now, is this report basically a report on going concern value of these three preferred issues?

A. It is basically, yes, although the value is also discussed in certain sections of the report on other than a going concern basis.

Q. Well, you have included in your study, have you not, your opinion of the fair value of these securities?

A. Yes, sir.

Q. Their intrinsic value?

A. Yes, sir.

Q. Now, would you look at pages 4 and 5 of your report and, commencing at that portion of it, do those pages refer in a general way to your studies in so far as market value of these securities is concerned?

A. Not to the extent that current market value at the present time is influenced by other factors than those related to intrinsic worth or to fair investment value as a going-concern.

Q. How have you treated the study with respect to market value, just briefly?

A. As a part of this study I was naturally interested in the market prices at which the several series of stock were selling, and despite the fact that there is a plan presently

before this Commission and well known to the public in which plan it is proposed to pay off all classes of stock at $100 a share, the $5 series preferred is still selling at a price of approximately 105½, or was during the week ended January 5, 1946. That was the week I made that particular market study. The $5.50 series was selling at $106 and the $6 series was selling at $107.25.

It is perfectly apparent, it seems to me, from those market prices, that the investing public has a feeling, one, that it is going to be a considerable period of time before this plan may become operative, on the one hand, or, two, that there is a possibility that the plan now proposed, whereby $100 of par would be paid, may be altered either as the result of the action of the Commission or the courts, or both, otherwise the stock certainly wouldn't be selling at these substantial premiums over and above the $100 par that is proposed to be paid.

It is quite evident that, from the standpoint of the market's appraisal of intrinsic merit or intrinsic worth of the stock, there are elements of value there sufficient to bring the market price up substantially above $100 in the face of these proposals.

Q. Now, is it fair to say, Dr. Badger, that the market value study which is outlined in your report is just one of the bases of your determination?

A. That is correct, because I attempted to seek a value on the assumption that Engineers Public Service would be continued as a going concern.

Q. In other words, your approach was an effort to determine the fair value or the going concern value exclusive of the impact of the Public Utility Holding Company Act of 1935?

A. Yes, sir.

Q. Now, will you turn to pages 5 and 6 of your report, and I ask you if the next basis of valuation that you considered related to general economic conditions and money rates?

Can you make a brief statement concerning that phase of your study?

A. Well, the value of a prefererd stock, which in a way is substantially similar to a permanent annuity, must stem, it seems to me, from two factors. You have got to seek a rate of discount to apply to that permanent annuity and that rate of discount has got to give weight to basic interest rates, or the rate of interest on a riskless security on the one hand and on the other hand has got to, or should, involve a premium in addition to the pure rate of interest to take account of the elements of investment risk that may surround the permanent annuity. Then, of course, in the case of a callable preferred stock it is conceivable that a rate of discount involving the first two factors might produce a value in excess of the call price, in which case the valuation would have an upper limit placed on it by the call feature, plus some additional premium to account for the period of time which investors might believe would exist between the time of their purchase and the time the stock might possibly be called, so it is quite essential in valuing a preferred stock to start with a study and a discussion of the conditions in the money market, what are basic interest rates, to what extent may these basic interest rates be considered as purely temporary or more or less permanent, and I attempted to make that study, and without going into an elaborate discussion of the problem I found that from the year 1932, as a matter of fact, down to the present time, there had been a continuous reduction in interest rates. Being in the type of business I am in I didn't have to make such a study, but I did in presenting it here for the benefit of the Commission, and it will be seen that long-term Government securities, which for purposes of this examination may be regarded as 10 to 20-year maturities on an average range from a 3.68 basis down to a 1.46 basis in 1945, November—and I can say that since the termination of the Victory Loan Drive last December that there has been a further substantial advance in all Government securities and a sub-

sequent reduction in the rates of interest thereon. The same tendency is clearly portrayed in the Standard Statistics Average on a yield basis of high grade bonds. That is a continuous statistical series that is prepared and published by Standard Statistics monthly and it shows there that high grade corporate bond yields dropped from the 5.28 basis on an average in 1932 to a 2.67 basis in 1945. High grade preferred stocks, as one might expect, show a higher yield than do high grade corporate bonds and, likewise, high grade corporate bonds show a somewhat higher yield than do the U. S. Governments. In other words, the greater the elimination of risk, the lower the rate, and that is evidenced here, but preferred stocks have gone through exactly the same cycle that bonds have, and quite naturally, because their preferred dividend payments are in the nature of interest, there is a fixed income obligation. The yields on 15 high grade preferred stocks as computed by Standard Statistics dropped from a 6.13 basis in 1932 to a low level of 3.65 in 1945. For most of the period there there were at least three public utility stocks in that index: Public Service of New Jersey, Pacific Gas & Electric, and I believe Pacific Telephone. There may have been a fourth one, I don't recall, but I did make an examination of the yields on high grade utility preferred stocks and found that the same situation existed there as existed in the general average. Pacific Gas & Electric, for example, being a noncallable 6 per cent preferred stock having a par value of 25, averaged to sell in the month of December, 1945 at $43 a share, which would give a corresponding yield of 3.49 per cent, even lower than the average for 15 stocks. Buffalo Niagara Electric Corporation recently brought out a 3.6 preferred stock for sale to the public at approximately 102.8, or at a yield of 3.50.

The general tendency in respect to high grade preferred utility stocks is identical to that of high grade preferred stocks as a class. In other words, there is nothing at the present time that would distinguish a high grade preferred

utility stock from a high grade corporate stock. The converse of a constantly lowering rate of interest or a constantly lowering rate of return on a preferred stock is a constantly advancing dollar price for the security, so that conversely we can say that preferred stocks have continued to advance throughout this entire period, and I believe I can make the unqualified statement without fear of contradiction that today high grade corporate bonds and high grade preferred stocks are selling at the lowest yield basis ever recorded in our own economic history and concomitantly or concurrently they are selling at the highest prices.

I believe in that connection it would be helpful to make a few comments on the possible permanency of the interest rate structure. I would like to quote first from the Federal Reserve Bulletin of November, 1945. This, incidentally, is an unsigned article that appeared in the Federal Reserve Bulletin, and being an unsigned article, in accordance with the stated policy of the editorial committee, the said committee representing the Board of Governors of the Federal Reserve System, are responsible for interpretations and opinions expressed therein, so I think we can state that this quotation which I am going to give you represents the opinions presently of the Board of Governors in respect to the situation in the bond market.

"In view of the existing sources of demand for Government securities and the reduced supply of new securities, prospects are for a continued strong market for these securities. Under the circumstances demands are particularly strong for the intermediate and long-term issues bearing the higher yields. Such of these issues as can be held by banks will be in demand by banks, while non-bank investors may be expected to buy principally the issues that are non-eligible for purchase by banks."

I have a considerable interest in the permanency of interest rates because part of my function is to advise a substantial number of banks and insurance companies in respect to their investment policies, and the amount of

assets that are under my supervision in that respect at the present time will exceed $100,000,000.

I have followed a number of statements of the Honorable Secretary of the Treasury, Mr. Vinson, who has on numerous occasions expressed his confidence in the permanency of present low rates of interest.

Furthermore, the Federal Government, with its present huge debt, a substantial portion of which comes due in less than five years, is vitally interested in the maintenance of low interest rates and the Federal Government, through the Federal Reserve Banks and through other powers which it presently has, has a firm control in respect to interest rates and I can see no possible reduction in interest rates in the future stemming from any cause which it is possible to present, and it is my opinion that interest rates are going to remain low for a considerable period of time and that correspondingly bonds and preferred stocks will continue at comparatively high levels, and in that connection I would like to state that any values that I may have placed on Engineers preferred stocks are not to be classed as temporary values, are not to be classed as transitory values, due to any peculiar set of circumstances which may evaporate overnight; they are permanent values, as far as one can consistently examine and look into the predictable future.

Q. Now, Dr. Badger, will you turn to pages 8 and 9 of your report, and I ask you whether or not another basic consideration in the valuation of these preferred stocks of Engineers on a going concern value basis or a fair value basis related to earnings analyses of the Engineers Company on a consolidated basis and on a corporate basis?

A. Yes. A prospective investor in a preferred stock is quite naturally interested in the operating results of the company whose stock he purchases and one factor of interest to a preferred stockholder is the number of times charges and preferred dividends are earned, and in that respect I found that on what we call an over-all basis that

charges and preferred dividends combined in the year 1940 were earned 1.22 times:

1941, 1.20;
1942, 1.22;
1943, 1.40 and
1944, 1.54.

In the year 1945, based upon Applicant's Exhibit 63, page 2, the coverage works out at a 1.47 basis, provided no effect is given to a reduction in income and excess profits taxes resulting from extraordinary non-recurring deductions. If such items were used to reduce taxes accordingly, however, as set forth in Applicant's Exhibit 53 and 66, over-all coverage would be 2.12 times.

I believe it would be proper to state that that is the actual coverage for those years on the basis that the books were actually kept and on the basis that taxes were actually computed and paid to the Federal Government.

Q. Now, Dr. Badger, would you comment briefly, if you please, on the analysis of earnings with respect to Engineers on a corporate basis, which you have set forth commencing at page 9 of your report?

A. Preferred dividends alone were earned in the year 1940 2.34 times:

1941, 2.07;
1942, 1.81;
1943, 2.48;
1944, 3.20;
1945, 2.77, without giving effect to reduction in federal income and excess profits taxes resulting from extraordinary and non-recurring deductions, but if such items were used to reduce taxes accordingly, as per Applicant's Exhibits 53 and 66, parent company preferred dividends would have been earned 4.75 times.

Q. Now, Dr. Badger, as another element in your study did you consider the estimated earnings of Engineers, and would you turn to page 10 of your report and comment

briefly as to what that table purports to show and the supporting data under the table?

A. The data on page 10 purports to show the estimated earnings of Engineers Public Service Company and subsidiaries, including the subsidiaries of Virginia, Gulf States and El Paso, on the assumption that Engineers Public Service Company continues in operation and continues to operate those companies in the year 1946, and that is an estimate that was prepared by the officers of Engineers Public Service and submitted in these proceedings under the heading of Exhibit 63, and this particular table comes from page 5 of that exhibit, and that exhibit shows that on an over-all basis charges in 1946 will be earned 1.67 times.

Referring back to the table on page 8, it will be seen that that represents the highest over-all coverage shown for any of the years 1940 to 1946, inclusive, and it maintains the trend of improvement that apparently was initiated in the year 1941, so that going way through the year 1946 we find continued improvement in coverage and we find that the highest coverage on an over-all basis is shown in the year 1946. In similar fashion the times that parent company dividends alone will be earned in 1946 on the basis of this estimate would be 3.39 times. Again, the improvement was continuous throughout the period and the figure of 3.39 is the highest figure for any of the years studied, 1940 to 1946, inclusive.

Q. Now, Dr. Badger, as the next element of your consideration and your studies in the valuation of these preferred stocks, did you consider and make a balance sheet analysis, and I refer you to pages 11 and 12 of your report and ask you to briefly state, if you please, what they purport to represent?

A. I broke the capitalization of the company down into two groups. The first grouping I indicated as preceding claims. Those would be items on the balance sheet such as subsidiary debt and notes, subsidiary preferred stock premium and accured dividends, minority interests, which

claims would come ahead of Engineers Public Service preferred. Then the second group of claims included Engineers Public Service preferred and subordinated claims to assets and I determined what percentage of the aggregate capitalization was represented by prior claims and what percentage of capitalization was represented by claims represented by the preferred stock or subordinate claims. In other words, this, as far as assets are concerned, is equivalent to indicating what coverage the preferred stock has got. We indicated the coverage that the preferred stock had in reference to its dividends and this indicates the coverage that it has, and I must state in this connection that this is predicated upon the book or carrying value of the assets and is not related to the market value of assets, and there is a sharp distinction between those two that I hope to point out in a separate table, but on the basis of the consolidated balance sheets in 1942, 71.62 per cent of the capitalization was represented by prior obligations and 28.38 by subordinated items and the preferred stock of the holding company. In 1943 the similar figures were 60.37 and 39.63; in 1944, 68.26 and 31.74.

Q. In connection with your balance sheet analyses at pages 11 and 12, did you consider and make a study with respect to comparable situations with regard to several companies as outlined on page 12, and if you did, would you state briefly what your studies in that regard purport to show?

A. Yes. A holding company is in the position of being responsible for the debt of the operation companies only to the extent that it sees fit to service that debt in the event it becomes necessary to do so. In other words, a holding company which has no debt outstanding of its own—and that was the situation here—unless perchance it has already guaranteed or assumed the bonds of its operating companies, has no obligation in respect thereto. They must stand alone on the basis of the operating ability of the operating companies to meet that debt. So, if one operating

company, we will say, becomes involved, there is no reason why the holding company, if it sees fit and it is economic to do so, can't cut that operating company loose. So, it isn't truly fair in analyzing the preferred stock picture here to show the situation as I did show it on page 11 unless we take into consideration the actual market value of the unrestricted and unpledged assets of the holding company as I did on page 13.

On page 13 I took the operating companies as at December 31, 1944, and despite the fact there were certain changes that took place in '45 and other changes are about to take place—I will discuss those later—I had to take that balance sheet because it was the last one which I had available for the parent company.

I assumed, on the basis of facts I will discuss in a moment, that the common stocks of those operating companies should be worth fifteen times a two-year average earnings.

My basis for that was, I might say, threefold. In the first place, it is my own observation in connection with my general work that a multiple of fifteen applied to two-year average earnings of operating utility companies now would be a conservative basis on which to appraise or estimate the values of such stocks.

Applicant's Exhibit 14 presented a study of the price-earnings ratios of the common stocks of four companies, Houston Lighting and Power, Idaho Power, Indianapolis Power & Light Company, and Tampa Electric Company, and on the basis of the study of this exhibit there was demonstrated that those four stocks averaged to sell at 14.44 times average per-share earnings for the period 1938 to '41, inclusive, 16.04 times yearly average earnings for 1942 to 1944, inclusive, plus 12 months ended June 30, 1945; 15.20 times yearly average earnings for the period 1938 to 1944, inclusive, plus 12 months ending June 30, 1945; and 15.58 times per share earnings for the year 1944; and 14.90 times twelve months earnings for the period ended June 30, 1945.

So, it would seem reasonable to assume a multiple of 15, based on that study.

However, several months back I was called upon to testify before the Securities and Exchange Commission in reference to the valuation of the preferred stock of American Light & Traction, and in connection with that study I made a more comprehensive survey of the price-earnings multiples of electric and gas common stocks.

In Appendix A of that report I set forth a study which showed the relationship between five-year average earnings of thirteen electric and gas company common stocks and the then current market value of those stocks.

At that time the multiple relationship was 15.85, which is a little bit higher than the multiple 15 which I used. I propose to submit a copy of that report as a part of this testimony. I regret that I haven't a copy of it here, but I will submit a copy.

Mr. Condon: At this point in the record I would like to incorporate by reference the Appendix A from Dr. Badger's report from the American Light & Traction case, being Allied's Exhibit No. 21-2 in docket No. 54-25-1 of volume 13 in the United Light & Power case, 11(e) Plan. We will supply all counsel with a copy of that.

The Examiner: Any objection?

Mr. Tucker: I haven't the slightest idea what it is. From the Doctor's description of it, I probably won't object.

If your offer by reference relates to one page Dr. Badger will show you there, we have no objection. Will you see if that is so, Mr. Condon?

Mr. Condon: I will be very pleased to.

By Mr. Condon:

Q. Dr. Badger, I draw your attention to page 12 of Preferred Stockholders' Exhibit 29 for identification, about the middle of the page, at which point in your report you state as follows:

"In this connection I would also like to refer to Appendix A of a report which I prepared in connection with the valuation of the preferred stock of American Light & Traction Company, which report is on file with the Securities and Exchange Commission."

I hand you the Docket Number and the exhibit to which I have just made reference, and ask you if you will point out and state for the record the specific study to which you refer in your report in the American Light & Traction case and identify it for the record.

A. I referred to the study in the appendix showing the price-earnings multiples for selected electric and gas companies, using May, 1945 average price and using average earnings of 13 gas and electric companies for the period 1940 to 1944, inclusive.

I show in connection therewith the price-earnings multiples for each company, and I show the average price earnings multiple for 13 companies, which figure is 15.85 as already indicated in my report.

Q. What figure have you used actually in your calculations?

A. A figure of 15.

Q. 15 flat?

A. That is correct.

Mr. Condon: I would like to either incorporate by reference or offer in evidence, with leave to supply a photoprint, this exhibit.

With the permission of the Examiner and consent of counsel I would like to reserve Preferred Stockholders' Exhibit No. 30 identified as Appendix A by Dr. Badger, and a copy of this exhibit will be supplied to all counsel.

I ask that it be received and marked by the Reporter, with the approval of the Examiner, without the necessity for further hearing.

The Examiner: I understand there is no objection by counsel to the receiving of this in evidence, and accordingly

it will be received as Preferred Stockholders' Exhibit No. 30.

(Preferred Stockholders' Exhibit No. 30 is received in evidence)

By Mr. Condon:

Q. Dr. Badger, as another element in your study attempting to arrive at the going concern value of these three series of preferred stocks, did you consider the dividend record of Engineers, and would you return to Page 14 of your report and comment briefly with respect to that study?

A. I did. From the time that the several classes of preferred stocks were issued, until some time in the middle of 1933, regular dividends were paid.

From 1933 to about August of 1936, no dividends were paid.

Thereafter, dividends were resumed and arrearages were paid, and by January of 1938, I believe that in all cases, the dividend arrearages had been paid off, and from then on regular dividends had been paid up to the present time.

Q. In connection with your efforts to determine the fair value, did you make a comparative study with respect to five Public Utility Holding Companies?

I refer you to page 16 of your report and ask you to state briefly what the data there and on the following page 15 purports to show.

A. I would be glad to discuss that page, but before I do so, I would like to state that I don't like the use of the word "comparative" because, in doing evaluation work it is always difficult to find two companies that are identical or are comparable in all respects.

I proceed on the theory that a man who has had considerable experience in analyzing securities, in dealing in securities continuously, should, on the basis of an analysis

of a given company, said analysis covering the important factors of value, be able to arrive at a valuation for that security. But I do feel that having done that, he should support that valuation that he arrives at by a study of a number of companies,—and here I say more or less similarly situated, no one identical, to be sure—but in making such study he justifies or proves to himself that the basis he used is consistent with general market conditions.

That was the purpose of the next two studies, if I make myself clear.

Q. Thank you, Dr. Badger.

A. In that connection, I took five holding companies, all of which had preferred stock outstanding, none of which companies can be classed—or I should say none of the preferred stocks of which can be classed—as of the highest investment caliber.

In other words, I would classify the preferred stocks of these five companies presented here as being of a medium grade preferred stock, not of the highest to be sure, and not of the lowest, but as a group, not any one more or less similar to the preferred stocks of Engineers Public Service.

To follow that through, let us take Columbia Gas & Electric Company for example.

For the period 1940 to 1944—and that was the latest date at which I could get figures for my comparative companies: I couldn't get the 1945 figures as yet because they are not out—Columbia Gas & Electric Company in 1940 earned its charges on an over-all basis 1.35.

In 1941, 1.22;

In 1942, 1.25;

In 1943, 1.47;

In 1944, 1.46.

If you look over to the extreme right, next to the last column, you will see the over-all coverage for Engineers Pubic Service Company, and you will note that in the first two years, Columbia Gas & Electric Company did better than Engineers Public Service. I might say that there was substantially no difference for the years 1941 and 1942.

In the year 1943 a difference of .07 in favor of Columbia Gas & Electric;

In 1944, Engineers Public Service Company passed Columbia Gas & Electric by .08.

In other words, there was a substantial similarity there with respect to over-all coverage.

With respect to an analysis of balance sheet items, the percentage of prior obligations to capitalization, Engineers Public Service did not stack up quite as well. On the basis of book value of equity per share of preferred, Engineers Public Service did better than some of the companies in some of the years, did worse than others in other years, but except for Niagara-Hudson, the figures are very close.

Niagara-Hudson, despite the fact that it has substantially heavier coverage with respect to assets, has a considerably lower coverage in respect to earnings, and Niagara-Hudson, incidentally, is currently in default as to its current preferred dividends, and has arrearages on the preferred stock at the present time.

The percent of net-quick to prior obligations, again we find that Engineers Public Service is in a median position.

In respect to times preferred dividends alone earned in the year 1942, three of the companies did better. As a matter of fact, four of them did better than Engineers.

In the year 1943, two of them did better than Engineers, and in the year 1944 Engineers surpassed all five companies.

So, it occurred to me after this study that taking the factors as a whole, Engineers might be said to rank in about a median or average position, as far as the preferred stocks of these five companies are concerned.

I proceeded to reconstruct the values of the various classes of preferred stock of Engineers Public Service, using the rates of Capitalization expressed by the market and stated dividends on these holding company preferred stocks. I found if we used Columbia Gas & Electric's ratios we would have $105.49 for the $5 preferred; $116.03 for the $5.50 preferred; and $126.58 for the $6 preferred.

That, of course, is on the assumption that the several classes of Engineers Public Service are non-callable.

Niagara-Hudson prices and yields would give values of $102.75, $112.94 and $123.00.

If we averaged the values obtained by the use of all five companies, we would have a value for the $5.00 preferred of Engineers Public Service of $107.49, the $5.50 preferred $118.31 and the $6 preferred of $129.07, without giving any effect to the call features that existed in connection with those three classes of stock.

Q. Dr. Badger, as a further basic element of consideration did you make a comparative study of ten medium-grade selected utility preferred stocks? I ask you to turn to page 17 of your report, and page 18, and ask you to outline briefly what you did in that respect?

A. I went through all of the public utility preferred stocks that are quoted in this volume known as Standard and Poor's Stock Guide, which is a monthly publication, and which is put out for the purpose of giving current prices on a wide range of listed and unlisted securities.

I tried to pick out as far as possible—and I exceeded these limits a little bit here and there, but not substantially—preferred stocks whose over-all coverage ranged from 125 to 175.

I also restricted this study to preferred stocks whose dividend rate in connection with call price would give me a proper comparison to use in connection with Engineers Public Service.

For example, if we had a 7 percent preferred stock callable at 105, it wouldn't constitute a proper comparison, because no matter how good the stock was, it wouldn't sell substantially in excess of 105.

We have no 7 percent preferred stock in connection with Engineers Public Service that is callable at 105, so that wouldn't be a proper comparison. Non-callable preferred stocks, of course, would be highly desirable in so far as they are available, meeting our other classifications; all

preferred stocks whose dividend rate was relatively low as compared with the call price, would likewise constitute more proper comparisons than would preferred stocks with high dividend rates and low call prices, because you have an extraneous factor not related to investment risk, not related to the inherent value of an annuity operating there to depress the price of the stock, and we want to eliminate that as a factor of value.

Out of a rather large number of preferred stocks, including both holding companies and operating companies, I selected the ten that appear on page 18.

On an average in 1943, the preferred stocks of those ten companies averaged to earn their preferred dividends and prior charges—that is, all charges—1.49 times as against 1.40 for Engineers Public Service.

In 1944 they covered their over-all charges 1.48 times as against 1.54 for Engineers.

Mr. Tucker: Your figures of 1.49 and 1.40 relate to the year 1943? I don't think you stated that.

The Witness: For 1943 the ten companies averaged to earn their over-all charges 1.49.

Engineers Public Service in that year averaged to earn its over-all charges 1.40.

In the year 1944 the ten companies averaged to earn their over-all charges 1.48, whereas Engineers Public Service averaged to earn its over-all charges 1.54.

Preferred dividend coverage alone compared as follows: The ten companies averaged to cover preferred dividends only 2.52 times in 1943 as against a figure of 2.48 for Engineers Public Service; and in 1944 the ten companies averaged to cover preferred dividends 2.46 times, and Engineers Public Service 3.20.

So, there again, Engineers certainly ranked as good as this group on average.

The stocks of these ten companies averaged to sell on a 4.5 basis, based upon their average prices for the week ending January 4, where that price was available.

Mr. Kanton: Where did you get that average price? I am trying to follow you on page 18. I have no figure for an average yield price on my copy. You used the figure of 4.5 percent.

The Witness: It is possible I did not put that average down there and maybe I should have. I referred to that in the text—that was a 4.5 basis. I believe that should have appeared on the chart.

Mr. Condon: I believe that is in the text, Dr. Badger.

The Witness: Yes, that should appear on the chart.

Mr. Tucker: What would it be if it appeared on the chart?

The Witness: The average of all those yelds was 4.5.

By Mr. Condon:

Q. That figure is set forth in the column appearing in the reconstructed values, about ten lines from the bottom of the page on page 18?

A. Yes, I know that. It should also appear under the average up here.

Q. Would you care to make a statement with respect to that, Dr. Badger?

A. Yes. The arithmetic average of the yields under column headed "Percent yield" on page 18 is 4.5.

If we apply that yield as a basis for capitalizing the stated dividends of these three classes of preferred stocks of Engineers, we get the corresponding values of 111.11 for the $5 preferred, 122.22 for the $5.50 preferred and 133.33 for the $6 preferred.

That, of course, is without reference to the call features, and is on the assumption that the Holding Company Act is not going to impinge on the company.

Mr. Tucker: Dr. Badger, right there,—because I might want to move to strike that part of your answer, you are not making any contention in this case, are you, that these values for the $5 of 111, for the $5.50 of 122 and for the $6 of 133 are values of these preferred stocks?

The Witness: No.

Mr. Condon: Just a minute, Dr. Badger.

I would like the record to show in the matter of Buffalo Niagara & Eastern Corporation, being Commission's release No. 6083, being under date of November 28, 1945, which was an 11(e) plan, where this Commission had before it the determination of fair value, going concern value, or intrinsic value of preferred stock, that language suggesting that values in excess of a so-called call price might be considered by the Commission, and I would like to read the answer to Mr. Tucker's inquiry, just one sentence from that opinion of the Commission.

"However, the call provision would ordinarily provide a maximum figure for the participation of the particular security since the holders of the junior securities have a right to retire the preferred at the redemption price quite apart from the impact of Section 11."

It is my view that where the Commission uses that language that there might well be situations that what would ordinarily be expected might not apply, and I feel it is perfectly proper that this Commission have all of the facts and all the estimates, as long as there is no question that Dr. Badger's figures appearing at the bottom of page 18 are ex-the Act, and ex-the call price.

The Examiner: I think he so stated.

Mr. Condon: He said it at least three times.

Mr. Tucker: Will you please read back my question and the witness's answer?

(The record was read.)

By Mr. Condon:

Q. In connection with that inquiry of Mr. Tucker, can you state for the record why you feel it appropriate to set forth at that point those figures to which you have just made reference?

A. Yes, sir.

Q. Go ahead.

A. The difference between the call price and the figures set forth here represent an element of value which could be extinguished by virtue of changing market conditions, or by virtue of changing investment status relative to this company itself, which value or which differential could be completely extinguished by such changes before there would be any change in my estimate of fair investment value. In other words, we could have a reduction from $133.33 as computed on this statement down to approximately $111.50 which is my appraised value of the $6 preferred stock, by virtue either of a change in business conditions or a change in the investment position of this stock before the fair investment value of the $6 stock of Engineers Public Service Company would be changed on the basis of my estimates.

In other words, that is a protective element, as one might say, inherent in that $6 stock which should be considered in placing any value thereon.

Q. Is your answer the same with respect to the $5.50 and $5.00 series?

A. Yes, sir.

Mr. Tucker: In other words, it gives you a cushion; that is what you are saying, isn't it?

The Witness: Yes, sir.

By Mr. Condon:

Q. Dr. Badger, did you give some special consideration to the Virginia Electric and Power Company? I refer you to pages 19 and 20 of your report, and I ask you to state briefly for the record what that portion of your study and report indicates.

The Examiner: We will take a short recess at this time.

(At this point a short recess was taken, after which the hearing was resumed.)

Mr. Condon: Will you read back the last question, please?

(The question is read.)

By Mr. Condon:

Q. Make it as brief as you can, Dr. Badger, please.

A. That shows the earnings available for preferred dividend requirements on Engineers Public Service—I should say for Virginia Electric & Power Company—for the last years 1939 through 1945, with the last two months of 1945 estimated; the amount of preferred dividend requirements predicated upon 1946 requirements, and the balance available for common. That would be substantially the amount that would be available for Engineers Public Service after the payment of charges and preferred dividends on Virginia Electric & Power Company. The purpose of that study was to show the amount of earnings which Engineers could derive directly from Virginia Electric & Power Company on the assumption that El Paso was disposed of according to the 1945 plan and provided the stock in Gulf States was sold at $11.50 a share in accordance with the provisions of the plan.

It will be seen that the balance available for common in 1939 of Virginia Electric & Power Company was $3,453,000; in 1940, $3,954,000; $3,783,000 for 1941—I will not read all of the years. On the basis of the tax situation as it actually worked out, for 1945 there would be $9,410,677 available, but it will be recalled that in the year 1945 there was an extraordinary and non-recurring tax adjustment that throws earnings somewhat above what they would be if that non-recurring item were eliminated. We have discussed that item before.

In the year 1946 there would be $6,125,000 available for preferred, $4,677,000 available after meeting preferred dividend requirements on Virginia Electric & Power Company.

The next line indicates my calculation of the freeze requirements.

I wish to show the amount available for common stock even after the freeze requirements would be fully adequate to meet the preferred dividend requirements on Engineers

Public Service outstanding preferred stocks provided Engineers Public Service were to utilize a total of $10,000,000 of cash plus proceeds from the sale of 1,000,968 shares of Gulf States common at $11.50 a share for the purpose of calling all of the $6 preferred stock at its call price, all of the $5.50 preferred stock at its call price, and the utilization of the balance of cash after those two issues were called to call the $5 preferred stock. That would leave outstanding after that transaction 99,863 shares of uncalled $5 preferred stock on which the annual dividend requirements would be $499,315. In other words, based on 1946 earnings as estimated, there would be $4,677,000 available from Virginia Electric & Power Company alone if the other two companies were disposed of to meet a remaining preferred dividend requirement in respect to Engineers Public Service of only $499,000. In other words, on the basis of these assumptions, it will be seen that the preferred dividend requirements of Engineers Public Service Company would be reduced from a present figure of $2,119,000 to $499,000 annually, an amount which would be well within the capacity of Engineers Public Service Company to pay if it were to continue as a holding company owning only Virginia Electric & Power Company or, two, if Engineers Public Service Company and Virginia Electric & Power Company were merged. Adequate funds would be available from Virginia Electric & Power Company to meet these requirements whether or not the freeze requirements previously mentioned were to be deducted from the balance available for the common.

Q. Dr. Badger, in the interests of brevity, as a result of your studies of the various documents and exhibits to which you have made reference, and as a result of the various studies giving consideration to the different component elements you have outlined, have you arrived at a conclusion with respect to the fair value and the going concern value of the several classes of preferred stock of Engineers

Public Service Company on the assumption that Engineers Public Service Company is to continue in business, or, in other words, ex the impact of the Act?

A. Yes.

Q. If you have, will you turn to page 21 and state what you have concluded?

A. It is my opinion that the $5 convertible dividend preferred—the convertible feature now has expired—would be worth at the rate of no less than $106.25 a share; that the $5.50 cumulative dividend preferred would be worth $111.38 per share; and that the $6 cumulative dividend preferred would have a value of at least $111.50 a share.

Q. Are the conclusions set forth in the report which has been marked for identification your own conclusions?

A. They are.

Q. Have they been arrived at in good faith?

A. They have.

Q. Are they based upon facts and figures which, to the best of your knowledge, information, and belief, are true and correct?

A. That is correct.

Mr. Condon: I offer the report and study in evidence.

Mr. Kanton: No objection.

Mr. Tucker: No objection.

The Examiner: It will be received as Preferred Stockholders' Exhibit No. 29.

(Preferred Stockholders' Exhibit No. 29 is received in evidence.)

By Mr. Condon:

Q. Dr. Badger, you have referred to preferred stocks of certain operating utilities and to certain utility holding company stocks. The record on your report shows that the operating utilities in the Engineers system have senior securities outstanding in the hands of the public and the

Engineers owns only common stocks of those operating utilities.

A. That is correct.

Q. What effect have you given to that in connection with the study that has just been received in evidence? Will you state your conclusions as to the values with respect to those preferred stocks of the operating utilities?

A. I have given consideration to the existence of the preferred stocks of the operating subsidiaries, and I have examined——

Mr. Tucker: May I interrupt and ask what issue in this case you think the value of the preferred stocks of the operating companies has?

Mr. Condon: I just think it is one of the elements here to show that Dr. Badger considered—if you prefer I withdraw the question I shall be very pleased to do so unless other counsel object.

Mr. Scheetz: I don't object. It seems to me the question stated another way is that on page 18 of Dr. Badger's report he has reached certain values based on a 4.5 per cent yield basis, and those studies refer back to operating utilities. The latter part of his report shows a percentage of 4.6 in evaluating the Engineers preferred. I think the question of Mr. Condon is the consideration that he gave to the fact that the Engineers preferred is based on common stocks of utilities with senior securities of the subsidiaries out in the hands of the public.

By Mr. Condon:

Q. Dr. Badger, would you give us the benefit of your answer to that question, if you will, if Mr. Tucker does not press his objection?

Mr. Tucker: I haven't made any objection to that question.

The Examiner: You say you have no objection?

Mr. Tucker: I haven't made any to date.

The Examiner: Proceed, Mr. Badger.

The Witness: I would like to say in general that all other things being equal, the preferred stock of an operating company would per se have a somewhat higher investment status than the preferred stock of a holding company.

I believe that Engineers Public Service Company as it is presently constituted with three operating companies, which three operating companies on a conservative appraisal would have a very substantial value—as a matter of fact, of the five companies which were owned in 1945, two either have been or will have been sold at prices close to the values indicated here, so that that value that is indicated for the companies as at December 31, 1944, now becomes cash in the hands of the parent company. On that basis we would have a total of $99,000,000 of either very liquid assets, such as cash, or reasonably liquid assets, such as companies which can be disposed of, as against a total par value of preferred stock of $39,000,000—$245 a share. I regard that as a very substantial element of protection in this case.

This holding company has no bonds outstanding prior to this preferred stock. The preferred stock therefore is in the form of a prior claim against those assets. The average rate at which the market capitalized the dividends of the 10 stocks, including West Penn Electric, which is a holding company, was on a 4.5 basis. Public Service of New Jersey, which is one of the companies I studied on page 15, has certain issues of non-callable preferred stock outstanding. I used the $5 preferred. There is a company which instead of having five years of improvement in respect to times dividends earned had five years of regression as far as times earnings are concerned, and earned its charges in 1944 only 1.25 times as against a figure of 1.54 for Engineers Public Service. That holding company preferred stock was selling on a 4.37 basis.

Taking all these facts into consideration, facts that unquestionably operating company preferred stocks should

sell at somewhat lower yields than holding company preferred stocks, I am still of the opinion on the basis of my studies that were it not for the existence of a call feature in connection with the several classes of Engineers preferred stocks, that they would sell substantially in excess of the values that I stated on page 21. Does that answer your question?

Mr. Condon: I think it does.

By Mr. Kanton:

Q. Is the effect of your answer, Dr. Badger, or at least part of your answer, that you consider the preferred stocks of the three operating subsidiaries to be of better quality than the preferred stocks of Engineers?

A. That is correct, and they are selling at very substantially higher prices than even the prices I have suggested here.

Q. But it doesn't necessarily follow—I am referring back specifically to part of your answer—that a preferred stock of a subsidiary would necessarily, because it is closer to earnings as you put it, be better than the preferred stock of a holding company?

A. No, sir, because other factors might be the same. You might have the stock of an operating company that was vastly inferior to the stock of a holding company.

By Mr. Condon:

Q. Dr. Badger, for facility and speed, did you have any book or record which would show what prices these preferreds of the three operating companies in the Engineers System are selling at?

A. I have.

Q. Would you state what they are for the record and the source of your answer?

A. Based upon Standard & Poor's earnings and ratings stock guide for January 1946, which contains prices

through December of 1945, during the month of December 1945, Virginia Electric & Power $5 cumulative preferred stock, which is callable at $117.50, sold at a high of $123 and a low of $121, and closed at $122. That compares with the value ex the call price for the preferred stock of Engineers Public Service of $108.70.

Q. Would you please continue, Dr. Badger?

A. The Gulf States Utilities $4.40 cumulative preferred, callable at $111, sold at $113.75 high in December, $113.25 low, and closed at $113.75. The El Paso—I don't find that.

* * * * *

[R. p. 1400]

RALPH E. BADGER,

previously sworn, resumed the stand and testified further as follows:

Cross Examination

By Mr. Tucker:

Q. Dr. Badger, how many drafts have you made of this report which was introduced yesterday as Preferred Stockholders Exhibit No. 29?

A. There never was but one completed draft. I dictated portions of it, and as that would come, I would have it corrected and then that would go back into this final draft. This was the only complete draft that I have had of the report. The other one contained, you might say, the dictated material, without any charts. In other words, I had these tables prepared in either pencil memorandum form or typewritten form, and then I together with those, would dictate portions of the report, and as those portions would come back, I would correct them and from those two groups of material the completed report was prepared, but this was the only draft in its completed form that I had prepared. I might say that I didn't start to work on this case until

some time about January 5, and it took me several weeks of working both day and night to digest this material and get myself to a point where I was sufficiently familiar to come to my conclusions to prepare this report.

Q. You were in New York, were you not, Dr. Badger, two or three weeks ago?

A. I was in New York on this matter, I believe, the last week in December, but I didn't go back to Detroit immediately. It was somewhere around January 3 or 4 before I got back to Detroit. I came down to New York some time in the vicinity of the 10th of January, but that was on an entirely different matter, and I didn't have any contact at that time with Mr. Condon.

The next time I came to New York, as I recall it, was a week ago—two weeks ago this Friday. That would be a week ago last Friday.

At that time I had no report prepared.

Q. You had no report at all at that time?

A. No, sir; hadn't even started to dictate the report at that time. The entire report was prepared subsequent to that time.

Q. When did Mr. Condon first see a draft of your report?

Q. As far as I know, he saw it the afternoon—I believe it to be Tuesday this week, because the report was mailed out from Detroit, I believe, Monday night.

Q. Did he at any time discuss with you the draft?

A. Not the draft of the report. He discussed certain of the tables that were contained in the report.

Q. You had no discussion with Mr. Condon with respect to the draft of the report?

A. Not of the report, because the report was not prepared at the time I last saw him, which was two weeks ago Friday.

Q. Are you saying, Doctor, that you had no conferences with Mr. Condon with respect to your draft report at all, at any time?

Ralph E. Badger—Cross Examination (Cont'd)

A. I said that I had, at the last conference with Mr. Condon, certain of the tables that subsequently appeared in the report.

Q. Yes, I heard you say that. I am talking now about the report.

A. That is correct.

Q. Well, what do you mean it is correct?

A. That the only discussion I had with Mr. Condon relative to this report was on Wednesday morning of this week.

Mr. Condon: You mean yesterday morning at 8:00 o'clock?

The Witness: Breakfast, yes, sir. That was the first time that Mr. Condon and I had discussed this report.

By Mr. Tucker:

Q. After you had had that conference with Mr. Condon, were any changes made in the draft?

A. Yes, sir.

Q. What changes were made in the draft?

A. They are all indicated in the report.

Q. Do you refer to deletions?

A. They are made in ink.

Q. On what I suppose is page 1?

A. Well, for example, on page 1——

Q. Let me ask you the questions, if you will. You refer to deletions on page 1, deletions on page 3, deletions on page 4——

Mr. Kanton: There is one on page 2.

Mr. Tucker: It is not important.

Mr. Condon: Either include them all, Mr. Tucker——

Mr. Tucker: You objected to my interrupting your cross examination. Let me have the same privilege. If you want to object to questions, I have no objection, of course.

Ralph E. Badger—Cross Examination (Cont'd)

By Mr. Tucker:

Q. —and deletions on page 13,——

A. I——

Q. Just a minute, please.

A. If you are asking me a question——

Q. I haven't yet gotten to the end of the question.

Mr. Condon: I would like the question re-read, please.

(The reporter read as follows:

"Q. You refer to deletions on page 1, deletions on page 3, deletions on page 4 and deletions on page 13——")

By Mr. Tucker:

Q. Is that right, Doctor?

A. They are not all deletions. Some are deletions and some are corrections or substitutions.

Q. Well, all right. We won't quarrel with the definition of the word "deletions." I take it the so-called deletion or what I refer to as a deletion on page 1 is what you would call a substitution or correction, is that correct?

A. That is correct, a substitution.

Q. I neglected the one on page 2. That is obviously a change in a figure.

A. That is a correction.

Q. The one on page 3, Doctor?

A. That is a deletion.

Q. What did it say before it was deleted?

A. I believe it says, "In the event the Plan should be deemed as involving an involuntary liquidation."

Q. What about the deletion on page 4—and that is a deletion, isn't it?

A. That is a deletion.

Q. A rather complete deletion, as far as I can make out. I couldn't read it.

A. It is a deletion of one sentence.

Q. What did that say? I don't care for the exact words.

Give me the substance of it. You must be able to remember that?

A. In substance it says that "On the assumption that parts 1 and 2 of the Plan should be consummated, which would eliminate from the system El Paso and Gulf States, after which elimination Engineers Public Service would continue its existence and operate Virginia Electric & Power Company alone, or should become merged with Virginia Electric & Power."

Q. It sounds like a lot more than those three lines that are deleted.

A. You asked me the substance.

Q. You think that is the substance of what that said?

A. I believe that to be the substance, yes, sir.

Q. I take it that what I referred to as a deletion on page 13 you have referred to as just a correction?

A. That was a substitution. At the time I prepared the report I did not have the accurate reference to the pages in the record where Mr. Benjamin's testimony appeared, but after my discussion with Mr. Gordon, we looked that up in the record and that became a much better reference for purposes of the report than was the reference previously made to the prepared testimony.

Q. Putting your mind for the moment on these things that you say are deletions, who suggested making the changes?

A. Was that a question, sir?

The Examiner: He asked who suggested making those deletions.

Mr. Tucker: Read the question.

(The question was read.)

The Witness: Well, the suggestion developed as a result of a discussion after our discussion of that particular paragraph, the last sentence.

By Mr. Tucker:

Q. You are not referring to the defetion on page 3, are you?

A. Page 4. Did you refer to the one on page 3?

Q. No. I said who suggested the deletions. I would like to have you start with the one on page 3.

A. The two deletions arose in exactly the same way.

Q. That is, the one on page 3 and the one on page 4?

A. That is correct. After a mutual discussion we both agreed that the two sentences, the one on page 3 and the one on page 4 did not add anything to the clarity or the purpose of the record, and they were deleted.

Q. One or the other of you and Mr. Condon made the suggestion in the first instance; which one made the suggestion? Those things just didn't happen simultaneously, did they?

You didn't of one accord arise and say "Let's strike these out," did you?

A. No, sir.

Q. Well, which one made the suggestion in the first instance?

A. I think I was asked if the report could be better or more clarified if those sentences were removed, or whether I thought they should remain in after we discussed the report, and I believe I said that I believed the sentences should be deleted, as I recall it.

Q. You were asked that by Mr. Condon?

A. That is correct.

Q. If you had been left alone and you hadn't had a conference with Mr. Condon, you would not have made the deletions; is that right?

A. That is correct.

Q. On page 7 of your report, in the last sentence of the second paragraph, you state:

It may, therefore, be stated that the present level of preferred stock prices is, so far as one can humanly predict, a permanent level. Did you say that in your report?

A. That is the last sentence in the second paragraph on page 7?

Q. Yes. Did you say that in your report?

A. Yes, sir.

Q. On the same page you say, do you not, "The values which I propose to place on these several classes of preferred stock of Engineers Public Service Company are, therefore, values of a permanent nature, and are not values of a temporary or speculative nature." Did you say that?

A. Yes, sir.

Q. You were valuing in this case a preferred stock of a holding company, weren't you?

A. Yes, sir.

Q. Did you with another gentleman or professor, prepare a book that got at least to a third edition, which I seem to have in front of me called "Investment Principles and Practices," by Badger and Guthmann?

A. That is correct.

Q. Without taking the trouble to make quotations from the book, because I assume you know pretty generally the matter in the book, do you have a sub-paragraph in that book, or a chapter, as I might call it—it is not a whole chapter, but a heading—that deals generally with the question of the bonds, reference to preferred stocks as a hedge, one against the other, or preferred stocks as a hedge against bonds? Does that mean anything to you?

A. Well, I couldn't indicate without reference to the book how these paragraph headings go. I fail to see how we could have stated that a preferred stock as an investment would be a hedge against a bond?

A. No, not a hedge——

Mr. Condon: Mr. Examiner, I want to interpose an objection. I feel if this line of inquiry is to be pursued, Dr. Badger should be handed the book which appears

before Mr. Tucker and his attention directed to the specific part of the book. This is not a memory contest, and if Mr. Tucker has any point in mind, I submit we come to it.

We have spent 25 minutes of time going into the question of a couple of typographical changes and a couple of immaterial deletions. I feel if we are going to get down to the meat of this cross-examination, let Mr. Tucker come to it and show Dr. Badger the book and the paragraphs to which he is referring.

Mr. Tucker: If the Examiner requires me to do it, I will do it. I would prefer to conduct my examination in my own manner. I think I have a right to do it.

The Examiner: Proceed with your examination, Mr. Tucker.

By Mr. Tucker:

Q. This in substance, Doctor, is what I understood from your paragraph. You understand, I am just a layman; I am not an expert who handles securities—I understand that you were saying in the book that if a man was a little nervous about his bonds, it wasn't a good thing for him to do, to sell his bonds and purchase preferred stocks—do you remember that?

A. Not in that language at all.

Q. Well, if it suggests something to you, will you tell me in your own language? I don't want to quarrel with you about language.

A. You are making certain interpretations of paragraphs in the book, and I can't recall exactly what the arrangement was in the book or what the actual wording was. And I would like to refresh myself as to that particular part of the book to see what you have in mind. The book contains some 700 or 800 pages, and I don't believe I could be expected to tell you exactly the import of every page or every material in there on the basis of a vague reference.

Q. Doctor, do you remember saying in that same connection, if it meant anything to you—if it didn't, you needn't answer the question—that preferred stocks were of a character of bonds to a certain extent, in that they had—both of them, one a fixed interest rate and the other a fixed dividend rate, but that preferred stocks as a class had not the security value, the safety factor, of the ordinary bonds, but in times of difficulty they partook more of the character of common stocks, and that a preferred stockholder found himself in the position, if you please, of one who took the risk of a limited dividend but in times of stress his stock became perhaps more of the character of a common stock and fluctuated accordingly.

Do you remember saying something like that?

A. Yes, sir; and I think your exposition of that part of the book is very good and very clear. This I would admit and say that that is substantially the way the book discusses that problem.

Q. That is the character of the thing that you are talking about here, the kind of a security that you are talking about here, when you say, Dr. Badger, "The values which I propose to place on the several classes of preferred stocks of Engineers Public Service Company are, therefore values of a permanent nature and are not values of a temporary or speculative nature," is that correct?

A. That is correct, and there is nothing inconsistent as between that and what was said in the book.

Q. Let us see about that. That is where we are going, I hope.

You agree, don't you, that a preferred stock will fluctuate with changes in what you call the yield basis?

A. Changes in interest rates.

Q. Well, in interest rates.

A. Yes, sir.

Q. I will let you set them up on that basis. I don't know much about this stuff, Dr. Badger,—pardon me. So that any change in interest rates, we will call it—let us use your

terms,—will effect a change in the value of the preferred stocks for the same reason that that kind of thing affects the change in the value of bonds, is that right?

A. Correct.

Q. And that is because, as you point out in your book, that both have limited returns; is that right?

A. Yes, sir.

Q. I will show you the book this time, so there won't be any difficulty about that.

Mr. Kanton: What is the date of the book?

Mr. Tucker: It is the third edition,—1942.

The Witness: That is correct.

By Mr. Tucker:

Q. Will you examine for me now so I can ask you some questions about them, those charts on pages 830, 831 and 832? I just ask you to examine them. When you have done so, you tell me, and I will ask you some questions.

A. (Examining) Well, I have examined them.

Q. Those describe, as to the first two charts, as I understand them, certain relationships between stock prices and business activity; is that correct?

A. The charts show the relationship between the common stock prices, industrial common stock prices, and business activity—industrial common stock prices and business activity; yes, sir. With that correction in your question, the answer is "Yes."

Q. That is all right. So far as timing is concerned, that chart on page 830 runs from the year 1883 on upwards, doesn't it?

A. That is correct.

Q. To what year—on page 830?

A. The chart is in two sections. The part on 830 comes down to 1906 and the part on page 831 which is a continuation of the same chart, runs from 1907 to 1930.

(Discussion off the record.)

Ralph E. Badger—Cross Examination (Cont'd)

Q. Dr. Badger, those charts on page 830 and 831 show a direct relationship, do they not, between—I know you are going to object, Mr. Condon—industrial stocks, as you say, and business activities; is that right?

A. Between industrial common stocks and business activity. It is quite important that the words "common stocks" be inserted.

Q. Doctor, would you say that there is any relationship between industrial common stocks and preferred stocks and bonds, in respect of their prices?

A. Not necessarily.

Q. Well, I asked you if you would say there is any. I don't think it is quite responsive.

A. It is impossible to make a generalization of this nature, because for the simple reason you have many different gradations in the quality of bonds, and you have many different gradations in the quality of preferred stocks. A low grade bond does tend to fluctuate with business conditions. Likewise, a low grade preferred stock will tend to fluctuate with business conditions. A high grade bond or a high grade stock fluctuates in accordance with money markets, and not in accordance with business conditions.

Q. I think I understand you. Now, will you just turn the page. That particular chart there is on a little different basis, as I understand it?

The Examiner: That is the chart on page 832, Mr. Tucker?

Mr. Tucker: That's right.

Mr. Condon: At this time I should like to request that the charts and page references which Mr. Tucker is employing and which are being examined by the witness be marked for identification as Preferred Stockholders' Exhibit 31 for identification.

The Examiner: All three of them?

Mr. Condon: I would like them marked, whatever the pages are here, 830, 831.

Ralph E. Badger—Cross Examination (Cont'd)

The Examiner: Let the chart on page 830 be marked Preferred Stockholders' Exhibit 31-A for identification, the one on page 831 31-B for identification and the one on page 832, 31-C for identification.

(Preferred Stockholders' Exhibits 31-A, B and C are marked for identification.)

By Mr. Tucker:

Q. Referring to the chart marked for identification as Preferred Stockholders' Exhibit 31-C, that is a little different from the other charts in that, as I understand it—you correct me if it isn't so—in this particular chart I guess you use, is it, production?

A. Federal Reserve Index of Industrial Production.

Q. Instead of what you called in the other charts, or what was referred to in the other charts as business activity; is that right?

A. Yes, sir.

Q. But it shows in the chart that we are now talking about—31-C, the same direct relationship, does it not, between the industrial common stocks, if that is with reference to that, and the production index?

A. It does—down to the year 1938. From the years 1938 on there is a substantial diversion in industrial production. From 1938 through the year 1940, which is covered by the charts, it advanced very substantially, whereas industrial common stock prices from the year 1938 down through 1940 either declined or remained stationary.

Q. Well, now, suppose you were to project that chart we are now talking about up to the present time. Would you think that perhaps there would be a harmony then between common stock industrials and production?

A. No, sir; there would have been a wide variation. The common stock prices declined down through May of 1942 whereas industrial production advanced very substantially during that period, from the 1940 level. So you

would have a continuation of the divergence at least through the middle of 1942. Then you would have had a period of possibly a year or a year and a half during which industrial stock prices advanced only slightly, whereas business activity was advancing very rapidly, and at the present time you would have a tendency for business activity to decline somewhat and industrial stock prices to advance very substantially.

Q. But your expert knowledge of such matters would lead you to the conclusion that that decline is not likely to last very long in production, wouldn't it?

A. Well, I wouldn't say that because the decline which I have reference to would be a decline from the war levels down to a peacetime basis. I am not referring at this juncture to a permanent decline of any substantial nature, but I think we would all agree that the state of business activity on a peace time basis would result in a lower level of industrial production than we experienced when Government expenditures were averaging $90,000,000,000 a year.

Q. Well, there is a lot of dammed-up deferred maintenance there is a lot of demand for gadgets that are dammed up, radios, and a lot of automobiles, and things dammed up?

A. That is true.

Q. And a multitude of things that you as an expert could tell me are, as soon as industry gets readjusted, going to come into the production area here, and will perhaps harmonize those two again, the stock prices and the production?

A. That is perfectly correct, and as far as one can prognosticate at the present time, business activity should remain at comparatively high levels for at least several years to come.

Q. Is it true, Doctor, that generally speaking—and you tell me the facts from your expert knowledge—that we perhaps without exception, after every war we have had what might be characterized, Oh, perhaps ten or fifteen years later, a deep depression?

Ralph E. Badger—Cross Examination (Cont'd)

A. That has been the experience in the past.

Q. Do you mean by saying that it has been the experience in the past, that it won't recur after this War?

A. I wouldn't make any generalizations as to what might or might not occur after this war for this reason: That after all prior wars the business expansion that took place, took place as the result of substantial increases in private borrowings in banks. The boom, so to speak, was financed by an increase in bank deposits, predicated by private borrowings, that is, borrowings of individuals and borrowings of corporations, and after the expansion had reached a certain point, contraction would step in, and a cycle of deflation would be started, as we proceeded toward the liquidation of those private debts.

The basis for the present coming expansion, if that is what we are going to have, is a vast increase in bank deposits and currency in circulation, all of which increase has been predicated upon Government borrowing, and you can trace very definitely the correlation between an increase in Federal debt and the increase in deposit currency and other currency in circulation.

Now, I asked myself, How are we going to ever deflate that type of bank credit? My answer is that only by a substantial reduction in the Federal debt, and it is my own observation—and I would state this here for the record, that I doubt that anybody in this room will ever live to see the day when there is any substantial reduction in our present Federal debt. Therefore, I do not look to see any substantial reduction in the present amount of deposit currency in circulation, and for that reason I say that it is impossible from an historical point of view to say that just because we had deflations after past wars, when private credit became contracted, that we are going to have a serious deflation after this war in the future, because I don't see how we are going substantially to curtail bank deposits through a reduction of Federal debt.

Q. Well, perhaps I don't understand too thoroughly what you say, but as a matter of fact, sooner or later, Doctor, the old economic laws of supply and demand with respect to capital are coming back into play in this country, aren't they—sooner or later?

A. Are you inferring by that that the laws of supply and demand aren't working at the present time?

Q. You can make your own inference about it, and I will ask you some further questions about it which I have in mind.

Mr. Condon: I would like to have the question, if there be a question, read to the witness.

(The record was read.)

Mr. Condon: I submit that answers that, and there is no question on the record for an answer by the witness.

Mr. Tucker: There is. He asked me a question, and I said he can make his own inferences, and now he can answer the first question.

The Witness: It is my opinion that the laws of supply and demand relative to capital have been operating in the past and will continue to operate in the future.

By Mr. Tucker:

Q. Subject, however, to certain Governmental controls that have been real substantial controls; is that true?

A. I don't know of any controls, any direct controls, that the Government has exercised over the capital markets. The Government unquestionably, through its various Federal Reserve Bank operations, has made conditions favorable to low money rates, but the Government has never stated that the rate of interest would be this or that. The Government has never restricted at any time during the war the rights of private corporations to enter the capital markets and to borrow. The Government itself has entered the capital markets and borrowed without any restriction, except technical restrictions in reference to subscriptions

to war bonds, to war loans, where certain types of borrowings have been limited in the amounts that they could buy of Government securities, but I would say, as far as direct controls are concerned, that the Government has not exercised any direct controls over the capital market.

Q. Well, I read about these open market purchases in the Federal Reserve System of Governments—doesn't that have the effect you are talking about?

A. That I would classify as an indirect means of influencing capital markets.

Q. In other words, they are pegging the Governments by open market purchases—you know what I mean by "pegging the markets?"

A. I don't quite understand your question, or the inference.

Q. I am not making an inference, I am asking you a question. If you don't understand what I meman by "pegging" I will try to explain, but I thought, as an expert, you would understand. Read the question.

(The question was read.)

The Witness: I didn't get that word "pegging". I thought you said "paying."

With that qualification, I would say that is correct.

By Mr. Tucker:

Q. Bankers do the same thing with respect to new issues, don't they? They peg at a certain price and they buy or sell to keep it at a certain price until the syndicating is over; right?

A. Investment bankers?

Q. Yes. They commonly do that, don't they, what they call "stabilizing?"

A. That is correct. In certain cases. They don't do it in all cases by any means. They do it in cases where they are distributing issues.

Q. That is what I said.

A. That is correct.

Q. Now, that introduces into your picture, doesn't it, a certain artificiality as to the price at which the security sells for in the market?

A. Are you referring to the operations of investment bankers, or to the operations of the Government?

Q. I am referring to both the operations of investment bankers and the Government.

A. I would say that was true, in reference to the operations of investment bankers, but I do not say that that was necessarily true in respect to the operations of the Federal Reserve Banks in the money market, because the operations of the Federal Reserve Banks definitely do increase the amount of available bank reserves, and as such make a fundamental change in the supply and demand equation that you referred to a short time ago, and as such bring about a natural situation that tends to maintain low interest rates.

Q. During the last war the total amount outstanding at the end of the war of Governments, as I remember, was approximately $24,000,000,000.

A. I think it was $26,500,000,000, to be exact.

Q. I accept your correction. I don't care about a couple of billions and a half. After this war we had Governments outstanding of what? $249,000,000,000, or something like that?

A. Approximately that figure.

Q. In the last war the Bonds that were issued by the Government in a series, if you will recall, declined in the market, didn't they?

A. They declined quite substantially.

Q. I am not holding you down to definite figures, but my recollection is that some of the Liberty Loans went as low as 70.

A. I would say the low point was nearer 80.

Q. Well, we will raise it 10 points, but it was very considerably under par?

A. That is correct.

Q. How did the Government meet that situation in the last war—by boosting the interest rate or the coupon rate?

A. In so far as the Government refinanced in an adverse money market, they had to increase the coupon rate on the bonds. The decline that you refer to down into the 80's, however, took place subsequent to the final War Loan in the last War, and the Government didn't do any financing that I recall at a time when the Liberty Bonds were down in the 80's. They did, however, in the latter part of the war, raise the coupon rate up to as high as 4¼ percent, as I recall it.

Q. 4¼ was the last Liberty Loan, is my next question to you. That is right, isn't it?

A. That is right.

Q. They started in around 3, perhaps?

A. 3 to 3½.

Q. And there weren't any open market purchases that I remember, at that time, were there?

A. No, the Federal Reserve System was introduced just prior to the commencement of World War I, and as between World War One and World War Two, very substantial changes have been made in the Federal Reserve System and in the operation of the system, but there were no open market operations at that time, as we now know them.

Q. And the Government had to go and pay the going concern rate for money in competition with others, although, as I recall, they did control to some extent, capital issues—had to show they were necessary, or something of that kind; that's right, isn't it?

A. Yes.

Q. My recollection is they were rather liberal in that policy with respect to capital issues?

A. I don't recall specifically what the controls were.

Q. Suppose that in this last war that we have just been through, Doctor, with instead of having $26,500,000,000 out-

standing, as we did after the last war, they had $249,000,000,000 outstanding——

* * * * *

[R., p. 1425] By Mr. Tucker:

Q. —and the $249,000,000,000 outstanding, and the Government hadn't exercised any of these artificial controls to peg the coupon rates, where do you think the large issue of Government bonds would have been selling?

Mr. Condon: I object to the question on the ground that it is confusing, that it confuses the wars and the form of the question is objectionable.

By Mr. Tucker:

Q. Let me ask the witness: Do you understand the question?

A. The question as it stands, to my mind, is confusing in this respect: It says "Suppose that after this last war we had had $249,000,000,000 outstanding instead of $26,500,000,000 and it seems to me that is what we do have outstanding after this last war—$249,000,000,000 or $250,000,000,000.

The Examiner: I think the trouble with it is you are referring to this last war, meaning the war of 1917-18, as the "last war" and the current war——

Mr. Tucker: World War Number Two.

By Mr. Tucker:

Q. At the end of World War Two you said, Doctor, that we have outstanding Governments of $250,000,000,000—let us not quarrel with a billion or so; small in percentage, isn't it?—and I am asking you, and it seems to me to be a rather simple question, that if the Federal Reserve System hadn't been conducting open market purchases, if the whole drive of the Government hadn't been to keep down interest rates, where do you think that Governments in the last issue would have gone, so far as coupon rate is concerned?

A. Well, that would be a difficult question to answer. For example, proportionately I believe Great Britain borrowed very substantial amounts of money, possibly on a proportionate basis as much as we have borrowed, and yet not having any Federal Reserve System there, but having a central bank, to be sure, they nevertheless had very low interest rates on all of that borrowing, paralleling our own low interest rates. If you are asking me what would have happened to interest rates in this last war if we had not had a central banking system my answer would be that I don't know. I couldn't state what would have happened to interest rates.

I doubt that would affect a system that the Government would have been able to borrow as much money as it had to. It may have elected to use other means to obtain the necessary capital to pursue the war.

Q. It couldn't have gotten much more in taxes——

Mr. Condon: Let the witness complete his answer.

The Witness: We would have entire changes in all of our conditions and all of our assumptions, and to go into speculation as to what might have happened or how the war might have been financed or pursued, or what would have happened to interest rates, it seems to me would be far beyond my ability to predict at this time. I could go on for hours and discuss various possibilities that may have arisen under those circumstances, but I don't believe it would be helpful.

The Examiner: Let us take a short recess.

(At this point a short recess was taken, after which the hearing was resumed.)

The Examiner: Let us come to order.

By Mr. Tucker:

Q. Do I understand, Dr. Badger, that you support the thesis that if the Government controls hadn't been work-

ing, bond yields and high grade preferred yields would be about the same as they are now?

The Examiner: Read that question, please.

(The question was read.)

The Witness: I don't recall that I made any such statement.

By Mr. Tucker:

Q. I am asking you if you support that thesis. I wasn't referring to anything that you said in the past. Do you now support that? Is that your position now?

A. I wouldn't attempt to state what bond prices would be or what the yields on high-grade preferred stocks would be under a different central banking system or in the absence of any central banking system. The controls that the Government is exercising at the present time are indirect controls that are being exercised through the Central Banking System. You are asking me what would happen to preferred stock prices, and bond yields in the absence of such a system. I would say that I couldn't answer that question without knowing what might be substituted in lieu thereof, or what other changes at the same time might be involved in your hypothetical question.

Q. Well, it is rather obvious, isn't it, doctor, that if the same lack of control which was exercised during World War I was exercised in World War II, those yields would be higher than they are now? I refer to the bond yields and the high grade preferred stock yields.

A. I think that is a reasonable assumption.

Q. Would you go so far as to say that they would be appreciably higher?

A. I believe so.

Q. But you don't think you are wise enough to tell me how much?

A. That is correct.

Ralph E. Badger—Cross Examination (Cont'd)

Q. You are familiar in general with Standard and Poor's indices, aren't you?

A. Yes, sir.

Q. Generally familiar?

A. Yes, sir.

Q. You must be, as an expert, aren't you?

A. Yes, sir.

Q. It is one of the things you have to keep up, don't you?

A. That is correct.

Q. I show you what purports to be—if you think it hasn't sufficient authority to be at all relied on, you can say so—a Standard and Poor Index with respect to high-grade preferred prices, as I understand it, or yields. I haven't asked you any question—I just show it to you and let you examine it. I will ask you a question in a minute.

A. Is there a question?

Q. No, there is no question yet. Have you examined this?

A. I have examined this, yes, sir.

Q. This chart purports to show, does it not, Doctor, price trends of high grade preferreds plotted on a yield basis; is that right?

A. That is what one of the charts purports to show.

Q. I refer particularly to this chart in the middle, Doctor?

A. Yes, sir.

The Examiner: May we have it identified?

Mr. Condon: May we have that identified specifically? I ask that it be marked Preferred Stockholders' Exhibit No. 32 for identification.

The Examiner: Let us have a description of it.

Mr. Tucker: I just described it in my question.

Mr. Condon: Mr. Tucker, would you mind stating what that index purports to show?

Mr. Tucker: That purports to give the price trends computed on a yield basis for the years 1942, 1943, 1944 and 1945.

The Examiner: Let it be marked.

(Preferred Stockholders' Exhibit No. 32 is marked for identification.)

By Mr. Tucker:

Q. Doctor, that shows for those years a very marked change in those prices, doesn't it?

A. It shows a constant advancement in prices, yes, sir.

Q. Well, it isn't constant, because there is a dip at the beginning, isn't there? There is a dip at the beginning of that chart, isn't there?

A. From the early part of '42, that is correct.

Q. There is a dip in the middle?

A. Yes, sir.

Q. And quite a marked dip in the middle of '42.

A. That is correct.

Q. This relates to high grade preferreds?

A. Yes, sir.

Q. Your report, Preferred Stockholders' Exhibit No. 29, says that Engineers Preferred is not a high grade preferred, doesn't it?

A. Says what?

Q. It is not a high grade preferred.

A. That is correct.

Q. Have you any reason to doubt the accuracy of that chart?

A. No, sir.

Q. It is the kind of thing you use constantly in your work as an expert in valuing securities?

A. Yes, sir. As a matter of fact, my own charts or my own series of data on page 6 indicates exactly the same situation. Yield for High Grade Preferred stocks for the year 1941 was 4.08, the average yield for the year 1942 was 4.31, and the yield for the year 1943 was 4.06. So you have a difference of approximately .23 in terms of yield as between 1941 and '42, and that is approximately the differ-

ence in yield as indicated, I believe, on the chart that you refer to in the year 1942.

Q. In the first year on this chart, 1942, the yield varies, doesn't it, from 4.25 to nearly 4.60; is that right?

* * * * *

[R. p. 1433]

The Witness: The yield varies from approximately 4.24 to approximately 4.55. That is by visual inspection. 4.24 to 4.55 would be my interpretation of it.

By Mr. Tucker:

Q. That is a considerable variation in one year for something that you characterize as of a permanent nature, isn't it?

A. I don't think that changes the implication of the paragraph in my report in which I referred to the permanency of the prices that I am using in connection with my appraisal here. I think my use of the word "permanency" in a connection of this kind should be possibly explained, as I explained it in my testimony yesterday. I was very careful in my testimony yesterday referring to this particular paragraph to say that in view of present circumstances and as far as one could reasonably predict these were permanent values. I wouldn't be so bold as to say that anything in our economic structure was permanent in the way that we regard the Rock of Ages as being permanent. It would be fatuous for me to make a statement of that kind. When I say that these prices are permanent and not speculative, I refer to them as being permanent as far as we can reasonably predict into the future at the moment, barring what you might call a holocaust such as World War III, barring some great critical movement that can't be forecast at the present time. I wouldn't get up here and say that any series of prices was permanent ad infinitum, but

Ralph E. Badger—Cross Examination (Cont'd)

I say they are to be regarded as permanent prices as contrasted with speculative movements in the market.

We have prices of securities sometimes running up for a few weeks and then coming down, because of a speculative movement or because of a manipulation in the market, or something of that nature. What I wanted to point out was that these values which I place on these stocks weren't just temporary, day-to-day values that might result from a speculative movement that had brought them up to some particular level which they wouldn't retain for any substantial period of time; they are permanent values one can reasonably predict into the future, values that probably will be maintained for a period possibly of three to five years, and in the absence of some possible worldwide event that we can't predict at the present time, I think, with that clarification, possibly we get a better diagnosis of the situation that you refer to.

In that particular chart the drop that you refer to there occurred in the first part of 1942 and that drop accompanied the decline in the military status of the Allied powers during the early part of 1942 following the attack on the United States by Japan in 1941, and was due to a set of circumstances that were entirely unusual and of, we hope, a non-recurring nature.

Q. Well, Dr. Badger, if you will read the paragraph on page 7, the second paragraph from the bottom, you don't make any qualification there such as you made in your testimony and now make, do you?

A. What paragraph did you refer to?

Q. The second paragraph from the bottom of page of preferred stock exhibit No. 29.

A. I didn't expand on my use of the word "permanent" in this report to the extent that I did in my testimony yesterday, and to the extent that I have at the present time, but in testifying in respect to this report yesterday I was very careful to explain that these values that I set were permanent as far as one can reasonably predict at the

present time and they were not to be regarded as of a temporary or speculative nature, and I will make that same qualification or explanation in reference to that paragraph at the present time, if you would like to have me.

Q. Don't you think you should fairly do it, if you make it in your testimony and you make it now?

A. I think that is correct.

Q. Well, just what would you like to add to that paragraph, the second paragraph from the bottom of page 7, to make it reflect what you now say it needs to reflect in order to be accurate?

Mr. Kanton: Off the record.

(Discussion off the record.)

The Witness: The values which I propose to place on the several classes of preferred stock of Engineers Public Service are, therefore, values of a permanent nature as far as one can reasonably predict at the present time and not values of a temporary or speculative nature.

By Mr. Tucker:

Q. And you now make that amendment to that paragraph, do you?

A. Yes, sir.

Q. Now how far can one reasonably predict the future, Doctor?

A. That depends on the nature of the matter that you are trying to predict. I think in a case of this kind, and I will always say barring something of an entirely unpredictable nature, such as a world war, that it is possible to predict somewhere between two and three years, up to five years.

Q. Now, in your private business, Doctor, if you know what I mean, if you don't, ask me, did you ever in your experience advise a client to buy a certain security and tell him that the money he put into it he should always

get back, as far as you could humanly predict, in your private busjness?

A. Yes, sir. I am doing that every day.

Q. You are telling them that, as far as can be humanly predicted, they can always get their money back?

A. That is correct.

Q. Just what they put into it?

A. That is correct.

Q. And what character——

A. As a matter of fact, I would go so fa——

Mr. Condon: Just let him finish, if you please.

The Witness (Continuing): —as to say that 90 per cent of the investments that I recommend, that they will get their money back, together with the rate of interest or the rate of return that they anticipate getting when they make the purchase of the security, and I couldn't operate on any other basis, and I invest for clients, and in the interests of clients, a great many millions of dollars a year on that same assumption, and I have done so for a great many years.

By Mr. Tucker:

Q. And you tell them that when you recommend a purchase?

A. That is right, yes sir. I don't say it in respect to every purchase, but I have always made that statement when I proceed to administer an account that that is the assumption and if there is any different idea on which an investment is recommended I would so state in making the recommendation.

Q. When did you last recommend the purchase of a medium grade preferred stock of a holding company, if you ever did that, and tell them that the investment that they make was of a permanent character, so far as one could humanly predict the future, and that they could, in your opinion, always get their money back?

Mr. Condon: I object to that question as being distinctly unfair. The Public Utility Holding Company Act with re-

spect to its impact on holding companies has a direct relationship to the preferred stocks of holding companies and the suggestion by this question that Dr. Badger could have advised his client with respect to that is absolutely baseless, unfounded and speculative.

Mr. Tucker: Let him answer. All he has to say is that he hasn't done it and it is over with.

Mr. Condon: I know that you want to be fair, Mr. Tucker.

The Examiner: I will overrule your objection, Mr. Condon. I think Mr. Badger is fully capable of answering that.

The Witness: I said in respect to 90 per cent of the investments that I made that I have made the statement, or the statement was understood between me and the client, that they would get their money back, together with the stated return. Ninety per cent of our business is with banks and banks, of course, are not permitted to buy preferred stocks and, therefore, the types of investment that I have recommended for the banks have been bonds and bonds of a character that gave reasonable assurance they were going to get their money back.

By Mr. Tucker:

Q. Well, now, you say reasonable assurance. There is a little different connotation, isn't there, Doctor, between reasonable assurance and so far as it is humanly possible to predict the future?

A. That certainly, as far as one could predict, they were going to get their money back.

Mr. Tucker: I submit, Doctor,—I won't ask to have it stricken, because it might add something to the record—that you haven't answered my question and I ask the reporter to read it back and then I would like to have you answer the question.

(The question is read, as follows:)

"Q. When did you last recommend the purchase of a medium grade preferred stock from a holding company, if you ever did that, and tell them that the investment that they make was of a permanent character, so far as one could humanly predict the future, and that they could, in your opinion, always get their money back?"

The Examiner: I think he answered the question indirectly, at least, Mr. Tucker, in that he advised you that he was representing banks who did not buy preferred stock and only bought bonds, from which I assumed he intended to say that he had never made any recommendations with reference to preferred stock.

Mr. Tucker: He didn't say it. He said that as to 90 per cent of his business he was advising banks and insurance companies. He left the inference that as to 10 per cent of his business he was advising other clients, and I asked him and I think I am entitled to an answer.

The Examiner: Will you answer the question directly, Mr. Badger?

The Witness: Well, I would say that I don't recall that I have ever recommended the investment of a medium grade preferred stock to a client, a medium grade public utility preferred stock to a client.

By Mr. Tucker:

Q. Why not, Doctor, if you think that you are capable of telling them that they can get their money back, so far as it is humanly possible to foresee the future? Why do you avoid that kind of an investment with your private clients, if it is of that type?

A. Because the clients that I advise are all banks or they are individuals with very substantial incomes, pay very high taxes, and require, as far as individuals are concerned, a tax exempt investment.

Q. But if you had a small client, who wasn't so concerned with his income tax, you wouldn't hesitate to recom-

mend a medium grade preferred stock with the same qualification, Doctor?

A. That is correct. I can think of several instances in which we have recommended preferred stocks, now that I look back. We were administering some small trust accounts for some of our banking clients and among preferred stocks that we recommended I believe was Consumers Power $4.50 preferred and also the $5 preferred. We were fairly heavy purchasers of that stock for these smaller accounts during the past few years, until the stocks got up to sell in excess of the call prices.

Within the last several years we have recommended the purchase, I believe, of Narragansett Electric preferred stock.

We have recommended, at certain levels, the purchase, I believe, of Columbia Gas & Electric preferred stock.

I don't recall of other stocks, but those are some of the stocks that we recommended at certain prices.

Q. Let's take Narragansett Electric. Do you recall what price you recommended its purchase at? Wasn't that one of the companies, Doctor, that you said you recommended the purchase of?

A. That is correct. My recollection is that that is a $50 par value, or at least it is either a $3 preferred or a $2.50, the coupon I forget at the moment, and I believe we recommended that at the time the stock came out at 52½ or 53.

These things happened several years ago. There have been many other transactions, and I can't be specific as to the date and price, but that is approximately the range.

Q. And do you recollect whether there was any reaction in the market after it came out?

A. My recollection is that the stock went up slightly after it came out.

Q. That sometimes happens, too, doesn't it?

A. Yes.

Ralph E. Badger—Cross Examination (Cont'd)

Q. Now, let's take your Columbia Gas & Electric. That was the other one, wasn't it?

A. Yes.

Q. Tell us the circumstances of that recommendation.

A. Yes. We recommended that stock, I believe, shortly after the change in tax rates, some time in the early '40s, when the stock was selling at comparatively low levels. I think the stock was down around 70 or 80 at the time we recommended that stock.

Q. And after you recommended it it never went below what you recommended it be purchased at?

A. I don't believe it did. My recollection is it started to go up.

Mr. Tucker: I may come back to that subject, Doctor.

I again show you your book, Doctor, and this time I will ask to have marked as Applicant's Exhibit for identification No. 72 the chart on page 851, and I hand that chart to you for examination.

(The document referred to is marked as Applicant's Exhibit No. 72 for identification.)

Mr. Condon: May I examine that for a moment, please?

Mr. Tucker: When you have examined it let me know, Doctor, and I will ask you the questions.

The Witness: All right.

By Mr. Tucker:

Q. Now, Doctor, the chart in your book at page 851, identified as Applicant's Exhibit No. 72, shows, does it not, the monthly high and low closing averages on a logarithmic scale of industrial stocks—you don't say they are common stocks, but I presume they are, is that right?

A. I would have to examine that a little more closely.

Q. Well, are they common stocks of industrials?

A. The chart on page 851 is the Dow-Jones Averages of Industrials for the years 1897 to 1941, inclusive, and it has the Dow-Jones index of public utility common stocks

for the years, well, either 1928 or 1929, down through 1940.

Q. And would you say, roughly, Doctor—I am not trying to be tricky or unfair—brother Condon thinks I am, but I am not—would you say roughly that the public utility stocks follow in general the industrial stocks on that table?

A. No, I would not.

Q. Well, you go ahead and describe what the table shows. It looks so to me, as a layman, but you describe it.

A. The public utility stocks did follow the industrials from the years 1928 or 1929 down through the years 1932. From then on the correlation did not continue, for the reason that from 1933 on the public utility industry became the subject of very serious and a very protracted political legislation and dispute, which eventually culminated in the passage of the Public Utility Act in 1935 and the impact of that Act I don't think was fully appreciated by investors at that time, with the result that for a long period of time, because of the attitude of the then existing administration, because of the disclosures that were made in various congressional investigations, because of the constant series of political attacks that were made on the industry, these securities remained under a cloud, with the result that when the recovery in industrials set in in 1933, 1934, utilities, although they did advance to some extent during that period, did not come up anywhere near to the relative levels that they sold at as compared with industrials in the earlier years.

Q. Now, will you turn, while you have the book there, Doctor, to page 348?

A. I have 348.

Q. Do you on that page say—and I will give you a little time to find it after I start reading it—do you say, "Investments in electric light and power operating companies as a class . . ." and then I will continue later when you

have found that expression, if it is on that page. Do you find it?

A. "Investments in electric light and power operating companies as a class . . . ", yes.

Q. Go ahead and read the rest of the sentence, please.

A. Do you wish me to read it?

Q. Yes.

A. " . . . warrant a high rating at the present time (1941) in view of their depression record, although they are currently threatened by inflation and hostile political activity."

Do you wish to me to continue?

Q. Yes. That is far enough, unless you want to continue.

Mr. Condon: Does that portion you have read reflect the sense of the entire context, Dr. Badger? If it does not, would you continue and read the entire paragraph?

The Witness: I believe that contains it.

Mr. Condon: Thank you.

By Mr. Tucker:

Q. Now, Engineers Public Service Company at the present time has three electric light and power operating companies, hasn't it?

A. Yes, sir.

Q. And you have made your valuation, I take it, on the assumption that they will continue to control those three companies, as a holding company?

A. Well, I made a supporting valuation also on the assumption that they could eliminate two of those operating companies through certain operations and that would not affect the values.

Q. But you did make your value primarily, I take it, on the basis of the continued existence of these three operating companies in the holding company system, that is fair, isn't it?

A. Yes.

Ralph E. Badger—Cross Examination (Cont'd)

Q. Now, in 1942 was Engineers subject to threatened inflation and hostile political activities which you mentioned?

A. To the same extent that other holding companies operating electric light and power operating companies.

Q. Are you through?

A. Yes, sir.

Q. And would you say that at the present time the Engineers securities are threatened by possible inflation?

A. To the same extent any other electric light and power company is.

Q. Well, is any electric light and power company at the present time threatened with possible inflation?

A. I believe there is a possible inflationary threat to the utility industry, which threat, of course, is contained in the time lag that might exist between the ability of companies through their regulatory bodies to get price rises concomitant with advances in operating costs that might develop through inflation. That is the sense in which a utility company is threatened by inflation. Inflation doesn't threaten to wipe them out, or anything like that. It simply might threaten for brief periods of time to effect some reduction in their operating profits because of that time lag.

Q. Well, you say brief periods of time. Did you ever try to get the rates of a public utility raised?

A. Well, I have never been an attorney representing a utility company and, therefore, I have never attempted to get a regulatory body to advance rates.

Q. Did you ever have any occasion to consider that particular problem as an expert in security valuations?

A. Yes, sir. We are continuously confronted with that problem.

Q. And do you go on the supposition in making your values that in a fairly brief period of time a public utility operating company can get its rates raised?

A. We have gone on the assumption that the various regulatory bodies would follow the laws in respect to the

granting of rate increases to the point of protecting the integrity of investments in the company.

Q. How long a period of time do you think it takes to get the protection of laws?

A. Well; I think that would vary with the regulatory body.

Q. And the courts?

A. And the courts.

Q. And the length of time it takes to get a case from the regulatory body to the courts and then perhaps the Supreme Court of the United States, to your ultimate protector, so to speak?

A. Where it has to be carried that far——

Q. Well, there have been plenty of cases involving rates that have been carried that far, haven't there?

A. Yes, and there have been many cases that have never gone before the Supreme Court.

Q. That is true, too, but how long a period of time on the average do you think it would take to go through that mill to the Supreme Court of the United States, where your ultimate protection might lie?

A. Well, that might require a period of several years to go up to the Supreme Court, if that became necessary, I would assume.

Q. And meantime if you had a serious inflation, that would result in increased, or might result in increased wages that you had to pay?

A. That is true, but, on the other hand, you might find during that period a substantial increase in business activity which might permit the company to absorb the impact of inflation during that period. In other words, usually periods of inflation are accompanied by increases in business activity and increased business activity results in heavier demands on electric and power companies, all of which might tend to offset during that period the temporary impact of inflation. That is a possibility. I mean, there

are a great many factors that you have to take into consideration.

Q. And it might result in very material increases of prices in all of the supplies that an operating utility company might have to have, fuel, steel, copper, and all of those things?

A. Well, any period of inflation would result in advances in these commodities, yes sir.

Q. Have you ever had occasion to consider, in the kind of a situation we have been talking about, what the effect of Government competition is on the raising of rates?

A. You mean the competition of other utility companies operating within the same area and furnishing the same type of service?

Q. No. I said Government competition, competition either by state bodies or the Federal Government.

A. Yes sir, we have had occasion to consider that.

Q. And what effect did you find that that kind of competition had on your ability to raise rates?

A. Well, in certain cases it has resulted in the sale of some of the operating properties to the municipality. In other cases it has resulted in possibly a maintenance of a given rate structure, or the lowering of a rate structure. I mean, the results have varied depending upon the particular circumstances.

Q. Well, isn't it true that if you have a competitive situation in the electric light and power field that you are unable, for economic reasons, to go to your Commission and the courts for any relief on your rate structure, isn't that true?

A. Well, naturally if you had two competing companies operating in the same territory and supplying the same types of service, competition would be the regulator of rates and not the regulatory body, but one of the peculiar characteristics of the utility industry is the fact that it is classified as a public necessity, that as a rule you can not operate economically two or more systems in a given com-

munity, with the result that it is a natural monopoly, and being an industry clothed with a public necessity and being a natural monopoly it has become necessary to develop and apply the theory of public regulation in respect to the operations of these companies. Now, generally speaking, public utility operating companies, electric light and power companies, enjoy monopolies in the territories that they are serving, and we go on the assumption that they are monopolies, unless we find out, as the result of our studies, that a contrary situation prevails.

Mr. Kanton: May I ask a question?

Mr. Tucker: Go ahead.

By Mr. Kanton:

Q. Isn't it also true that there would be competition in a given area between a gas utility and an electric utility? Have you come across that in any of your studies, Dr. Badger?

A. Not to any appreciable extent. There is naturally some competition between gas and electric light and power, but that is restricted now to only certain types of uses, but I would say that generally speaking each type of utility had its own types of demand which it serves without serious competition, except within a fairly small range of users, let me put it that way.

Q. Do your mean space heating for one?

A. Space heating or cooking, but generally speaking, for all power purposes and for all lighting purposes we find that electricity is the more economical. For certain industrial uses, for space heating and for cooking——

Q. There is competition?

A. (Continuing)—there is competition.

Well, there is no competition, as I see it, in the space heating as between electricity and gas, if I understand space heating to mean the heating of buildings, and so forth.

Q. Heating of buildings and homes.

A. I would say there is no competition there between electricity and gas.

Q. If I understand it, I have had it brought to my attention that there is some competition expected in the immediate future between gas and electric, competition in acquiring the rights to heat homes?

A. Possibly the electric industry is going to develop a rate structure or a type of heating unit that could be economically utilized for space heating, but up to the moment the cost has been all in favor of the gas company and I don't think the utility companies have relied much upon that type of demand. That has been my experience.

Q. Well, in those two limited fields that you have just mentioned, where there is competition, to that extent, or to some extent, that takes the place of the regulatory authority in the particular neighborhood where both the gas and the electric utilities are operating, is that correct, Dr. Badger?

A. It would, and it would, of course, not affect the entire rate structure, but it would only apply to the rates applicable to current that might be devoted to those specific uses.

Mr. Kanton: Thank you.

By Mr. Tucker:

Q. Doctor, there are situations in this country where we have competition in particular areas or threatened competition, are there not?

A. There are areas where the Government has consummated the development of hydroelectric projects and in the areas served by those developments there has been competition with private utility companies.

Q. Yes, and would your experience lead you to believe that that threat of competition extends outside of the particular area in which the Government serves?

A. Not to any appreciable extent; that is, not that type of competition.

Q. Well, I don't see what you mean by your answer, but let me ask you some further questions.

A. I refer to the competition of electric power that has been developed through these Government propects. There is an area in which that can be distributed economically and there is a geographical area beyond which that current can not be supplied economically, so that I don't think the competition from these Government projects is felt beyond, you might say, the area in which that current can be distributed economically.

Q. Have you given some thought to the patricular problem or are you more or less extemporizing?

A. I beg your pardon?

Q. Have you given some thought to that particular problem, or are you in that answer more or less extemporizing?

A. Do we give thought to it?

Q. I say, have you given thought to it?

A. Indeed, yes sir.

Q. Isn't it true that around the area of TVA's operations the people in those areas are conscious of what they feel are advantages that they can gain from Government operation?

A. Yes, sir.

Q. Because of the fact that the Government pays no taxes, has multiple service involved and can allocate costs more or less arbitrarily, and all that kind of thing. Now, they see certain advantages arising from those economic factors, don't they?

A. Yes, sir.

Q. Outside of that area?

A. Yes.

Q. And they are conscious of that fact, aren't they?

A. Yes, sir.

Q. And don't you think that that leads to a threat of competition in these other areas?

A. Not so much a threat of competition as a threat of political pressure against these other companies, possibly to bring rates into conformity with rates within the areas.

Ralph E. Badger—Cross Examination (Cont'd)

Q. Well, in the face of that kind of a situation that I have described, do you think a company in the outside area would ask for an increase in its rates?

A. Do I think it would ask for an increase in its rates?

Q. Yes.

A. Under the impact of inflation?

Q. Yes.

A. If it felt that it was entitled to it, I believe it would, yes sir.

Q. And run the risk of stirring up Government competition in that area?

A. It wouldn't necessarily run the risk of stirring up Government competition in that area. There might be no facilities for developing Government projects within the area. The Government isn't just going to go into every area in the country and start a steam plant. It isn't going to undertake a small hydroelectric development within every area. It has confined its activities primarily to navigable rivers and where there are other projects combined with the utility development that made it a logical project for the Government to undertake.

Q. Well, you say the Government isn't going to do it. Don't you think that a gentleman by the name of Ickes has something like that thing in mind, even to the development of steam plants?

(At this point there followed a discussion which by order of the Trial Examiner was physically stricken from the record.)

The Witness: I would like to make one slight change in my answer.

By Mr. Tucker:

Q. Yes, you may do so.

A. I believe I made the categorical statement that the Government would not do this. I should change that to

read that the Government in my opinion would be unlikely to, if I can make that change.

Q. Now, you have read the record in this case rather thoroughly, haven't you?

A. I beg your pardon?

Q. You read the transcript of testimony in this case rather thoroughly?

A. Yes, sir.

Q. Do you recall——

Mr. Condon: Just a second. I don't think Mr. Badger got the question. Would you please the question?

The Examiner: He asked you if you read the entire record in this case.

The Witness: No, sir. I have not read the entire record.

By Mr. Tucker:

Q. Did you read those portions of the record which had to do with testimony by Mr. Barnes, the president of Engineers, as to threatened or probable Government competition?

A. I read certain parts of his testimony in which he referred to that. If it would be proper for me to refer to his prepared testimony, I could find that much more readily than I could the testimony as actually given in the record, and I assume there is no substantial change between his prepared testimony and the record.

Mr. Tucker: Mr. Barnes informs me, Mr. Badger, that that was not in his prepared testimony, that that was brought out on cross-examination either by Mr. Scheetz, Mr. Condon, or Mr. Kanton.

Mr. Condon: Let's look at the prepared testimony first, if you don't mind.

Off the record.

(Discussion off the record.)

The Witness: The part that I read appears on pages 219 and 220 of the record in this case.

Ralph E. Badger—Cross Examination (Cont'd)

By Mr. Tucker:

Q. And what, in general, had that to do with, Dr. Badger?

A. It had to do with competition of federal projects.

Q. You say it had to do with competition of federal projects?

A. Yes, sir.

Q. In very general language?

A. I thought it was rather specific.

Q. And you weren't aware of the fact that in respect of his cross-examination he took up specific projects of the Government and detailed them one after another?

A. I didn't read the cross-examination and I am not familiar with what developed on cross-examination,

Q. And you made your valuations of your preferred stock in this case without reference to the testimony given in this case by Mr. Barnes in detail in connection with Government competition, is that true, Doctor?

A. In so far as testimony on cross-examination varied from his direct testimony. If there was any change developed on cross-examination that was not contained or implied in the direct examination, and to the extent that such a change exists I did not give consideration to it.

* * * * *

[R. p. 1459] By Mr. Tucker:

Q. Dr. Badger, did I understand you correctly this morning to tell me that you saw some signs in present conditions of the possibility of inflation?

A. I believe I said that there were factors in the economic structure today which might, conceivably lead to inflation.

Q. Inflation has some effect, does it not, on high grade bond and preferred stock prices?

A. On prices?

Q. Yes. Well, indirectly.

A. Not necessarily.

Q. Well, will you explain what you mean by "not necessarily"?

A. I will be very glad to. I think that we would all agree at the moment that we did have the threat of inflation, and I think we would agree that up to date there has been some modest inflation in wages and prices. It used to be the general idea of economists that as one approached an era of inflation, or as one progressed into an era of inflation, that high grade bond prices and high grade preferred stock prices would drop and the yields thereon would advance, but the entire experience of our economy under its present set-up is counter to that point of view.

For example, in the face of this inflation and with such inflation as we have already had, we have had right down to the present time a consistent advance in bond prices and in the prices of high grade preferred stocks with a concurrent reduction in the yield thereof, so that that correlation that was economic doctrine five or ten years ago finally has got to undergo a change.

I believe that we would find high grade preferred stock prices and bond prices today to be governed over considerable periods of time by funds available for investment, funds seeking an investment, and the supply of available securities on the other hand, and that, I think accounts for the fact that high grade bond prices and preferred stock prices today are going right on into higher levels with a concomitant reduction in yield, whereas you might argue on the basis of previously accepted doctrine that we should have a decline. We haven't had decline, we have had a continuous advance.

Q. Isn't that because of an economic lag in the situation, perhaps?

A. I don't think so. I think it is due to relations between the supply of investable funds on the one hand and the

supply of available investment opportunities on the other hand.

Q. Doctor, have you changed your opinion in this respect since you wrote your book?

A. Yes, I have been changing my opinion in that respect quite definitely during,—well I would say the past five years. I think that you will find some change in that particular phase of general economic theories.

Q. This book came out in the third edition—that is, three years ago, isn't it?

A. Yes.

Whereas it may have been printed in '42, it probably was written in parts of '41 and '42.

Q. In any event you don't recollect that you developed the theory that you just expounded in your book, do you?

A. No, sir; I am quite sure that I did not.

Q. Well, there is one thing that is rather basic in economics, isn't there, and that is that you by and large find it difficult to change human nature?

A. That is true.

Q. In a period of rising prices, doctor, when an individual has a fixed income security, he gets into a somewhat embarrassing situation, doesn't he?

A. I wouldn't agree with you that he got into an embarrassing situation, necessarily. As I interpret the word "embarrassing" I would say that the holders of fixed income bearing securities, as well as the owners of life insurance policies, as well as the owners of deposits in banks, as well as the owners of dollar bills in his or her pockets—any such owner becomes affected by a decline in the purchasing power of, let us say, his money, or his money as represented by these other types of securities. That does not mean, however, that the dollar price of those securities declines also. His purchasing power may decline, but the dollar price of the security isn't required to decline also, because the dollar bills that he had in his pocket declined in purchasing power, and he still may receive $100 for his

bonds and his par for his bonds, he may receive his interest as stated, and the market price of his bond can continue to remain at 100, but he is nevertheless injured, because the $100 that he gets from his bond will only purchase 75 percent of the quantities of goods that those same dollar bills would previously purchase, or 50 percent of the amount which could previously be purchased, depending upon the advance in prices, depending on the degree to which the inflation occurs. It is a common error to feel that inflation per se is going to restroy market values of fixed income bearing securities. A dollar bill is always worth a dollar bill. A $100 short-term Government Bond is aways worth $100. That isn't the question.

The question is what will the $100 buy in the way of goods? That is why the holders of fixed income bearing securities, as well as the owners of these other types of securities and evidences of debt or money are affected by rising prices and are, to use your term, embarrassed.

Q. Human nature being what it is, it is true, isn't it, that a man who sees his purchasing power fading away because of the fixed interest or dividend nature of his securities, certainly has an urge to increase his income; isn't that true?

A. He may have an urge to, but he may have an inability to do it.

Q. Well, let's see about the inability. Are stocks at the moment on somewhat the same comparative yield basis —I may not be using technical terms; I hope you see what I mean—as bonds and high grade preferreds? Isn't there an advantage to a man that has a fixed income bond or a fixed income high yield preferred stock at the present time to get some common stocks with this money and get a larger return that he could from the bonds and preferred stocks?

A. In cases, that may be perfectly true.

Q. That would at least have a tendency, wouldn't it, to lower the price of the bonds and raise the yield of the bonds and the preferred stocks? A tendency, I say.

A. There might be other factors that would far outweigh that. That factor in itself, and even alone, if that were the only factor in a complex economic structure such as we have, if that were the only factor that was in operation, that might be sure to depress the prices of fixed income bearing securities, but it is perfectly evident, without going into any theoretical demonstration, we can prove empirically there must be other factors far outweighing that because of the fact, as I say, common stock prices are advancing, indicating that people are desirous of purchasing them, but preferred stock prices and high grade bonds are advancing pari passu?

Q. Yes and I suggest with respect to that, that there might be a lag in there. You don't have to answer that question. It is just a statement to clarify my next question. Isn't it true, Doctor, that our experience with other inflationary periods—and we have had some of them, haven't we? Isn't it true that our experience with those periods has been that our bond yields have risen and bond prices have fallen?

A. That is true—and with very much less in the way of a time lag than you are supposing to exist in the present case. But, as I have previously stated, there are fundamental differences in our entire banking structure today than existed in those past times, and we have forces today which may, for a very considerable period of time, maintain bond prices at much higher levels than they would otherwise be. They may maintain lower interest rates than we would have under different circumstances.

As I have tried to point out in my study here, I believe that this level of interest rates—and again I use the term "permanent" with the same qualifications that I did, namely, as far as one can reasonably predict—I believe that interest rates are going to remain at these levels. And I might even suggest the possibility of interest rates going to lower levels than we are experiencing at the present time. I believe one of the concerns of the Federal Reserve

authorities today centers around the question, not of supporting interest rates at these levels, but to prevent them from going still lower.

Q. How recently have you been in touch with any officers of the Federal Reserve System? I notice you refer to that as "Bank." I was quite severely criticized just a few weeks ago by referring to it as a bank. They said it is not a bank, it is a system—but never mind.

A. I believe I used the plural "banks."

Q. Then you mean the member banks?

A. No. There are twelve Federal Reserve Banks, on top of that is the Board of Governors. So, when I speak of the Federal Reserve banks, I refer to the system in the aggregate and ramifications thereof.

Q. Now, I asked you how recently you have been in touch with them down there, as to what their policies and feeling are with respect to the subject of inflation.

A. The only way that I have been in touch with the officials of the Federal Reserve System is through their publications, such, for example, as the Federal Reserve Bulletin which is published monthly.

Q. Does that indicate some fear on the part of the officials of the system that we may get inflation more or less runaway?

A. I believe their publications would indicate that—I can say this on the basis of my interpretation—that they are concerned with the possibility of inflation.

Q. Would you say that they also indicated there is some concern as to whether or not they are going to be able to control it?

A. I don't know that they recognized any inability on their part to control it. They recognize its possibilities, and I think they are concerned with devising, in so far as possible, means to anticipate and to control it. As to whether they feel that they can control it or not, I wouldn't want to say.

Q. I don't want to go into a discussion with you of the labor policy that the Government is pursuing, and its effect on prices, but you wouldn't say it was beyond the realm of even probabilities that we are going to have very substantial rising in prices because of the labor disputes and their settlements, would you?

A. You are projecting me into a highly controversial matter when you ask that question.

. . . . . .

[R. p. 1469] By Mr. Tucker:

Q. Doctor, it seems to me that in 1927 and in 1928 I heard some economists and investment advisers saying that we were on a new investment plateau and we were in a new era. You know some economists and investment advisers who took that position, don't you?

A. I think that there were beliefs held to the effect that we may have attained some sort of a new era. I would hesitate to interpret their thoughts in the matter, but the phrase was used, at least—let us put it that way.

Q. That general philosophy cost a lot of people a lot of money, didn't it?

A. Well, I don't know whether it was that philosophy that cost them the money or the fact that human nature doesn't change, costing them money.

Q. You would resent any suggestion on my part, I am sure, that perhaps you are aligning yourself up a little bit in this present situation with that school of thought, in this permanency of the prices, yields, and that kind of thing?

A. Well, I will state that such an inference, to my mind, was an improper inference. Of course, naturally, I wouldn't be in a position to take offense at any interpretation that you might place on my report, but I think I would be within my rights to state that I disagreed most heartily with the inference.

. . . . . .

Ralph E. Badger—Cross Examination (Cont'd)

[R. p. 1471] By Mr. Tucker:

Q. It is true, isn't it, that inflation invites expansion of business and in due time increases the demand for capital, isn't it?

A. Increases the demand for capital or decreases?

Q. Increases.

A. Increases—yes, sir; that would be true.

Q. As a result of that situation, when that inflation comes, if it comes—and you say you see some signs of it—that demand will cause investors to require and secure higher yields, won't it?

A. Well, the same situation would apply there as would apply to these previous cases where you are trying to isolate one influence out of a complex structure.

For example, at the present time and as a result of the prosecution of the war, a substantial, a very substantial addition to our permanent capital of this country has already been made in the way of substantial additions to our supply of machine tools.

Substantial additional factory floor areas have been created throughout the country and the supply of fixed capital in this country has already been very greatly increased as the result of the war activity.

I would say that you could have a substantial degree of increase in productive activity without increasing your fixed plant any from this level, but merely to arrive at a point where you were utilizing that plant at 100 percent capacity.

I just cite that to show how misleading it is to take one factor and hold that up as having a possible relationship to another factor in our economy. You have got to take all factors into consideration; as an isolated factor, the steps, (1) inflation, (2) an increase in productive activity resulting therefrom, would, in itself, be a factor increasing the demand for capital and tending to increase interest rates. But, as the situation stands today, we have released as a result of the cessation of war, subtantial quantities of fixed

capital that we hope to employ in this so-called era of inflation that is coming. We have substantial Government surpluses the Government is trying to dispose of, and we have a very substantial addition to our fund of investment capital through the increase in bank deposits, and so forth, all of which would tend to cause interest rates to remain low, or to go lower.

So that a diagnosis of the situation for the next several years, to me at least indicates a continuation of low interest rates or possibly a further decline of interest rates.

Q. Would you turn, please, Doctor, to page 11 of Preferred Stockholders' Exhibit No. 29. In the table on that page you have undertaken, have you not, to compute for the years 1942, 1943 and 1944 as applied to Engineers Public Service Company, the book equity, book value equity, per share, for the preferred stocks?

A. Yes, sir.

Q. Now, I notice that you have included in the assets in arriving at these ratios—is that the proper term to apply to them, Doctor?

A. Yes, sir.

Q. —for each of these years, an item called "Reserves," $14,352,830.47 for 1942, $4,350,470.62 for 1943; and $4,394,705.20 for 1944; is that correct?

A. That is correct.

Q. Can you tell us what these reserves are, and what the justification is for including them as assets for the purpose of determining this ratio?

A. They are reserves for depreciation in the value of investments of subsidiaries. Until such time as the actual investments in subsidiaries is decreased on the books of the company, this would be a proprietorship item in respect to whatever book value did exist on the asset side of the balance sheet.

Q. Were you struck by the fact, Doctor, that there is a drop in the reserves between 1942 and 1943 of approximately $10,000,000?

A. I noticed that.

Ralph E. Badger—Cross Examination (Cont'd)

Q. Did you make any inquiries to find out what this was caused by?

A. My recollection is that it was caused by the elimination of the Puget Sound from the system as between those two years, or at least a substantial part of it was thus occasioned.

Q. That means, does it not, to use the laymen's language, and not an accountant's language or an expert's language, that you have included in computing the book value equity per share for the preferred for 1942 a reserve that was set up to cover the loss which had previously been recognized as having been incurred?

A. Well, of course, any reserve against possible decline in the value of assets is a reserve to take care of such possible decline.

At the time Puget Sound Power & Light was eliminated from the system, the entire composite balance sheet was changed. The assets or investments on the asset side of the balance sheet were eliminated from the consolidated statement and all liabilities and all reserves in connection therewith were eliminated, and whatever cash or securities may have been received by Engineers as a result of the disposition would appear in the 1943 statement.

Q. Yes, I know, but when you made up the statement for 1943, you then say you were struck by the fact that there had been a decrease in that item of $10,000,000. Did that indicate to your mind that there wasn't much of a substantial value in the reserve for $14,000,000-odd that you set up in the 1942 column?

A. Well, that series of computations there is predicated exactly upon the statements as they were published by Engineers Public Service. I didn't attempt to change any of the captions or any of the figures. I made certain rearrangements, but the balance sheet is exactly what it purports to be and it is predicated upon the books of the Company. The computation that I made in respect to page 13 is a somewhat different statement, because there I took the aggregate

reconstructed market value of these subsidiary stocks, without any relation to their book values, and substituted those values, in lieu of the book or carrying values of the system. So that that would be my interpretation of the coverage of the preferred stock on the basis of estimated or appraised market values.

The statements on page 11 do not involve any construction of values on my part but are taken directly from the books of the Company and the computations set up and fully set forth.

Q. I understand, Doctor, but you are an expert in these matters.

A. I don't purport to interpret anything on page 11.

Q. You arrive at a result, don't you, Doctor?

A. Well, I arrived at a mathematical computation.

Q. I understand. I am talking about whether, as an expert you shouldn't have recognized that perhaps that mathematical computation of the book value of equity per share of preferred of $225.65 for the year 1942 was in view of the inclusion of that $14,000,000-odd item for reserve, a misleading calculation?

A. I fail to see why it is a misleading calculation. It is perfectly obvious in that value there is $14,000,000 of reserves, and as to whether at that time and over a period of years that full loss was going to be taken or was not going to be taken is a question for subsequent determination. The Company was carrying its assets on the books at a given figure, and if they set up reserves against those assets, the only alternative I had was to put the reserves in where I put them and to proceed with the computation.

Do you think that is really a fair statement of the situation, Doctor? You must have known as an expert in these matters, that that reserve wouldn't have been set up if the loss hadn't been recognized as having been previously incurred whether it was a closed item, or whether it wasn't a closed item, isn't that true?

A. Not from the accounts, the way they were stated. I can cite many instances of where corporations write up substantial reserves against possible inventory depreciation, reserves against contingent losses, reserves for post-war development, and so on *an infinitum*, and where such reserves are never used, but are eventually thrown back into surplus.

Q. You could have made an investigation, couldn't you, Doctor, to determine the nature of that reserve if you wanted to—right?

A. That was the way the books were stated. That is the way I stated it here.

Q. I repeat the question and I would like you to answer it, Doctor.

Mr. Tucker: Let me have the question again.

(The question was read.)

The Witness: Well, I did make an investigation as to the nature of the reserve, and I stated here exactly what the reserve is. It is a reserve to provide—let me use the exact wording of the company here—that is the reserve for depreciation in value of investments in subsidiaries, less certain deductions explained in Note K.

Mr. Kanton: You are reading from what report, Doctor.

The Witness: That is reading from Applicant's Exhibit 37-J, page 19, and Note K appears on page 22.

By Mr. Tucker:

Q. Are you through, Doctor?

Mr. Condon: He hasn't finished reading the note yet.

Mr. Tucker: I asked him if he was through. Can't I even do that?

The Witness: Do you want me to read the entire note?

By Mr. Tucker:

Q. I don't want you to—I asked if you were through answering the question.

Ralph E. Badger—Cross Examination (Cont'd)

A. Yes.

Q. At the time you prepared this table on page 11, you knew the facts that you have just stated, Doctor?

A. Yes, sir.

Q. Where on page 11, or in language subsequent to that, do you, if at all, describe what those reserves are?

A. No further explanation is given of them other than to say they are reserves.

Q. Why, if you include those reserve, Doctor, didn't you on the basis of the logic that you applied in including these reserves, also include the reserve for depreciation?

A. Because the reserves for depreciation are a series of reserves built up as an offset to the plant account, fixed assets of the property, and charged annually to earnings.

Q. To offset losses?

A. No, sir; to offset what is recognized as an annual depreciation in the value of the fixed assets.

Q. I don't care to go into a long dissertation on the nature of depreciation reserves, but isn't it generally for the loss-in-service value incurred during the particular year?

Mr. Condon: Mr. Examiner, aren't we getting into another discussion here that is getting a little off the beam? I feel that if we are going to get involved into a controversy on what theories of depreciation are going to be or should have been applied, or matters of that character, that we are getting outside the fair scope of cross-examination.

The Examiner: I still think, Mr. Condon, Mr. Tucker has a right to go into the basis that the expert used for his opinion.

The Witness: I don't think I would quarrel with you about a refined definition of depreciation reserve. I stated that it was because of a loss in, a constant annual loss, value of fixed assets ensuing from the use of those assets. Now, you stated that it is a loss in the service value of those assets. I wouldn't quarrel with you on a definition as to

the nature of depreciation reserves. I think fundamentally we mean the same thing.

By Mr. Tucker:

Q. But, generally speaking, it is a loss of the same character as this reserve, isn't it? It is a loss?

A. It is a depreciation in value that is incurred from the normal use of the property over a period of years, and not restored through maintenance.

Q. These reserves represented a loss that may have been incurred over a period of years. I suppose it may have been well the decline value?

Mr. Condon: May I ask Mr. Tucker what reserves? Depreciation or the reserves referred to on page 11 of the report?

Mr. Tucker: I am talking about both of them.

Mr. Condon: I think then he ought to, in fairness to the witness, be more precise in his language, because in each case the word "reserves" is used. If he is going to use the word "reserves" I think he should be made to specify whether he is talking about the depreciation reserve or the reserves as testified to by Dr. Badger and referred to in page 11 of his report, so that there would not be any confusion in the record.

Mr. Tucker: As long as I don't confuse the witness, he can take care of himself on his answers.

By Mr. Tucker:

Q. Are you confused?

A. I don't believe I am; no, sir.

The Examiner: Proceed with your examination, Mr. Tucker.

Mr. Tucker: Thank you, sir.

The Witness: That is, I am not at this point. I have been at other points.

Mr. Condon: But for different reasons.

Ralph E. Badger—Cross Examination (Cont'd)

The Witness: These reserves, it seems to me, are not similar to reserves for depreciation, and the full explanation of the $14,362,000 item is contained on page 22 of Exhibit 37-J. We are now describing the depreciation reserves,—not the depreciation reserves, the reserves for depreciation in the value of investments in subsidiaries, which is the $14,352,000.

By Mr. Tucker:

Q. Doctor, you were preparing this report for filing with the Securities and Exchange Commission, weren't you?

A. Yes, si

Q. Are you familiar with the method by which the Securities and Exchange Commission determines these equity ratios that you have got at the bottom of this tabulation on page 11?

A. No, sir.

Q. You told me yesterday, if I recollect, that you had read a lot of releases issued by the SEC. Did you find in those releases some determinations of such equities per share of preferred?

A. I have no doubt that there were such, but I think you will appreciate that I can't recall at the moment the specific locations of those computations, nor would I be prepared at the moment to say that I was familiar with the specific methods which were used in each case.

Q. Your ratios at the bottom of that tabulation—I am referring to the tabulation on page 11—are described as book value equity per share preferred, aren't they?

A. Yes, sir.

Q. What they are in reality is gross book value equity per share preferred, is that a fact?

A. No, sir.

Q. Let's see about that.

A. They would be net value after depreciation reserves but gross before other reserves.

Well, accepting your correction, do you consider that one of the factors which should be taken into consideration in valuing preferred stock to be the net book worth of that preferred stock, and by net book worth I mean the determination arrived at by taking the total assets of the company as shown by the balance sheet and deducting intangibles such as 100.5 and 107 accounts, and deducting liabilities of the system ranking prior to the preferred stock, such as long-term debt, current liabilities, subsidiary preferreds and reserves?

A. May I have that question read? It is rather long.

(The question is read.)

The Witness: Would you define those numerical accounts for me?

By Mr. Tucker:

Q. Are you not familiar, Doctor, with the Uniform System of Accounts of Public Utilities?

A. I believe they are depreciation reserves. I would like to have that verified.

Q. I am asking you a question now. Are you familiar with the Uniform System of Accounts set up by the Federal Power Commission for public utilities?

A. Not to the point of recalling the specific designations that go with those numerals.

Q. Explaining to you then, 100.5 in the Federal Power Commission classification is an account known as "Utility Plant Acquisition Adjustment" and 107 is "Utility Plant Adjustments." I think perhaps 107 would be broadly characterized as write-ups and 100.5 perhaps would be broadly characterized as something the company paid for, assets in excess of original cost. Does that give you some idea of what those things are?

A. Yes, sir. I would say that would be one type of study that might be pertinent in respect to value, but I don't think

that you could arrive at a value of a public utility stock by that method. It might be one of the methods that would be employed. It would at least be one approach.

Q. Doctor, you made, on page 15 of your report, a comparison between five public utility companies and Engineers as to book value equity per share preferred stock, did you not?

A. Yes, sir.

Q. With respect to them, did you make any investigation to determine how this book value equity per share preferred stock was arrived at by those companies?

A. Well, I made the computations myself in arriving at those several series of book values from their own balance sheets as taken from Moody's Public Utilities 1945 volume. I made the computations. I computed the amount of book values behind each one of those preferred stocks. I have here my computations.

Q. Did you follow the same method there that you followed on the tabulation on page 11?

A. It was my intention to.

Q. Did you find any reference in your analyses to utility plant acquisition adjustments and utility plant adjustments with respect to those companies? I am referring to the companies on page 15 of your report.

A. Well, I would have to look at my records to ascertain that.

Q. Would you look at your records to answer the question?

A. I would say offhand that the book values didn't stem from an examination of assets less liabilities but did proceed with the preferred stock-common stock surplus reserve items which were added up and a computation was made in that way, and was not made on the basis that you suggested in your hypothetical question, that being the same method that I used here in connection with Engineers Public Service.

Ralph E. Badger—Cross Examination (Cont'd)

Q. Would you mind looking at your record and telling me the facts.

* * * * *

[R. p. 1485] By Mr. Tucker:

Q. Can you give me the answer to the question?

A. I answered the question.

Mr. Condon: Will you read the question, please?

(The record was read, as follows:)

"Did you find any reference in your analyses to utility plant acquisition adjustments and utility plant adjustments with respect to those companies? I am referring to the companies on page 15 of your report.

"A. Well, I would have to look at my records to ascertain that.

"Q. Would you look at your records to answer the question?

"A. I would say offhand that the book values didn't stem from an examination of assets less liabilities but did proceed with the preferred stock-common stock surplus reserve items which were added up and a computation was made in that way and was not made on the basis that you suggested in your hypothetical question, that being the same method that I used here in connection with Engineers Public Service.

"Q. Would you mind looking at your record and telling me the facts?

"The Examiner: While he is looking for it, we will take a short recess."

The Witness: Now if you will give me the question again I will answer.

(The question is read.)

The Witness: That is the fact.

Ralph E. Badger—Cross Examination (Cont'd)

By Mr. Tucker:

Q. Well, do you know from the history of those companies whether some of them have charged off 100.5 items to surplus and 107 items to surplus, so that if any of those items were included in others, it would not be a fair comparison?

A. I couldn't state that, sir.

Q. In other words, you didn't carry your investigation far enough to really know, Doctor, then, whether this is a fair comparison or not; is that true?

A. Well, I still believe it is a fair comparison.

Q. On the supposition I have made, it couldn't be, could it?

A. It is a fair comparison in that it reflects on the basis of the balance sheets of the companies at the several dates the book values of their preferred stocks computed from their statements appearing in Moody's, and using identically the same methods as were used in connection with Engineers Public Service, I would say it is a fair comparison.

As to whether or not these companies in the past made certain charges in more or less degree to their surplus accounts doesn't change the status of the books at these given periods that I was using.

Q. The fact is, Doctor, you don't know what the past history of these companies is and whether they were on a comparable basis or not, do you?

A. The computations were made on a comparable basis. As to whether the accounts as set forth in Moody's represent comparable bases of accounting with the methods used here, I confess I would not know.

Q. You don't know, do you, Doctor, as you sit on the stand at the moment, what the net worth of Engineers preferred stock is; is that a fact?

* * * * * *

[R. p. 1488] The Witness: At December 31, 1945?

Ralph E. Badger—Cross Examination (Cont'd)

By Mr. Tucker:

Q. At whatever date you use in this tabulation. You can assume, of course, that when I use the term "net worth" it was as I defined it in a previous question. That, I suppose, is understood. This computation on page 11 is made for the years '42, '43, and '44. I ask the question with respect to each of those. Now, understand, I am talking about net worth and not gross book value equity per share preferred.

A. I would say that I did, yes, sir; and I would say that your question in the negative there called for a denial that that question was true. I think unless the report is in error as far as arithmetic is concerned that the figures are available thereto produce the net worth of the assets available for the preferred stock.

Q. If that is so simple, I ask you to undertake to do it on the figures that you have arrived at on page 11, if I understood you correctly.

A. At 1944 the aggregate net worth of book assets available for the Engineers preferred stock amounted to $75,551,000 without giving any consideration to reserves for possible decline in the value of investments; and, $71,156,000, giving 100 per cent weight to reserves which had been set up for possible decline in the value of investments.

Q. Would you put that on the same basis that you put what you call book value equity per share preferred in your tabulation on page 11, or do you have to divide it by the number of shares of preferred?

A. That would have to be divided by the number of shares to give the per share value.

Q. Would you take the one where you exclude the reserves and make the computation for me?

A. You wish me to divide those two figures?

A. Yes, I do. Can you do it with a slide rule?

A. I haven't got a slide rule here.

Q. Suppose we furnish you one.

A. That is fine. If you could tell me offhand the number of preferred shares outstanding——

Q. We will assume there are 392,455 shares outstanding. You can just ignore the 455 for the purpose of your slide rule computation. It is going to be about anyway, isn't it?

A. It would give you a value of approximately $183 per share.

Q. That is for the year 1944, excluding the reserves?

A. That is correct.

Q. You think that that results in giving you a net book value of equity per share of preferred?

* * * * *

[R. p. 1490] The Witness: Based on the books of the company, I do.

By Mr. Tucker:

Q. Let us see, Doctor. If you will take in that report—if that is your report—the year 1944 and follow through some of these items, I would like to ask you whether or not in order to get a net book value of equity per share—and I say net book value—you wouldn't have to exclude, if you follow the method used by the Securities and Exchange Commission in handling these matters, the following items: Do you find in that balance sheet an excess of recorded gross investments in shares of subsidiary over net assets applicable thereto—I think you will find it reflected on page 24—note D-4 of $25,246,000?

A. The mere fact that the Securities and Exchange Commission for one purpose might require a deduction of that item doesn't imply that for the purposes of this study here it should not be included. That is the excess of reported gross investments in shares of subsidiaries over the net assets applicable to such shares at dates of acquisition as adjusted to give effect, among other things, to reduction of certain properties to original cost. The fact of the matter is that the company paid $25,246,000 for that pro-

portion of their assets, and they are carrying those assets on their books, or that portion of their assets at that figure, and I think it is perfectly proper in view of that situation to include that amount in the book value of the equity per share of common. Now, as to whether the Securities and Exchange Commission for other purposes elects to have that item deducted, I don't think destroys the validity of the statement that I make on page 11 or the validity of the statement that I make in my testimony here in which I state there is $192.50 gross value or $183 net value after the deduction of reserves for possible depreciation in investment.

Q. Well, you don't fully agree with the method of presentation followed by the Securities and Exchange Commission?

Mr. Condon: I object to that question. There is nothing in the record to indicate that the witness so testified, and there is nothing as yet in the record as to what the attitude of the Securities and Exchange Commission is except Mr. Tucker's excerpts with respect thereto in his question, and I object to the question on those grounds.

The Examiner: I will sustain the objection, Mr. Tucker.

By Mr. Tucker:

Q. Do you know, Dr. Badger, that the Securities and Exchange Commission ordinarily shows the things in the releases on two bases, one leaving in the items and one taking them out?

Mr. Condon: I object to the form of the question. Mr. Tucker is again purporting to interpret what the Securities and Exchange Commission is alleged to have done in certain calculations without supplying the data to the witness for examination and I object to the question.

Mr. Tucker: I asked him if he knew. He can tell me whether he does or whether he doesn't.

Mr. Condon: I say that that presupposes a state of facts not in the record and I object to the question on that ground.

The Examiner: Read the question back.

(The question is read.)

Mr. Condon: I feel that if there is any basis for that statement by Mr. Tucker that he should produce the release, that he should have it marked for identification and shown to the witness and counsel.

The Examiner: I will sustain the objection, Mr. Tucker.

By Mr. Tucker:

Q. Dr. Badger, I hand you Holding Company Act Release No. 6176 in the matter of American Power & Light Company, File No. 70-618.

The Examiner: Off the record.

(Discussion off the record.)

Mr. Tucker: I will refrain from further pursuing this until I can hand Dr. Badger a series of releases by which I can set this thing up in tabular form instead of narrative form, and I think it will be simpler.

I haven't any objection to your seeing it if you haven't one, Mr. Condon.

Mr. Condon: I would like to have this release identified for the record, please. He was purporting to interrogate the witness with regard to his conclusions as to certain opinions or releases of the Commission and I would like to have the release, which is Holding Company Act Release 6176, which he has just handed the witness, marked for identification, as Preferred Stockholders' Exhibit No. 33 for identification.

Mr. Tucker: Would you mind having Dr. Badger's copy identified instead of mine, because mine has a lot of pencil notes and he has a clean copy.

Ralph E. Badger—Cross Examination (Cont'd)

The Examiner: Let that be marked Preferred Stockholders' Exhibit No. 33 for identification.

(The document referred to is marked as Preferred Stockholders' Exhibit No. 33 for identification.)

Mr. Tucker: I think I can simplify the cross-examination on these points if I leave it and take it up on Monday, if that is the next hearing day, or whenever the next hearing day is.

By Mr. Tucker:

Q. Let's see if we can't agree on a few things, Doctor. You recognize, do you not, that there are some advantages in a holding company type of structure, so far as public utilities are concerned?

A. Yes, I admit that, and agree with it.

Q. I said I hoped we could agree on a few things.

A. Yes.

Mr. Kanton: That is just between the witness and Mr. Tucker.

By Mr. Tucker:

Q. Now, would you say that one of those advantages is the diversity that is ordinarily introduced in the holding company type of structure?

A. That would be an advantage from the standpoint of the security holders of the holding company, yes, sir.

Q. And would you agree that that arises, Doctor, largely since they are all in the same type of business?

A. Well, you would get geographical diversification in so far as the holding company had operating companies in different areas.

Q. And you mean by that, do you not, that the different areas would probably be basically affected by varying economic backgrounds or factors—you get a diversity there?

A. It is conceivable.

Ralph E. Badger—Cross Examination (Cont'd)

Q. Will you put your mind on Engineers Public Service Company first as it was constituted at the time of the passage of the Public Utility Holding Company Act in August, 1935, and do you recall how many states Engineers had property in at that time?

A. I can't recall the exact number, but it was a substantial number.

Q. Could I suggest that maybe it was 11?

A. Well, I would say it was at least 11. I was going say to 15 to 18.

Mr. Kanton: I don't see the relevancy of this line of cross-examination, but I know that information is contained in the Section 11(b)(1) order issued by this Commission and directed to Engineers Public Service Company, and I would like at this time to ask Mr. Tucker, if I may, the purpose of this line of cross-examination as to the past history of Engineers and how many states it was in and how many states it is in now.

Mr. Tucker: The purpose of it?

Mr. Kanton: Yes, sir.

Mr. Tucker: Does the Examiner think it necessary to disclose to a witness on cross-examination the purpose of my questions?

Mr. Kanton: Well, I personally can't see the relevancy of that and I would be glad to be——

Mr. Tucker: I will undertake to establish the relevancy of it and if I don't, you can move to strike.

The Examiner: Proceed, Mr. Tucker.

By Mr. Tucker:

Q. And some of those properties were located, talking about geographical areas rather than states now, in the Puget Sound district at that time?

A. Yes, sir.

Q. Some of them were located in the Middle West, around Nebraska, Wyoming, and perhaps at that time Colorado, I am not sure, but in that area out in there?

A. Yes, sir.

Q. Another was located in Virginia and North Carolina, was it?

A. Yes, sir.

Q. These are a series of separate questions and if you will just answer as I ask them——

A. I thought you were going to include the entire group and then ask me a question.

Q. No. I would like an answer to each of them.

You said yes as to each question up to date, or you intended to, didn't you?

A. I intended to, yes sir.

Q. And you said yes with respect to Virginia and North Carolina?

A. Yes, sir.

Q. Now, another was located in Georgia?

A. Yes, sir.

Q. Another was located in Key West?

A. Yes, sir.

Q. Another was located in eastern Texas and western Louisiana?

A. Yes, sir.

Q. Another was located in west Texas?

A. Yes, sir.

Q. And New Mexico is included in that?

A. Yes.

Q. Isn't it true that the economic background of all of those areas is substantially different, the one from the other?

A. I would say that is true. The industries are varied as between the geographical areas.

* * * * * *

[R. p. 1507] By Mr. Tucker:

Q. Doctor, you know, do you not, that up to January, 1945, the Standard & Poor's, whatever you call it, put ratings on preferred stocks?

A. Yes, sir.

Q. In connection with your study of this case did you consult those ratings?

A. Yes, sir.

Q. On page 15 of your report, Doctor, being Preferred Stockholders' Exhibit 29, you have a list there, do you not, of six companies, including Engineers Public Service Company, that you make some comparisons with respect to —right?

A. Yes, sir.

Q. That you make some comparisons with respect to?

A. Engineers?

Q. Yes, sir.

A. Yes, sir.

Q. Now, putting your mind on Columbia Gas & Electric, which is in the first column on page 15, which preferred stock of Columbia Gas & Electric did you use in your analysis?

A. I used the $5 preferred.

Q. With respect to that my information shows that there is a 5 per cent B issue and a 5 per cent convertible issue. Now, which of those two did you use? Did you use the convertible or did you use the 5 per cent B issue—apparently the 5 per cent B.

A. Well, I think you will find the convertible is known as the convertible preference stock. If that is correct, then I used the 5 per cent B. The designations that I have are 6 per cent cumulative preferred, Series A, 5 per cent cumulative preferred, callable at 105 and 5 per cent cumulative preference stock, callable at 100.

Q. Well, let's assume, then, for the purposes of the present inquiry—and you can correct the record later if our assumption is wrong—that you used Columbia Gas & Electric Company 5 per cent B that I have been talking about in your study.

A. All right. I would state here that I used the 5 per cent cumulative preferred, callable at 105.

Q. Yes, but we have to get together on something.

Mr. Condon: Well, suppose you do the getting together, Mr. Tucker.

Mr. Tucker: All right. I don't care which way you put it.

Mr. Condon: The witness has stated what he used.

Mr. Scheetz: Yes, I care. I think we had better talk about what the witness used.

Mr. Condon: The same thing.

By Mr. Tucker:

Q. All right. What rating with respect to whatever you used for Columbia Gas & Electric Company did Standard & Poor's rating for January 1945 give to that preferred stock?

A. Their current market rating for that stock was their second category, which is above average. That is on the basis of current market ratings.

Q. Now, I want the investment ratings, if you please, and not the current market ratings.

A. I can't give you that, sir.

Q. Did you consult the investment ratings of Standard & Poor's in connection with your study?

A. I did, but I didn't split those down and I don't recall what those ratings were in the manuals.

Q. Have you anything in your supporting papers that would give it to you, Doctor? You usually pull something out of a bag that gives these things. Have you got anything that would do that?

A. The only rating that I could give you is their current market rating.

Q. That is not the one that I want to inquire about.

Mr. Condon: Mr. Tucker, may I inquire at this time whether or not these ratings as to which you have been interrogating the witness appear on the documents that you have before you?

Mr. Tucker: Yes, they do.

Mr. Condon: And could we have the date of that memorandum, if you will?

Mr. Tucker: The date of the memorandum was 1/30/46.

Mr. Condon: And could we have it more completely identified for the record?

Mr. Tucker: Well, I have no objection. You identify it, will you? You seem to be able to do that with more facility than I do. You have had more practice.

Mr. Condon: Mr. Tucker, can you state for the record whether or not these alphabetical designations refer to ratings other than current market ratings? I notice this is a longhand memorandum, undoubtedly prepared for you to facilitate your examination. I would like you to state for the record just what those ratings purport to be.

Mr. Tucker: Well, they are the investment ratings. They are not the current market ratings. Does that answer your question?

Mr. Condon: Is that your statement for the record?

Mr. Tucker: Yes. We got them yesterday by telephone from Standard & Poor's, and that is what they said they were giving us.

The Examiner: All right. Proceed with your questions, Mr. Tucker.

By Mr. Tucker:

Q. Now, Doctor, apparently you wouldn't have a recollection now, if you haven't any record of these things, as to what it was that you learned when you consulted something or other as the basis of your report, would you? You wouldn't remember, or have you that kind of a memory that would remember what they were?

A. I don't recall what the investment ratings of Standard & Poor's was in respect to these stocks.

Q. You do not?

A. No, sir.

Ralph E. Badger—Cross Examination (Cont'd)

Q. And you would say the same thing with respect to the list of 10 companies on page 18, would you?

A. That is correct, yes sir.

Q. Could you, without inconveniencing yourself while you are in Detroit, consult your records and bring back the investment ratings, and I mean investment, not current market.

A. Yes, sir.

Q. By Standard & Poor's—any others that you want to, of course, but at least that—of all of the companies shown on page 15 and all of the companies shown on page 18?

A. Yes, sir.

Q. Now, just one very short line of inquiry, I hope.

Mr. Kanton: Mr. Tucker, do you have any particular period in mind that you want that for? Do you want it as of December 31, 1945?

Mr. Tucker: I want it for the month of January, 1945, which, as I understand it ——

Mr. Kanton: 1946, you mean?

The Witness: I assume you want the most current of the ratings.

Mr. Tucker: Off the record.

(Discussion off the record.)

Mr. Kanton: May I ask the relevancy, then, if they were stopped one year ago, for asking for those ratings at this time?

Mr. Tucker: Sure. It is to show that what the market analysts appraised these preferred stocks at appears to be quite contrary to the witness' investment appraisals of these investments.

Mr. Kanton: You mean in 1945? There is a possibility that these same analysts may have changed their minds by 1946.

Mr. Tucker: They don't make the ratings any more, but certainly I can go into it and let the witness explain, if he wants to, what has happened in the meantime, but try

to reconcile his appraisals here with the market analysts' appraisal, and it is pointed out to me that all of these comparisons in here start with December, 1944, as a matter of fact, so I have a direct comparison for that particular year.

The Witness: Why wouldn't it be more proper, Mr. Tucker, to give you the current market rating which Standard & Poor's put on the stocks and which I do have at the present time?

Mr. Kanton: That is what I have in mind, Mr. Examiner.

The Witness: I have the type of rating that they are making at the present time right before me. Now, to be sure, I have not before me the ratings that they were making a year ago or two years ago and have ceased since that time making, but I have their current ratings right up to the moment here and I would think, for the benefit of the record and the court, and whoever is to determine this thing, that those ratings would have far more value and far more weight than something that was made a year ago and has been discontinued for practically a year.

Mr. Tucker: Well, we will let Mr. Condon and the other lawyers go into that matter if they want to on re-direct. I don't care to.

The Witness: As a matter of fact, I am not too sure that I can get those ratings in every case, because we don't file that old material of Standard Statistics. I will endeavor to get it in so far as possible.

* * * * *

Hearing on February 4, 1946.

RALPH E. BADGER

Cross Examination (Resumed)

[R. p. 1539] By Mr. Tucker:

Q. Now, would you turn to page 2[illegible] of your report, Doctor, and under the heading "Conclusions" close to the bottom of the page, you state there, do you not, that it is your conclusion that the several classes of preferred stock of Engineers Public Service Company have fair investment value on the assumption that Engineers Public Service Company is to continue in business as follows:

For the $5 stock, $106.25;

For the $5.50 stock, $111.38; and

For the $6.00 stock, $111.50;—is that a fact?

A. You asked me if that was a fact?

Q. Yes.

A. Those are my conclusions,—yes, sir.

Q. And later in that same paragraph, Doctor, you say, referring to those values, "These values are equivalent to the full call price for the stock plus three months' cumulative dividends." You say that, do you not?

A. Yes, sir.

Q. Three months' cumulative dividends. Now, will you tell us why you included in those values, an amount equal to three months' cumulative dividends?

A. At any given time, and in the absence of a published call notice, a preferred stock which is callable at a specific price may well sell in excess of the call price and the amount in excess of the call price at which the stock may sell would depend upon an investor's appraisal of the probable length of time that it might take the corporation to effect the call.

In the case at hand, I placed a minimum of three months there as the possible time which the investor might consider a proper interval and in doing so I may have gone a bit on

the conservative side; but it was my opinion, and is my opinion, that it would not take any substantial period of time for Engineers Public Service on a going concern basis, to effect these calls. I think that is purely a matter of judgment as to what that additional premium should be, and I figured that that would be the minimum amount of premium. Other appraisers may have placed a higher additional premium than I did.

Q. Now, doctor, looking at the plan, if the Commission found it fair and equitable to pay $105 to the $5 stock and $110 to the other two series, this value stated by you would be fully met if you assumed that it would take about three months to carry out the plan after the decision of the Commission; is that correct?

A. If it could be done in that short a time,—yes.

Q. Well, that is the assumption that you made in which it could be called?

A. Yes.

Q. And if you make the same assumption with respect to carrying out Part 1 of the Plan, my statement would be correct—that if they got $105 for the $5 and 110 for the $5.50 and the $6, and it took three months to carry it out, then they would get accrued dividends during that three months period under the Plan, wouldn't they?

A. That is correct.

Q. And if it took longer to carry it out, then they would get more than the amount that you would bring, is that right?

A. That is correct.

Q. Will you look again at page 19 of your report? How did it happen that you made that special analysis, Doctor?

A. I wanted to determine what the values of these preferred stocks might be on the assumption that Engineers Public Service elected to divest itself of El Paso by a recapitalization of the company and a distribution of the shares to the common stockholders of Engineers Public Service, and also divest itself of Gulf States by a recap-

italization and disposition of the shares, as provided in the present Plan at $11.50 a share, and continued to maintain and operate Engineers Public Service Company as a holding company owning Virginia Electric and Power. In other words, I wanted to see if the execution of that part of the Plan would necessarily affect my appraised values of Engineers Public Service preferred stocks.

Q. How logically could that study affect those values, Doctor?

A. It couldn't cause any substantial change in my appraisals.

Q. Well, it is on an entirely different basis, isn't it, Doctor, that you made your appraisals? You made your appraisals on the basis of a going concern, Engineers as a going concern, and this isn't Engineers as a going concern at all, is it?

A. It would be on the basis of Engineers as a going concern, if, having consummated the two parts of the Plan which I previously referred to, having consummated those parts of the Plan, if Engineers continued as a holding company and continued to operate Virginia Electric, the valuation would still be on a going concern basis.

Q. Yes, but on a going concern basis, which is entirely different than the going concern basis that you are using, when you placed these values on these preferred stocks—is that correct?

A. Well, if that El Paso and Gulf States in this second assumption were eliminated from the holding company, and certain of the preferred stock were called to utilize the cash presently available, plus the cash that would be received from the sale of Gulf States stock—to that extent, would it be operating on a different basis, yes, sir.

Q. The ratios would all be different, the times earnings would all be different? Hardly anything would be the same, isn't that correct?

A. They would be improved by the consummation of this plan. As far as earnings are concerned, the times earnings would be substantially improved.

Q. But they would be different?

A. They would be better.

Q. And one thing that would be gone: is that whatever diversity there is in having in Engineers, Gulf States and El Paso, that would be gone under your study, wouldn't it?

A. Yes, sir.

Q. Do you regard that as an element of value or not?

A. I regard the loss of value occasioned by the loss of diversity to be a much smaller value loss than that gained by the other improvements that would be made by virtue of carrying out the assumption set forth here.

Q. Now, you are talking about the preferred stocks?

A. Yes, sir.

Q. But Virginia Electric and Power Company is located in an area which has both agricultural and very heavy manufacturing facilities, isn't it?

A. It has both agricultural and manufacturing, yes, sir.

Q. Gulf States Utilities Company is located pretty largely in an oil country, oil producing and refining country, isn't it?

A. To an extent, yes, sir.

Q. And they also raise some cattle there?

A. And some agriculture, as well.

Q. They do produce some rice in that area, do they not?

A. Yes, and there would be some merchandising and a certain amount of manufacturing.

Q. When you get to El Paso, you have an entirely different economic situation, don't you?

A. Yes, sir.

Q. You have ore refining as one of the large industries in El Paso, don't you?

A. Yes, sir.

Ralph E. Badger—Cross Examination (Cont'd)

Q. And you have agriculture down the Valley to a very considerable extent——

Cotton, even long staple cotton is raised in the Valley, isn't it?

A. Yes, sir.

Q. And a little further out you have some cattle, I suppose?

A. Yes, sir.

Q. So that the economic aspects of those three situations are entirely different, aren't they, Doctor? Or, I will say substantially different?

A. That is correct. There is a substantial difference in the areas.

Q. If your plan that you have suggested here were carried out, whatever benefits result from that economic diversity would be lost to Engineers, would they not?

A. They would be lost to the corporation as it would then be constituted, but they would not be lost to the present stockholders of Engineers.

Q. They would be lost to Engineers?

A. They would be lost to Engineers, as it would then be constituted, but they would not be lost to the present stockholders of Engineers Public Service.

* * * * *

[R. p. 1545] By Mr. Tucker:

Q. You say they would not be lost to the present stockholders of Engineers Public Service. Those stockholders have already lost, have they not, a lot of the benefits of diversity in connection with other companies that we were required by the order of the Commission to dispose of?

Mr. Kanton: Clarifying the question, do you mean the preferred and the common stockholders? Or only the common stockholders, Mr. Tucker?

Mr. Tucker: I am talking about the common stockholders.

Mr. Condon: I object to that line of inquiry on the ground that this is not proper cross-examination and on the further ground that it is an attempt upon the part of Mr. Tucker to cross-examine the witness on a matter that is pending before the Supreme Court of the United States and is not in issue at the present time in this proceeding.

The Examiner: I sustain the objection, Mr. Tucker.

Mr. Tucker: Well, I submit, Mr. Examiner—I shouldn't do it, but I should take an exception, but, if the Examiner please, I submit that this witness himself said what effect it would have on the common stock, and they are not my words, they are his.

The Examiner: He didn't say "common stock". He said "the stockholders."

(The Reporter read from the record the following:

"They would be lost to Engineers, as it would then be constituted, but they would not be lost to the present stockholders of Engineers Public Service.")

The Examiner: I stated, Mr. Tucker, in my ruling, that you might ask the witness if had given consideration to that phase of the valuation. Beyond that, I don't think it is proper on cross-examination.

By Mr. Tucker:

Q. When you said "stockholders" what stockholders were you talking about, Dr. Badger?

A. Both the preferred and the common stockholders.

Q. Precisely.

A. On the assumption that this Plan is carried out as I have set forth here, not as it is proposed by Engineers Public Service, however, under the present Plan of 1945; but under the Plan that I propose, any loss that might be occasioned as a result of the divestment of El Paso and the divestment of Gulf States Utilities would be passed on to the common stockholder by continuing their interest in the enterprises and the preferred stockholders under this Plan

would receive the call price for their stock. The preferred stock that was not called would continue to draw the $5 dividend until such time as it was called, at the option of the Company. The Company at all times has the option to call these preferred stocks at $105 and $110 respectively. It is part of the contract between the preferred stockholder and the corporation, so I think the use of the word "stockholders" under those circumstances, was an advisedly selected word.

Q. But taking in the common stock as well as the preferred stock?

A. Yes, sir.

Q. Now, part of your answer leaves me in some confusion. You said "Under the Plan the Preferred stockholder would get the call price." What Plan are you talking about?

A. I said the Plan referred to in my report.

By Mr. Condon:

Q. Would you identify the pages, please, Dr. Badger?

The Examiner: I think perhaps the witness means rather than the Plan, that if the Commission finds the amount that he has recommended in his report for the preferred stockholders, rather than a Plan that he suggested. I don't know that the witness has suggested a plan.

Mr. Condon: It is just a method of calculation that starts at page 19 and continues through 21, if I understand it correctly.

The Witness: That is correct.

The Examiner: I think it is more a question of terminology. You have not suggested any other Plan other than the one that Engineers already has before the Commission, have you, Dr. Badger?

The Witness: I have not suggested any plan at all, but I have set forth here a calculation showing what would transpire, as far as the several stockholders are concerned, if the El Paso Company were distributed in kind, Gulf

States were distributed at a price of $11.50 per share for the newly constituted shares of Gulf States, certain cash which is presently available in the corporation, together with cash that would be received from the sale of Gulf States were to be used by Engineers Public Service Company for the purpose of calling a substantial amount of its preferred stock at the call prices thereof.

The Examiner: And that is what you meant by the plan that you suggested.

The Witness: That is correct.

By Mr. Tucker:

Q. What you really do in this section is to suggest, isn't it, Doctor—and by "this section," I mean your special analysis re Virginia Electric and Power—what you really do is to propose an alternative plan that Engineers might have adopted if it had seen fit to do so, is that right?

A. Well, you can call it that if you wish. It certainly is a method that might have been followed.

Q. Now, what justification do you think there would be in keeping Engineers as a holding company over Virginia alone?

A. Well, there might be several advantages in doing that.

Q. Will you tell us what they are, please, Doctor,—or might be?

A. If that policy were to be followed, according to my calculations, the preferred stock charges of Engineers Public Service could be reduced to a figure no greater than $499,000 a year, and it is my opinion that it would be possible for Engineers Public Service completely to eliminate those charges because in the calculations that I made I stated that $10,000 of cash——

Q. Do you mean $10,000,000?

A. $10,000,000 of cash was to be utilized. It was testified to last Friday, according to my interpretation of the

testimony, that there was approximately $16,000,000 of cash in the holding company at the present time. It is also my opinion that if Engineers Public Service Company were required to divest itself of Gulf States on the basis of competitive bidding it would be able to receive an amount substantially in excess of $21,964,000 therefor, for that same stock which is now under the promulgated plan of the Company to be sold at $11.50 a share to the present stockholders of Engineers, it is my opinion that that stock could still be sold to the stockholders, and would be subscribed to on the rights that were given at a price substantially in excess of $11.50 a share; so that there are at least those two possibilities existing, whereby Engineers Public Service, as the continuing holding company, would be in possession of substantially more than $31,964,000 of cash, which I set forth as the amount to be used on page 21.

Furthermore, under the Plan as promulgated by the Company, there is a proposal to borrow $3,000,000. It is my opinion that that could still be borrowed and that these additional amounts could be borrowed at rates of interest substantially below the dividend rates on the preferred stock which might be called, with the result that it would be possible through the execution of a plan following the suggestions which I set forth on page 21, to continue Engineers Public Service Company in operation with no preferred stock outstanding, all of the preferred stock having been extinguished at the call prices; therefore, with no preferred dividend requirements ahead of the common; that such a holding company, owning Virginia Electric, might conceivably acquire additional properties contiguous to the properties it is now operating, and that under the consolidated operations of Engineers Public Service and the Virginia Electric and Power, there would be only a nominal expense with the possibility of substantial savings by virtue of the filing of consolidated returns.

* * * * *

Ralph E. Badger—Cross Examination (Cont'd)

[R. p. 1555] The Examiner: The witness hasn't answered the question. The question was what advantages there would be from consolidated returns.

Do you want that question to stand, Mr. Tucker, knowing that he is not an expert?

Mr. Tucker: Yes—I would like it to stand if I may.

The Examiner: All right.

Dr. Badger, you may answer the question, then.

The Witness: I can't cite the exact pages in the record, but is my impression that on either direct or cross examination it was shown that there was a net saving of, I think, somewhere in the vicinity of $100,000 a year which would accrue to Engineers Public Service by virtue of filing consolidated returns under the circumstances here set forth.

The Examiner: I think so, to complete the answer on that, let us get the record fully on that. I think the record also shows that it would cost about $130,000 a year to operate Engineers.

The Witness: That is correct. So that the net cost, after balancing the savings of a consolidated return, as against the aggregate cost of operating Engineers Public Service would be in the amount of approximately $30,000, which is an insignificant amount looked at from either the common or the preferred stockholders' point of view, or from the point of view of both common and preferred stockholders.

By Mr. Tucker:

Q. Will you look at page 9 of your report, Doctor? In the first full sentence at the top of page 9 of your report, Doctor, you say that if such items were used to reduce taxes accordingly, over-all charges would be 2.12 times?

A. Yes, sir.

Q. And you do say that, don't you?

A. Yes, sir.

Ralph E. Badger—Cross Examination (Cont'd)

Q. And those charges that you referred to could be properly characterized, could they not, as including non-recurring items?

A. Yes, sir; page 8 fully explains the nature of those items under Note 1.

It says: "Does not give effect to reduction in Federal Income and Excess Profits taxes resultant from extraordinary non-recurring deductions. If such items were used to reduce taxes accordingly, (as set forth in Applicant's Exhibits 53 and 66) over-all coverage would be 2.12." So they were non-recurring items.

Q. Now, I ask you, Doctor, what weight can be given to an over-all coverage which reflects, as you say, this ratio of 2.12 does, non-recurring items?

A. Well, in so far as those non-recurring items may have been applicable to excess profits taxes in the year 1945, to that extent they might be considered indirectly as being a continued saving in subsequent years in the event that in subsequent years there are no provisions for Excess Profits taxes; but to the extent that they would apply against normal income taxes or surtaxes, they would be purely non-recurring items, so there might be some basis for arguing that consideration to a limited extent should be given to the 2.12 figure.

Q. What do you mean by "a limited extent?" How limited?

A. To the extent that excess profits taxes will presumably discontinue in years subsequent to 1945.

Q. Now, Doctor, I asked you if, over the weekend, if you could do it, you would get for me the Standard and Poor's ratings in respect of certain companies. Do you recall that?

A. Yes, I recall it.

Q. Did you succeed in doing that?

A. You asked me, I believe, to get a series of ratings?

The Examiner: Investment ratings, I think the question was.

Ralph E. Badger—Cross Examination (Cont'd)

The Witness: Known as investment ratings, which ratings have been discontinued for a considerable period of time. You asked me to get the last available of such ratings?

By Mr. Tucker:

Q. That is right.

A. Or I should say the last of such ratings, as were available?

Q. That is right. Now, I ask you—Did you do it?

A. Yes, sir.

Q. Did you get them with respect to the month of January, 1945?

A. I was given by Standard Statistics, the Local Office in Detroit, a record of those ratings which were published under date of September 11th, 1944, and I was assured that there had been no change in those ratings as between that date and 1945; so, if their statement is correct, I have the 1945 ratings.

Q. Would you be good enough to read them into the record in respect of the companies which appear in the tabulation on Page 18, first?

* * * * *

[R. p. 1563] Mr. Condon: May I ask that the document referred to and produced by the witness be marked for identification as Preferred Stockholders' Exhibit No. 34?

The Examiner: Let it be so marked.

(Preferred Stockholders' Exhibit No. 34 is marked for identification.)

Mr. Condon: I have a preliminary question.

By Mr. Condon:

Q. Dr. Badger, with respect to Preferred Stockholders' Exhibit No. 34 for identification, which bears the caption "Standard and Poor's Ratings, five public utility preferreds

used for comparative purposes with Engineers Public Service Company preferreds," could you state for the record, prior to reading the ratings just what type of ratings they purport to be? Are they investment ratings or are they market ratings or what are they?

A. The ratings appearing there in the first column are investment ratings. Those ratings, as I have stated, and as we know, were discontinued early in 1945 and do not appear in any of Standard's statistics services at the present time.

The ratings appearing in the second column are known as current investment ratings, and those are the ratings which are currently published in connection with Standard's statistical service and are currently used by them?

Q. Current investment ratings?

A. Those are current market ratings.

Q. Then correct your statement. You said "current investment ratings."

A. I should have said "current market ratings."

By Mr. Tucker:

Q. What is the difference, Doctor, between a current investment rating and a current market rating? One for the short pull and the other for the long pull?

A. No, sir; I believe that Standard Statistics found their method of investment ratings as applied to preferred stocks to be of little or no value and I believe for that reason they discontinued them.

They substituted in lieu thereof a series of ratings that could be maintained more up-to-date, that were more current, and were used to reflect those factors that give rise to, we will say, value determining factors, in respect to the several preferred stocks.

Q. Are you through?

A. Yes, sir.

Q. Now, Doctor, what do you base that belief on? You said you believed something. Were you informed by some

official of Standard & Poor's that that was the reason that they discontinued the ratings?

A. Yes, sir; I was.

Q. Who gave you that information specifically?

A. That information was contained in a bulletin that was put out by the Home Office of Standard Statistics and was supplied to all of their sub-offices, and I was furnished a copy of that bulletin from the Detroit Office and I have the bulletin right here, as a matter of fact.

Q. Will you let me see the bulletin?

A. Yes, sir.

Mr. Condon: May the record indicate that the witness is handing the bulletin to Mr. Tucker, and I would like the bulletin to be marked for identification as Preferred Stockholders' Exhibit No. 35 for identification.

The Examiner: Let it be so marked.

(Preferred Stockholders' Exhibit No. 35 is marked for identification.)

* * * * *

[R. p. 1567] The Examiner: Hearing no objection, it will be received as Preferred Stockholders' Exhibit No. 35.

(Preferred Stockholders' Exhibit No. 35 is received in evidence.)

* * * * *

[R. p. 1583] The Witness: The next point that I was proposing to refer to dealt with the recomputations of coverage in connection with Pennsylvania Power & Light on the assumption that the same number of shares of 4½ per cent preferred stock had been outstanding in the years 1943 and 1944 as were outstanding after the refinancing of the old several classes of preferred stock in 1945.

By Mr. Condon:

Q. And you are referring to data appearing on page 18 of Preferred Stockholders' Exhibit No. 29?

A. That is correct. Pennsylvania Power & Light computations there are predicated upon the then existing preferred stocks that were outstanding. Early in 1945 the three classes of old preferred stock, to wit, $7 preferred, $6 preferred, and $5 preferred were all called and $44,000,000 par value of $100 par 4½ per cent preferred was substituted in lieu thereof so I made computations to show what the coverage would have been using the then existing earnings but substituting for the years 1943 and 1944 the charges which would ensue from $44,000,000 of $100 par value 4½ per cent preferred stock outstanding.

By Mr. Kanton:

Q. Dr. Badger, in other words, the question I asked you this morning with reference to Pennsylvania Power & Light with reference to whether the $5 cumulative preferred should be exchanged for $4.50 and the callable price at 110 should be changed to 112 stands corrected?

A. Yes, sir.

Q. And those are the only corrections that will appear or need appear under the column going across the chart on page 18 and based on the Pennsylvania Power & Light statistics shown thereon?

A. Well, it might be argued, Mr. Kanton, that since there was a refinancing in 1945 and since the price that we used of 114⅛ is now going to refer to this 4½ per cent preferred stock, which is currently outstanding, that an adjustment should be made on a pro forma basis to show what the charges would have been for the years 1943 and 1944 had that stock been outstanding instead of the three classes of stock that were outstanding.

Q. Would you think, Dr. Badger, that if such changes were made on the basis that you have just indicated any appreciable amount in the average times charges and the preferred dividend coverages would take place?

Mr. Condon: Mr. Kanton, I believe that Dr. Badger has before him the computations to which you have just made.

reference and he can state them for the record if you so desire.

Mr. Kanton: Thank you.

By Mr. Condon:

Q. Will you so do, please, Dr. Badger?

A. If those changes were to be substituted, charges for Pennsylvania Power & Light alone and not for the average of all Penn companies for the year 1943—coverage would be raised for the year 1943 from 1.21 to 1.52 and for the year 1944 coverage would be raised from 1.18 to 1.47.

The preferred dividend coverage alone would be raised from a figure in the year 1943 from 1.52 to 2.93 and in 1944 the figure would be raised from 1.47 to 2.85.

The yield which is shown computed on a 5 per cent preferred stock would be correspondingly reduced from a 4.4 basis to a 3.92 basis.

The average yield for the 10 stocks would be slightly reduced.

The average times preferred and charges covered would be increased very slightly.

The times preferred dividend coverage alone in respect to the averages would be increased slightly.

Those would be the only changes that would be occasioned if the computations previously referred to were made.

By Mr. Kanton:

Q. Now, Dr. Badger, with respect to those changes for Pennsylvania Power & Light and referring back to the last paragraph on page 17 where you state the reasons for selecting a wide list of electric and power company preferred stocks on the basis you stated in said paragraph would you now, in the light of your present testimony of the changes for this company, still consider Pennsylvania Power & Light Company to be a company that could still be used for comparative purposes with the Engineers preferred stocks?

A. I would because on an over-all basis charges would still have been earned by a number of times which would have come within the limits there set forth, to-wit, between 1.25 and 1.75.

The Examiner: Does that clear it up?

All right, Mr. Tucker.

By Mr. Tucker:

Q. Now, Dr. Badger, in making these computations you didn't make any change, did you, due to the fact that a different tax situation would apply to the 4½ than applied to the 5 in the amount of your surtax deduction?

A. No, sir. The change was made without any computation in respect to taxes. I would have been unable to make such a computation.

Q. If you had taken it into consideration, it would have reduced the coverages slightly, wouldn't it, Doctor?

Mr. Condon: I object to that question on the ground that it presupposes a state of facts not in this record. There is not a scintilla of testimony or evidence upon which this witness can answer this question and I state that it is speculative and I object to it. There is no proof of the fundamental or basic facts upon which the question is predicated.

The Examiner: Read the question.

(The question is read.)

Mr. Tucker: The witness has just said, if you please, that he didn't take it into consideration.

Mr. Condon: I state that it is argumentative and it presupposes a state of facts not proven in this proceeding and it is not proper cross-examination. We have no proof before us in this proceeding about the surtax rates of Pennsylvania Power & Light or any such material.

If Mr. Tucker desires to develop that let him establish it but it is not a fact as yet established, if it be a fact.

The Examiner: I think you might ask him, Mr. Tucker, what effect, if any, if he knows, that would have without presupposing that it might not require a reduction in the figures.

Mr. Tucker: All right.

By Mr. Tucker:

Q. I will ask you the question that the Examiner put.

A. From the data that I have available I would be unable to compute the effect that this change might have had retroactively on the tax liability of Pennsylvania Power & Light.

Q. Well, you know that the preferred stock dividends of an operating company are entitled to a certain deduction for surtax purposes, don't you?

A. Yes, sir.

Q. And that is 16 per cent of the dividend, you know that?

A. Yes, sir, that is correct.

Q. Well, that is all you need to have, isn't it, to make this computation?

Mr. Condon: Mr. Examiner, I feel that this is not proper cross-examination. The witness hasn't testified that he used that method or that it should be used.

The Examiner: He is asking if that is all he needs to make that computation.

Mr. Kanton: Excuse me. Mr. Reporter, will you read that question?

(The record was read, as follows:)

"Q. Well, you know that the preferred stock dividends of an operating company are entitled to a certain deduction for surtax purposes, don't you?

"A. Yes, sir.

"Q. And that is 16 per cent of the dividend, you know that?

Ralph E. Badger—Cross Examination (Cont'd)

"A. Yes, sir, that is correct.

"Q. Well, that is all you need to have, isn't it, to make this computation?"

The Witness: I wouldn't say that that was necessarily a correct statement. What more information I might or might not need I am unable to state at this time because I have not before me the tax returns of the company nor their methods of computing taxes nor what proportion of taxes were applicable to excess profits taxes, to normal taxes, or to surtaxes.

By Mr. Tucker:

Q. But, Doctor, if you decreased the dividend which a company pays, it is bound to affect the situation to the extent of this 16 per cent on the amount of the dividend, isn't it, necessarily? You don't have to know everything about taxes to know that, do you?

A. If that were the only factor involved in the situation, that is correct.

* * * * *

[R. p. 1590] By Mr. Tucker:

Q. If you save $100,000, Doctor, by decreasing the dividends, wouldn't that necessarily increase your taxes by $16,000?

* * * * *

[R. p. 1591] The Witness: Yes sir, if that were the only factor under consideration.

* * * * *

[R. p. 1594] The Examiner: Read the question back, Mr. Reporter.

(The record was read, as follows:)

"Was National Lead that is referred to in the second paragraph under the heading of Preferred Stocks, also

quality ratings on preferred, among the list of high grade preferred stocks in the Standard Statistics ratings that you referred to in your report?"

Mr. Tucker: On page 6.

The Witness: There is a National Lead 6 per cent preferred stock that is included in the 15 preferred stocks which go to make up that index.

By Mr. Tucker:

Q. So that Standard regards National Lead preferred as a high grade preferred, does it not?

A. Yes, sir.

Q. With respect to that, they point out, do they not in the second paragraph of Preferred Stockholders' Exhibit No. 35 that it fluctuated all the way, this high grade preferred, from 60 to 170; is that right?

A. That is correct.

Q. Do they also point out in the same paragraph that the dividend was adequately covered during that tremendous fluctuation?

A. Yes, sir.

Q. Do they say, "and in a variable security, with no maturity date, that's the only quality feature that matters, while market performance and prospects are often of highest importance?" Do they say that, Doctor?

A. They imply that dividend coverage is the principal factor to be considered as far as a rating process is concerned.

Q. But even with respect to that, they point out that although the dividend of National Lead was adequately covered it fluctuated all the way from 60 to 170, don't they, Doctor?

A. That is quite correct and I might go further to say that Eastman Kodak, which I think all investment analysts would agree has outstanding the highest grade investment stock in the United States, said stock fluctuated during the

period 1929 to 1935 from a low of 99 to a high of 200 in the year 1945, so that there unquestionably were factors involving the valuation of preferred stocks during this period, such as changes in money rates, which could very easily substantially change the values of preferred stocks. If you will refer to the index presented there in respect to high grade bond prices, you will see that the index of yields has declined from 5.28 basis in the year 1932 to a 2.67 basis in the year 1945 as indicative of the changes which have taken place in the money markets during that period.

In other words, interest rates during this period were practically halved. The difference between 5.28 and 2.67 represents a reduction of approximately 50 per cent in interest rates during this period.

We have already discussed interest rates and their possible permanency or lack of permanency in previous testimony and with the halving of interest rates it would be normal for a 100 per cent advance to occur in respect to the highest grade preferred stocks. That is what we had in the case of Eastman Kodak. We had more than a 100 per cent increase in the price of National Lead, but a very substantial portion of that increase in value is to be attributed not to any change in investment characteristics, not to a greater or less coverage, but to a vast and fundamental change which has taken place in respect to interest rates during this period.

Q. If you will refer to Eastman Kodak in your report on the valuation of preferred stock of the American Light & Traction, you threw that out of consideration on the basis that that was among preferred stocks a "sport", didn't you?

A. That is correct, and among preferred stocks I suppose it might be compared to the Lodges back in Massachusetts, where the Cabots are supposed to speak only to the Lodges and the Lodges are supposed to speak only to God; in other words, we might make an analogy with Eastman

Kodak because it is so vastly superior in respect to all types of statistical analysis to any other preferred stock in the country, and from a statistical point of view I think it was proper to exclude it.

Q. In any event this general paragraph that we have been talking about, the second paragraph under that heading Preferred Stock etc., on Preferred Stockholders' Exhibit 35, shows, doesn't it, that the reasons they stopped making investment ratings on even high grade preferred stocks is that they fluctuate so widely?

A. I think the exhibit speaks for itself.

Q. All right. That is satisfactory to me.

Now, as a matter of fact, they were talking there about what you admitted a few minutes ago they characterized as a high grade preferred and you are talking in this case, so far as Engineers preferred stock is concerned, with respect to something that you admit is a medium grade preferred. Is that true?

Mr. Condon: As of what date, Mr. Tucker?

Mr. Tucker: As of the date he speaks of in his report, whatever that is.

The Witness: I didn't refer to National Lead in my report.

By Mr. Tucker:

Q. You referred to Engineers as a medium grade preferred stock?

A. That is correct.

Q. And not a high grade preferred stock?

A. That is correct, yes, sir. I did.

Q. Did you not?

A. Yes, sir.

Q. And you say that you admitted that National Lead was regarded by Standard as being a high grade preferred?

A. Yes, sir.

Ralph E. Badger—Cross Examination (Cont'd)

Q. You don't so characterize it, do you?

A. Yes, I do.

Q. So that when you talk in your report about this medium grade preferred of Engineers as having a permanency of value so far as you can humanly predict, the Standard & Poor's wouldn't agree with your analysis on the basis of this second paragraph, would it?

A. I wouldn't admit that statement at all. I don't think it is a correct statement of fact.

Q. Well, Doctor, they say they stopped the stock rating, even high grade preferred stocks, because they fluctuated all over the map, didn't they, in effect?

A. They said they have ceased assigning investment quality ratings to preferred stocks because of the fact that their quality ratings were meaningless.

Q. And their quality ratings were meaningless because of what?

A. Apparently because they weren't of any particular use.

Q. But don't they say in that paragraph——

Mr. Condon: Mr. Examiner, I thought that Mr. Tucker said he was satisfied with this witness' statement that the exhibit spoke for itself. Now we are getting off into specific inquiry as to sentences and clauses and phrases of the exhibit.

I feel that there ought to be some limit to this type of examination. The exhibit is already in evidence.

The Examiner: I don't think he is commenting so much on this exhibit, Mr. Condon, as he is on the witness' testimony as to the permanency as he has alleged in his report of the values that he has placed there.

I think it is perfectly proper cross-examination.

By Mr. Tucker:

Q. Don't they say in that paragraph that the reason they didn't think they were of any particular use was

because they fluctuated? They refer to them as tremendous fluctuations, don't they?

A. Well, I wouldn't make that inference from reading the letter. It gets to be a question of one man's opinion as against another man's opinion as to how this letter should be interpreted and if you wish me to give my opinion as to why they were discontinued I would be glad to do so; but I don't think that that would be particularly helpful.

By Mr. Condon:

Q. Helpful to whom, Dr. Badger?

(No response.)

Q. It would be particularly helpful to whom, Dr. Badger? Mr. Tucker?

A. It wouldn't be helpful to these proceedings. I don't purport to put myself in the shoes of the people that wrote this letter. They clearly stated in the letter that they abandoned these ratings because of the fact that they were meaningless and they use the exact words "meaningless" and they state in the letter that they have substituted in lieu thereof a different type of rating which they believe to be far more significant and to have greater value to their clients.

Now as to what further reason they had in the back of their minds when they came to that decision, I am not qualified to state.

Mr. Tucker: I will call attention to the fact that the witness has proceeded to do exactly what Mr. Condon objected to my doing a few minutes ago.

Mr. Condon: My objection was overruled, Mr. Tucker, and you persisted.

Mr. Tucker: Mr. Examiner, I have had prepared a chart largely from the record in this case showing Standard & Poor's preferred stock yields and that is the same yield

chart that we have been talking about as I understand it for the period from 1918 to January 1946.

We have superimposed on that chart the yields of the Engineers 5% preferred plotted at June and December from the time this 5 per cent preferred stock was issued in about the middle of the year 1928 to January 1, 1946.

We have also superimposed on that chart the Federal Reserve index of production.

I ask that this be marked for identification.

The Examiner: Let that be marked as Applicant's Exhibit No. 76 for identification.

(The document referred to is marked as Applicant's Exhibit No. 76 for identification.)

* * * * *

[R. p. 1624]

D. C. BARNES,

previously sworn, resumed the stand and was examined and testified further as follows:

The Examiner: Mr. Barnes, you have previously been sworn in this case.

Direct Examination

* * * * *

[R. p. 1625] By Mr. Tucker:

* * * * *

Q. Are you qualified in public utility financing, do you think, Mr. Barnes?

A. Yes, I think so.

Q. How many millions of dollars of issues would you say roughly you have handled?

(Discussion off the record.)

The Examiner: Have you any question as to his qualifications, Mr. Condon?

Mr. Condon: Mr. Examiner, I would like very much to accept Mr. Kanton's statement but I have never heard Mr. Barnes testify with respect to h' qualifications.

The Examiner: Proceed, Mr. Tucker, with your examination.

Mr. Condon: I would like to say this—that I have no objection in the interest of brevity to Mr. Tucker leading the witness and just putting enough in this record to show his qualifications. I feel that if I did any less I might be subject to criticism and I say that with the greatest respect to staff counsel.

Mr. Kanton: May I state this for the record, that I have absolutely no objection to the qualifications of Mr. Barnes to testify in the capacity he just stated he is going to testify.

The Examiner: Have you any objection, Mr. Scheetz?

Mr. Scheetz: No, I have not.

The Examiner: Mr. Tucker, you may proceed to satisfy Mr. Condon as to his qualifications.

What was the last question?

(The question was read, as follows):

"Q. How many millions of dollars of issues would you say roughly you have handled?"

The Witness: I think in round numbers, half a billion dollars would be conservative.

By Mr. Tucker:

Q. In connection with those issues, Mr. Barnes, did you have to make comparisons with other issues outstanding in the market at the time?

A. Very definitely so.

Q. So that you have had in connection with all of that financing experience, in connection with making comparisons betwen one issue and another?

A. That is correct.

D. C. Barnes—Direct Examination (Cont'd.)

[R. p. 1631] The Examiner: The Trial Examiner is sufficiently satisfied as to Mr. Barnes' qualifications. You may proceed, Mr. Tucker.

Mr. Condon: Exception.

The Examiner: Noted.

By Mr. Tucker:

Q. Mr. Barnes, does this correlation as shown on that chart, between the Federal Reserve index of production and the $5 preferred yield and the Standard and Poor's High Grade Preferred Stock Yield form a fair comparison, do you think?

Mr. Condon: May I have a general objection and exception to this entire line of testimony, so that I shall not have to interrupt?

The Examiner: You may, Mr. Condon.

Mr. Condon: An exception, sir.

The Witness: I think the correlation with the Federal Reserve Board production index and the yield of the Engineers Preferred stock is a fair correlation.

I think there is not a correlation between the production index to the same extent with the index of high-grade preferred stocks, and that is one of the purposes of this exhibit.

Dr. Badger, in his report, related very definitely his conclusions to inferences or conclusions drawn by him from the immunity of high-grade preferred stock yields and high-grade bond yields to changes in business activity. He pointed out that such high-grade securities as high-grade preferred stocks and high-grade bonds, particularly, related more to the cost of money than to fluctuations in business conditions; and I think this chart brings that out very definitely, and it proves also to my mind that Engineers' $5.00 preferred stock ranks more in the class of common stocks, in which there is a very close relationship between production indexes and the yields or prices of such stocks.

D. C. Barnes—Direct Examination (Cont'd.)

Mr. Tucker: I again offer the exhibit in light of the testimony of Mr. Barnes.

Mr. Kanton: May I ask several questions, Mr. Examiner?

By Mr. Kanton:

Q. The line appearing at the top of the page, Mr. Barnes, is a graph showing the high-grade preferred stocks extending on a yield basis from 1918 to 1946, is that correct?

A. That is correct, in the black line.

Q. That is the high-grade preferred stocks?

A. Yes.

Q. The yield basis of the Engineers' $5.00 preferred stock, which is the solid red line, in the testimony of Dr. Badger is a medium-grade preferred stock?

A. He so classified it.

Q. Do you agree with that classification, sir?

A. Well, I should say that it was not better than a medium grade.

Q. Now, you testified you have used the Federal Reserve index of production in the past for comparative purposes, with low-grade preferred stocks and common stocks, is that correct?

A. That is correct.

Q. In your opinion, do you think the three lines shown on this chart, one graphically showing high-grade preferred stocks, one graphically showing one medium grade preferred stock and the other an index of production which is supposed to reflect the positive correlation with low-grade preferred stocks and common stocks, is a proper chart for comparative purposes?

A. Yes, I think it is.

Q. Why is that, sir? Based on the remarks that I have just given?

A. Because I think what Dr. Badger classes as a medium grade preferred stock is closer to a low-grade preferred stock than it is to a high-grade preferred stock and therefore it is more responsive to changes in business conditions than is the high-grade preferred stock.

Q. Well, let us assume that $5.00 preferred stock is a medium-grade preferred stock. Would you think that this chart would be applicable to the points that are trying to be brought out through its introduction, sir?

A. I beg your pardon?

The Examiner: Read the question.

(The question was read.)

By Mr. Kanton:

Q. Do you understand that question?

A. If I understand what you mean by "points to be brought out" I think the points that the chart is intended to show are the close relationship beween the Engineers' preferred stock and the production index.

Q. But if the Engineers' Preferred stock can be properly classified as a medium-grade preferred stock, would such a comparison be feasible?

A. Yes, I think so.

Q. Even if it is a medium-grade preferred stock?

A. Certainly.

Q. Have you ever had any occasion in the past to compare the Federal Reserve Index of Production with a medium grade preferred stock? Or, as you testified, such index has been used by you in the past just for comparative purposes with low-grade preferreds and common stocks?

A. I think the chart speaks for itself, Mr. Kanton, in that it shows a very definite correlation between Engineers' preferred stock and the production index, and it shows no such correlation with the high-grade preferred stocks.

Now, there is no sharp cleavage line between medium-grade preferred stocks and low-grade preferred stocks as

they are progressing downward in security in character of security.

Q. Has any attempt been made to compare the Federal Reserve index of production with a composite group of medium-grade preferred stocks, to see if there has been any positive correlation, as you have testified, on Applicant's Exhibit No. 76 for identification?

A. I don't know of any comparison that has been made of a specific group of medium-grade preferred stocks, but the way to find out the correlation is to draw the curve showing the respective factors that you are to compare and a comparison, for example, of the production index with the price or yields of high grade bonds would show that there was no relationship,—no substantial relatio ship or close relationship,—between such an index and the price or yield of that class of security.

Now, as you depart from that class of security and get closer to a common stock, you get progressively closer to the full reflection of the production index and the price or yield of the security that you are considering.

Q. But you have not prepared any chart showing a comparison between what you would call medium grade preferred stocks with the Reserve index of production?

A. This is the only chart that we have prepared for this purpose.

Q. Have you ever prepared any chart showing the comparison of any of the three series of Engineers' preferred stocks with the Federal Reserve index of production in the past?

A. No, we have not.

Q. And this is the first time that any attempt has been made to plot a chart showing the yield basis of the $5.00 Engineers' preferred stock with the Federal Reserve Index of Production?

A. By us. You understand that financial services and textbooks are full of charts of this general character, comparing——

Q. By general character, you mean exactly a comparison between the yield basis of the Engineers' $5.00 preferred stock and the Federal Reserve index of production, or do you mean a comparison between the Federal Reserve index of production and a low-grade preferred or common stock?

A. Particularly common stocks.

Mr. Kanton: That is all, Mr. Examiner.

By Mr. Condon:

Q. Mr. Barnes, do you know the meaning of the coefficient of correlation?

A. Why, I suppose it is the degree in which the two curves follow each other.

Q. Is that just a supposition? Are you ad libbing or do you know that to be a fact?

A. I don't know the formula for determining it.

Q. Are you able to examine this exhibit for identification and state what the coefficient of correlation is with respect to these several lines plotted on the graph?

A. No, I am not.

Q. Do you know whether any such mathematical calculations were made by Mr. Hastings prior to the presentation of his document?

A. I doubt if he made any such computations.

Q. Did you have any discussion of that type with him?

A. No, I did not.

Q. Are you unaware of the mathematical calculations resorted to by Commissions to determine the degree of accuracy of these graphs by means of calculation of the coefficient of correlation?

A. I am not familiar with the formula by which these computations are made.

Q. Is this a new expression to you?

A. No, I have heard of the coefficient of correlation before.

Q. But you have never made any attempt to translate it in connection with this graph?

A. That is correct.

Q. Did you ever make any attempt to translate the coefficient of correlation with respect to any other plottings of this type?

A. Only by eye.

Q. Nothing more scientific than that?

A. That is correct.

Q. Is that the yardstick that has been applied by you and Mr. Hastings to this graph?

A. Yes, I think so. We have plotted two curves and observed the correlation that exists between the two curves.

Q. You say that you had occasion to refer to other indices of this character. Do you recall giving that testimony?

A. Yes, I do.

Q. Can you state how many indices of this character you have seen in your experience that are correlated to the Federal Reserve index of production?

A. Well, there are a great many of them.

Q. I am asking you what you have seen and what you have before you.

A. Well, for example, we have indices that cover manufactured and durable goods; we have indices that cover food production; we have indices that cover electric power, commodity prices, raw materials, semi-manufactured goods, manufactured goods, farm products.

Q. Are they separate indices or do they represent component parts of the Federal Reserve index of production?

A. Well, they are separate indices that are published.

Q. Do you find any there correlating the Federal Reserve index of production with the preferred stocks in the book that you have before you, from which you have been reading? And I mean specifically the preferred stocks of utility companies.

A. Well, in this same table we have a tabulation giving the index prices of utility securities.

Q. What type of securities, Mr. Barnes?

A. The stock prices.

Q. And what kind of stock?

A. Well, it is not specific in its description.

Q. Do you know what they purport to set forth there, whether they are common or preferred stocks?

A. I think unquestionably they are common stocks.

Q. Yes. Now, I have asked you to point out the correlations that have come to your attention with respect to the Federal Reserve index of production and utility preferred stocks, other than the Applicant's Exhibit No. 76 for identification. Have you ever seen an animal like that before?

A. Yes, I have seen many curves in which on the same curve has been plotted bond yields, preferred stock yields, common stock yields and business activity index, or——

Q. Mr. Barnes, I have asked you a very simple question. Have you ever seen an attempted correlation between the Federal Reserve index of production and a utility preferred stock; and, if you have, will you state where you saw it?

A. Well, I answered that question by telling you that I have seen curves showing the indexes of bonds, preferred stocks and common stocks, and the index of business activity, or Federal Reserve index of production.

Q. Restricting your answer, Mr. Barnes, if you please, to a correlation or attempted correlation between the Federal Reserve index of production and a utility preferred stock, can you answer that question?

A. Not a utility preferred stock by itself.

Q. That is the question I have asked you three times. Can we have a direct answer, if you please, sir?

A. I said, not a utility preferred stock by itself.

Q. Now, you were asked a question as to whether or not the Engineers preferred was a medium-grade preferred and I believe you said you felt that that was a fair characterization, or something of that nature. Is that correct?

A. I said that it was not better than a medium-grade preferred stock, if I recall my answer correctly.

Q. Yes. You wouldn't characterize it on the same basis as a low-grade common stock, would you?

A. No, indeed.

Q. When you say it is closer to a common stock than to a medium-grade stock, did you give that testimony, in substance?

A. I don't think I did, no. I would say that it is closer to a common stock—closer to some common stocks—than it is to a medium grade preferred stock; in fact, some common stocks are superior in investment value and security than Engineers' preferred stock.

Q. How far back are you projecting from the standpoint of time? Are you talking about January of 1946 in that answer?

A. I am talking about the present, yes.

Q. Now, you said the proper way to draw a comparison was to draw the curve, from the standpoint of attempting to correlate the relationship, if any, between the Federal Reserve index of production and the $5.00 preferred stock of the Engineers Company; is that your testimony?

A. I think so.

Q. By drawing the curve, are you referring to the graphic presentation referred to on Exhibit 76 for identification, Applicant's Exhibit No. 76?

A. That is correct.

Q. You have no other drawing of any other curve in mind except as set forth in this document, is that right?

A. When I am speaking of this particular comparison, no.

Q. Did you ever prepare any document like this for submission to your Board of Directors?

A. Submission to our Board of Directors?

Q. Yes.

A. No, I never have presented any comparison of that kind to our Board.

Q. Did you ever present a comparison of this type to any tribunal, any court, any rate-making body, or quasi-

public institution with which Engineers had any dealings or transactions?

A. Not that I recall.

Mr. Condon: That is all.

Mr. Scheetz: I have no questions.

The Examiner: All right, Mr. Tucker.

Mr. Tucker: I again offer the exhibit.

Mr. Condon: And I make the same objections and I feel that the testimony that has been developed here shows the complete lack of all foundation for any fair comparison and more particularly the lack of any competent testimony to support it being the basis for a comparative purpose or use in these proceedings.

The Examiner: Do you have anything to say, Mr. Kanton?

Mr. Kanton: Mr. Examiner, in light of the testimony of Mr. Barnes that he characterizes the Engineers $5 preferred stock as charted here as closer to what he would term a low grade preferred rather than what Dr. Badger would call a medium grade preferred, and that in the past he has used the index of production for comparison of low grade preferreds and common stocks to that extent I would have no objection to the introduction of Applicant's Exhibit No. 76 for identification as part of the case presented by the Applicant.

However, I wish to point out that there is a definite distinction being made as to the characterization between Dr. Badger and Mr. Barnes, if I am correct, as to whether Engineers $5 preferred stock is a medium grade or a low grade preferred stock. If I am mistaken to the extent that the Engineers $5 preferred stock is classified by Mr. Barnes as a medium grade preferred stock, I would have an objection to the use of this exhibit for the purposes already stated.

I further object to the graph going back to the period of 1918, from 1932, as going back too far in the past; and I don't think it can be used for any comparative purposes.

With those statements, Mr. Examiner, with reference to Applicant's Exhibit No. 76, I will leave it to your discretion to make a determination.

Mr. Schreetz: Mr. Examiner, not having objected to Mr. Barnes' qualifications, in fact having accepted them, I would not object to the exhibit.

It seems to me that the further question is as to the weight of the evidence.

The Examiner: I think that is the whole question, as to the weight to be given to this chart.

I think there is enough in the record clearly indicating that that is the situation in which the Commission might well judge as to the weight to be given.

For that reason, I will overrule Mr. Condon's objection and likewise Mr. Kanton's objection and submit this as Applicant's Exhibit No. 76.

I will allow you an exception, Mr. Condon.

Mr. Condon: Thank you.

(Applicant's Exhibit No. 76 is received in evidence.)

* * * * * *

RALPH E. BADGER

Cross Examination

[R. p. 1654] By Mr. Tucker:

Q. Dr. Badger, you testified on direct-examination, did you not, that in connection with the preparation of your report, at the transcript, 1353, you had read certain releases of this Commission?

A. Well, I don't see on page 1353 where I—yes, that is correct. I see the numbers.

Q. One of those releases that you say you read was Holding Company Act of 1935 Release No. 5021, which happens to be the findings and opinion of the Commission in the case of Virginia Electric & Power Company, Virginia

Public Service Company, and Engineers Public Service Company, in which the order at least is dated April 29, 1944?

A. Yes, sir.

Q. You read that release, did you?

A. Yes, sir.

Q. If you look at pages 10 and 14, those two pages that I have referred to, Doctor, would you say that the Commission was there figuring the adjusted net plant and property ratios on various bases both with and without intangibles?

Mr. Condon: May I have that read? I was talking to associate counsel here.

(The reporter read the pending question.)

The Witness: That is true as far as page 10 is concerned.

By Mr. Tucker:

Q. How about page 14, Doctor? The table is entitled, isn't it, "Relationship of Security Structure to Assets"?

A. On both pages 10 and 14 the accounts are shown, in the one case excluding accounts in 100.5 and 108.15 and also including amounts in accounts 100.5 and 108.15.

Q. Now will you look at the other release you there mentioned, on transcript, 1353, namely, release 5568; and with respect to that I direct your attention to pages 8 and 10. Does that show that the Commission made its calculation excluding certain intangibles?

Mr. Condon: When you say made its calculations, Mr. Tucker, do you mean a calculation?

Mr. Tucker: Yes.

Mr. Condon: Would that be a fairer statement?

Mr. Tucker: I think so. I accept the amendment.

The Witness: Yes, sir, they did.

Ralph E. Badger—Cross Examination (Cont'd)

By Mr. Tucker:

Q. Among other things, they excluded plant acquisition adjustments, plant adjustments, Account 107?

A. Yes, sir.

Q. And in that particular case, plant acquisition adjustments, Account 100.5 seems to have been a credit, isn't that true?

A. That is true, in the amount of $201,923.

Q. If you can tell me what that means, I will be grateful.

A. Presumably, it would indicate that they had paid less for certain subsidiary properties than the cost of said property to the unit first employing said property. That is what I would infer it to be.

Mr. Kanton: Mr. Tucker, is the purpose of these references to show that the Commission looks at all available data before it in any particular case and in the particular case you have before you?

Mr. Tucker: Yes, that is right.

Mr. Kanton: Thank you.

By Mr. Tucker:

Q. Now, as I understood it, you were going to review your determination of the asset values for the preferred as is shown by your report over the week end. Did you do that?

A. To the extent of eliminating reserves against depreciation in the value of investments?

Q. Yes, for one thing.

A. Yes.

Q. And eliminating 107 items, items in Account 107 which you and I understand to mean, I take it, substantially write-ups. Isn't that what Account 107 applies to, Doctor?

A. That is the way I would classify Account 107. I wouldn't so classify Account 100.5 as write-ups.

Q. I understand that you wouldn't from what you have testified here today.

Mr. Kanton: Is the record to show that the witness and counsel are referring to the Federal Power Commission's uniform system of accounts?

Mr. Tucker: Well, I think when you will read the record you will understand that.

The Examiner: The answer is yes.

Mr. Tucker: Anybody that is familiar with these matters would say that 100.5 was a Federal Power Commission classification, but that is what I am referring to.

The Examiner: Let's not get in an argument at this time. We all understand that.

The answer is yes.

By Mr. Tucker:

Q. You understood that I was referring to the Federal Power Commission's classifications in using these numbers, didn't you, Doctor?

A. The record might be clarified if the reporter, when we say one hundred five we mean 100.5.

Q. Yes, 100.5 and 100.1?

A. Yes.

Q. Did you make some revision of your calculations to show what the results would be, eliminating 100.5 and 100.1?

A. Yes, sir.

Q. And the reserves that we were talking about the other day which were set up against losses?

A. Yes, sir.

Q. Do you recall what I mean?

A. Yes, sir.

Q. Will you tell us the results that you got from those recalculations as briefly as you can?

A. I made first a study or perhaps I should say I amended or extended the study of Engineers Public Service Company and five public utility holding companies to sup-

plement the study on page 11 of Preferred Stockholders' Exhibit No. 29 and in that computation I showed the ratios for the five public utility holding companies and Engineers Public Service, including general reserves.

I also made a similar study in which I eliminated general reserves from all of the comparative companies and from Engineers Public Service and under the caption General Reserves was included Engineers Public Service Company reserves for depreciation or possible depreciation in respect to investments.

The caption on this sheet, discussing Engineers Public Service, says "Including Puget Sound." That, of course, would not apply for the years 1943 and 1944 and possibly might preferably be eliminated in its entirety. I, therefore, will take it out because it doesn't add anything to the computation.

Eliminating reserves for possible security depreciation reduces the book value of equity per share of preferred in the year 1942 from $225.65 to $191.31; for the year 1943 the reduction is from $192.40 to $181.99; and for 1944 the reduction is from $192.50 to $181.31.

Mr. Kanton: May I have a copy of that, Dr. Badger?

The Witness: The other ratios indicating the percent of prior obligations to total capitalization are changed slightly and those changes appear on the exhibits.

By Mr. Tucker:

Q. Could I have a copy of it, Doctor?

A. Yes, sir. I am going to give you one as soon as I finish crossing off this material. I would also like to state that I have not had an opportunity to check these figures myself. I hope that they are correct. They were prepared in some cases by me and in some cases by my staff with as much accuracy as we could utilize in the comparatively brief space of time.

Q. This paper, if I understand your testimony correctly, that you have just handed me, which I will ask to have marked as——

Mr. Condon: Now, just a second, if we are going to mark them. Let's mark the originals if you have no objection, Mr. Tucker.

Mr. Tucker: No, if you will let me mark it, please.

Mr. Condon: That is one. Do you have the other original study there before you, Dr. Badger?

Mr. Tucker: Now just a minute, Mr. Condon.

The Examiner: Proceed, Mr. Tucker.

The Witness: There is another part to this.

Mr. Tucker: Now wait just a minute, please. We have got to have a little orderly procedure, it seems to me.

Would you mark that, Mr. Examiner, please, Applicant's Exhibit for identification No. 77?

The Examiner: Let it be marked as Applicant's Exhibit No. 77 for identification.

(Applicant's Exhibit 77 was marked for identification.)

By Mr. Tucker:

Q. Now referring to Applicant's Exhibit for identification No. 77, Doctor, as I understand you, all that you said you reflected in this exhibit was to take out the reserves that were indicated both as to Engineers and the other companies shown on the chart, is that right?

A. That is correct.

Q. Just the reserves?

A. That is correct. No adjustment was made there for items classified as accounts 100.5 or 107.

Mr. Tucker: I offer Applicant's Exhibit No. 77 for identification in evidence.

The Examiner: Is there any objection?

(No response.)

Ralph E. Badger—Cross Examination (Cont'd)

The Examiner: Hearing no objection, it will be received as Applicant's Exhibit No. 77.

(Applicant's Exhibit 77 was received in evidence.)

By Mr. Tucker:

Q. Doctor, do I understand that you also made some additional calculations in respect of the preferred stock ratios shown in your report?

A. Yes, sir.

Q. Will you hand me a copy of those additional calculations so that I can talk to you about it?

A. I would like to state——

Q. Go ahead, make some statement about it if you want to. I don't care.

A. Yes, sir. This is quite important, I feel. I would like to state that in making these calculations——

Mr. Tucker: Perhaps for the record I might have it identified and then you can talk about it as an exhibit for identification. I offer this for identification as Applicant's Exhibit No. 78, Mr. Examiner.

The Examiner: Let it be marked as Applicant's Exhibit No. 78 for identification.

(Applicant's Exhibit 78 was marked for identification.)

By Mr. Tucker:

Q. Now referring to Applicant's Exhibit for identification No. 78, do you have some comment that you wanted to make about it, Doctor?

A. Yes, sir. On the second page of that exhibit would be indicated the eliminations that I made in connection with Engineers Public Service, and those eliminations consist of an item of $25,246,487.75 which figure appears on page 24 of Exhibit No. 37-T, Applicant's Exhibit 37-T, headed "Excess of recorded gross investments in shares of subsidiaries over the net assets applicable to such shares

at dates of acquisition, as adjusted to give effect, among other things, to reduction of certain properties", but I am informed that those are not electric properties, "to original cost."

There is also a deduction of $17,297,622.68 which represents plant acquisition adjustments in the amount of $17,297,622.68, that being a 100.5 item.

Q. Which one being the 100.5 item, plant adjustments? You call it plant adjustments; it should be plant acquisition adjustments.

A. It should be plant acquisition adjustments.

Q. Down below you say it, so I guess it is all right. Go ahead.

A. As against those gross deductions, I applied two items appearing on page 21 of Applicant's Exhibit 37-T, to wit, the reserve item of $7,947,076.04 and another item of $2,585,328.98.

I don't believe the specific allocations of those reserves or the items contained on Note 2 are quite correct, but the gross effect, nevertheless, would be the same whether they were allocated to the proper items or not. The gross effect would be the same.

There was another item appearing on page 24.

Q. Do you mean page 24 of Applicant's Exhibit 37-T?

A. Yes.

Q. Go ahead.

A. An item of $6,915,751.68, which is merely stated as plant adjustments in that tabulation. I was unable fully to interpret that account when I made my computation, but a discussion of that item with Mr. Benjamin would indicate that that should properly be classified as a 107 item, so this computation which you have at hand requires a further adjustment in the amount of $6,916,000, approximately.

Q. Without taking the time now to amend Exhibit 78 for identification, do you suppose that before tomorrow morning you could reflect the additional adjustments that you think should have been made of $6,916,751.68, which you say is Account 107 material?

Mr. Condon: Mr. Examiner, I object to that question on the ground that it presupposes testimony that Dr. Badger has not given. I bear in mind that these calculations were prepared at Mr. Tucker's request and there is nothing in the record to show, no evidence to show that these calculations are anything other than to indulge Mr. Tucker. We do not submit that these are proper calculations in any case. That is not Dr. Badger's testimony and I object to the question as to form.

Mr. Tucker: Well, I will withdraw the question.

By Mr. Tucker:

Q. Do you understand the nature of Account 107 of the Federal Power Commission classification?

A. Yes, sir.

Q. In effect it is a write-up, isn't it?

A. In some sense, yes, sir.

Q. Now if you had known that there was a write-up in the accounts that you were using in making your original analysis of these asset values, wouldn't you think it properly should have been taken out?

A. Not for the purposes for which that comparison was set up. The five other utility companies, as well as Engineers Public Service—now let me change that—at least two of the other utility companies and Engineers Public Service in their annual reports set up balance sheet figures without any reference in the balance sheet as such to other write-ups or accounts to be classified as 100.5 or related items.

In the case of all three companies, however, explanatory notes relative to such items are contained. The various investment services, such as Moody's, publish the accounts of all of the five utility companies on the same basis that I used in my report and only by examining the fine explanatory note—I mean they were printed in fine type—would it be possible for one to determine what amounts in the case of each company were involved in Accounts 100.5 or 107.

Furthermore, in the case of Public Service of New Jersey the following appears: "In November, 1943, Public Service Electric & Gas Company received according to the Stockholders' Report orders from the Federal Power Commission and the Board of Public Utility Commissioners of the State of New Jersey showing (1) $14,578,064 for electric properties, $20,509,936 for gas properties, and $14,750,147 for joint electric and gas properties, or an aggregate of $49,838,147 to be established in utility plant acquisition adjustments account (100.5); and (2) $32,708,159 for electric properties, $16,775,209 for gas properties, and $5,857,354 for joint electric and gas properties, or an aggregate of $55,340,722 to be established in utility plant adjustment accounts (107), and indicating that approximately $9,500,000 of the amounts to be established in the utility plant adjustment accounts should be charged to earned surplus as one step in the disposition of these amounts.

Public Service Electric & Gas Company does not agree with the findings in the staff reports and orders of the Commissions and is contesting the orders as to certain classifications and the disposition of certain amounts.

"The order of the Board of Public Utility Commissioners of the State of New Jersey relates only to classification of plant accounts and does not make any provision with respect to the disposition thereof. Public Service Electric & Gas Company filed responses to these orders and hearings with respect to electric plant were held during 1944 before an Examiner of the Federal Power Commission. Main briefs are to be filed by the Public Service Electric & Gas Company and the staff of the Federal Power Commission on or before February 20th, 1945 and reply briefs on or before March 31, 1945, at which there will be an oral argument before the Federal Power Commission."

That appears on page 37 of the published reports of the Public Service Corporation of New Jersey for the year ended December 31, 1944.

In other words, there is divergence of opinion as to how these matters should be handled. Apparently there is litigation in respect to how these matters should be handled, and I think it is proper to state that there may be a divergence in the minds of experts as to what effect this type of classification or the handling of such accounts may or may not have on the question of the value of preferred stocks.

Q. On the assumption, however, Doctor, that the item appearing on page 21 of Applicant's Exhibit 37-L, which you referred to heretofore today as T——

(Discussion off the record.)

The Examiner: Let the record show that the witness's reference heretofore to Applicant's Exhibit 37-T in his testimony was in error, and that he intended to refer to Applicant's Exhibit 37-L.

Is that right, Dr. Badger?

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[R. p. 1668] By Mr. Tucker:

Q. Dr. Badger, I understand that before the adjournment for dinner you stated, in explanation of Applicant's Exhibit 78 for identification, that you overlooked an item of $6,915,751.68, being Account 107 as shown on page 24 of Applicant's Exhibit 37-L in Note D-1. You did so testify, did you not?

A. I did not testify that I overlooked that item. I testified that I did not feel that I had sufficient information concerning its nature to classify it, but that upon discussion of the matter with Mr. Benjamin I did feel that it should be classified as a 107 item.

Q. Yes. Now, if you had deducted this amount in Exhibit 78 for identification, would not the balance available for preferred stock, excluding Accounts 100.5 and 107, be $32,227,680.80 instead of $39,145,432.48, as stated in the line on Applicant's Exhibit 78 for identification opposite the

item "Available for preferred stock, exclusive 100.5 and 107," under the heading "Engineers Public Service Company"?

A. It would in respect to the computations that were made, also excluding reserve items.

Q. All right, with that explanation.

A. I am assuming the correctness of your arithmetic. I believe that to be correct.

Q. Now, you didn't, in Applicant's Exhibit No. 78 for identification, deduct, did you, an item of $3,783,413.36, which is unamortized debt discount and expense shown on page 20 of Applicant's Exhibit 37-L, did you?

A. No, sir, nor did I include an item of $1,785,946, which would have been represented on the liability side as unamortized premium less expense on bonds, so that neither the premium nor the discount items were given any consideration in the computation.

Q. Nor did you deduct in Applicant's Exhibit No. 78 for identification an item of $563,586.36 shown on the same page as capital stock expense, did you?

A. No, sir. In that connection I might also say that I gave no consideration to the item on the liability side of the balance sheet representing premium and discount on preferred stock of subsidiary companies in an amount of $341,663.

Q. Well, if you had given consideration to them in your calculations, how would you have treated those items, Doctor, to which you just referred, the unamortized premium less expense on bonds, on the liability side and the premium and discount on preferred stock of $341,663?

A. I would like to correct that to state that I did include the premium and discount item on preferred stock which appears on the liability side in the amount of $341,663, and I placed that in the category representing obligations prior to the preferred stock of the holding company. I did not take into account capital stock expense of $563,586. In view of the fact that both items represent on the one side a

premium, on the other side a discount, and presumably it would be written off over a period of years, I would say that they should either both be included or they should both be eliminated. If you made that computation on that basis, there would be a variation in the accounts of about $222,000. In other words, my calculations would be changed by that amount, which I believe is sufficiently small to warrant the statement that they would not change the ratios perceptibly.

Q. Well, that would leave, would it not, about $2,000,000 on the unamortized debt discount and expense item on page 20 of Applicant's Exhibit 37-L which ought to be reflected in your tabulation?

A. Well, I don't say that it ought to or ought not to. I say that if it is proposed to eliminate all of those items from both sides of the balance sheet, there would be a net difference of $2,000,000, approximately, that should come out of the assets side. I am not stating here, and in connection with this question, whether that should or should not be eliminated. I think that is a matter that we could reserve for discussion.

Q. Well, on the assumption that this net amount were deducted in Applicant's Exhibit 78 for identification, what would the item "Available for preferred, exclusive 100.5 and 107" become, Dr. Badger?

A. Would you give me the figure that you had for the previous computation there after deducting the $6,000,000 item? I didn't write that down at the time you gave it to me.

Q. $32,227,680.80.

Mr. Condon: Mr. Tucker, in your question you presupposed that there were no deductions for the adjustment accounts 100.5 and 107. Aren't you referring to a different line wherein the amounts are set forth as being available for the preferred exclusive of the Accounts 100.5 and 107, and you should deduct your $6,000,000-plus from $43,540,136.68, rather than from the $39,145,432.48.

Mr. Tucker: I don't care. Let the witness say where he would like to deduct it.

Mr. Condon: I think, in the interest of correctness of the record, that you inadvertently applied the deduction of the $6,000,000 figure and said that that was predicated upon a base that was calculated without deduction for the adjustment accounts 100.5 and 107, and I feel that the exhibit for identification does not so show.

The Witness: I think, Mr. Condon, that you may be confused in that there are two complete sets of computations there with 100.5 and 107 items deducted. In the first one, the reserve items, and including, in the case of Engineers Public Service, reserves for possible depreciation in investments is not taken out; it is included. In the second one, reserves for depreciation of investments in the case of Engineers Public Service and other general reserves in the case of the other five companies are deducted, as well as 100.5 items and 107 items.

Mr. Condon: But isn't it the fact, Dr. Badger, that the second set of tabular figures reading in a horizontal way refers to the adjustments excluding reserve items and deducting the adjustment accounts 100.5 and 107?

The Witness: Deducting all of the adjustment accounts 100.5 and 107, with the exception of $6,915,000.

Mr. Condon: So that if Mr. Tucker asked you to apply the deduction of this $6,000,000 to $39,145,432.48——

The Witness: You would then get the $32,227,000 figure.

Mr. Condon: But did that base exclude the 100.5 and 107 accounts?

The Witness: That includes all 100.5 and 107 accounts, including the one that I have indicated that I did not previously deduct, and it also excludes reserve items such as reserves for depreciation and inventory.

Mr. Condon: Thank you.

Ralph E. Badger—Cross Examination (Cont'd)

By Mr. Tucker:

Q. Now, Doctor, would you answer the question? What you have to do, isn't it, Doctor, is to take the reduction of $3,783,473.36 for unamortized debt discount and expense and the deduction of $563,586.36 for capital stock expense, or a total of $4,446,997, after deducting from that item the two items on the liability side that you testified with respect to, is that right?

Mr. Condon: I think that question is pretty confusing, Mr. Examiner, at least it is to counsel.

The Examiner: Well, if the witness understands it, that is the point.

Do you understand the question, Mr. Badger?

The Witness: Yes sir, I understand what it is going to be.

The Examiner: Let's have your answer, then.

The Witness: If we could go to the net result, I think what Mr. Tucker is about to develop is that there is a net amount involving these unamortized debt discount and premium items.

By Mr. Tucker:

Q. That is right.

A. That there is a net amount presently in existence on the asset side of the balance sheet of approximately $2,000,000.

Q. That is right.

A. And I believe he is going to ask me what the result would be if that $2,000,000 were deducted.

Q. That is right. I now ask you the question you said you thought I was going to ask you, Doctor, and ask you for the result.

A. The arithmetical computation would be $30,228,000, approximately.

Q. And would you translate that by slide rule, if I can get you one, into the last figure under the column "Engi-

neers Public Service Company, book value preferred," after all of these adjustments?

A. Well, I would get a value of approximately $77 per share.

Mr. Tucker: I now offer as Applicant's Exhibit No. 78 Applicant's Exhibit 78 for identification, subject to the adjustments which the Doctor has made on the stand.

Mr. Condon: Mr. Examiner, I have some preliminary questions to ask of Dr. Badger on this exhibit.

The Examiner: You may proceed.

By Mr. Condon:

Q. Dr. Badger, I hand you Applicant's Exhibit 78 for identification and ask you whether or not, in your opinion, this calculation prepared at the request of Mr. Tucker, plus the amendments and supplementations of your testimony with respect thereto, gives any fair or proper method for arriving at the going concern value or the fair investment value of the preferred shares of Engineers Public Service Company?

A. I don't think it gives any indication of the fair investment value or the going concern value or the liquidating value of the preferred stocks of Engineers Public Service.

Q. Would you state the reasons for your conclusion?

A. For one thing, we arrive at the net valuation here of $30,000,000. It has already been testified to that this holding company, Engineers Public Service, has approximately $16,000,000 in cash, against which there are no prior claims other than the preferred stocks of Engineers Public Service; from the record and on the basis of the testimony of Mr. Barnes, president of the company, there is evidence to the effect that Engineers' holdings in Virginia Electric & Power Company have a value of at least $65,000,000; there is a proposal involved in the 1945 plan promulgated by Engineers Public Service involving the sale of Gulf States at an aggregate valuation of approximately

$22,000,000, which value has been indicated as lower than the fair market value of that stock, in testimony——

Q. By approximately how much?

A. Well, my recollection is by——

Q. $6,000,000 or $8,000,000?

A. Somewhere between $6,000,000 or $8,000,000.

Q. Proceed.

A. And on the basis of my own appraisal of that stock, by at leas. $7,500,000. In addition to that, there is El Paso Electric, which has a fair value of somewhere between $6,000,000 and $8,000,000, so that the sum total of values that have already been established, readily marketable values that have already been established in connection with the assets of Engineers Public Service Company, against which there are no prior claims other than the preferred stock here involved, would total as follows:

$16,000,000 of cash;

$65,000,000 for Virginia Electric;

$30,000,000 for Gulf States;

$7,000,000, roughly, for El Paso, giving a valuation on these assets, in accordance with the evidence and/or records in this case, of $118,000,000. Certainly this looks ludicrous as compared with the value of $30,000,000. Now, one or the other method must be in error.

Q. And would you care to state your opinion as to which is the erroneous method?

A. It is my opinion that for the purpose which this computation of mine was originally made that the methods that I applied are more correct than the methods suggested in the cross examination, and it is my opinion that even there the values arrived at are erroneous and that the real value of the assets behind Engineers Public Service preferred stocks outstanding in the amount of approximately $39,000,000-plus, against which there are either no claims or very small claims, have a value of approximately $118,000,000.

Now, I must state that I have, in connection with that sentence, computed the other liabilities existing on the balance sheet of Engineers Public Service Company, the parent company, only at December 31, 1944, and I stated that there were no claims prior to the preferred stock. That should be corrected to indicate that at December 31, 1944, which is the last balance sheet I had available, there was an item of long term contract payments due in the amount of $645,773 and current liabilities in the amount of $226,539.77 and a reserve for taxes on income of prior years of $13,958, or an aggregate amount of considerably under $1,000,000, so that exclusive of that small amount of claim we have admittedly from the record here a value of assets, marketable assets of $118,000,000 behind the preferred stock of Engineers Public Service, with no prior claim, and I believe that could be representative of the fair amount of market value that you have on an asset basis as a protection against this preferred stock at the present time.

Q. Now, Dr. Badger, I understood your arithmetic in the questions propounded by Mr. Tucker to show a total value for the preferred, upon the basis of calculation in Applicant's Exhibit 78 for identification, which you prepared at his request, of approximately $30,228,000?

A. Yes, sir.

Q. Do I understand from your testimony that the actual value, tangible liquid value is almost four times that amount?

A. That is correct.

Mr. Condon: Mr. Examiner, I object to the document in its entirety and I move to strike all testimony with respect to it.

Mr. Tucker: Just a moment.

By Mr. Tucker:

Q. Doctor, will you look at page 11 of your report? I ask you what your purpose was of putting into your report

the tabulation shown on page 11 if you feel the way you now said you feel?

A. It was purely for the purpose of making a comparative study with five other holding companies on a similar basis throughout and the only purpose for which that was used was in connection with that study, which appears on page 15, and the results of that study on page 11 are carried over and are indicated on page 15 to show comparative studies computed on similar bases for the five holding companies.

Q. But you do there show book value equity, preferred shares of Engineers, don't you, in a series of tabulations running across the page for the years 1941, 1942, 1943 and 1944, and that is book value?

A. I show it and I show the basis on which it was prepared. I show the items that went in constituting it.

Q. Now, isn't it true, Doctor, that in Applicant's Exhibit No. 78 for identification we do no more than to take out of those figures there, at least with respect to the year 1944, certain items that you admit wouldn't have any realizable value for the preferred stock—you can't sell a write-up and get any money for it, can you?

Mr. Condon: Now, I object to the form of the question on the ground that it is triple-barreled.

The Examiner: I think if the witness understands it he can answer it, Mr. Condon.

Mr. Condon: May we have the question repeated?

The Examiner: Do you want to hear it?

Mr. Condon: Yes.

(The question is read.)

Mr. Condon: I submit that that is a question that is clearly objectionable as to form and should be reframed.

Mr. Tucker: Strike out the words "you can't sell a write-up." Strike out the last phrase and then answer the question, Mr. Badger.

The Witness: I would say that for the purpose for which this balance sheet was prepared that I would be entirely unwilling to admit, and do not admit for this record or any other record, that the write-up items or the unamortized debt discount in respect to certain securities that were issued do not have a value. That involves us at considerable length into a question of accounting.

Mr. Tucker: Just a minute before you——

Mr. Condon: Let him complete his answer, please, Mr. Tucker.

The Witness: If you wish me to go into that at length, I can prove——

Mr. Tucker: Just a moment, if you will, please.

Mr. Condon: May the witness be permitted to complete his answer, Mr. Examiner.

The Examiner: Proceed with your answer, Dr. Badger.

The Witness (Continuing): For accounting purposes it is necessary that those items appear there and it is perfectly proper that they should appear there and when one is making the study of the nature as the study appearing on page 11, I contend that the study is proper in that they are there included.

By Mr. Tucker:

Q. 78 was a comparative study involving all of those companies, wasn't it?

A. 78 was a comparative study with very substantial modifications and the treatment of accounts that I don't subscribe to here as being proper in preparing an exhibit of that kind.

Q. Well, making the deductions of 107 and 100.5, Doctor, would get us back to what the Federal Power Commission talks about as original cost, wouldn't it?

A. That is correct.

* * * * *

Ralph E. Badger—Cross Examination (Cont'd)

[R. p. 1685] By Mr. Tucker:

Q. Applicant's Exhibit No. 78 for identification, Doctor, is a method of approach when you are trying to determine over-all this question of value for the preferred stock, isn't it?

The Examiner: Can you answer that, Mr. Badger?

The Witness: I thought the question had been objected to.

The Examiner: This is another question.

(The question is read.)

The Witness: Well, I presume any method that anyone might use is an approach. As to whether it is an approach that I should feel should be accorded great weight or little weight is, of course, a different matter. One can make any computation that he desires or feels proper in his own mind in arriving at a given value. I don't feel that the approach as carried through, together with the collateral computations that have been required in this case, gives any realistic picture of the value of the assets which are available as a security for this preferred stock.

By Mr. Tucker:

Q. But did you find when you read, as you have testified you did, Commission Release 5568 and Commission's Release 5021, that the Commission made somewhat the approach that is made in Applicant's Exhibit No. 78?

Mr. Condon: I object to that.

Mr. Scheetz: Objected to.

Mr. Condon: I object to that on the ground that it is Mr. Tucker's characterization of what those releases contain, that they are not in evidence and it is not proper cross examination.

Mr. Tucker: The witness said that he read them.

Mr. Condon: That doesn't make any difference, Mr. Tucker. If you wish to point out to this witness any parts

of the releases that he read that are inconsistent with his testimony, that is the proper way to cross examine, not to characterize a document not in evidence and to ask him if he didn't make some calculation at variance with some of the material contained therein. You were denied the privilege of having these documents received in evidence in toto by the Examiner and you took exception and I submit that this is an oblique effort to accomplish the same result and should be rejected and I object to the question.

Mr. Tucker: I press the question.

Mr. Scheetz: Mr. Examiner, my objection is a simple one, that I don't think it is proper to characterize the data referred to as the Commission's approach, because I think it carries implications of a method of valuation and I don't think that that necessarily follows.

Mr. Kanton: Mr. Examiner, I believe I stated my position prior to the dinner recess, which was restated by Mr. Condon and concurred in by Mr. Scheetz.

The Examiner: I will sustain the objection, Mr. Tucker, and allow you an exception, if you desire.

Mr. Tucker: Will you save the exception, please?

By Mr. Tucker:

Q. Instead of using the word "approach" I ask, with respect to Commission Release 5021, whether the Commission on page 14 of the release, which you say you read, did not make an analysis of assets on the basis, first, of excluding 100.5 and 108.15, and then including amounts in Accounts 100.5 and 108.15.

Mr. Condon: Just a minute. May I examine that release for a moment, please, Mr. Tucker?

Mr. Scheetz: Mr. Examiner, it seems to me that it is a misnomer to call it an analysis of assets, but I won't object, because I think the witness can handle it.

The Examiner: I think the witness is capable of handling it.

Ralph E. Badger—Cross Examination (Cont'd)

Mr. Condon: I would like to draw the Examiner's attention to the fact that this does not appear to be an 11(e) proceeding at all. What the witness has had drawn to his attention were the findings and opinion of the Commission in the matter of Virginia Electric & Power, Virginia Public Service Company and Engineers Public Service Company, and it is apparent, whatever use this Commission had for the particular tables, that there is nothing in here to suggest that that same method was employed or was to be employed in connection with a valuation of preferred stock on a going concern basis and I object to it.

The Examiner: I will overrule your objection. I think Dr. Badger is well able to answer that and explain that situation. I think it can be included as a part of his answer just as well.

Mr. Condon: I respectfully except.

The Examiner: Now, Dr. Badger, do you understand the question or do you want it read back to you again?

The Witness: On page 14 computations regarding adjusted net plant and property calculations are made on four different bases, one basis excluding amounts in Account 100.5 and 108.15, but not adjusted to eliminate certain unamortized debt discount and expenses and capital stock discount and expenses, and in another case adding those back. There is also a computation made including amounts in Accounts 100.5 and 108.15, and likewise including and excluding unamortized debt discount and expense, capital stock discount and expense.

The Examiner: Now, in that case was the Commission dealing with an 11(e) case in appraising the value of the stock? In other words, was the situation comparable with the present hearing?

The Witness: I don't see that it was in any way comparable, Mr. Examiner.

The Examiner: In what respects?

Mr. Condon: He said in any way.

Any further questions, Mr. Tucker?

Ralph E. Badger—Cross Examination (Cont'd)

The Examiner: I assume from your answer, Dr. Badger, that the situation there was not analogous with the present situation at all.

The Witness: That is correct.

* * * * *

[R. p. 1693] Mr. Condon: I now renew my motion to deny admission to Applicant's Exhibit 78 for identification on the ground that it is incompetent, that no basis has been laid for its reception, that it is misleading, and the only testimony in this proceeding is to the effect that it has no probative value. In addition to that, and supplementing my prior application, I ask that Dr. Badger's testimony elicited on cross examination with respect to this exhibit and his supplemental calculations be stricken for the reasons asserted.

The Examiner: Does Commission counsel have any comments to make on it?

Mr. Kanton: Mr. Examiner, I think quite a bit of time and effort have been put into the preparation of this exhibit and into the comments and questions with respect thereto by Dr. Badger and Mr. Tucker. While I do have some question as to the relevancy of this exhibit and the testimony with respect thereto, because Dr. Badger has himself stated that, while he has prepared this exhibit, that he did not place any weight thereon, I would not object to letting the exhibit come in and the testimony with respect thereto for whatever consideration the Commission may deem it is worth.

Mr. Condon: Mr. Examiner, I feel that, putting staff's counsel's statement succinctly, it amounts to nothing more than a desire not to have Dr. Badger's efforts in this connection go unrequited. I assure staff counsel that that is not a basis or foundation for admitting an exhibit which was prepared, I submit, over the protest of preferred stockholders' counsel, who suggested that if Mr. Tucker wishes to offer this line of proof he should get his own expert and lay a proper foundation for the document.

Now, the fact that we spent a lot of time interrogating this witness with respect to a document not in evidence, the Rules of Evidence are clear that if the document itself is not admitted on the ground that no proper foundation has been laid, and here I submit there isn't a shred of evidence to support its admission, but for the mere request of Mr. Tucker that we sought to comply with, there is nothing to support this document at all, and if that be true, how much time we expended on it, due to the forbearance of counsel out of respect to the Examiner, shouldn't serve as a foundation for its admission. I submit it should be denied.

Mr. Kanton: Mr. Examiner, technically I agree with Mr. Condon, and from his interpretation of my remarks, and my own interpretation, there is no doubt in my mind that there should be an exclusion of this exhibit and the testimony pertaining thereto, because if Mr. Tucker wanted to put this in evidence, and this goes to his whole case here, he had every opportunity to have exhibits prepared and have one of his witnesses, either Mr. Barnes, Mr. Hastings or Mr. Benjamin, take the stand, prepare it and comment thereon, but when he takes the position, as he has here, of having preferred stockholders' witness prepare something and then have the same witness, in answer to his questions, say that he places no reliance on it, technically I don't see any basis for admission. However, for whatever consideration, as I said before, the Commission may want to give it, of course, subject to your ruling, technically speaking I would have an objection, but otherwise I have not.

Mr. Tucker: I have just this to say: I think the Commission would welcome this exhibit.

Mr. Condon: Mr. Examiner, this Commission has been criticized publicly for failing to adhere to rules of evidence, and I submit if there was ever a document that had not a scintilla of basis for presentation of an exhibit this is a shining example.

The Examiner: I am inclined to agree with you on that, Mr. Condon, but on the other hand we have a study here,

this report of Dr. Badger, and he has had certain approaches made to valuations of this stock and Dr. Badger admitted, in answer to a question by Mr. Tucker, that this is one of the approaches, although he didn't agree that it was a proper approach. I also agree with the position of Commission counsel that Mr. Tucker had full opportunity for his own experts to have this exhibit prepared and offered, and it might be technically objected to for that reason, but I think there is enough in the record to show just what it is and I don't think there is any particular harm done by letting it in the record, because the Commission will have all of the information before it in considering this exhibit, and for that reason I am going to overrule your objection and admit it as Applicant's Exhibit No. 78.

(Applicant's Exhibit No. 78 is received in evidence.)

Mr. Condon: I respectfully except.

Mr. Scheetz: Mr. Examiner, I assume that my earlier objection will be considered as having been renewed and, I assume, overruled by your recent ruling.

The Examiner: Off the record.

(Discussion off the record.)

Mr. Condon: Mr. Examiner, I am wondering if, without disrespect, I might point out one thing that I feel may serve as a basis for reconsideration of your Honor's ruling with respect to this exhibit. I understood you to say that Dr. Badger's testimony was to the effect that this was one approach to this particular——

The Examiner: But that he didn't agree with it. He said it wasn't the right approach.

Mr. Condon: That testimony was coupled with the rest of his answer, which said that anybody could make any kind of calculations, but he has repudiated and disowned this document and I respectfully urge that with that as a premise there is no basis, there is no testimony to show that this is a proper method at all, that is, the basis for the

admission. Simply because it is an approach or a method of calculation, as Mr. Tucker accepted an amendment to a question, it does not serve as a basis for admitting it.

The Examiner: Well, the Examiner has already stated in his opinion that the approach was entirely improper, it wasn't properly proved, but that I saw no particular harm in admitting it into evidence with the testimony of Dr. Badger on the subject, and I see no particular reason for reversing myself on that. It will be admitted as Applicant's Exhibit No. 78 and I will allow you an exception.

Mr. Condon: Exception.

Mr. Tucker: I have no further questions.

The Examiner: Now, do you went to cross-examine next?

Mr. Kanton: Yes.

By Mr. Kanton:

Q. Dr. Badger, page 4 of your report, second full paragraph, your definition of fair investment value, reading: "Fair investment value may be defined as the price or value at which the shares of the several classes of stock would exchange hands between willing buyers and willing sellers, neither under compulsion to buy or to sell, and both thoroughly informed of all of the various elements of value."

Could you tell me what you had in mind when you used as part of your definition "all of the various elements of values"?

A. Well, the elements of value would include a question of the history of the enterprise, the question of its management, the nature of the business in which it was engaged, the question of competition, the question of past, present and future earnings, the dividend-paying capacity of the company, the asset values behind the security—that, I think, would cover the more important elements.

Q. And in your determination of the fair investment value of the preferred stocks of Engineers did you take into consideration every one of those elements of value?

A. Yes, sir. I did not cover them all in this report, but I gave consideration to all of them.

For example, I didn't believe that it was necessary to engage in a long written report on the history of this company, because it is fairly well known to the Commission through various previous hearings.

I didn't discuss the question of management, because I didn't believe there was any divergence of opinion as to the ability of the management; the nature of the business is well known to the Commission and to other interested parties, so there were some of the elements of value that I did not discuss in the report, but I certainly did give consideration to them in my arriving at the value of this stock.

Q. In other words, your over-all judgment figures which you set forth in the conclusions did consider in one form or another all these elements of value?

A. That is correct.

Q. You speak on page 4 under the title "Basis of Valuation," "Although the several classes of preferred stock of Engineers Public Service Company are bought and sold on the New York Stock Exchange, the reported prices at the present time can not be regarded as representative of fair value."

Now, my question is: Can market value ever be regarded as representative of fair value or fair investment value, as you put it?

A. Well, that is a rather difficult question to answer. I think it would be a fair statement to say that in a free and unfettered market that on any given date the market prices as emanating from purchase and sales might or might not be the fair value, but that they tended to approach it, and stocks that are actively traded probably approach fair investment value very closely, unless by virtue of pronouncements by the management of the company, unless by virtue of the spreading of rumors, unless by virtue of circumstances that create either fear on the one hand or a favorable atmosphere on the other hand, through events that

may or may not be permanent and as the result of those events unduly depress or unduly raise the price of stock, that in the case of actively traded stocks we frequently have a close approach to fair investment value represented in the market prices of stocks.

Q. Using your expression "Free and unfettered market" in your experience as an expert financial analyst have you ever noticed any stock or any time when the stock market was ever in a condition that you could say it was free and unfettered?

A. Well, I think it more closely approaches it at certain times than it does at other times. For example, in the period between 1929, and I might extend that period well into the '30s, we had a serious depression involving heavy liquidation of borrowings, which had been made by individuals to carry securities, and unquestionably market prices at that time were depressed, possibly very substantially below their true investment values because of necessitous liquidation. It is my opinion that for a considerable period of time, and as the result of adverse political developments in respect to public utility stocks, that certain public utility stocks were selling below their fair investment value. There may be other periods, such for example as the present time, when a stock like this newly launched automobile firm, may be selling at above its fair investment value. That, of course, is a question that will take time to answer, but, on the other hand, stocks that are very actively traded, without any undue influences prevailing in a given time, presumably closely approximate their fair investment value.

That is about the only answer that I could give to that question.

Q. But you would not, in your opinion, as an expert, substitute market values as a test to determine fair investment value in and of itself?

A. No, sir.

Q. And would you say that preferred stocks similar to those of Engineers Public Service Company, or any preferred stock of a holding company which is under the jurisdiction of the Holding Company Act, has a free and unfettered market?

A. Well, I would say that many of them do not have a free and unfettered market.

Q. And with specific reference to the Engineers preferred stock?

A. That is true. I do not believe that that stock at the present time is enjoying a free and unfettered market and I think it is influenced, as I have stated, by the proposal of the company, and the threat of litigation in connection therewith, to pay off such stock at $100 a share.

Q. On page 7 of your report, Dr. Badger, subject to the qualifications placed on part of this report, which you made during the cross-examination by Mr. Tucker, as to the permanent nature of prices of preferred stocks, were your remarks directed not only to high grade preferred stock prices, as you state on page 7, but also to medium grade preferred stocks, as you so classify the Engineers preferred stocks?

A. Well, I think that over a period of years that a stock classified as medium grade would normally fluctuate over a wider range than would high grade preferred stocks. I think that would be a fair statement and one that would have to be made in the interests of truth. There may be periods, however, during which medium grade public utility preferred stocks may be expected to maintain a level over a considerable period of time, and when I stated that it was my opinion that this value that I was testifying to here was a permanent value, I used the word "permanent" as the antithesis of a temporary fluctuating or speculative value. The value which I am attesting to here is in my opinion a fundamental and real value under the circumstances as they surround the money markets today, as they surround the utility industry in general, and as they surround Engineers

Public Service Company in particular, and I don't believe that they represent in any sense of the word fictitious, temporary or speculative values.

Q. And you are placing in that category, subject to your minor exception, both the high grade and medium grade preferred stocks, as you so classify them?

A. Yes.

Q. Would you also place in that classification low-grade preferred stocks?

A. Well, I think that in answering that question it would be necessary to go into the nature of each specific stock. I would say, as a class, that unquestionably low grade preferred stocks would fluctuate over a much wider range than would medium grade or high grade, and when you ask me what is likely to take place in respect to low grade common stocks today, you are more or less asking me what I think is going to occur with respect to the market, if I understand your question.

Q. No. That was not the purpose of my question. I was getting back to your statement as to the permanent nature, so far as one can humanly foresee, as you used it, and applying that statement, as you have, to both the high grade and the medium grade preferred stocks, I wanted to know whether you would also apply, aside from what you call wider fluctuations, the same opinion as to low grade preferred stocks.

A. Well, about the only answer I can give to that is this: that it is my opinion that, at least for some time to come, low grade preferred stocks are going to enjoy a good market. They may be selling at levels today that are below levels that will be attained subsequent to now, but those levels are likely to remain more or less permanent for at least two or three years.

Now, in the case of a low grade preferred stock we could have a substantial decline in value occasioned by what we would call a temporary reaction in the common stock market, and that might carry low grade preferred

stocks down along with the decline in common stock prices. I don't believe, with this money market, that that type of a temporary decline or corrective movement, as we call it, in the common stock market, would be likely to affect the value of medium or high grade preferred stocks, at least it would not do so appreciably.

Q. And interpreting your last remarks, a temporary reaction or corrective movement in your opinion would not effect the Engineers preferred stock?

A. That is correct.

Q. Dr. Badger, in the top paragraph of page 11, last sentence of the first paragraph, "It is a reasonable assumption therefore that this Company should continue in future years to register progress along with other units in the industry." Now, is your reasonable assumption based primarily on past, present, or future earnings levels of Engineers, or is it based on one or two or three of them?

A. May I have that question?

Q. (The question is read.)

The Witness: I would say it is based on all three.

Q. Referring now to page 15, Dr. Badger, you use for comparative purposes the five utility companies listed in the table on this page. Can you tell me how you went about selecting these five companies, and why you consider them similar or comparable with Engineers Public Service Company?

A. Well, I wouldn't want to say that any company was exactly comparable to Engineers Public Service, and I believe I stated that at no time have I attempted to take one company or a group of companies and apply so-called price-earnings ratios or price-dividend ratios, or any other ratios from that company over to Engineers Public Service. This study was, along with other studies, purely for the purpose of fortifying my judgment as to what I thought these stocks to be worth. The times dividend coverage in respect to all of these companies—and I refer now

to the times all charges and preferred dividends were earned—ranged from approximately a 1.25 basis to a 1.75 basis. There were some exceptions during certain years. That placed the coverage charges of these companies within the range during that period for Engineers Public Service, and there again I state that my figures are approximate, because in three years, without excluding Puget Sound, which, during those three years tended, at least during two of them, substantially to reduce the coverage—in those three years the coverage ranged from a 1.2 basis to a 1.22 basis. I figured that close enough to approximate the 1.25 to a 1.75 basis. That was one of these factors. In fact, I might say that was one of the most important of the factors that I used in selecting these companies,—I endeavored to cover, in so far as possible, all holding companies dealing with electric light and power in a substantial measure for making that comparison.

Q. Doesn't Columbia Gas and Electric Holding Company system have large gas operating companies?

A. Yes, it does. Of course, it does at the present time have very substantial electric properties too. I believe Columbia Gas is at the present time under order to divest itself of those electric companies, although it is my opinion that the order has not as yet been carried out; but it has got very substantial electric properties.

Q. Well, in the introduction to this table, you said these holding companies are similar in many respects. Now, in choosing these five companies, did you also look at other holding companies, say, for instance, Commonwealth and Southern or United Light & Power? And in so looking at them—I am just using holding companies for examples—did you look at them and then put them aside, as not comparable with Engineers Public Service Company?

A. I did, yes. Commonwealth and Southern, for example, I think I can indicate why that was discontinued. I would like to refresh my memory on some of these things, because it is a little difficult for me to continuously bear all

of these factors in mind. I would like to run down that Commonwealth and Southern and explain the reason for excluding it. Commonwealth and Southern was excluded because it had accumulations of $29.25 thereon at January 2, 1946, and the dividend record of that company with that arrearage, to my mind, would have made it an improper comparison.

Q. Using that illustration, would you say the five public utility holding companies that you did use have a dividend record comparable with Engineers?

A. The one exception would be Niagara Hudson on which, at the present time there is an accumulation of unpaid dividends. I have forgotten the exact amount, but I showed it in my report. In computing the price, I deducted the accumulated dividends with a ten percent discount thereon.

Q. Is that present arrearages? As of the time you prepared this report?

A. That is correct, sir.

Q. So, after examining, as you put it, quite a number of public utility holding companies, you, in your opinion, decided that the five holding companies appearing on page 15 were the closest comparable with Engineers Public Service Company—is that correct, Doctor?

A. Those were the five which I was able to find which came the closest to resembling Engineers Public Service,—and I don't say that the comparison is 100 percent by any means, in the case of any of these five, but they were the five most comparable ones that I could find in examining a very large number of holding company issues.

Q. Would you say basically that from this comparative study on page 15, that you did use it as a test for arriving at the value of the Engineers preferred as set forth on page 17 of your report?

A. Only to the extent that it tended to corroborate my judgment.

Q. Of what the Engineers preferred stock is worth on a going concern basis?

A. That is a corroborative study only.

Q. Referring now to page 17, the second full paragraph appearing thereon, next to the last sentence:

"These prices, of course, are without reference to the call prices at which these stocks can be called;" and paraphrasing the previous sentence you gave certain values for the three series of preferred stocks. Did you also mean to say here, with respect to these valuations, that it was not only without reference to the call price; it was also without reference to what you would put the impact of the Public Utility Holding Company Act?

A. Yes.

Q. When you say "ex the Holding Company Act" as you use it in your report, do you mean ex the impact of Section 11 of the Holding Company Act or ex the entire impact of the Holding Company Act? I have specific reference as to whether you mean the impact of section 11(b)(1) of the Act as affecting Engineers?

A. I have reference to the impact of Section 11, and for purposes of clarity, that entire phrase should be used or substituted in lieu of the phrase "ex the Holding Company Act."

Q. Dr. Badger, on pages 19 and 20—and I think you go on to page 21—you have what you call a special analysis regarding Virginia Electric and Power Company. I think you told us that this study was made at the request of Mr. Condon. Can you tell me, in arriving at your determination of the fair investment values of the preferred stocks of Engineers, what weight, if any, you gave to this special analysis of Virginia Electric and Power Company?

A. I would like to make one correction. If I did state that that was made at the suggestion of Mr. Condon, I did not so intend, because no one suggested that I make that study other than myself. In other words, I believed that that study was a necessary study to complete my analysis of the fair investment value at the present time of these preferred stocks, because obviously the Company had

it within its option, and presumably without any substantial legal contest, and possibly without any legal contest—I don't know what authority they may have required from the Public Utility Commission—but exclusive of that, they had it within their power to proceed up to this point on their own initiative, and whether they were operating under the impact of Section 11 or not, this is something that they may have carried out. So all that is necessary to show what the value of the preferred stock would be in so far as they might pursue the various alternatives that were open to them.

Q. I think my question had a double-barreled effect, if I may quote Mr. Condon, and the second part of the question is, How much weight did you give to this so-called special analysis in arriving at the fair investment values, as you put it, of Engineers' preferred stock?

A. Well, I would say I gave confirmatory weight to it, in that it confirmed my original appraisals.

Q. Did you in your consideration, in preparing this special analysis, consider whether Virginia could support the present corporate structure of Engineers as now constituted?

Mr. Condon: Just a minute, Mr. Kanton,—I am a little confused.

This special analysis on pages 19 to 21 suggests the employment by Engineers, if I read it correctly, of $10,000,000 of the $16,000,000 cash on hand, the sale of the Gulf States stock for approximately $22,000,000, and the retirement of all the 5½ and 6 per cent preferred and a substantial amount of the $5 preferred.

I wonder if you would be kind enough to reframe your question?

Mr. Kanton: No, I wasn't referring to the special analysis as set forth on pages 19 to 21 of the exhibit. I just asked Dr. Badger if, in his analysis of Virginia he gave any consideration as to whether the present corporate structures as now constituted with the preferred stocks could be supported by the earnings of Virginia alone, and

assuming only for the purposes of my question that El Paso and Gulf States went out of the picture.

By Mr. Kanton:

Q. The only question I asked, Dr. Badger, is whether you gave any consideration to that?

A. Well, I gave it only passing consideration—only passing consideration—because it occurred to me that they might and could support the present structure, but not by what I would consider to be a satisfactory margin of earnings.

Q. For the preferred stock?

A. That is correct. It could be done, as I recall it, but the earnings coverage would be comparatively small.

Q. It wouldn't be as good as it is today, naturally?

A. No, sir.

Q. And you wouldn't think it feasible?

A. I wouldn't consider it desirable to do so.

Q. On the last page of your report, Dr. Badger, page 22, the last paragraph, if it read this way:

"It is my further opinion that these several classes of preferred stocks would have the same values, whether Engineers Public Service Company divests itself of El Paso and Gulf States (under the Plan of September 10, 1945) and either continues with Virginia Electric & Power Company as its sole subsidiary"——

you will notice I have just left out your first "whether" phrase, and went in to the second one. Could you tell me what you meant by that, sir?

A. I meant that there would be no changes in my appraisals.

Q. Well, isn't that somewhat in the nature of the question I just asked you, or did I misinterpret your language here?

A. I think it would be similar, with one exception, that the Company, having divested itself of El Paso and Gulf

States, under the Plan of September 10, 1945, having done that, the Company, the directors, certainly would be in possession of a substantial amount of cash; and they have outstanding three classes of preferred stocks, starting with the 6 per cent dividend, the 5½% per cent dividend and the 5 per cent dividend, callable, I believe, on thirty days' notice, in whole or in part, at 110 for the 6, 110 for the 5½ and 105 for the 5 per cent preferred, and it would occur to me that they certainly in good judgment would do either one of two things; they would utilize excess cash for the purpose of calling as much of that stock as they could, starting with the highest coupon, or they would omit taking that action on the assumption that they might find alternative uses for the money through acquisition of other earnings properties.

Q. In other words, what I was getting at in the previous question and the one I asked you just now, in your last paragraph you are assuming here that if either of these three possibilities took place and the preferred stocks of Engineers were outstanding at that time, you would come to this conclusion?

A. Yes, sir.

Q. In your considerations, in your over-all considerations, how much weight did you give to the voluntary liquidation preferences stated in the charter with respect to the preferred stocks of Engineers?

A. Well, I gave weight to those factors within certain limits, as being limiting factors of value, not positive, but limiting factors. In other words, as I endeavored to point out, were it not for these call features, it is my opinion that the preferred stock of Engineers would be worth in excess of these values, but since the Company has cash, is within the possibility of coming into the possession of more cash, and since the Company has the right under the contract to call these stocks in, all or in part, an investor isn't going out and pay a very substantial premium for those and thus put himself in the position of what we would call a nega-

tive yield on the securities, but they are not what I would determine to be a value creating factor.

Does that answer your question?

Q. It does. I think you have used two terms which I would appreciate it if you would embellish upon. You used the term limiting factors of value and positive factors of value. Now, if I could try to see when you went and reviewed all these computations you made with respect to the preferred stocks of Engineers, and you sat down and sat back and reviewed them in your mind, you did have what you call certain limiting features and certain positive features. Could you tell me now to the best of your ability and recollection what you considered limiting features and which you considered positive features, and which ones you gave the most weight.

A. Well, we will start out with the limiting factors first. The call feature is a limiting factor which we might further define as being of a mechanical nature. It doesn't require any judgment or any interpretation other than to say that there probably would be some period during which the stock would be called and there would be a still further premium added to represent an investor's appraisal of what that period would be. There are other limiting factors of value arising, because this preferred stock, in my opinion, is a medium grade preferred stock and not a high grade preferred stock, and I think that in reviewing those I would say that the coverage was less than is necessary,—I mean the earnings coverage is less than is necessary to cause it to be rated as a high-grade preferred stock.

The dividend record of the company, while clear for a number of years in the past, has not always been clear. That would be a limiting factor as far as value is concerned.

I would also say that another limiting factor arose because of the consolidated debt ratios, which are less favorable in the case of this company than they are possibly in American Gas and Electric and other companies that may be of higher grade.

Those are some of the limiting factors, and I tried to give due weight to all of them. On the positive side, we have evidence of continued improvement in earnings, extending on the basis of the Company's own estimates, through the year 1946.

Q. Would you characterize that as future?

A. Future earnings, yes. We have good management. We have on the basis of an examination of the holding company structure alone a very favorable picture with very substantial assets.

Q. You mean on a going concern basis, as now constituted? You mean the three operating companies?

A. Regardless of how it is considered, because if the Company continues on a going concern basis, the value is there. If the Company is liquidated, then it comes into possession of cash, because of the fact that it is divesting itself of assets, in lieu of cash.

On the basis of preferred dividend coverage alone, we have a fairly strong picture with an improving picture. I think those would constitute some of the favorable factors.

Q. There are other factors, perhaps?

A. Unquestionably there would be.

Q. Did you consider the liquidation preference of the preferred stock as a limiting factor?

A. I considered that as a limiting factor, yes, sir.

Q. And now you mentioned four positive features of value. I hope I characterize them correctly.

One is future earnings;

Two is good management;

Three is substantial assets; and

Four is preferred dividend coverage, with, as you put it, an improving picture, and also keeping in mind that there may be other positive factors.

Looking at these four positive factors and any other possible ones, which one in your mind would you give the most weight, or did you give the most weight, in arriving at what you considered the fair investment values for the preferred stocks of Engineers?

Ralph E. Badger—Cross Examination (Cont'd)

A. I would say, Mr. Kanton, that it was a very difficult thing for an expert to reduce to mathematics or to percentages the amount of weight that he gives to one factor as contrasted with another. I don't believe that is possible. After all, despite the fact that you make many computations, every expert has in mind not only all of those computations, but his general experience and other factors, and he tries to arrive, on the basis of all of those factors, at what he considers to be a fair appraisal of the stock, and I don't believe he can segregate those in his mind and say he gave 25 percent to this and 10 percent to this and 50 percent to that.

Q. I can appreciate that answer.

A. I would say that I couldn't answer your question.

Q. Let me try to rephrase it. In evaluating a preferred stock—any preferred stock—would you give more weight to future, past or present earnings?

A. Well, I would give more weight to present and future earnings, than I would to past earnings, by all means, as that is what is going to support your value.

Q. Taking dividends—you used dividends in the case of Engineers, as a limiting feature and you based that on past history. Is it possible that the dividend policy of Engineers since 1938 up to the present, and as you foresee, might also be used as a positive feature, perhaps discounting the past history of the dividends of Engineers?

A. That is true. Let me state it this way.

The period of time elapsing between a deferred dividend and a given valuation continuously lessens the importance of the past deferment. In other words, if the Company went for the next twenty-five years and we were placing a value on this stock twenty-five years hence and it had continued dividends during the twenty-five years under consideration, then the fact that it defaulted back in the middle 30's would be given little or no weight, if you see what I mean.

Ralph E. Badger—Cross Examination (Cont'd)

Q. Now, if we take two of the positive features of value, future earnings and good management, isn't it a reasonable assumption to say that more weight might be placed on future earnings rather than good management?

A. Well, if we were assured of good future earnings, we could more or less ignore the management factor.

Q. You don't think management even could overcome good future earnings in a situation like that?

A. They would have some difficulty in doing it.

Q. Well, you say,—to paraphrase your testimony up to this point, that you couldn't take any of the positive features of that value and weigh one as against the other, but you did take all the positive features of value, weighed them against the limiting features of value, and did, on an over-all judgment basis, come to the conclusion stated in your report?

A. That is exactly what I did.

Mr. Kanton: That is all, Mr. Examiner.

The Examiner: Mr. Scheetz, do you want to cross examine?

Mr. Scheetz: No questions.

The Examiner: Mr. Condon, are you ready?

Mr. Condon: I would like a two minute recess.

The Examiner: Very well.

(At this point a short recess was taken, after which the hearing was resumed.)

Mr. Condon: Mr. Examiner, at this time I offer in evidence Preferred Stockholders' Exhibit 30, which said number was reserved, and this exhibit is a part of Appendix A of Allied's Exhibit 21-2, Docket No. 54-25-1, Volume 13.

It is referred to in the report, Preferred Stockholders' Exhibit 29, and I believe leave was granted to supply a photostatic copy of this original exhibit, which I would like to have marked.

Mr. Tucker: Mr. Condon,—I have no objection.

The Examiner: It may be received in evidence as Preferred Stockholders' Exhibit No. 30.

(Preferred Stockholders' Exhibit No. 30 is received in evidence.)

[R. p. 1721] *Redirect Examination*

By Mr. Condon:

Q. Dr. Badger, in cross examination by staff counsel you were asked with respect to prices of preferred stocks in respect to call prices. You were asked whether or not the prices that you fixed on page 17 of your report, which is Preferred Stockholders' Exhibit 29, were without reference to the so-called call prices and ex the impact of Section 11 of the Act. Do you recall that testimony?

A. Yes, sir, referring to paragraph 3 on page 17.

Q. That's right. Do you know whether or not it is a fact that there are a number of preferred stocks that are selling in excess of the call prices?

A. Yes, sir.

* * * * *

[R. p. 1726] By Mr. Condon:

Q. Dr. Badger, Mr. Tucker drew your attention to the two items appearing on pages 3 and 4 of your report, that were physically stricken in ink, and you were asked to state the substance of the deletions. Do these deletions change in any way the substance of the report or affect in the slightest degree the integrity of your determination with respect to the going concern value of the three series of preferred stocks?

Mr. Tucker: I object to the form of the question. This witness is his own witness, and I think that that is a very leading question.

Mr. Condon: I am entitled on this redirect examination to ask this witness what effect, if any, those deletions had.

The Examiner: You didn't ask him that way, Mr. Condon, you asked him in a very leading way, undoubtedly. I will sustain the objection because the question was undoubtedly leading.

By Mr. Condon:

Q. Dr. Badger, do you recall these two deletions to which reference was made, on pages 3 and 4?

A. Yes, sir.

Q. Can you state whether or not those deletions changed in any way the integrity of your report or the conclusions set forth therein with respect to the fair or going concern value of the three series of preferred stock of Engineers Public Service?

Mr. Tucker: I object again. I think that in view of what has preceded that question, that again is a very leading question. Just because he said "whether or not" doesn't make any difference.

Mr. Condon: That is a perfectly proper question.

Mr. Tucker: No, no. I still think, under the circumstances, that it is a leading question, and I object to it.

Mr. Scheetz: Mr. Examiner and Mr. Condon, isn't it true that we now have of record the substance of the deleted text?

Mr. Condon: Yes, but I want to have it established from this witness, if it be the fact, that those deletions were immaterial and in no way changed or altered his conclusions, and I think I am entitled to do it.

The Examiner: Read the question.

(The question was read.)

The Examiner: I can't see that is leading. I will overrule the objection.

Mr. Tucker: The Examiner will save my exception.

The Witness: The deletions and/or changes in no way affected the conclusions contained in my report.

Ralph E. Badger—Redirect Examination (Cont'd)

By Mr. Condon:

Q. Now I ask you the same questions, with respect to the arithmetic inaccuracies drawn to your attention on page 13 of the report.

Mr. Tucker: I object, on the same ground.

The Examiner: Overruled.

Mr. Tucker: The Examiner will save my exception.

The Witness: The inaccuracies there referred to, which have been corrected for the record—I should say the correction of the inaccuracy which was made in the record in no way changes my value.

By Mr. Condon:

Q. Would you state briefly, if you will, how it came about that the deletions were made, and the mathematical inaccuracy appeared in your report?

A. Well, as to the deletions, I believe I have already discussed the methods which led—I mean the facts which led to those deletions.

As to the arithmetic inaccuracy and as to several typographical errors that have been called to my attention, those arose because of the fact that in order to meet the time schedule that was set for me in respect to this matter, I did not have a proper amount of time to recheck all of the calculations and to recheck the report in its entirety.

Q. Dr. Badger, you were asked by Mr. Tucker whether or not you had read the cross examination of Mr. Barnes with respect to the matter of alleged Government competition in the areas in and proximate to the Virginia properties, the Gulf State properties and the El Paso properties. Do you recall that line of inquiry?

A. Yes, sir.

Q. Subsequent to your examination by Mr. Tucker, have you so read that testimony of Mr. Barnes, given on cross examination, with respect to that subject matter? And if you have, will you state for the record whether it has

occasioned any change in your opinion as expressed in your report or the conclusions set forth therein?

A. It did not occasion any change.

Q. Did you read the testimony?

A. Yes, sir.

Q. By "the testimony" I mean Mr. Barnes' both direct and cross examination with respect to this matter of alleged Government competition.

A. I had previously read the direct testimony and I have since read the cross examination, and have not in any way changed my opinion as to value.

Q. Dr. Badger, under cross examination by Mr. Tucker, you were asked to make certain calculations, assumptions, adjustments, changes; you were requested to make further studies, to prepare certain exhibits; your attention was drawn to certain releases of this Commission, and you listened to the testimony of Mr. Barnes and Mr. Hastings given this afternoon. Can you state whether or not any of the data to which I have just referred, and the testimony and/or exhibits referred to, including the exhibits offered in evidence by Engineers on your cross-examination, cause you to change in any way the opinions of value expressed in your report?

A. No, sir.

Q. Did you hear Mr. Barnes testify this afternoon that the Engineers' preferred stock in January, 1946, is a low grade preferred, and so characterized it?

A. I heard him express the opinion that it was no better than a medium grade stock, and, if anything, approached a low grade preferred stock.

Q. Do you agree with that conclusion?

A. No, sir.

Q. Will you state the reason for your disagreement?

A. It is my opinion that Engineers Public Service Preferred stock is at least a medium grade preferred stock. I have gone into that at very great length as to my reasons for classifying it as a medium grade stock, and

wouldn't feel that it would be necessary to continue at the present time.

Mr. Barnes has already testified to the fact that Virginia Electric Power Company alone had a value of $65,000,000, which, as I indicated, was a value against which no prior claims existed. With all of the other factors which I have determined as a result of my study of Engineers Public Service, it would be impossible for me to characterize this in any other way than a medium grade public utility preferred stock.

Q. Dr. Badger, Mr. Tucker propounded a number of questions and asked you to make certain assumptions concerning deductions with respect to the so-called 100.5 and 107 and/or other accounts, with respect to the system of accounts, of the Federal Power Commission, and he drew your attention to certain releases of this Commission wherein certain calculations were made with respect to those adjustments. Do you have that line of inquiry in mind?

A. Yes, sir.

Q. Was there anything drawn to your attention with respect to that subject matter which causes you to change in the slightest the conclusions set forth in your report as to the fair going concern value of the series of preferred stocks of Engineers as to which you have testified?

Mr. Tucker: I object.

The Witness: No, sir.

Mr. Tucker: On the ground it is a leading question.

The Examiner: I can't see where that is leading.

Mr. Tucker: Read the question.

(The question is read.)

Mr. Tucker: I withdraw my objection.

By Mr. Condon:

Q. Dr. Badger, do you have before you the applicant's Exhibit No. 73, being these Standard and Poor's ratings

with respect to which you were interrogated on cross examination by Mr. Tucker?

A. I have them.

Q. Dr. Badger, did you make inquiry with respect to the Standard and Poor's ratings as to which you have testified, in so far as these so-called investment ratings were concerned, and their discontinuance?

A. Yes, sir.

Q. Is it or is it not a fact that the bond ratings of Standard and Poor's that were included in the Corporation and Municipal Bond Guide of September 11, 1944, were continued?

A. They were,—and to the best of my knowledge are continued today.

Q. Is it a fact that the Standard and Poor ratings discontinued only as to these investment ratings, but carried on and down to the present time have included the bond ratings that were contained in the Corporation and Municipal Bond Guide of September 11, 1944?

A. The bond ratings are continued.

Q. Would you look at the second column vertical fashion and look at the rating given to Engineers Public Service Company?

A. Yes, sir.

Q. Would you state briefly if you can when the Company gave the rating "above average" to Engineers Public Service Company, if you know?

A. I couldn't answer that question.

Q. Could you fix an appropriate time? In other words, how long prior to January, 1946?

A. I am unable to answer that question.

Q. Could you state with reasonable degree of certainty, Dr. Badger, that on the witness stand, and in connection with the preparation of your report, that you were in possession of information not possessed by Standard and Poor's—and I draw your attention specifically to the estimates of earnings of the Company for the year 1946.

Ralph E. Badger—Redirect Examination (Cont'd)

A. It is my opinion that at the time I prepared that report that this was confidential information which was in my possession but which was not in the possession of Engineers Public Service Company.

Q. Not Engineers Public Service?

A. I should say Standard and Poor's.

The Examiner: You said "confidential information" I think he is wrong about that.

Mr. Condon: I am going to develop that it was confidential, if the Examiner please. I made a statement on the record that early in January, with the consent of Mr. Tucker and Mr. Benjamin, I made that data available to Dr. Badger, and thereafter the material was received in evidence, and therefore became no longer confidential.

Mr. Tucker: That's right. But I call your attention to the fact also there were some investment banking men sitting back here day after day while this stuff was going in, and at least one member of the banking profession in New York had seen it.

Mr. Condon: We are talking about Standard and Poor's ratings.

Mr. Tucker: I don't know whether he is connected with Standard and Poor's ratings or not.

Mr. Condon: That is up to you to establish, if you feel it is necessary.

The Examiner: I think your statement was that confidential information was given to the witness prior to this hearing. It was confidential at that time. Of course, once it is offered here it is no longer confidential. This is a public hearing. Standard & Poor's may have secured it as a result of this hearing. That was the reason I called your attention to the fact.

Mr. Condon: Mr. Examiner, I draw your Honor's attention to the fact that this Exhibit 73 talks about the year-end stock guide, January, 1946. The only year-end it could be would be December 31, 1945.

The Examiner: I just wanted to clear that up, that "confidential" part, and I think you have cleared that up sufficiently for the record now.

By Mr. Condon:

Q. Would you say that the information that you had originally received as confidential information from me and that was subsequently introduced in evidence, would tend to raise or lower the rating of "above average" given as of the year-end, December 31, 1945, by Standard and Poor's, as set out on Applicant's Exhibit 73?

A. Well, I would think it would tend to improve the status of the preferred stock. As to whether or not it would raise the rating or not is another question; but it certainly would establish that this preferred stock was better, and was entitled to be classed as a higher grade stock than said stock would be classified without the possession of that information.

Mr. Condon: May I have Applicant's Exhibit 76, please, that graph?

(Discussion off the record.)

By Mr. Condon:

Q. Dr. Badger, it appears at the moment the reporter has in his office Applicant's Exhibit 76. Is it fair to say that you have in mind that particular exhibit which purports to show in solid red lines and broken red lines,—and I think in blue lines, certain graphs or charts? Do you have that exhibit in mind?

A. Yes, but not well enough to be subjected to any examination in reference to it.

Q. But you have it enough in mind to answer a few questions in a general way with respect to it?

The Examiner: Suppose you propound the questions and see whether or not the witness can answer?

Ralph E. Badger—Redirect Examination (Cont'd)

By Mr. Condon:

Q. Do you recall my asking Mr. Barnes today if he was familiar with the coefficient of correlation with respect to graphs and charts?

A. Yes.

Q. Could you define for the record the meaning of coefficient of correlation?

Mr. Tucker: Could you do it without the book?

The Witness: I could do it without the book, but I would do better with the book.

Mr. Tucker: I suggest he answer without the book.

The Examiner: Without the book.

The Witness: There are certain formulae here that I——

The Examiner: I think the question was asked of Mr. Barnes without the book. If this witness knows enough about it, I think he can answer it without the book.

Mr. Condon: If he doesn't, I will offer the book in evidence.

Mr. Tucker: I object to the book.

The Witness: Well, the coefficient of correlation is a mathematical designation of the precise extent to which two variables vary from a fixed mean together or diametrically or vary in inverse ratio, or indirectly. It is also used to measure the time lag in respect to correlation, where we are interested in a coefficient of correlation between two time series, and it is also a mathematical expression which indicates the intensity of variation of one series as contrasted with another series. That is a bit technical. We might say in general that it was a mathematical formula which gives mathematical expression to the extent to which two variable series do vary directly with each other or inversely to each other.

Q. Is it designed, Dr. Badger, to supply a modicum of accuracy in these attempted correlations, and to indicate the degree of fallacity that may follow from visualar, visible, approach to comparative charts?

Ralph E. Badger—Redirect Examination (Cont'd)

A. Yes, sir; it reduces it down to a mathematical designation and eliminates a substantial amount of error that may arise from a visual examination of the data.

Mr. Kanton: Could I hear that question and answer, please?

(The record was read.)

Mr. Tucker: Mr. Examiner, I would like to ask Mr. Condon what the last two questions have got to do with any issue that is pending before the Commission in this present proceeding?

Mr. Condon: They relate to your exhibit, Mr. Tucker, that you got in over my objection and exception.

Mr. Tucker: It hasn't anything to do with my exhibit that I can see.

Mr. Condon: You can't see a good many things about this matter.

The Examiner: Proceed, Mr. Condon.

By Mr. Condon:

Q. Is it fair to say, Dr. Badger, that a layman applying merely the ocular approach to Applicant's Exhibit 76, might be led into grievous error as to his conclusions.

Mr. Tucker: I object.

The Examiner: I will overrule the objection.

The Witness: It is a possibility.

Mr. Tucker: The Doctor isn't a layman. I don't see how he can get any construction a layman would have.

Mr. Condon: He was once a layman, Mr. Tucker.

By Mr. Condon:

Q. Dr. Badger, I hand you Applicant's Exhibit 76, with respect to which I have asked you a few preliminary questions. Do you recognize the document?

A. Yes, sir.

Q. Do you feel that the attempted correlation of the Federal Reserve Index of Production, with the $5 preferred

stock of Engineers Public Service forms any proper or fair basis for comparison?

Mr. Tucker: Now, I object. I think that is a particularly leading question, and I don't think he ought to lead this expert.

The Examiner: I can't see where that is leading.

Mr. Tucker: If that question doesn't suggest an answer to the witness, I don't know what a leading question is.

Mr. Condon: Are you afraid I am going to color this witness's judgment, or sway his opinion?

Mr. Tucker: I don't think you should ask an expert a leading question.

Mr. Condon: I don't believe it is a leading question. I think it is quite proper. I don't think it is a leading question the way Mr. Tucker says he understood it.

The Examiner: Read the question.

(The question is read.)

Mr. Tucker: I object.

The Examiner: I will overrule the objection.

Mr. Tucker: I will take an exception.

The Witness: It is my opinion that if the coefficient of correlation were computed in respect to the two series of data, to wit, the Federal Reserve Index of Production and the inverted price, as we call it, or the price on a yield basis of Engineers Public Service, that it would be relatively low. For example, a close visual inspection of these two curves indicates that in the years 1929, '30, '31 and '32, and presumably into '33 and possibly '34—the years '32 to '35 do not indicate the exact course of Engineers Public Service Preferred, because the data goes off the chart—there was a very much sharper decline in the price of Engineers Preferred than did occur in respect to the Federal Reserve index decline, and further indicates that in the year 1932 the Federal Reserve index of production started to go up and it was by inspection here approximately two years later before Engineers preferred started to rise. We find also

that in the beginning of the year 1936, Engineers Public Service started a precipitous decline that lasted until the middle of 1937. The Federal Reserve Index of Production, however, continued to advance through the entire year 1936, and did not start to decline until the year 1937, so that there was a complete lack of correlation there during that year.

Engineers Public Service started an advance in the middle of 1937, whereas the Federal Index of Production did not start its advance until 1938, so there was somewhere between six months and a year lag between the initiation of those moves, and during a portion of that time the two curves were going in diametrically opposite directions.

During the period 1938 to the middle of the year 1939 there was a correlation, but beginning in the middle of the year 1939, again we have a complete reversal in the move of Engineers Public Service Preferred and a continuous decline throughout the period mid-1939 to mid-1940, during which entire period the Federal Reserve Index of Production was advancing.

To continue, in the beginning of the year 1941, we started a very substantial decline in Engineers Public Service preferred, which decline was wide in amplitude and continued down practically to the year 1942, and during that entire time the Federal Reserve Index of Production was advancing, so we have a complete lack of correlation during that entire period, and it was not until 1942 that we again find both of the curves moving in the same direction.

So it is my impression, on the basis of that more—I shouldn't say more careful, but as careful a visual inspection as I can give it that if we were to compute mathematically the coefficient of correlation between those two series, we would find a very low degree of correlation to exist.

Mr. Condon: That is all for the time being.

The Examiner: Anything further, gentlemen?

Mr. Tucker: Yes, I have something further.

[R. p. 1742] RALPH E. BADGER,

Recross Examination

By Mr. Tucker:

Q. Did you consider, Doctor, in connection with your comparisons, American Water Works, and abandon it?

A. My recollection is that I did.

Q. Why did you abandon it?

A. I will have to refer to my records. The fact of the matter is I believe I made up a chart on American Water Works—not a chart, but computed data on it as I assembled my data. There was some reason that led me to abandon it.

Q. In the first place, both Engineers and American Water Works are holding companies, aren't they?

A. Both of them are holding companies, yes, sir.

Q. You would have something to start with there that you didn't in all of your comparisons—right?

A. Beg your pardon?

Q. I say, you would have something to start there with that would be a similarity that you did not have in all of your comparisons?

Mr. Kauton: Isn't American Water Works a sub-holding company?

Mr. Tucker: It may be sub. I don't care—it is a holding company.

The Witness: For one thing, American Water Works and Electric is a $6.00 cumulative preferred with a call price of only 110, so that under no consideration could we have there substantially in excess of 110, and that would have brought about a yield—if I could have that slide rule a moment—of 5.4 percent. That would have been the yield that would have resulted had the stock been selling at its maximum price, and it was selling at approximately its maximum price.

By Mr. Tucker:

Q. We have a 6 in this case?

A. We have other classes of stock such as the 5 percent preferred stock. If you had taken that yield of 5.4 and

applied to the 5.50 stock, you would have got a corresponding price of 102, which would be unrealistic; and if you applied the yield of 5.4 to the 5 percent stock you would have a corresponding price of approximate 93. Obviously your mathematics become confusing.

Q. Mr. Condon asked you some questions, and you made certain assumptions with respect to the amount of cash presently in the Engineers Public Service Company, the parent company. He mentioned $16,000,000 and I think you followed him and you said "Yes, $16,000,000." Where did you get the $16,000.000, or where do you get the $16,000,000 from this record?

A. I believe that was the approximate figure that was testified to by Mr. Benjamin.

Q. I hand you transcript page 1290, which contains Mr. Benjamin's testimony on cross-examination by Mr. Condon on the subject, and I will ask you if you find $16,000,000 in that testimony?

Mr. Condon: In the interest of time saving, Mr. Examiner I am perfectly willing to admit the amount of cash is $14,000,000, or $14,500,000. I may have misspoken. It was my impression that Mr. Benjamin testified that that had been supplemented somewhat. If I am in error, I am willing to confess the error.

Mr. Tucker: You say "if you are in error." I would like to show by the record that you are in error.

Mr. Condon: At that point in the record I undoubtedly am in error.

The Witness: The record refers to $14,000,000.

By Mr. Tucker:

Q. $14,000,000, or $14,500,000?

A. Well, it would be in excess of $14,000,000. As a matter of fact, apparently it would be in excess of $14,500,000.

Mr. Condon: Mr. Tucker, I would like to ask you for the record if the testimony of Mr. Benjamin was not to the effect that it was anticipated that there would be about

$1,500,000 more coming to the company from Western Public Service, and that brought it up to approximately $16,000,000, at another point in the testimony?

Mr. Tucker: No, I don't think so at all. If you think so get the point in the testimony.

On the basis of the figures here, disregarding the $14,000,000 at the end—on the basis of the figures that he quotes there, it is $14,600,000, isn't it?

Mr. Condon: I will accept that figure, and I made a mistake of $1,400,000.

The Witness: The figure as appearing in the testimony is $14,650,000. I was discussing this from listening to the testimony and I was under the impression that he had stated that an aggregate amount was or would shortly be $16,000,000. I apparently was in error by assuming that was to be added to the $14,500,000.

Mr. Condon: Did the difference of $1,400,000 make any difference whatever in your calculations?

The Witness: No, sir.

The Examiner: All right, Mr. Tucker.

Mr. Tucker: That is all.

The Examiner: Is there anything further, gentlemen?

Mr. Scheetz: Mr. Examiner, at last I have an exhibit, and that is in response to your request that I prepare a list of stockholders whom I represent and offer it as the exhibit number 1 of Home et al.

Mr. Kanton: I think the record should show, Mr. Examiner, that both Mr. Condon and Mr. Scheetz have submitted briefs on behalf of their respective preferred stock interests, in answer to the motion made by Mr. Tucker for severance, five days ago, and those motions were filed with this Commission during the business day today.

The Examiner: I understand there is no objection to your Exhibit. That will be received as Home Number 1.

(Home Exhibit No. 1 is received in evidence.)

(Discussion off the record.)

* * * * *

Hearing on February 13, 1946.

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[R. p. 1785] Mr. Condon: All right, Mr. Examiner. I ask leave to reserve Preferred Stockholder's Exhibit 29-A, which will be the several sheets retyped as a document and can be read in connection with Exhibit 29 as and when the Commission reads Dr. Badger's report, as a copy of his report.

The Examiner: Do you want to be a little more specific than that and refer to the specific pages you want?

(Discussion off the record.)

Mr. Condon: I have a great respect for the people who are going to read this record and read the exhibits. I have served as referee and special master many times myself and have seen cases of reports where it is necessary for a reader to wend his way through corrections and changes in a report. Now I want to set Mr. Tucker's mind at rest. I have no intention of doing anything further than having a clean copy, to use the Examiner's expression, which does nothing more than set forth the corrections that are in the minutes, and if it goes beyond that I shall expect to hear from Mr. Tucker. It will not. I see no objection to adopting the suggestion of Mr. Kanton, provided we have the time to do it, to have a 29-A constitute a complete recopy of the report, not in any way to do anything further than to make it easy to read rather than wading through laboriously 15 or 20 pages or more of testimony and checking back against the document which can only result in irritation to whomever has occasion to read it, and I don't believe that that should be visited upon us or on our side of this case in view of the limitations of time and the circumstances under which we were compelled to have that report prepared. Now, I can see no harm in it, and I ask that a 29-A number be reserved for that purpose. I have no objection, giving all the time to counsel to check it and if there be any inaccuracies in it that they be drawn to our attention and we will promptly correct them.

Mr. Scheetz: In that connection, Mr. Examiner, it will be helpful if the revised copy would show the points at which the corrections were made and perhaps the page reference in the notes of testimony to support it so that in reading it one doesn't have to compare it with the exhibit 29.

Mr. Tucker: That's what I was going to suggest.

Mr. Condon: We will undertake to do that.

The Examiner: I understand then there will be no objection to it under those circumstances, Mr. Tucker?

Mr. Tucker: That's right.

The Examiner: Then we will reserve Preferred Stock holder's Exhibit Number 29-A for that purpose with the understanding that after a copy of this revised report has been submitted to Mr. Tucker and to Commission counsel and approved by them, and to Mr. Scheetz, that it may be incorporated in the record without reopening the hearing.

Is that agreeable to everybody?

Mr. Tucker: That is agreeable to me.

The Examiner: That will be done.

(Preferred Stockholder's Exhibit 29-A was reserved as noted.)

(Discussion off the record.)

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(Hearing closed at p. 1815.)

ORAL ARGUMENTS BEFORE THE SECURITIES AND EXCHANGE COMMISSION.

Hearing on September 5, 1946.

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

IN THE MATTERS OF:	
ENGINEERS PUBLIC SERVICE COMPANY	File No. 54-132
EL PASO ELECTRIC COMPANY	File No. 70-1149
GULF STATES UTILITIES COMPANY	File No. 70-1150

Hearing Rooms A, B and C,
Securities and Exchange Commission Bldg.,
Philadelphia, Pa.,
Thursday, September 5, 1946.

Met, pursuant to notice at 11:00 o'clock a.m.

Before:

Commissioners JAMES J. CAFFREY, Chairman,
RICHARD B. MCENTIRE,
EDWARD M. HANRAHAN.

Appearances:

BERNARD S. KANTON, on behalf of the Securities and Exchange Commission.

WILLIAM E. TUCKER, of Mudge, Stern, Williams & Tucker, 20 Pine Street, New York, N. Y., on behalf of the Applicants.

LAWRENCE R. CONDON, by ARTHUR H. CLEPHANE, on behalf of Thomas W. Streeter, Columbian National Life Insurance Company, and others.

FRANCIS H. SCHEETZ, of Evans, Bayard & Frick, 1335 Land Title Building, Philadelphia, Pa., on behalf of Home Insurance Company, et al.

PROCEEDINGS

The Chairman: This is the matter of Engineers Public Service Company.

We are told that three counsel have requested an hour apiece. We would appreciate it if you could keep it certainly within the hour and, if possible, cut it down as much as you can for us.

I understand that Mr. Tucker is to be the first in order.

Two of our Commissioners are unavoidably absent. If there is no objection, upon condition that they read the transcript of this argument, they will participate in the decision of the case.

Is there any objection?

There is no objection.

Argument of William E. Tucker

Mr. Tucker: If the Commission please, I would like to divide my time, if I may, since I have the burden here. I will give three-quarters of an hour for my main argument, and fifteen minutes for rebuttal.

The Chairman: That will be all right.

Mr. Tucker: At the outset I believe that I should outline to you briefly the plan which is the subject-matter of this application.

Engineers has formally disposed of many of its properties in compliance with Section 11(b)(1) and with the successive orders of the Commission entered for the purpose of effectuating that section as applied to Engineers.

As a result of those dispositions, Engineers now finds itself with only three public utility subsidiaries, namely, Virginia Electric and Power Company operating in Virginia, West Virginia and North Carolina; Gulf States Utilities Company operating in Texas and Louisiana; and El Paso Electric Company operating in Texas and New

Mexico. These subsidiaries are called in our brief and will be called in this argument Virginia, Gulf States and El Paso, respectively.

Of these three subsidiaries, the order of this Commission dated September 16, 1942, requires Engineers to divest itself of its interest in Gulf States and El Paso and this plan is filed for the purpose, among others, of accomplishing such divestment.

Engineers corporate structure could hardly be simpler. It has outstanding no bonds or debentures and no bank debt. Its only outstanding securities consist of three series of preferred stock commonly known as $5, $5.50 and $6 dividend preferred stock, and common stock.

The plan is divided for procedural purposes into two parts.

The provisions of Part I briefly stated are as follows:

First we have the divestment by Engineers of its interest in Gulf States and El Paso.

Engineers is to divest itself of Gulf States through the issuance by Engineers of warrants to its common stockholders permitting them to acquire on a share for share basis the Gulf States common stock, as reclassified for such purpose, at $11.50 per share.

The common stock of El Paso is to be distributed by Engineers as a dividend in partial liquidation to the common stockholders of Engineers on the basis, also after reclassification, of ½ of a share of El Paso for each 1 share of common stock of Engineers held.

The retirement of the issued and outstanding shares of preferred stock is, of course, a prerequisite to this action. The question whether or not any additional amount is payable to such stockholders, who are to receive $100 per share and accrued dividends, is to be determined under Part II of the plan, the provisions of which I will explain later.

The funds necessary to accomplish such retirement will be derived from three sources, (1) $15,500,000 of cash which it is estimated will be in the treasury of Engineers on

Argument of William E. Tucker (Cont'd)

October 1, 1946; (2) approximately $22,000,000 derived from the exercise from the warrants for Gulf States common stock; and (3) from the proceeds of the bank loan for $1,500,000 proposed to be obtained by Engineers from The Chase National Bank of the City of New York at an interest rate of 1½%. It is proposed to pay off this loan from dividends received by Engineers from Virginia and on the basis of current dividends from that source this loan should be paid off in full by July 1, 1947. Accordingly, this loan may properly be viewed as a relatively small and short-term bank loan.

Then comes the dissolution of Engineers and the distribution in connection therewith to the common stockholders of Engineers of as many as possible of the shares of common stock of Virginia owned by Engineers.

The plan provides that within sixty days from the effective date of Part I, that is, from the mailing of the warrants for Gulf States stock to the Engineers common stockholders, Engineers shall file with the Secretary of State of the State of Delaware a Certificate of Dissolution. It is provided that the filing of that certificate shall effect such dissolution and thereafter Engineers will wind up its affairs. To that end the Plan provides that Engineers shall be continued as a body corporate for the purpose and for the term specified under Section 42 of the General Corporation Laws of the State of Delaware, that is, for 3 years unless at the end of the period there shall be unsettled litigation. The Plan also provides that the persons who at the time shall be directors of Engineers shall become the trustees in dissolution to wind up Engineers' affairs and distribute as many shares as possible of Virginia held by Engineers to the common stockholders of Engineers in liquidation, after, of course, the debts and liabilities of Engineers shall have been settled and paid. Engineers is a Delaware corporation and this suggested procedure is the ordinary and usual procedure for the dissolution of such a corporation.

If it shall be determined that some amount in addition to $100 per share and accrued dividends is to be paid to the preferred stockholders, it is contemplated that the trustees in liquidation will borrow the funds necessary to pay such amount and that this loan as well as the loan previously referred to will be paid off by the trustees from dividends received by them on the common stock of Virginia. It is estimated on the basis of current earnings that this second loan, if one becomes necessary, can in that manner be paid off by October 1, 1948. Accordingly, this second loan also will be of short duration.

Incidentally, the Plan provides for the cancellation of the contracts with the service company, Epsco, Inc., which is the mutual service organization which has serviced Engineers, and since the carrying out of these contracts is its only business, the cancellation of those contracts will terminate Epsco's business career.

Now we will come to Part II of the Plan.

Part II of the Plan, included therein as a separate part merely for procedural purposes, provides that Engineers shall pay to its preferred stockholders no amount in addition to $100 per share plus accrued dividends, but that if the Commission shall believe it to be fair and equitable that Engineers should pay to its preferred stockholders any such additional amount and shall make any findings or orders to that effect specifying such amount, then this part of the plan shall be automatically amended to provide for the payment by Engineers of such additional amount "subject, however, to the fact that Engineers shall have the right to contest such findings or orders both before the Commission and in the courts".

Part II was inserted in the plan merely for the purpose of mechanically permitting the severance of the two parts administratively so that Part I could become effective and carried out if possible while the additional amount, if any, payable to the preferred stockholders was being finally determined. Engineers does not believe the form of Part II

is of particular importance. If the Commission finds it objectionable in any respect there is no reason why it should not be changed, just so Engineers shall have the right to contest any order awarding the preferred stockholders more than $100 per share plus accrued dividends.

I think the only real substantive question in this case is the amount which should be paid to the preferred stockholders. We believe that the plan is fair and equitable when it provides for the payment to those preferred stockholders of $100 and accrued dividends and no more.

It is the position of Engineers that such payment to the preferred stockholders is a fair arrangement to both the preferred and common stockholders, and it is the position of the Staff and counsel representing in this case the shares of preferred stock, that it is not.

Counsel for the Staff and counsel for the preferred stockholders contend that the preferred stockholders should receive what this record shows and Engineers admits to be the present investment value of such preferred stock viewed apart from the Act as limited by the ceiling imposed on such investment value by the call prices of $105 for the $5 stock and $110 for the $5.50 and $6 stock.

We believe that at the basis of this argument is the question whether Engineers liquidation is voluntary or involuntary. We take the position that it is voluntary.

It seems to us important to determine that question since in this particular case—and I think this is the first time this kind of a case has come before the Commission—the charter provides that for an involuntary liquidation the payment shall be $100 and accrued dividends, while for a voluntary liquidation there shall be added the call premiums, or $5 for the $5 stock and $10 for the $5.50 and $6 stock.

I won't take time to read the charter provision, but I believe that is a fair statement of it, and it is set forth in my brief as well as in the record.

So that it may be clearly understood and to avoid any possible misunderstanding of Engineers' position in this case, I want to say at the outset that we are not urging that it would be a violation of Engineers constitutional rights unless the involuntary liquidation preference is strictly carried out. On the contrary, we are taking the position that on all the facts shown by this record, the fair and equitable standard set up in Section 11(e) of the law, which is applicable to this Plan, requires that the preferred stockholders shall receive no more than $100 per share and accrued dividends.

That the liquidation of Engineers here proposed is involuntary seems to us to be perfectly plain. Engineers would not be dissolving if Section 11 of the Act had not been passed. It would have continued into the future for many years. In fact it is difficult to imagine any likely circumstance or set of circumstances which would have caused its liquidation at any time. Thus, Section 11 of the Act is the cause without which the liquidation would not have happened. Thus it is a liquidation forced by the Act and such a liquidation cannot be other than involuntary.

Under Section 11 and this Commission's various orders thereunder, Engineers has already disposed of five of its public utility properties and a number of non-utility properties. After these dispositions it finds itself with only three subsidiaries. Two of these, Gulf States and El Paso, were ordered divested by the September 16, 1942 order, and when these are divested, Engineers will be left with Virginia alone. Thus the purpose of the Engineers organization has by law been frustrated. This frustration is so complete that a member of the Staff of this Commission argued in a brief filed with this Commission in the Section 11(b) (1) case that the maintenance of Engineers as a holding company over Virginia alone would be an "economic monstrosity". The continuation of Engineers permanently as a holding company over Virginia alone not only would serve no useful purpose whatsoever but this record shows

that the increment costs of such continuance would be $180,100 per year—too large an amount of money per year to spend for the maintenance of a useless holding company. The Staff was right. Such continuance would be an "economic monstrosity".

The conclusion that the liquidation of Engineers under these circumstances is involuntary is supported we believe by a long series of opinions of this Commission and of the courts in which it has been held that steps taken under the compulsion of the Act must be deemed to be involuntary. A considerable number of such cases are cited in our brief and I will not take the time to discuss them in detail. The conclusion which we have drawn therefrom is certainly sound.

We do not believe there was anything in the Otis case which requires the payment to preferred stockholders of more than $100 per share and accrued dividends.

The Commission in the reargument of the United case on August 6th heard a lot about the Otis case and the discussions got to be, I thought, somewhat philosophical. However, to show that the language of the Supreme Court in the Otis case to the effect that the dissolution there involved was not the kind of a liquidation envisaged by the charter and that it was not an "anticipated liquidation" within the meaning of the charter provision relating to dissolution, has no application in this Engineers case, needs no philosophical discussion. It is only necessary to point out that the kind of a liquidation involved in this case is not the kind of a liquidation involved in the Otis case as shown by the express language of the majority opinion in that case. In the Otis case the dissolution was simply an internal reorganization within a holding company system, and when it was accomplished, a holding company system would still remain in existence with no real break in the continuity of the enterprise. That dissolution was so expressly described in the majority opinion, page 628, as follows:

> " * * * As Railways was the only company in the tier below Power of the holding company system, it would become by the dissolution of Power the top holding company and Power's preferred and common stockholders, by the distribution to them of all of Railway's common would have in the aggregate the same rights in Railways and in the holding company system that Power had. * * * ".

Again, in that opinion the Supreme Court expressly limited the language with respect to the liquidation not being "envisaged by the charter provisions" to the dissolution of the particular company involved in that case. I quote from page 631 as follows:

> " * * * The exercise of legislative power by Congress through 11 (b) (2) to accomplish simplification as a matter of public policy and the Commission's administration of the Act by dissolution of this particular company results in a type of liquidation which is entirely distinct from the 'liquidation of the corporation, whether voluntary or involuntary' envisaged by the charter provisions of Power for preferences to the senior stock."

Thus by its express language the Court limited the application of the Otis case to the kind of a liquidation there involved which was obviously not a final determination and elimination of a holding company system as is the case here. In this Engineers case the liquidation is not the liquidation of one holding company in a series of holding companies in a system, leaving in existence in the system thereafter one or more holding companies. When the proposed liquidation of Engineers is completed, not only does the corporate existence of Engineers finally end but it also results in the termination of the Engineers holding company system itself.

Thus, the common stockholders of Engineers when the liquidation is completed will not have a continuing interest in the business for which Engineers was organized. The enterprise will have ceased to exist and all that will be left to such stockholders will be some of the "bricks" which had previously constituted the original structure. That original structure will have been entirely and ultimately destroyed. No holding company will be left.

Thus, it seems to Engineers that we can in this case start with the safe assumption that this Engineers liquidation is involuntary and that the involuntary charter provision is one of the bundle of rights which must be taken into consideration in the determination of this case. Then comes the question how much weight should be given to the contract in this case. It is our position that under the facts here it should equitably be given controlling weight.

I have not the time on this oral argument to undertake any full explanation of the Otis case or of the serious disagreement which has arisen as to what the Supreme Court there said and did. Personally, although I admit of some difficulty in clearly following some of the reasoning of the majority, I have no serious quarrel with the result which the majority arrived at under the facts of that particular case. I think it is essential, however, in interpreting that opinion and attempting to reason from it to this and other cases, that the facts of that case be clearly borne in mind. In that connection I do desire to point out, as forcefully as I can, that there are at least four substantial differences between the facts which existed in the Otis case and the facts which exist in this Engineers case and they are as follows:

(1) Here there are admittedly more than sufficient assets to pay the preferred stock its involuntary liquidation preference and leave for the common stock a substantial equity, which was not true in the Otis case. This difference clearly means that we do not have in this case the principal problem which faced the Supreme Court in the Otis

case, namely, the protection of the legitimate investment interest of the common stock in a situation where if the full liquidation preference were given to the preferred stock, the common stock would be wiped out.

That problem is not here. That is the problem that troubled the Supreme Court in the Otis case, in my opinion.

This certainly is a very substantial difference between the Engineers case and the Otis case.

Second, here the liquidation involved is a final liquidation after which the holding company system will be completely eliminated, while in the Otis case the liquidation was merely of one company in a holding company system, with a holding company continuing after the liquidation and with no substantial break in the enterprise as a going concern. This difference I have already fully discussed.

Third, there was evidence of substantial losses already imposed and to be imposed by the impact of Section 11 which will fall solely on the common stock if the preferred stock is given more than the amount provided in the charter to be paid on involuntary liquidation.

Fourth, here there was also evidence that if it were not for the impact of the Act the preferred stock could have been refinanced with a saving to the common stock having a capitalized value of $2,500,000.

These third and fourth differences between this case and the Otis case I would now like to take up in some detail.

The Engineers Company at the time the Act was passed had an option to purchase 75% of the stock of El Paso Natural Gas Company. Because of the fear which I expressed to the management that the acquisition of the stock under option would be a violation of the Act, they never did acquire such stock but assigned their rights under the option to a trustee under a trust instrument which directed him to acquire the stock but to sell it; and the stock was thus acquired and sold. Measured in terms of the difference between present market values and the market values at the time of such sales, there is even now a loss of about

$4,000,000. Should this loss be borne entirely by the common stock of this company and not shared in by the preferred stock?

Again, Engineers invested $34,000,000 in the stock of Puget Sound Power & Light Company. It divested its interest in that stock under compulsion of an order of this Commission and received for that large investment only $750,000. While it is impossible to state the value of the common stock of Puget without a complete analysis of that company, the market action of the stock shows that the value of that property has greatly increased since that divestment in 1943, so what has happened is that Engineers has lost the opportunity to recoup its investment or some substantial part of it. Should the loss of that opportunity be borne entirely by the common stock and not shared as well by the preferred stock?

Again, the impact of the Act has radically changed the character of the company which the stockholders hold and when this Plan is carried out will further alter that nature. At the time of the passage of the Act Engineers had eight properties located in fifteen States. Now it has three properties only and the Plan contemplates their divestment also. All of this has been caused by the Act. Thus Engineers as an enterprise will cease to exist, it has lost the substantial advantage of diversity, it has lost the savings from combined purchases, sales development and other services and it has lost the leverage from the inclusion of $40,000,000 of preferred stock in its capital structure.

Again, if it were not for the impact of the Act the Engineers preferred stock, the record here shows, would be refinanced on a 4.6% yield basis and would result in a net saving in dividends to the common stock of about $166,000 per year. This saving capitalized at 15 times, a capitalization figure used by Dr. Badger, a witness for the preferred stockholders in this case, would increase the common stock in value by $2,500,000. The Act takes this value away from the common stock. Are the preferred stockholders to have no share in that loss?

While I am on this subject I would like to quote briefly from Mr. Condon's reply brief in this case. On that point he says:

> "It is just nonsense to say that payment of the call prices would place any 'burden' on the common stockholders and the calculation on pages 13-14 with respect to the alleged loss of $2,500,000 from inability to refinance preferred stock are actually ludicrous. Using the same argument, the preferred stockholders could contend that the common stockholders are making $29,286,140 by retiring the preferred. The present preferred dividend requirements are $2,119,076. No more preferred dividends will have to be paid after the stock is retired. This saving capitalized at 15 times amounts to $31,786,140. Deducting the 'loss' of $2,500,000, which Mr. Tucker is worrying about, means that the common stockholders have a net gain of $29,286,140 from the effects of the plan."

What his mathematics overlooks is the cold fact that it would cost more than $39,000,000 to save this $29,000,000.

The fact cannot be overlooked in this case that if the preferred stock is paid on any theory, $105 for the $5 stock and $110 for the $5.50 and $6 stock, the preferred stockholders will be receiving the most that they could possibly have received under any conditions in view of the voluntary call prices. Thus, if the effect of the Act on the preferred stockholders in this case is ignored, it results in leaving the preferred stockholders unscathed and scot-free from the effect of the Act, while the the common stockholders alone are left to bear all the losses and all the dislocations caused by its impact. We say such a result would be inequitable and unfair in the extreme.

Under these circumstances, the majority opinion in the Otis case clearly permits and the facts in this Engineers case obviously require that here the equitable emphasis be

placed on the involuntary liquidation preference of the preferred stock and not its so-called present investment value, ex the Act.

I have somewhat the same feeling about this ex the Act business Commissioner Healy has. I feel it is all-prevailing, it is ever-present, and to view the situation ex the Act is to indulge in one of the good old-fashioned common law fixtures that they used to indulge in many years ago in order to arrive at results. That is not equitable.

The involuntary liquidation preference should be carried out unless there are substantial countervailing equities. Here is a case where the equities are all the other way —in favor of the common stock.

Before closing this part of my argument which has to do with the award to the preferred stockholders, I would like to point out the inequity of placing much emphasis on the so-called present investment value of the preferred stock, ex the Act. That investment value has no such permanence as to entitle it to any considerable weight. Market values are the resultant of two variables—one, the cost of money and two, the risk factor determined largely from earnings. A holding company preferred stock, although a fixed income stock, by its very nature is inherently about the most volatile fixed income security in the market. Dr. Badger's claim in his testimony that present market values of preferred stocks are "as far as one can humanly predict, a permanent level" is extravagant and unrealistic.

Holding company preferred stocks are at the moment close to their all-time peak and under the circumstances of this case, since the premiums are a ceiling on the market values, the values of those preferred stocks have only one way to go and that is downward; and that they will go down and go down considerably is inevitable. That result is only a matter of time; and it may be soon. We have always had periodical depressions and we undoubtedly will continue to have them in the future. In fact, the Honorable Henry A. Wallace, Secretary of the Department of Commerce of the

United States, recently predicted another depression within two years and the Brookings Institute has recently forecasted an increase in the cost of money.

Under these circumstances, if in this case any considerable weight is to be given to current market values of the Engineers preferred stock ex the Act, that value must be leveled off and put more in line with the inevitable course of such values in the future.

In this connection we refer to a foot-note at page 16 of the Engineers' brief which shows that none of the preferred stocks were issued on a basis higher than $100, that none of them ever sold above $100 in the market until the year 1944 except for brief periods when conversion privileges and common stock purchase warrants induced higher prices. That during the years 1933 and 1934 all of the series of preferred stock sold in the market around $10 to $15 per share to $30 per share, and that as late as 1942 all three series sold in the forties, and that the average market price of all of the series during the whole period the stock has been outstanding is actually in the sixties. If, as the majority opinion in the Supreme Court said it is not intended that the operation of the Act shall result in a windfall to any class of stockholders, these preferred stockholders cannot be awarded more than $100 and accrued dividends per share.

Furthermore, I would like to point out that it is my firm belief that, as applied to such a case as here involved, the investment theory which a majority of this Commission, as previously constituted, seems to have adopted is in my opinion a one way street, and I would like to give an illustration to show what I mean. Suppose the present Engineers preferred had been put out on a 4.6% basis on which basis the evidence in this case shows that it now could be refinanced. Suppose thereafter that the cost of money rose to 6% with no change in the risk factor. The investment value of that preferred stock would then be $77 per share. If such a liquidation as is now proposed were to

take place under those conditions, and there were sufficient assets to pay the preferred stock the involuntary liquidation price of $100, plus accrued dividends, and still leave a substantial equity for the common stock, does anyone believe that the preferred stock under such conditions would be awarded only its then investment value of $77 per share? Personally I do not. It seems much more probable to me that the preferred stock would be awarded, instead, the involuntary liquidation preference of $100. If this is so, then certainly there is something wrong with the present investment rule. It will not work both ways. The fact is that what the preferred stock is entitled to receive in this case is its involuntary preference of $100 and accrued dividends. That is its claim and that and no more should the preferred stock in this case be awarded.

I just have a few minutes to take up two questions that have been raised in the opposition brief. One is the suggested escrow.

The Staff brief suggests that an escrow fund should be set up to cover the amount, if any, in addition to $100 per share and accrued dividends which should be awarded to the preferred stock and for fees and expenses.

Engineers does not believe the additional expense involved in such an escrow is either necessary or justifiable. The plan proposes that the common stock of Virginia would be retained until the unfinished business of Engineers is concluded, including the payment of the additional amount, if any, to the preferred stockholders. That common stock, the record shows, at the lowest estimate has a value of $57,000,000 and at the highest estimate has a value of $88,000,000. Mr. Barnes, the President of Engineers, who perhaps knows more about its value than anybody else, believes it has a value of around $65,000,000. We are here dealing with relatively small amounts of money chargeable against this large value. The escrow fund could be raised by increasing the subscription price of the Gulf States common stock under the warrants unless

the market continues as at present, by selling some of the shares of common stock of Virginia or by borrowing funds from a bank. The increase in the subscription price of the Gulf States as a remedy for this situation may not now be available. If the money were borrowed from a bank, interest would be payable while the fund remained idle. If the money were raised by the sale of some shares of common stock of Virginia, it would take that much away from the interest of the common stockholders in Virginia and would subject them to additional taxes. Furthermore, if as much as 5% of such Virginia stock were sold, Engineers ownership of voting securities would be reduced below 95%, which would prevent the filing of consolidated tax returns and subject the dividends on the remaining common stock of Virginia owned by Engineers to unnecessary taxes. Another objection to the sale of shares of Virginia common stock is that there is no seasoned market for that stock. It is common knowledge that an unseasoned security is hard to value and is unlikely to sell at its full value. An example of this is the recent Dayton Power & Light issue which was offered to the public at 36. Yesterday it sold as low as 30¼. The point here is if the Virginia common is distributed to the Engineers' common stockholders they can, if they wish to sell the stock, wait for a seasoned market and not take the sacrifice involved in the sale of an unseasoned stock.

If it be true, as we believe, that the escrow is unnecessary, also the expenses of the depositary and of printing escrow receipts would be wasted.

With reference to the suggestion which the Staff makes for the issuance of transferable certificates of beneficial interest, it seems clear to us that since these certificates merely represent an interest in a lawsuit, they would be nothing but a speculation and are not the kind of a security which should be transferable or traded in on the open market. If an escrow is to be established, we certainly do not believe that the interest therein should be represented by

transferable receipts under these conditions. The simplest and most economical way to handle the claims to the escrow, if there is to be one, would be to have it payable to the holders of record of the preferred stock at the time the preferred stock is surrendered for cancellation and receives $100 per share and accrued dividends, and not represented by transferable certificates.

However, Engineers is not inclined to believe that the question of escrow or no escrow is a vital matter and if the Commission disagrees with Engineers on this point, we will be pleased to discuss the details of an escrow arrangement with the Staff and other counsel. Engineers urges, however, that even if such an escrow arrangement is deemed essential by the Commission, the Commission give consideration to the placing of a suitable number of shares of common stock of Virginia in escrow rather than requiring the raising of cash which would remain idle until the final determination of the amount, if any, of the additional payment to be made to the preferred stock.

We argue in our brief, and I won't take time to argue it here in detail, that this Commission under this Act has no authority or jurisdiction over the fees and expenses which Engineers does not voluntarily assume. It has been suggested here in the opposition briefs that this plan is not fair because it does not contain such provision. It is our legal view that the interjection by the Commission of the payment of fees and expenses not voluntarily assumed by Engineers as a condition to the plan would be beyond the power of the Commission.

Lastly, with respect to the bank loan, it is suggested in the Staff brief that the bank loans which the plan contemplates should be eliminated by increasing the subscription price of the Gulf States common stock under the warrants from $11.50 per share to $14 per share. Under present conditions—and I refer to recent action in Wall Street—this would be doubtful of success, even if it were feasible.

Argument of William E. Tucker (Cont'd)

It is the position of Engineers that the common stockholders of Engineers should not be asked to pay more than $11.50 per share for the Gulf States stock under the warrants. The plan contemplates that the first loan which has now been reduced to $1,500,000 and the second loan of say $3,700,000 if fees and expenses are to be included therein, are entirely reasonable. On the basis of the current Virginia dividend rate, the loan of $1,500,000 can be paid off by July 1, 1947, and the second loan of $3,700,000 can be paid off by about October 1, 1948. These are certainly relatively short term obligations and it seems to Engineers that it is within the bounds of reasonableness for it to carry out that part of the plan without interference. Furthermore, if the bank loans are to be eliminated in the manner suggested, we have developed in our brief the additional tax burdens which will be imposed on the stockholders through the payment of Virginia dividends directly to them instead of their application to the payment of the bank loan. It is there shown that if the weighted average individual surtax net income of all of the common stockholders of Engineers is between $4,000 and $6,000, they would in the aggregate by this method be required to pay additional Federal taxes of about $1,284,000, and that if 90% averaged between $4,000 and $6,000 and 10% averaged between $100,000 and $150,000, the aggregate additional tax would be about $1,595,000. We say to the Commission that the imposition of that additional tax burden on the common stockholders, simply to avoid paying these reasonably short term bank loans, would be unfortunate to say the least. Furthermore, the objective apparently of the Staff in suggesting the elimination of the bank loan is apparently to speed up the ultimate distribution of the common stock of Virginia to the Engineers stockholders in liquidation. If this be the purpose of the Staff, as we point out in our brief, it is not likely to be accomplished in any event. This for the reason that no substantial distribution of Virginia common stock can be made until the tax and other liabilities of

Engineers are settled. There has been no audit of the complicated Engineers consolidated tax picture since 1943 and it seems clear that without the assumption by the directors of a personal liability for such taxes, no substantial distribution of the Virginia stock can be made until those matters are settled. It is unlikely that they will be settled before the bank loans are paid off by the application thereto of dividends from Virginia. Accordingly, the elimination of the bank loans would appear to serve no useful purpose whatsoever, and to carry with it heavy tax burdens as I have already shown.

I thank you.

The Chairman: We will now hear from counsel for the Staff.

ARGUMENT OF BERNARD S. KANTON

Mr. Kanton: May it please the Commission, Mr. Tucker's argument this morning would have us believe that there is only one problem or one issue in this case, namely, the amount to be paid to the preferred stockholders, whether $100 or $105 or $110 per share.

Our brief points out that the Staff considers that there are two other important issues in this case equally as important with the payment of the preferred stockholders, and they are the proposed bank loan and trusteeship, which we feel are not necessary nor fair and equitable, and the other problem which Mr. Tucker briefly touched on, the payment of fees and expenses to participating counsel in this proceeding.

It is the purpose of the Staff this morning to cover two of these three issues, namely, the proposed bank loan and the trusteeship as set up in the plan and the proposed payment of $100 per share to the preferred stockholders.

Regarding the bank loan and trusteeship, our brief outlines the following objections that the Staff finds with this bank loan and trusteeship. We feel that if it is approved,

Engineers or the trusteeship would have the burden of paying continuing taxes, operating expenses, and interest on the bank loan, which, as Mr. Tucker stated this morning, are admittedly useless expenses and of no benefit to the Engineers system, that is the holding company system.

Furthermore, it would continue a holding company organization which serves no economic purpose.

Third, such holding company organization is to be preserved for the sole purpose of thwarting the normal corporate function of declaring dividend income.

Last, but not least, it disfranchises the common stockholders of Engineers for an indefinite period and cuts off their control of Virginia.

In reading Mr. Tucker's brief and the record we hear the statement that it perhaps may take two or three years to wind up Engineers after its formal liquidation and dissolvement. But there is an important statement appearing on page 35 of Mr. Tucker's brief where he says:

> "The suggestion to eliminate the relatively small bank loan loses its force when it is realized that it will be necessary to defer the final distribution of the Virginia stock * * * until well after October 1, 1948."

So we do not know if it is going to be two years, three years, five years, or more.

Of course, he leaves us with the inference that it may only take a year or two years or three years, but we will get to that subject later as to the novel tax consequences that this proposed plan is to bring about.

On an examination of the record the Staff finds that this entire plan was considered by the Board of Directors in terms of tax consequences to the common stockholders of Engineers. We point out specifically in our brief the pages that we base that statement on.

If we would turn now to page 31 of Mr. Tucker's brief, in arguing against the proposal presented by Mr. Condon that the preferred stockholders would be at a disadvantage

who held no common stock at the time of the exchange of the preferred for the Gulf States common, he says at the bottom of that page:

> "The tax advantage mentioned is not an incident of the Plan but rather a result of the income tax law."

And he quotes the Commission's opinion on the New England Power Company case.

He goes on to say:

> "That law notoriously does not apply in the same manner to everyone. The effect and amount of the tax depends upon the individual circumstances of the taxpayer as to tax cost, the nature of the disposition, etc. The Plan is not responsible for those variations."

The Staff concurs with that.

However, when Mr. Tucker is trying to sustain his position of the bank loan and the trusteeship on page 37, when he again mentions the tax consequences, and he points out if the Staff's suggestions were followed:

> "this would result in imposing upon the Engineers' stockholders an additional income tax liability which would not exist if the normal procedure were followed and Engineers paid off the senior stock from its own funds,"

and he goes on to say:

> "Since consolidated returns would be filed, Engineers would pay no income tax upon such dividends."

He sums this statement up by saying:

> "Certainly that plan should be adopted which does not impose extra burdens in the aggregate on the common stockholders."

From reading the statements on page 37 and the brief and the record it becomes obvious that Mr. Tucker's consideration, perhaps the management, is that their entire plan was considered in terms of tax consequences to the common stockholders, the large common stockholders, not the consequences to the system which would comprise Engineers and Virginia or the preferred stockholders who are to get out of the picture, or perhaps even the small common stockholders, but just the large common stockholders.

So when Mr. Tucker says on page 31 that:

> "The tax advantage mentioned is not an incident of the Plan but rather a result of the income tax law"

we feel that it becomes apparent that instead of tax consequences being an incident of this Plan, the Plan is really an incident of tax consequences to large common stockholders.

On pages 33 and 34 of his brief Mr. Tucker refers to our Cities Service case, No. 4944, as illustrative of a case where this Commission permitted a bank loan as an appropriate device for retiring senior securities.

Mr. Tucker could have cited other cases where we have also permitted bank loans to retire senior securities, but in all these cases, including the Cities Service case, a bank loan did not unnecessarily delay the final elimination of the holding company in question, because in each one of those cases there were other Section 11(b) problems to be resolved by the company and this Commission.

Here, instead, the bank loan and the trusteeship creates delay in eliminating an unnecessary holding company, and furthermore continues the payment of useless expenditures which Mr. Tucker says would happen if a holding company organization were continued just over Virginia.

There is no doubt in our minds that we would have a holding company as such over Virginia because the dominant characteristic of a holding company is the ownership of securities where control is exercised, and in this particu-

lar case where we would have a holding company formed, whether you call it Engineers, a trusteeship, or association for tax purposes, we cannot determine at this time when it would come to an end.

The Staff in its brief had this question particularly in mind when it referred to past decisions of the Commission under the issues in this case, when we stated on the top of page 15:

> "it is equally clear that a plan cannot be found 'necessary' merely because it is one conceivably available method of bringing about the result. A plan must be such that it has real promise of bringing about the result competently and expeditiously. In other words, the action to be taken should be such as will achieve this result most effectively and quickly."

We do not feel that the proposed bank loan and trusteeship as proposed by Engineers will bring about an effective and expeditious termination of a holding company over a single operating company which Mr. Tucker quoted to be a situation that would call for the words "economic monstrosity".

In our brief the Staff suggested the raising of the warrants price to $14 a share, and it was Engineers' position, and still is, that such increase would make the common stockholders of Engineers lose their position in the Engineers enterprises as now constituted, meaning that they would lose El Paso, perhaps, Gulf States, and/or Virginia.

Section 11(e) envisages voluntary plans. This plan is a voluntary plan filed under Section 11(e). The management could have proposed other plans as the record well indicates. Instead of paying out the preferred stockholders in cash, they could have given them part cash and part tickets, meaning some of the securities in the operating companies. The Staff submits that the Plan as proposed provided for the issuance of warrants as an appropriate method, but it is emphasized that the method was chosen by Engineers.

Argument of Bernard S. Kanton (Cont'd)

The general characteristics of a warrant offer, one of which is to permit a common stockholder to invest more cash in order to maintain his interest in the enterprise, and the Commission has found in many cases that as long as the common stockholder can transfer these warrant rights he feels he is being treated fairly. We point that out in our brief. So if an Engineers common stockholder wished to dispose of his interest in Gulf States instead of exercising his warrant, he could sell his warrant rights, and that position is left available to him under the Plan. If he only wanted to exercise some and raise cash by the selling of some warrant rights, he can. The thing to be borne in mind is that this proposal is primarily a voluntary one, made by the management of Engineers, which we submit is an inappropriate one.

However, Engineers argues that the raising of the warrant price of $2.50, for every 50 cents you raise the warrant price, being outstanding 2,000,000 shares of Engineers common, you get approximately $1,000,000, so for $2.50 you get $500,000. But they say, if you raise it $2.50 the common stockholder will lose his interest in the Engineers enterprises as presently constituted. There is nothing in the record to indicate that a $14 warrant price would force any one or several stockholders to dispose of their interest any more than the same stockholder would sell at $11.50. It is a very small increase in the warrant price. However, the record does show that the raising of a subscription price to $14 would permit Engineers to forego a bank loan.

Mr. Tucker made the statement this morning that he did not think that the present warrant offering proposed, as set forth in the Plan, would be successful, because of the present market. I do not know if he made that in the form of an amendment or the consideration by the management of an amendment.

Anyway, we point out in the Plan that we are not saying necessarily that Gulf States should be used as the medium of raising $14. You can use two tickets, meaning Gulf

States and El Paso, or perhaps Virginia, because, as Mr. Barnes, President of Engineers, testified, he believes that Virginia is worth at least $65,000,000, and there are statements put in the record by investment bankers to show it is worth up to at least $85,000,000. Barnes also said he would consider an offer of $35,000,000 for Gulf and that he would take at least $9,000,000 or $10,000,000 for El Paso, making a total of $110,000,000. We don't know how this would be divided, but we do feel that the raising of $22,000,000 can just as easily be attained on the basis of $109,000,000 worth of assets as if an attempt were made to get $27,000,000.

There is a novel argument presented for the first time in Mr. Tucker's brief on pages 35 to 39, that the consolidated tax liabilities of Engineers for the years subsequent to 1943 have not yet been determined by the Treasury Department, that claims for refunds have not been acted upon, so that if all of the Virginia stock was distributed the directors may be personally liable.

The real reason for this argument appears on page 36w where Mr. Tucker says:

> "It might not be deemed necessary to hold all of the common stock of Virginia for this purpose as protection but the Engineers directors would undoubtedly not desire to distribute as much as 5% of the Virginia common stock for such distribution would make it impossible for Engineers and Virginia to file consolidated returns * * * and Engineers would then become subject to tax on the dividends received from the balance of the Virginia common stock."

There is the old argument of the capital gains versus dividend income which has primarily been in the back of the mind of the management in proposing this plan.

However, we wish to state that this entire argument is an afterthought. The attitude of the Staff in the record

was perfectly clear, that we opposed the bank loan and the trusteeship, and yet this argument was not advanced as a reason for having a bank loan and a trusteeship in the entire record.

We feel the real purport of this argument is that Engineers is requesting the Commission to permit a different kind of holding company organization to continue in existence so that consolidated tax returns can be filed for an indefinite period so as to permit large common stockholders to defer payment of dividend taxes in favor of what they prefer to call normal procedure of capital gains. That we feel is the underlying philosophy of this entire proposal.

This record does not indicate, and the Staff would like to know, what is the outside amount of this Engineers tax liability. What technical questions, if any, may have to be considered, and what efforts, if any, Engineers has made to have the Treasury Department accelerate its examination of their 1944 and 1945 reports. The Staff feels that an examination of the 1944 and 1945 returns should be routine. Of course, this is based on pure assumption and has nothing to go by in the record except what we have here in Mr. Tucker's brief, because the excess profits credit and consolidated tax basis for 1942 and 1943 have been cleared, with one exception, perhaps, and that is the distribution of property losses for carry-backs arising in 1944 and 1945. If that were pertinent, the brief indicates that a tax refund claim of $5,000,000 net is being asked for by Engineers, and that would seem to indicate to us at least that for 1944 and 1945 Engineers would not have any tax liabilities when there is a carry-back that great. Furthermore, all these taxes are being accrued currently, so the Staff does not feel that there is any tangible amount that could be claimed from a routine examination of Engineers tax returns for 1944 and 1945 to the extent at least that Engineers should hold approximately $75,000,000 of Virginia assets.

On page 37 of the brief it is stated:

> "It should also be remembered that if the common stockholders of Engineers were required to furnish the additional funds for retirement of the preferred stock and the distribution of the Virginia stock were made at once, as suggested by the Staff Brief, this would result in imposing upon the Engineers' stockholders an additional income tax liability which would not exist if the normal procedure were followed and Engineers paid off the senior stock from its own funds."

This argument assumes that all common stockholders desire capital gains, even to the extent of continuing an unnecessary holding company with useless expenses. There is nothing in the record to substantiate that assumption. This argument also assumes that each stockholder, meaning each individual common stockholder, is in the position to forego dividend income ad infinitum. There is nothing in the record to substantiate that.

The Commission received a letter on Tuesday, September 3, from an investment adviser, one Calvin Bullock, who advises open-end investment trusts which have an aggregate of 28,000 shares of common stock of Engineers Public Service Company. He points out that he is not in favor of this proposal of Engineers to set up a three-year trusteeship, and that it is unnecessary for the company to incur bank borrowings.

He goes on to state his reasons which I will not state for the record right now, but if counsel has no objections, I would like to submit in the record of action, as I did during the hearings in this case, pertinent comments of preferred and common stockholders.

Mr. Tucker also states on page 37:

> "Under the normal procedure Engineers would borrow the funds for the redemption of the preferred

stock and would pay off these loans out of the income which it would receive as dividends on the Virginia stock and the value of Engineers common stock would be increased in like amount."

This raises a serious question if this is not in effect a redemption of Engineers senior securities because of the argument made by counsel of the maintenance of Engineers or trusteeship as a holding company as long as possible in order to gain so-called normal tax benefits from Engineers' large common stockholders, plus the additional fact, as Mr. Tucker argues on page 37 of his brief, that for the purposes of the bank loan and the trusteeship, the expenditure of $357,000 a year are essential expenditures which cannot be avoided.

Of course, Mr. Tucker also makes the argument, as he did this morning, on page 7 of his brief, when referring to expenditures with reference to the payment of the preferred stock, that a holding company over Virginia alone would not only serve no useful purpose, but would also lead to additional and useless expenses.

However, for the purposes of maintaining a holding company organization over Virginia it appears that these same expenses now become essential.

On page 37 Mr. Tucker also argues, as he did this morning, that common stockholders will be subject to a surtax if the bank loan and the trusteeship are eliminated.

We think the best answer to that is Mr. Tucker's own answer to Mr. Condon when Mr. Condon raised the point that he did think that the preferred stockholders were put at a disadvantage because they did not own common stock and could not get in on the Gulf States exchange. As I stated this morning, and I again quote from page 31 in answer to this argument made by Mr. Tucker on page 37, the tax law "notoriously does not apply in the same manner to everyone. The effect and amount of the tax depends upon the individual circumstances of the taxpayer as to tax cost, the nature of the disposition, etc.".

The Staff feels that a more persuasive showing need be made by Engineers to sustain its argument that a bank loan and a holding company form of trusteeship is necessary and fair and equitable.

Mr. Tucker said this morning that the expenses for continuing a holding company organization over Virginia would amount to, as he put it, $180,000. The record shows, quoting from Exhibit A, page 3. of Applicant's Exhibit No. 1, that it would be $357,500.

Mr. Tucker points out in his brief that there is $132,000 of corporate expenses, but we don't want to quibble as to whether it is $180,000 or $360,000, approximately, but we would like to point out, contrary to what Mr. Tucker states, that there is nothing in the record to substantiate that Virginia needs a super staff over it at the cost of $88,000 a year. At the present time Virginia has one president, one executive vice-president, five vice-presidents, plus other officers drawing approximately $157,000 a year. There is nothing in the record, as I have just said, to show that Virginia could not operate efficiently with its present officers. In any event, we still feel that this is a corporate expense of Engineers or the trusteeship.

With respect to the $45,000 of interest which appears on Exhibit A of page 3, we also feel that even though this interest may be worth more than that to the common stockholders, just like the corporate expenses of the officers, this is also a corporate expense of the trustees.

Turning now to the question of the payment of the preferred stockholders, Mr. Tucker considers his theory for the payment of the preferreds to be in accord with the Otis case, American Power & Light case, the El Paso case, and the Western case, as he points out in his brief.

Then he makes a statement on page 5 that Engineers is being forced to involuntary liquidation and dissolution because of Section 11(b). We concur. However, there is an argument, being made by inference at least, that Engineers is being deprived of certain other rights, of being

eliminated as a holding company. Arguing the force of the involuntary liquidation, he implies that Engineers, if it wished, could not voluntarily liquidate, could not merge, or could not consolidate. With that we do not agree. If we were to look at the El Paso case, and the background there, we had issued an 11(b)(1) order to Engineers telling them to vest themselves of their interest in El Paso, but Engineers voluntarily liquidated El Paso. This plan as originally filed provided for two alternative means of eliminating Engineers as a corporate entity. One was an involuntary liquidation and dissolution, and the other was the merger. The merger route has been taken out by amendment. The record will also indicate that company witnesses have testified that all these other routes were available and are available for Engineers to be eliminated as a corporate entity, and as a matter of record it appears that the Plan might still be amended to provide for the merger.

However, Mr. Tucker argues that he is being forced into one channel, an involuntary liquidation, and there is a reason for that. If Mr. Tucker said, "Well, we want to merge or consolidate," he runs up against two problems. One is right in the charter of Engineers, because Engineers' charter provides, and I am reading from page 28 of the Staff brief:

> "A consolidation or merger of this corporation with any other corporation or corporations shall not be regarded as a liquidation, dissolution or winding up of this corporation within the meaning of this Paragraph III, provided such consolidation or merger does not substantially impair the rights and preferences of the preferred stock."

It should also be pointed out that the corporate laws of Virginia and Delaware provide for appraisal of companies consolidated or merged, and as Mr. Tucker admits in his brief, the investment values of the preferreds today are at

least equal to their respective call prices. The Staff does not say that Mr. Tucker or the board of directors of Engineers or the management cannot select any means. They have chosen to select or call this an involuntary liquidation or dissolution. That is perfectly agreeable to the Staff, but the Staff would like to point out that Section 11(e) permits the management or the board of directors the voluntary choice of selecting a route or vehicle for eliminating Engineers as a corporate entity. They have taken the choice of an involuntary liquidation and dissolution.

On page 9 of Mr. Tucker's brief he quotes our American Power & Light case, at the top of the page, and says:

> "The rights of the debenture holders are ascertained by reference to the contractual provisions of the indenture. That is precisely what we are asking the Commission to do in this Engineers case."

The Commission in the American Power & Light case did not only consider the contractual obligations of the debenture holders, but in that case and in every other case considered contractual rights as being one of the entire bundle of rights, and we clearly indicate that on page 8 where we say:

> "If we follow American contentions"—they happen to be the same as Engineers' contentions here—"the carrying out of Section 11 would result in substantial injustices to security holders, and such a result is contrary to the Congressional intention manifested in Section 11."

On the top of page 10 we said:

> "The Otis case establishes the principle that the present investment worth of a security should be the measure of its participation in the Section 11(e) plan providing for the winding up of a company."

Since the Otis case this Commission has held that once it is established that the impact of the Act brings about a plan filed under Section 11(e) in order to comply with Section 11(b), the preferences of the security affected are not matured, but the measure of participation of such security is determined by the legitimate investment value.

The only cases recalled offhand as corollary to this principle are the El Paso case, the New England Power Association case, which dealt with the North Boston Lighting Properties preferred securities, and the present American Light & Traction cases. But these cases in no way affect the Otis and the legitimate investment value theory. In fact, they reaffirm it, because they do not permit a windfall to one class of securities by operation of the Act.

In other words, the El Paso case, as for an example, was purely a factual determination that Engineers Company—meaning they had the legal voting power—would—meaning it was economically desirable—voluntarily liquidate El Paso as a corporate entity. Where it is reasonable, men can differ. It was decided that El Paso would and could have been voluntarily liquidated. But that principle—whether you call it a corollary or exception—reaffirms the Otis case by not permitting a windfall by the operation of the Act.

In discussing the Otis case Mr. Tucker attempts to distinguish the type of involuntary liquidation in that case with the present case. The only significant distinction that the staff observes between these two cases is that the legitimate investment values are different at the time that these two cases were presented to the Commission.

At the time the Otis case was presented to the Commission, legitimate investment value of the preferred stock was below $100. At the time of the present consideration, admitted by counsel, it is above $100 for the involuntary liquidation price. Mr. Tucker argues that the involuntary liquidation in the Otis case wasn't internal reorganization, and that is not the fact in this case. In the Otis case the Supreme Court stated the issue very clearly on page 635:

Argument of Bernard S. Kanton (Cont'd)

"The issue in this case is not whether full priority should be given to preferred over common stockholders but whether the priority which is established by the charter, Note 6, is applicable to a simplification by liquidation under 11(b)(2) and (e)."

The point at issue is whether this charter provision applies. The Court answers that. On page 637 the Court said:

"The charter preference is inoperative in simplification under Section 11(b)(2). The provision having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a simplification under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated liquidation within the meaning of Power's charter provision."

It goes on on page 638 and answers this same argument Mr. Tucker is trying to say that the Otis case is distinguished from the present case:

"The reason does not lie in the fact that the business of Power continues in another form. That is true of bankruptcy and equity reorganizations. It lies in the fact that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of the stockholders or involuntarily through action of creditors."

Then Mr. Tucker argues on page 21 of his brief:

"The situation and the character of the liquidation in the Otis case is different from this case."

The situation is the same. The impact of the Act has caused the liquidation in the Otis case and has caused it in this case, except in the Otis case there was no choice of elimination by liquidation and dissolution, whereas the management has chosen this route. If you recall in the Otis case we had told the management they should liquidate and dissolve United Light & Power.

With respect to the character being different we wish to point out that the purposes are not to be matured, and the fact, as I have just stated from the case itself, that the business of Power may have continued in another form, was specifically answered by the Supreme Court.

An involuntary liquidation and dissolution in the sense of the charter means only one thing, and that means financial distress. At the time this Commission considered the Western Public Service Company case, when Engineers requested the Commission to permit it to use its funds to buy its preferred stocks on the open market at the then market prices which ranged anywhere from about 50 to 70, Mr. Tucker took the position that even if this was a Section 11(e) proceeding, certain considerations would have to be given at that time, 1942. Those considerations are very important, because they are quite contrary to the position that Mr. Tucker and the management take today.

At that time Mr. Tucker spoke of an involuntary liquidation and dissolution in the sense of the charter, and I would like to quote again from page 32 of our brief what he considers an involuntary liquidation and dissolution:

> "Section 11 is not a situation where the company is in financial difficulty, in the ordinary case, and it certainly would be so in our case because we have no bonds, we have no bank debt, we just have preferred stock, it is an arbitrarily and forced statutory termination of the enterprise, and it has no relation whatsoever to any factors which the parties could have had in mind when they entered the enterprise."

Argument of Bernard S. Kanton (Cont'd)

The same thing was considered by the Supreme Court in the Otis case. However, I would like to read the same portion of the Otis case which Mr. Tucker read this morning, but with the emphasis on the point that Mr. Tucker made in the time of the Western case. The Otis case says:

> "The exercise of legislative power by Congress through Section 11(b)(2) to accomplish simplification as a matter of public policy and the Commission's administration of the Act by dissolution of this particular company results in a type of liquidation which is entirely distinct from the liquidation of the corporation, whether voluntary or involuntary, envisaged by the charter provisions of Power for preferences to the senior stock."

I would like to read one sentence further after Mr. Tucker stopped:

> "This conclusion by the Commission permitted the Commission to examine the investment barriers of the common and preferred stocks of Power."

The Chairman: Could I ask you a question?

Mr. Kanton: Yes, sir.

The Chairman: Supposing the lawyer when drafting a charter wanted to provide against all kinds of involuntary liquidations and dissolutions? What kind of words of art would he use? What would he use?

Mr. Kanton: Well, say for example, Mr. Tucker were drafting the charter of Engineers back in 1925 and he had in mind what an involuntary liquidation means, financial distress,—if I were drafting that charter, I would have to think in terms of an involuntary liquidation being something else than financial distress, and I would have to speak in terms of not meaning financial distress, but any action of any kind whatsoever.

The Chairman: Like atomic energy blowing up the plant and all the people?

Mr. Kanton: Anything, sir.

The Chairman: As a careful lawyer, would you intend to provide against such things as the atomic bomb when you were drafting the charter?

Mr. Kanton: No, sir.

The Chairman: You wouldn't think of it?

Mr. Kanton: No, sir.

The Chairman: Wouldn't you intend to provide against all contingencies that were involuntary?

Mr. Kanton: All contingencies as expressed in that language, sir.

The point we are trying to make, I think, is this, sir. The term "involuntary" had a meaning at the time it was placed in the charter, meaning financial distress. They were used as words of art and still mean the same thing. It is being interpreted to mean something else, impact of the Act. The Engineers today, like most of the holding companies under Section 11(e) are not solvent. As a matter of fact, they are solvent. They have the right, the choice to go out through other means. They do not have to go out through a so-called involuntary liquidation. They can voluntarily liquidate. You see, the difficulty in this case is that the voluntary liquidation price is not the same as the involuntary, which is the difference from the other cases, so the Company cannot argue that we are voluntarily liquidating. They must say "We are involuntarily liquidating, and we must try to distinguish it from the Otis case, which says an involuntary liquidation put in the charter before 1935 meant one thing, financial distress."

The point is, getting back to your point, sir, I think that because of the meaning of "involuntary liquidation", in the law, that more specific words would have to be put in building up what is meant by an involuntary liquidation, more than the word "involuntary" meaning of any nature, of any kind, and take it out of the realm of words of art.

The Chairman: Up to the Otis case, wasn't that the common concept of members of the Bar that "involuntary"

was supposed to cover all contingencies that were not voluntary?

Mr. Kanton: By members of the Bar you mean, sir,—?

The Chairman: Men who used to draw these so-called charters for corporations, lawyers.

Mr. Kanton: I may be wrong, sir, but I don't think so. I think, as the Supreme Court pointed out very clearly, that it had a different meaning, meaning financial distress, as we pointed out on pages 9 and 12 of our Release in United Light & Power, 4215.

The Chairman: Will you quote that phrase from the Supreme Court ruling where it uses the words "financial distress?"

Mr. Kanton: It does not use "financial distress" but it does say "The exercise of Legislative power by Congress results in a type of liquidation which is entirely distinct from the liquidation of a corporation, whether voluntary or involuntary, envisaged by the charter provisions of Power for preferences to the senior stock."

Of course, I used the words "financial distress" because, reading the cases, that is what involuntary liquidation means, and that is what Mr. Tucker himself said in 1942, what involuntary liquidation means,—financial distress.

The Chairman: I did not mean to interrupt you.

Mr. Kanton: That is all right, sir.

On page 21 of Mr. Tucker's brief, it is stated that the Commission considered the El Paso case on the basis of contract rights. That is true, the Commission did consider it on the basis of contract rights, but a specific contract right, not, as Mr. Tucker says.

Mr. Tucker says in the El Paso case:

> "Payment to the preferred stockholders of the amounts provided in the charter to be paid to them on liquidation whether voluntary or involuntary, was held fair and equitable."

Then he goes on to say:

"That is exactly the position we take here."

The reading of the case will disclose it was on the basis of the fact that a voluntary liquidation could and would have occurred outside the impact of the Act, and that was a pure factual determination. The case clearly indicates, in reading El Paso, on page 3, that they are trying to effect the voluntary liquidation, and throughout the opinion they speak of voluntary liquidation, not an involuntary liquidation, and that is the basis of that decision, and not as Mr. Tucker says, just plain contract rights as he is trying to say right now, which we must look to, immature involuntary preference.

Commissioner Hanrahan: Doesn't it become clear that every one of these cases are factually decided that way, the matter of Otis on its facts, the matter of El Paso on its facts? You are answering Mr. Tucker by saying the matter of El Paso, because of the facts, aren't you?

Mr. Kanton: No, the proposition posed to us in the El Paso case, and the American Light & Traction case by the management, is that it was a voluntary liquidation, that would have been brought about outside the impact of the Act. There the Commission has to determine the fact whether that could have been so. In the Otis case, and every other case, the managements have said the impact of the Act has brought this about, whether we merge, consolidate or involuntarily liquidate. The Otis case set up a standard for measurement which says that preferences cannot be matured.

When you get to these factual determination cases, and the management says we could have done this outside of the Act and would have done it, we must determine then is that true, shall we give the controlling weight, as we did in the El Paso case, or give it considerable weight, as we did in the North Boston properties in the New England case?

Argument of Bernard S. Kanton (Cont'd)

That factual determination is not here before us today because the voluntary price happens to be the same as the call price, and the involuntary price is the par. So Mr. Tucker cannot argue involuntary liquidation because if he does he admits he has to pay the preferred stockholders $110.

In attempting to distinguish the position that the Engineers' management took before the Commission in the Western case, it is argued that, on pages 22 and 23, that Engineers is considering contract preferences as one of many factors, but that under the fair and equitable standards of this case it means that preferences must be given controlling weight.

I believe I pointed out that the basis of Mr. Tucker's fair and equitable argument is that he is asking us to mature the involuntary liquidation preferences or give them controlling weight, and the staff feels that to follow this argument would, in effect, overrule the Supreme Court's decision in the Otis case.

The only real distinction between the Otis case and the Engineers' position in the Western case in 1942, which were practically the same, and the present case, is that the legitimate investment values are now above the involuntary liquidation price, so that to give substance to Mr. Tucker's argument would place a premium on common stock managements to delay complying with the Act until the investment values of senior securities go up to a point where the junior securities can step in under the guise of the impact of the Act and lower the investment value claims to the involuntary liquidation prices. Under such a procedure the equity holder has nothing to lose and everything to gain because, as Mr. Tucker argued this morning, he agrees in principle with the Otis case, as he stated in his Western case, because he did not want the common stockholders to be freezed out.

That was on a going concern basis and that is the way legitimate investment values are determined, the way earn-

ings will continue. That is the way we are arguing today, the standard is still the Otis case, that if the earnings were to continue, its legitimate investment values, are at least $105 or $110, and they should be paid $105 or $110.

The last point Mr. Tucker makes on this is what we would call the legitimate sharing of the cost argument.

The staff thinks this a totally improper one because it ignores the investment values of the preferred today and attempts to value the preferred in the light of past history of Engineers.

Nevertheless, we want to point out several facts that Mr. Tucker's approach is without substance. This argument, in effect, was made by Engineers, North American, before the Supreme Court, on the question of the constitutionality of Section 11(b)(1), and the Supreme Court, in Justice Murphy's opinion, contained in 66 Supreme Court 785, states as follows:

> "Moreover, there is no basis here for assuming that in limiting the scope of North American's operations there will be dispositions of securities for inadequate considerations, therefore, by raising a question as to whether there is a destruction of these values without just compensation. The Act does not contemplate or require the dumping or forced liquidation of securities on the market for cash. Under Section 11(d) and Section 11(e) of the Act, any divestment or reorganization plan must meet the standards of fairness and equitableness. In many instances this may evolve no more than a distribution of these securities among the existing shareholders of the holding company, but securities sold for cash, speculation as to the unfavorable market conditions cannot undermine the validity of Section 11(b)(1). Any plan of divestment or reorganization, moreover, must be carefully scrutinized by both the Commission and the enforcing Court, thus enabling the assertion and protection of all shareholders' rights. (See Otis & Company *vs.* SEC.)"

And there are provisions in the Act guarding against any unduly rapid divestment or liquidation.

There the Court puts in a footnote:

> "Under Section 11(c) the holding companies are given at least a year to comply with an order of the Commission under Section 11(b). The Commission is also authorized to extend the time for an additional year, on a proper showing."

In reading this quotation from The North American case, and looking at the present case, it should be pointed out that since 1942 Engineers has more than the statutory two years under Section 11(c) in order to comply with your divestment orders, because of the pending appeal at this time before the Supreme Court, and it has disposed of its properties from 1942 to date on terms most advantageous to itself.

We feel that this whole argument of Mr. Tucker's is based on the hindsight theory. What would the position be if the investment values in 1942 were higher than they are today? What could his argument be then, losses or gains? The entire argument ignores the real nature of a common stock. Mr. Tucker never uses any figures. He just says "We get to $100 because it is fair and equitable." We do not know what he divides by, what he adds or what he is taking away or who is to get something.

Let us look at a couple of figures:

In Engineers today the common stockholders have invested approximately $58,000,000 or $30 a share. They are asking or suggesting that they increase that to $27,000,000. The Company proposes $22,000,000. The total of $27,000,000 and $58,000,000 is $85,000,000. Then, measuring that $85,000,000 against what Mr. Barnes considers these three properties are worth, it looks like for that $85,000,000 the common stockholders are going to get at least $109,000,000. The common stockholders would argue Yes, what about the interest the preferred stockholders

have been getting on their investment, a weighted average of 5.3 percent? Engineers' common stock dividends ceased in 1932. If we were to take the same weighted average of 5.3 percent of $58,000,000 present investment we get approximately $45,000,000. We add the $45,000,000 to $85,000,000 and we get $130,000,000. The preferred stockholders would then say: "What about Puget Sound? That was a pure equity investment, a loss that should never have been made of $34,000,000." It was made at a time and with a borrowing of money at 5.5 percent in order to get a return of 2.5 percent. At the time of the passing of the Holding Company Act of 1935, Puget was not paying any dividends. The preferred stockholders would argue, "Take that $34,000,000 off" and so you only have an investment of approximately $95,000,000. They are still getting at least $110,000,000, so if we look at that in that light, in terms of figures, it does not appear that Engineers' common stockholders are being so badly treated, on the basis of Mr. Tucker's argument of comparing the $39,000,000 invested, with the $42,000,000, which is the present investment value of those preferred stocks.

As I said before, we don't know where Mr. Tucker adds or where Mr. Tucker subtracts. All we know is in effect he is asking this Commission to mature the involuntary liquidation preference. We don't know how he gets it to $100. He has not told us. On the figures I have given he perhaps would get more or less. In any event, his entire argument ignores the real nature of a common stock. It is an equity and leverage security that other than investment ventures, stands to gain limited sums and loses the entire investment, which losses and gains of past operations are reflected very clearly today in the investment values of both the preferreds and common stocks.

I would like now to briefly refer to the illustration on page 25 offered by Mr. Tucker to indicate that the investment value theory cannot operate logically if his factual situation were assumed to exist. That, as he explained

this morning, where you have a 4.6 preferred stock with a cost of money which had risen to 6 percent and no change in the risk factor, he claims it would have an investment value of $77.

The difficulty with his illustration is that we do not know what the common would be entitled to under this illustration. That is a very important factor. We had the same thing in the Otis case and we had the same thing in the Puget Sound Power & Light case, where the preferred stock got 97 percent of the enterprise and the common got 3 percent.

He does not tell us what the investment value of the common is and that has to be determined. We need more facts in order to make such a determination.

What I would like to point out in the Western case, Release No. 4114, what Mr. Tucker and the management's position was when the same factual situation existed, as he points out, and claims here, reading from the bottom of page 8, we say:

> "On the other hand, Engineers' president testified on the basis of a rough calculation of eight times current earnings applicable to common stocks of subsidiaries, plus Engineers' cash assets of $7,500,000, that at the end of January, 1942, Engineers' investments had a value somewhat in excess of the involuntary liquidation preference and the outstanding common stock, or $100 per share."

The same factual situation. Reading now from page 11, what was the position in 1942, that the management took when they had enough assets?

> "We also take note of Engineers' argument that the pending Section 11 proceeding is not likely to result in the liquidation of Engineers, and that even if it does, the proper standard for the adjustment of rights of the preferred stockholders is not the liqui-

dation preference to which they would be entitled, on a voluntary liquidation, liquidation in bankruptcy, or a reorganization proceeding, but the fair value of their expectations, in the absence of any such proceedings, taking into account their liquidation preferences as but one of many factors."

That is the same position, I think, the staff would take here.

My time is running short. I thank you, gentlemen.

(Formal matter relating to adjournment omitted.)

* * * * *

ORAL ARGUMENT OF MR. ZAZOVE.

Mr. Zazove: From considering Mr. Tucker's brief and his argument here this morning, we have been relieved of one point, as far as we are concerned, in this case, and that is, the necessity of arguing as to the real worth, the real value, of these preferred stocks.

Incidentally, before I get into the merits of our position here, I'd like to explain to the Commissioners just how it happened that Mr. Condon was in this case, and whom he represents.

At the time that the Board of Directors of Engineers was considering the filing of this Plan and the adoption of it, one of the directors, namely, Mr. Streeter, cast a dissenting vote when the Board of Directors voted on the Plan. It was his position that the Plan was unfair to the preferred stockholders, and it was his further position that in view of the attitude of the management and its counsel, namely, to represent exclusively the common stockholders, that it was necessary in this case, in order that adequate representation be assured to the preferred stockholders, to have independent counsel.

As a result of his position, the Board of Directors adopted a resolution, to which we refer in our brief, which

authorized the Company and the Officers to employ Mr. Condon, as a representative of the preferred stockholders. In this resolution it was provided that the Company would reimburse the preferred stockholders not to exceed $5,000, for any expenses incurred by Mr. Condon in so representing them. The resolution further provided, however, that nothing in that resolution was to prohibit or restrict Mr. Condon from applying to the Commission for a further allowance or award, in so far as the Commission thought his services were entitled to more.

We make this point because we feel that it is indicative of the entire attitude and the approach which the management and the Board of Directors took in this entire case. The Plan provides, as well as does the brief that Mr. Tucker filed here, that the Company will resist in litigation, in argument, or in any other manner the award and the payment of any amount in excess of $100.

It seems to us that in view of the fact that it was considered an adversary proceeding, in view of the fact that the company's entire management and that its counsel was devoting its talent and its weight to representing exclusively the common stockholders, that it came with ill grace to file a plan here which made no provision whatever for the payment of counsel fees or expenses to anyone who would be representing the stockholders, other than the common stockholders, and that it comes with considerable ill grace to at this time continue in a position that the Commission does not have authority or jurisdiction to award fees and expenses. It just happens, in this particular situation, as the record shows, that the expenses out-of-pocket, which Mr. Condon's office has incurred already, before the hearings were closed, exceeded the $5,000 figure that was mentioned.

We are not at this time talking about fees, but we are talking about an attempt, if it is condoned, to place the preferred stockholders, who in this case are unorganized, in a position where they have the Company with all its

assets and with its lawyers fighting them, and with no provision for anybody paying independent counsel to represent their position. We think that as a matter of administration of the Public Utility Act, that it is a salutory thing to have outside counsel in these cases.

We'd like to call your attention to what Commissioner Douglas said when he was a member of this Commission a long time ago in the International Paper case, where he pointed out that when you examine plans with a view to determining their fairness, it is necessary to consider whether there has actually been arm's length bargaining as between the groups who had adverse interests in these proceedings.

Applying standards of that nature, it seems to me, gives the Commission the equitable power, as well as the duty, to consider that here was a plan that was proposed at the beginning, considering only how it affected common stockholders.

There has never been any consideration given by the management or by the Board as to how it affects the preferred stockholders. They have been treating the preferred stockholders here as interlopers, rather than as part owners of this business. Not only in the payment of $100 but in other aspects which I will mention later, is this plan unfair to the preferred stockholders, and so I dissent from Mr. Tucker's position that the only question here involved is how much do you pay the preferred stockholders. I'll get to that later.

We felt, in view of what the Commission said in the American Power & Light case that the Commission had an independent duty to arrive at its own conclusions as to the value of these preferred stocks. The management at the hearings, produced no evidence whatsoever as to the value of the stocks.

Mr. Barnes, the President and Mr. Benjamin, the secretary, testified that in the absence of the Act the stock

would be refundable, but that was the sole extent to which they went. Consequently, it was necessary, we felt, to employ the services of one whom we considered an expert in valuing security issues, and accordingly we employed Dr. Badger, who has testified before the Commission in other proceedings, and he has made an extensive study and a report was filed in this proceeding, indicating the value of these stocks. I do not feel that it is necessary at this time to take up the Commission's time by reviewing that evidence, but I do feel that it is important to point out that Dr. Badger decided that in his opinion as an expert, if there were no call provisions in the Charter, these stocks would have a value of $108.70 for the $5 preferred, $119.57 for the $5.50 preferred and $130.30 for the $6.00 preferred. So, when we talk about $105 and $110, we must bear in mind that the stocks are really worth more than that.

But, assuming that the call provisions in the charter place a ceiling upon the amount that the preferred stockholder can get we have to say then that at the most we are entitled to what the preferred stock would get if the stock was called.

Getting down to what Engineers' argument really boils down to, it seems to me that Mr. Tucker's brief is an attempt to rationalize what he has said and what Engineers has done in other situations with what they are attempting to do here. He is talking in terms of fairness and equity but he is getting back constantly to the fact that what they are asking the Commission to do is to say that there is a ceiling in all Section 11 reorganizations as to what the treatment is to be that is to be afforded senior security holders. That ceiling, in the case of preferred stock, would be the involuntary liquidation price.

The reason he has done that is because Mr. Tucker does not really object to applying the investment value theory. He doesn't object when it benefits the common stockholders. This very management has done it many times, has applied it in other cases which I will mention. Mr. Kanton this

morning dwelt on the Western case. There is no sense in repeating that, but let's go back to 1941, at a time when Engineers disposed of some of its assets and had some money available.

At that time the stock market was down. The preferred stocks were selling at around $60, and then because it suited their convenience, and because they were afraid that they would have to be in here arguing that the common stock should not be eliminated on a dissolution of Engineers, they said that you should not judge these things on the basis of an involuntary liquidation because they wanted to have something left for the common stock, but if it was an involuntary liquidation when this plan was filed, similarly the disposition of these assets back in 1941 was the first step in the dissolution, and if it is true now that the involuntary liquidation provisions should apply, it was true then, and we'd like to know why the Commission permitted them to go out and buy a preferred stock at less than $100, because those were the involuntary liquidating preferences.

In 1943 they did the same thing. When the Western case came along they had quite a bit of money accumulated and they wanted to buy 35,000 shares at less than $100. Apparently the Commission foresaw what was going on, that this was a piecemeal attempt at buying preferred stock, and they wouldn't approve it.

The Commission pointed out there that the stock market prices were influenced by the action of the management.

Mr. Tucker makes a lot of the fact that the preferred stock in the depression years sold at around $16 or $20. Well, he fails to mention to you that in 1942 the common stock was selling for $1.25. Now if you are going to use stock market values as tests of what you should pay the preferred stockholders in this case, it seems to me that the common stockholders are getting all the breaks here, because they are certainly going to get a lot more than $1.25 for their stock.

In addition to that, Mr. Tucker attempts to discard the Otis case by saying that the dissolution there was different than the dissolution here. We do not agree with that, but let's assume that that is the case.

If the dissolution there was different than the dissolution here, and in there you had a holding company system continuing, and he says it's all right in such a situation to apply the fair investment rule, then we would like to know why Engineers in the El Paso case—and don't forget the El Paso case was a plan proposed by Engineers—they didn't say "Apply the investment value doctrine." They did not. There they said, "We want to apply the voluntary liquidation provision of the charter," because it so happened that in El Paso, they called for the payment of par, but in this case, where it happened to be the same as the redemption prices, they don't want the fair investment value theory any more, and they want to apply strictly the involuntary liquidation provisions of the charter.

I want to elaborate more on this situation of whether or not you have a holding company continuing in existence.

If it is true that the rule in Otis applies only where you still have a continuing holding company system, that means that where you have a series of companies you apply the investment value rule in all the dissolutions until you get to the last company, and then when you get to the last company, since there is no more holding company system in existence, you apply the involuntary liquidating prices.

Well, it seems to me that tests and rules of fairness cannot depend on when, in a process of simplification, the dissolution of a particular company happens to occur, and as far as the preferred stockholders are concerned, it is vitally important to them because you have different groups of preferred stockholders in all these different companies, and you cannot be applying one rule of involuntary liquidating prices to one group and to another group apply the fair investment value theory. You come out with an impossible situation.

Oral Argument of Mr. Zazove (Cont'd)

In line with the Otis case, I'd like to point out—and our brief has quoted some of the cases before—that this Commission has really consistently been applying the fair investment doctrine even though it hasn't talked about it in all the cases. Usually you don't get into this controversy because a company recognizes that where there are enough assets and enough earning power to warrant payment of the call prices that is what they do. They don't make any fuss about it.

On page 5 of our brief, footnote five, we state:

> "Recently the Commission approved an application by Columbia Gas & Electric Corporation, proposing the issuance of warrants to its common stockholders to purchase the common stock of an operating subsidiary,"——

and that is exactly what happened here, in connection with the common stock of Gulf States; and the divestment of Cincinnati in the Columbia case had been required and ordered under Section 11. The application provided that they wanted this application approved so the stockholders could "maintain their investment position" in the subsidiaries.

To interject here, when this Plan was filed, the management of Engineers sent out a letter to all the stockholders of Engineers in which it said that it had decided upon this Plan, and the mechanics of it, so that the common stockholders could maintain their interests in the subsidiaries. It is exactly the same situation as the Columbia Gas situation.

Not only that, but throughout his brief, Mr. Tucker has always objected to the position taken by the staff because, he says, if we have to sell some Virginia stock for an escrow, then the common stockholders will be losing their position with the company, or if a common stockholder has to sell some of his warrants or some of his Engineers' stock to raise money, he would be losing his position in the under-

lying companies. So the situations are identical. Incidentally, I forgot to say that it was proposed to use the proceeds from the exercise of the warrants for the redemption of the preferred stock of Columbia, and that preferred stock had to be retired because, when the Company had divested itself of its assets, its capital structure would no longer support the preferred stock.

But, mind you, there the Company came in voluntarily and said "We will use the proceeds to retire the stock at the redemption prices." The Commission approved of this. We do not think the rule as to the amount that the preferred stockholder should receive in these cases should depend on what the management thinks is fair, which is what this boils down to.

If Engineers had come in with an application saying, "We are going to use the proceeds from these warrants, and the cash we have on hand for the paying off of preferred stockholders at redemption prices," I do not think that the Commission would have turned them down as being unfair to the common stock, in view of the previous decision. That's what has been happening all along.

Take the North American situation. Originally, the North American Company filed a plan in which they proposed to retire their preferred stock at the involuntary liquidating. There there was a difference, just as here, between involuntary liquidation and voluntary liquidation. But the case dragged along and dragged along and no decision was being reached, and the management of North American realized that they were paying high dividends on these preferred stocks, and that they had adequate cash on hand and they had assets that they could get a bank loan. Those are exactly the same things that are happening here.

They came to the Commission and said "It just makes good sense to us to let us retire the preferred stock and pay the redemption prices" and the Commission permitted them to do it.

In release No. 5796, which was the findings of the Commission in that case, they said "With respect to the propriety of the proposed payment of the call price of $55 per share plus accrued dividends to retire this Serial Preferred Stock, the record indicates that it is financially advantageous to The North American, under present market conditions, to sell 700,000 shares of common stock of Pacific, and use the proceeds thereof, together with other funds not currently needed in its business, to redeem its serial preferred stock, 6 percent series.

"This is because Pacific common stock is now selling on a yield basis of 5.19 percent, together with other assets, yielding very little income, and will be employed to redeem a 6 percent stock at $55.00 per share or on a 5.45 percent basis."

Well, that is exactly the situation here. If it was fair to The North American stockholders to pay them redemption prices because the stock was certainly worth it, then we think it would not be fair here to do anything other than that.

Getting back to method again, as Mr. Kanton called to your attention this morning, under Section 11(e) the management has a choice of remedy, so to speak, a choice of method. In this particular case every single method they could have chosen except this dissolution thing which they finally came up with, would have resulted in the preferred stockholder getting the redemption prices.

For example, when the Plan was originally filed, it provided alternatively for a merger of Engineers with Virginia Electric Power Company, and the reason for it was a tax one.

They had a $31,000,000 carry-over as I recall, and they wanted to save that carry-over by merging with Virginia, but then the Excess Profits Tax Law happened to be repealed in the interim and so they couldn't take advantage of this carry-over any longer, and they came in and amended the Plan and said, "We are going to dissolve Engineers."

I don't think that they would have done that except that at the hearings, counsel for the Preferred Stockholders, on cross-examination, brought out that the Charter of Engineers provides that in the event of a merger, it is not to be considered a dissolution, within the meaning of the charter, which brought them face to face with this proposition, that if they merged the companies they would then be faced with the Delaware law and the Virginia law, which provide that the stockholders are entitled to an appraisal, and they would have had to be paid off at the value of the stock. So they changed it.

Well, there were other alternatives. They could have offered the preferred stockholders a chance to participate in this business—and I will later develop why I think the business is continuing—but they didn't.

What they wanted to do here was to maintain the equity in the underlying companies exclusively for the common stockholders, unless, as a common stockholder, a fellow also owned the preferred stock. We will develop later on why they did that.

Another method they could have used was just an out and out refunding, which is just what they are really doing here, anyway.

They are going to have a bank loan; they are going to sell warrants. It's the same thing as a refunding. Instead of selling the stock at competitive bidding, which a lot of companies do, they are selling it to the common stockholders. In other words, the common stockholders are putting up the money, which, together with the cash on hand and together with the proceeds from the sale of warrants, will be used to retire the preferred stocks.

The trouble with Mr. Tucker's argument is that, in his own words, "You can't have a rule that won't work both ways." That's what we think this boils downs to. If it is fair to give the preferred stockholders less than their involuntary liquidation preferences, when the stock is not worth any more, it certainly must be fair to give them more

when it is worth more, and the only reason he isn't contending for that is because he is interested solely in how this plan affects the common stockholders, rather than all the stockholders.

His second point, about Otis, is that the dissolution there was different than this one. Well, in Otis the Company was dissolved just as much as it was here. It was terminated, and everyone was paid off. In Engineers, Engineers has dissolved and the stockholders are paid off and that is the end of Engineers. But, as far as the business continuing, we think that it is exactly the same. All that Engineers' business was was to hold stock in subsidiaries. If you were a stockholder of Engineers, you held indirectly through Engineers, stock in underlying operating companies.

After this plan gets all through working itself out, these stockholders of Engineers wind up holding the stock of the underlying companies directly. Instead of holding Engineers' stock they hold the underlying stocks, and the operating companies which are really the business of Engineers, will continue in business.

As far as diversification is concerned, which Mr. Tucker talks about, the stockholder has just as much diversification whether he holds the stock directly or indirectly.

Furthermore, in Puget Sound, which was another case where Engineers itself had come in with a Plan to reorganize the Puget Sound Power & Light Company,—the Commission listened to a similar argument and said that in the United Light & Power case, which we are calling "Otis"; "that situation contemplated an actual liquidation," so apparently the Commission, as well as the Supreme Court, was not influenced by the fact that all you had was the top holding company going out and an intervening holding company becoming the top holding company.

I'd like to refer to what Commissioner McConnaughey said in the El Paso case, when he talked about liquidation. I do not think I could equal Mr. McConnaughey's language, but I think it applies here, and I'd like to read it. He said:

Oral Argument of Mr. Zazove (Cont'd)

"Liquidation has various meanings, depending upon the setting in which it is used. If it gets in its most generally accepted sense, as applied to corporate operation, the word describes a complete winding up that brings to an end the active participation in a going enterprise of all who theretofore had been associated with it. Not only is the intangible corporate vehicle dissolved, but its rights and property by which the business had been conducted are disposed of and the proceeds distributed among all the participants in proportion to their interests. Thereafter, none of them draws benefits from the continued operation of the enterprise. The interests of all participants is liquidated."

It is obvious to us that there is no liquidation here in that sense. The business of Engineers is going to go on, and the common stockholders are going to have the benefits of it, and anybody that talks about burdens because of the Holding Company Act is just closing his eyes to the facts.

In our brief we made a calculation on page 36, which just shows whether there has been any burden here that anybody can talk about.

In 1938, which was at a time when Engineers registered under the Act and became subject to its provisions, the earnings of all the subsidiaries—and there were eight of them then—applicable to the stock holdings of the Engineers, amounted to only $3,690,000.

Then, after they disposed of all these companies that Mr. Tucker had talked about this morning, so that now they only have three left, we find that in 1945, those earnings from just the three companies, as compared with the eight, amounted to $6,422,000.

They got rid of some companies, but what did they get rid of? They got rid of peanuts. Key West, a traction company down in El Paso, and the big one they got rid of was Puget Sound, in which they lost $34,000,000.

They used to have a system of accounting there where every year they would offset the losses of Puget as against what they took in from these other subsidiaries. Then, using their own 1946 estimate, we find that from only the three subsidiaries that are left, the earnings applicable to the common stockholdings of Engineers are $7,700,000, in contrast with the $3,690,000 in 1938.

If that is a burden brought about by the Holding Company Act, I wish that the preferred stockholders could be so burdened.

Mr. Tucker also made fun of the fact that we said that his calculation about this $2,500,000 loss from the inability to refund the preferred stockholdings was inaccurate because it is going to cost them, he says, $39,000,000. Well, that is not a cost such as when you go out to a night club and spend $10. Their $39,000,000 is being invested in this company. They can get the $39,000,000 back any time they want. If his argument has any validity at all, why not capitalize all the preferred dividends they are going to save? If you do that, they wind up with a $29,000,000 profit.

Of course, it is not profit any more than it is losses, and when they talk about selling El Paso and Natural Gas Company, of course, they made $1,000,000 on that—he didn't say that—he said "If we had held it until we got to the peak of the market we would have made $4,000,000 more."

So, he says, "We lost $4,000,000."

The fact is, they made $1,000,000 and they didn't lose anything on it.

Incidentally, Mr. Kanton says we ought to get down to figures.

What we are fighting about here is $3,200,000. That is the difference between what they would have to pay if they paid the involuntary price as against the redemption price. You'd think it was something. Actually they've got a claim here with the Internal Revenue Bureau for a $5,000,000 tax refund, and they usually get what they claim because they are very careful fellows.

The preferred stockholders are going to be out of the picture entirely, and who is going to get this $5,000,000? The common stockholders.

What they are doing here is getting the preferred stockholder out of this continuing business at a time when the preferred stockholder can't possibly duplicate their investment. Even if they paid them the call price and they invested that, all they will get is 4.6, so as far as burdens are concerned, it seems to us that the burdens are all on the preferred stockholders.

Getting down to our argument, we think you can look at this thing in two ways. If you want to look at this case like you did at El Paso, it is a very simple matter to dispose of the whole business. In El Paso you had a situation where a company, after complying with the requirements of Section 11(b), found itself without any reason for existence. The common stock management, which was Engineers, had the power to dissolve it; so it was simple. You say in the absence of the Holding Company Act it makes sense that these people, having the power, would dissolve the company. Let's look at the contract and see what they would get.

There it turned out it was $100 a share because the provisions of the charter were identical, whether you had a voluntary or involuntary dissolution.

It's all right with us if you look at this case in the same way. Engineers is now in a position where it serves no useful purpose. The common stockholders have the power to dissolve Engineers. Why not say "In the absence of the Holding Company Act there is no reason for keeping it in existence?"

Instead of doing it under Delaware Law, they are doing it under Section 11(e), but applying the charter provisions, if you treat this like El Paso, you pay the voluntary liquidation price, which happens to be the same as the redemption price, which is no problem at all, but we don't think, if you do that, you are being consistent with other cases, because—and this applies to El Paso—in all these situa-

tions, it seems to me that you are bound by what the Supreme Court said in the Otis case, and what this Commission has already said in the American Power & Light case, and I am not relying on American Light & Traction, because we don't know what the answer there is, but it seems clear that they said that granting an involuntary liquidation of a holding company because of the Act, if you look at the charter, you won't find any provisions in there that cover the situation. They are inoperative, both the involuntary provision and the voluntary provision.

So, in order to be consistent with what the Supreme Court said in Otis, we think that what you have to do here is to value the security they valued the securities in the Otis case, and I don't know any way of doing it except this investment value rule, and that rule does not depend only on the cost of money. That is one of the arguments Mr. Tucker made this morning. If the Engineers sold stock which originally sold on a 4.6 basis, and the cost of money went up, today it is only worth $77.00. What's wrong with that is that it isn't the only factor involved in investment values. You have to consider earnings, assets, what's left for the common stockholders. It is all a fairness and equity theory. You have to look at what each group is giving up and you have to decide what each group ought to get, so that no one is standing the cost of complying with the Holding Company Act; and that is why we think that the legitimate investment value theory is the only one which will work in every situation, and do equity in every situation.

If you were to go along with Mr. Tucker in this case, I feel that what you would be deciding is this, that you can never, in a liquidation or a reorganization under the Holding Company Act, give more than the involuntary liquidating prices. You are putting a ceiling on it. Well, if you do that, you come to a situation where your equity demands, as it does here, that the preferred stockholder be given

more than $100. If there are any losses here at all, it isn't true that the preferred stockholders aren't bearing any part of them. For example, suppose there were no call provisions in this charter; then the Engineers' stock would sell at something above the call prices, as Dr. Badger testified. At whatever price they are selling, it would reflect whatever losses have existed in the Engineers' system because of the Holding Company Act, or for any other reason. Now, the fact that that price is held down by a call provision in the charter doesn't mean that the losses, if any, haven't been reflected in the value of that stock. It just happens that the value has passed the point where the redemption price in the charter puts a stopper on it.

You see, if you had a situation like American Light & Traction, the price of that stock would rise to a point where it would reflect cost of money, and it would reflect losses. In other words, it would be a perfect situation of what the market value of the stock was, considering all the factors. It is only because you have a ceiling price here which the charter puts on it that you can't say that the preferred stock wouldn't be selling for more.

The Chairman: Supposing, instead of taking this road that is proposed in the plan, the Company came in and proposed to divest itself by sale of its interest in these two subsidiaries, in whole or in part; turn it into cash, and thereby become an exempt company, under the Holding Company Act.

Then, supposing the common shareholders wanted to discontinue the existence of this company. Would you say that then they would not be permitted to exercise the charter rights of voluntarily liquidating the corporation?

Mr. Zazove: If the Commissioner please, I think that if I were on the Commission I wouldn't let them go that far. This is no different from what happened in the North American situation, where they tried to go into the State Courts, where the Commission got an injunction.

The Chairman: I was taking the first step.

Supposing they come in now in this case and ask for permission to sell, dispose of their holdings through competitive bidding, and that's all they ask for. What would be the objection to granting that authority?

Mr. Zazove: I think the Commission should say at that time, "Tell us what you are going to do with the proceeds, how you are going to apply them?" or, if it didn't, you ought to approve such a thing with conditions. I don't think you ought to avoid Section 11(e) in that manner, because Section 11(e) imposes a duty on the management to dispose of the assets in a fair and equitable manner, and I don't think it makes any difference whether you sell at competitive bidding or not.

As a matter of fact, this plan does call for competitive bidding sale. I don't think the test of fairness depends on what the method is. It can't, any more than it is fair; the way we look at this thing,—why, in Columbia, you permitted them to retire the preferred stock at redemption prices because the Company voluntarily came in and said, "This is the way we want to do it."

Why should a different test be applied because Engineers wants a different method?

I do not see any point in rehashing Otis. I was here a month ago and it was rehashed plenty in American Light & Traction. I doubt if people will ever agree on what Otis stands for. It seems to me there is a guide post now.

I used to work for the Commission some time ago, and at that time we used to grope around.

I remember, when The North American case was filed,—I worked on that case—we were in a quandary.

I'll show you how it works if you use Mr. Tucker's argument, where they were proposing to retire a series of preferred stock at $50.00, which was an involuntary liquidation price, when that stock had been issued after the Holding Company Act was passed, with the approval of this Commission, and sold to the public at $52.50, and it had only been out two years.

Here they are arguing that this is an involuntary liquidation; therefore we pay involuntary liquidation prices.

We were in a box there. I do not know of any theory that would work except this fair-value theory.

The fact that the Commission let them ultimately pay the fair-value prices indicates that that was the fair thing.

Besides that look what Engineers did in El Paso. Engineers held a block of El Paso stock. Originally when that El Paso case came before the Commission they filed an application proposing the sale of all the assets and the dissolution of El Paso, and they were going to retire the preferred stock at the involuntary liquidating price of $100. While the Commission had the case under advisement, they filed an amendment and said, "We don't want to dissolve El Paso. Instead we want El Paso to buy in the preferred stock at tender." So what did Engineers do? It sold the preferred stock which it held in El Paso for $114 to El Paso and then a couple of years later they came in with an application to pay off the balance at $100, which is what the effect of that whole situation was. They got the investment value of their stock out of it but the public didn't.

Take Puget Sound. There Engineers owned the common stock in Puget. They were afraid that if they applied the involuntary liquidating preference of the company they wouldn't get anything because the arrearages were so high. They came in with a plan and said, "You can't hold out the preferred stockholders here." In the Western case they did the same thing. But do you know why they were arguing in favor of investment value there? Because as I pointed out to you before the stock was selling so low and the underlying assets had such a small value that they were afraid that as representative of the common stockholders there wouldn't be anything left for them. So they were anticipating that when the time came when they were to dissolve Engineers they would get something out of it for the common stock.

I want to point out some other evidences of what we think indicates whether this plan is fair. I mentioned to you that this was not a product of arm's length bargaining. Mr. Barnes testified that the only people he consulted before they filed this plan were the representatives of the biggest common stockholder. And let me call your attention to the fact that this Engineers outfit is controlled by a handful of people, decedents of the Stone & Webster crowd. It is the Stone & Webster family that control everything from start to finish. They are all people that were working for Stone & Webster from 1925. They are all very wealthy people, and all they are interested in as far as this company is concerned is to see that they don't get any dividends. They don't want dividends. They don't want to pay 80 per cent of every dollar they get to the Federal Government. They want this money applied to the retirement of the preferred stock so that all they will have to pay is the capital gain tax.

To show you how unfair it is to the preferred stockholder, they have a provision in here that if you, as a common stockholder, also own preferred you are permitted to turn that preferred in as applying on the purchase price of the Gulf States. That is a tax on that transaction. I know that tax transactions are not supposed to be a test of fairness but when you look at a plan where every conceivable angle has been reviewed, they don't pay a cent of taxes and that's what underlies the whole thing. That's the reason they want a bank loan and want to continue Engineers in existence, so those dividends in Virginia will go up to Engineers, which will just be a few men acting as trustees, but they will be able to file a consolidated tax return and instead of paying taxes on the dividends they get from Virginia, that money will be tax exempt except for a 2 per cent penalty, and will be applied to the payment of the bank loan. If you pass out the Virginia stock to the Engineers common stockholders then they get dividends directly from Virginia. And don't forget that the fact that they

haven't paid dividends since 1932 doesn't mean that they haven't had any earnings. They have had plenty. How do you think they got 15½ million dollars in cash? They have been accumulating this money all the time for the purpose of eventually retiring the preferred stockholders. And it is all for the purpose of escaping taxes. That's all right; everybody likes to escape taxes, but I imagine many of the 12,000 public stockholders would much prefer to get dividends out of this thing. I don't think that the tax situations when they are applied in this manner should be excluded as indications of fairness.

I forgot to tell you that the preferred stockholder who doesn't own any common has no choice. He gets cash immediately and it is taxable immediately. He doesn't have any choice as to when he will sell his underlying security, when to take the tax consequences, whether to hold it or do anything with it. He doesn't have any choice.

As far as the benefits of this plan are concerned, I pointed out already that there is a tax refund of $5,000,000 involved here, and I am sure that if they only get $4,000,000 it takes care of the $3,200,000 that we are trying to get for the preferred. They will be putting the idle cash which they have been holding in the till to use. It seems to me that they would have a long time ago said it is only good sense to at least make a pay-down on the preferred stock. Commissioner Healy told them to do that in the Western case: "Why don't you apply this idle cash that you have in preferred stock to reduce the amount of dividends." But they don't want to do it. They have made up their minds that they don't want to pay more than $100, and that's it.

Mr. Kanton mentioned the expense of maintaining Engineers. We don't know if it is $108,000 a year or $357,000 a year. You have two sides arguing about different amounts there. But certainly the common stockholders are going to save that amount eventually when there won't be any more Engineers. And, as I pointed out to you before, as far as the bulk of the common stockholders are concerned, they

are going to be a lot better off. They are going to have three operating securities which the company itself admits will pay $2.50 dividends. Compare that with a stock which hasn't paid a dividend since 1932, which sold for $1.25 in 1942. If that is burdening, I can't see it.

I don't see any purpose in rehashing all the things that have gone before this. I just want to call your attention to the fact that they have been consistent ever since 1938 in ignoring what the preferred stockholder actually owned in this business. They have been trying to buy them out piecemeal. In 1938 they bought out a block of them at $79. In 1941 they bought out a block of them at $85. In 1941 they were turned down when they tried to acquire 35,000 shares. So what did they do? They owned stock in El Paso, so they came in with a proposal that they would give the stockholders part cash and some of this natural gas common. When you added it to the cash it was still under $100. Of course, now they are willing to give them $100 but no more. The reason that proposal didn't work is because the price of the stock on the market went to $100 so they couldn't get anybody to exchange. In 1944 they came in again and this time the Commission let them go through with it because they said the price was reaching the point where if there was any element of unfairness it was negligible, and they let them acquire 25,000 shares at under $100.

We want to call your attention also to the fact that in 1945 the directors of Engineers actually adopted a resolution which would authorize the payment of 20 per cent of the amount of preferred stock outstanding, with corresponding reduction in the redemption price and in the voluntary liquidating price. What happened? They looked at the charter and they felt that that wasn't safe enough. In other words, they weren't sure that they could get out from paying more than a hundred dollars. So counsel for the company drafted an amendment to the charter in which he said that from now on because of this pay-down business, when the successive pay-downs reach $100 that is to be deemed

as exhausting the claim of the preferred stock. He himself didn't feel that the charter authorized the company to limit them to $100, so they wanted to put in an amendment. Well, the directors never got around to filing a plan of that nature, so the amendment to the charter didn't have to be adopted. But at the hearing we tried to offer that proposed amendment into the record and we thought it was certainly indicative and good evidence as to what the company's management and the company's own lawyer thought was necessary to get these preferred stockholders out at the involuntary liquidating prices. The trial examiner excluded it. We made an offer of proof; we took exception, and we respectfully submit that the trial examiner was in error.

Getting to the tax advantages, they have been covered by Mr. Kanton. As far as this escrow arrangement is concerned, I am inclined to admit that maybe it is a trifling matter in this case because of the fact that the assets are so valuable here. But it seems to me that when you add it to everything else, it is indicative of the fact that they didn't care about the preferred stockholders' point of view. They never considered it. They are interested only in the common stockholders' angle. You talk about fairness. It seems to me that the least they could have done is to make some provision for an escrow. We don't say they have to put up cash. Let them put up Virginia stock. If you will notice in their brief they say, "O.K., we will put up some Virginia stock," but does he say who will get the earnings on that Virginia stock?

Suppose the preferred stockholders eventually wind up in this thing and they own the money in the escrow; in the meantime, if it goes on for three years the common stockholders will be reaping all the earnings. If that is a test of fairness I can't see that one either.

Another thing we are very concerned with is this. The plan provides that upon depositing $100 per share, dividends will be automatically terminated. I know that in other cases the Commission has gone along with that, but if you will

examine those cases you will find that the management was neutral; it was not taking sides one way or the other, and that is why they were permitted that termination of dividends. But here all the assets of the company, the company's management, the company's lawyer, are pitted against the preferred stockholders. They don't make any bones about it. They say that we are going to cut you out, and they say if the Commission says we have to pay you more than $100, we will take you to the highest courts in the land. But they don't want to provide any fees or expenses for counsel to represent the preferred stockholders, nor are they interested in paying the dividends to the preferred stockholders.

It seems to me that where you have the company itself fighting one class of stockholders; the only fair thing to do is to maintain all the parties in the status quo. Why should we be kicked out immediately not knowing whether we are ever going to get any earnings on this money? Don't forget that this plan provides that it can be amended at any time. The minute they put up $100 for the preferred stockholders, they are out. There is nothing to stop this company from not even going through with the plan. They provide in there that if they don't mail out the warrants, the plan is not to be consummated. Or suppose something happens in the tax laws and they decide it is a good thing to merge Engineers. They can amend the plan. There is nothing to stop them from doing it. In the meantime the preferred stockholders are out. Furthermore they have got an appeal pending here. They are attacking the constitutionality of the Act; they are attacking this Commission's own order. Whoever heard of an outfit contesting the validity of a statute, contesting the validity of orders, and then trying to reap the benefits from them, which is exactly what they are trying to do? They want all the benefits of an involuntary liquidation but they don't want to comply with the orders if they don't have to. They have never dismissed their appeal. It is still up there.

We have also mentioned in our brief another point which no one else has mentioned, and it seems to us that it is of vital importance. There is a Part 1 to this plan and a Part 2. Part 1 says that the Commission shall find that it is not fair to pay the preferred stockholders any more than $100. Part 2 says that it is dependent on the effectuation of Part 1. And Part 2 is supposed to give you a way of deciding that we can get more than $100. You can't effectuate Part 1 until you decide we can't get more than $100. If you decide that, we have to appeal from that order, otherwise we are stuck. If we don't appeal, we are in a position where we are bound by the rule of the case. Where do we go? Do we go to the Court of Appeals? I don't know. If you tried to decide Part 2 it says you can't decide Part 2 until you have consummated Part 1. You may find us in the Circuit Court of Appeals in one issue and in the District Court in another. I think the District Court's jurisdiction depends on the voluntary nature of the plan filed pursuant to Section 11(e), and I don't believe that a District Court judge whose jurisdiction depends on the voluntary nature of this thing will take jurisdiction of this case where the plan is being fought by the company. They say it right in the plan. They say, "If you say even under Part 2 that we have to give the preferred stockholders more than $100 we will fight it." So they wind up in the District Court opposing their own plan. If that is a voluntary plan, I don't see it. But let's assume that the District Court has jurisdiction. You will find that Engineers has cooked up a scheme here to circumvent the Circuit Court of Appeals. Where you file a plan and you maintain that it is fair and equitable, and the Commission says it isn't, then what the company is supposed to do is to appeal to the Circuit Court. But the net result of what they are trying to do is this, that the Commission will say that it isn't fair, then they will wind up in the District Court and the District Court will say it isn't fair, then they will appeal to the Circuit Court of Appeals. So they have got two cracks at it instead of one, which the statute intended.

Rebuttal Argument of Mr. Tucker

I think I have saved a few minutes for rebuttal. I thank the Commissioners.

Mr. Tucker: Just a minute on that rebuttal. I think I have the right to open and close.

The Chairman: The Commission feels, Mr. Zazove, that Mr. Tucker has the right to finish.

Mr. Zazove: That is perfectly all right. I am willing to abide by the Commission's ruling. I don't think I could have added anything anyway.

REBUTTAL ARGUMENT OF MR. TUCKER

Mr. Tucker: There has been a lot of talk in this case about taxes. I don't admit for one single minute that it was the main consideration of the management to set up a tax-free plan, as far as they could. But we haven't any apology to make to anybody—this Commission or anybody else—when we say that we do take taxes into consideration. I say that any business man in these days who ventures to take a serious business step without considering the effect thereon of Federal taxes and state taxes is just foolhardy indeed because he will get himself into one awful mess. If I had the time I could give you some illustration from my own experience that will show that to the queen's taste.

Suppose that we had brought in a plan which had neglected the tax consideration and left them out of the plan. The staff of this Commission would have been the first to point them out to us and say, "When there is a method provided under the tax laws whereby you can save these folks taxes, you certainly aren't fair to them when you don't do it." Now, I say to criticize us from that kind of procedure, which is just ordinary business judgment in these days, is unfair.

I wish that we didn't have tax problems in this situation. We are criticized for continuing this trusteeship until they are settled, but nobody tells us how we can go through and complete the liquidation of the company without settling

those things. It seems to us that you have no alternative in this or any other situation where there are serious tax problems but to wait until those things are settled, and if it takes the three years allowed by the Delaware law, it is just too bad. We hope it won't. We hope by the time we get these loans paid off that these things will be adjusted.

If I can say off the record, some criticism has been made by Mr. Kanton that we haven't told him what we have been doing about these tax situations. The tax authorities are coming into our office next week to attempt to work out the 1944 audit. Now, that doesn't mean just because we have claims for refunds that other things are not going to be overlooked. Anybody that has ever had any experience with the Federal tax authorities ought to know better than that. They will look at your refunds and they will see whether they want to allow that, but they don't stop there; and some of these positions that we have been taking are claims that can be questioned. There is no doubt about that. Anybody that files tax returns these days is bound to do that to protect themselves. We don't know and nobody knows whether this audit is going to take a little while or a long time, and nobody knows what the outcome is going to be. It may well be that our claims for refund, that they have talked about, may be disallowed and they still may say that we owe some more taxes.

Can the directors of this company under that kind of a situation just sit by and say, "We are going to distribute all these assets," and take the risk of having the Government come to these directors and say, "You pay the taxes, fellow, you made the distribution." I say that as counsel for Engineers even if this Commission ordered us to do that kind of thing before these problems are settled I would advise Engineers to take it to the courts and fight the Commission, with every confidence that the courts would say no to this Commission. They would say, "You've got to wait until these things are settled."

Rebuttal Argument of Mr. Tucker (Cont'd)

The trouble with the staff, the trouble with my opponents, is that they are unwilling to give Engineers a decent time for a decent burial. What we have followed here is the ordinary method for dissolving a company under Delaware law. I say that with these tax problems in this picture you certainly can't cut us off and say arbitrarily that this is the time you are going to make distribution.

Commissioner McEntire: Mr. Tucker, on that point I haven't gotten from your argument in chief whether or not the company has any plans or any estimate of the probable time it will take to work out this tax situation.

Mr. Tucker: Yes, Commissioner, the record develops the fact that there were some tax problems arising in 1944—claims for refund. I don't know whether I can answer your whole question on the record but if you are not satisfied and you are willing that I go off the record, I can go off the record for the rest of it. We sold in 1944 some traction properties in Richmond. The tax cost of those properties goes back to some acquisitions that were paid for on a stock basis in the reorganization, I think, in bankruptcy, way back in 1896, I believe. Taking a quick view of that situation, we claimed a two million dollar loss on those properties. It was a very complicated picture. Various traction companies were thrown together at that time. Now, what is your tax loss? Our tax man—and this shows in the record—spent about twelve months investigating this whole picture and he came up with a claim of $12,000,000 for a tax loss, and we having paid some taxes without taking that loss into consideration, claimed a refund.

Well, how long is it going to take the tax authorities to do what we did in eight or nine months? You tell me. Certainly they are going to be more careful than we were. They aren't going to let the Government get stuck on that kind of a proposition, and it is going to take a long time to do it.

There is another loss shown in the record of five million dollars. We sold a bus company that we had acquired in connection with Virginia Public Service in Newport News

in 1944. We didn't even file the tax return because we got an extension until August, 1945. It wasn't even filed until then. We came up with a claim against the Government of five million dollars.

These it is true are claims that we are making that ought to lead to some refund of taxes. But what I am saying is that the situations of our consolidated tax returns are so complicated and so difficult of analysis that our judgment as to how the law applies to them may be wrong, and these things which we claim for refund may be thrown out. If I am a director in my present financial condition I am not going to take that risk; not at all, and I don't see any reason why I should.

Commissioner McEntire: That isn't quite what I had in mind, Mr. Tucker. I was wondering if you knew or had any present estimate of the probable length of time it is going to take to have that tax situation rot along and come out with an answer. I might ask you whether or not any inquiries have been made of the Treasury Department, Bureau of Internal Revenue, as to when you might expect an answer.

Mr. Tucker: I don't believe that I can give you an answer to the first one. The Government knows about the tax situation on this present plan because we have been taking it up with them. In fact, they have said to us—and this is one thing we are going to ask the consideration of the Commission on—"You want a tax ruling on this thing saying these things are tax free or that it won't be more than this or that amount. We will have to get a look at the order that the Commission enters here before it is entered, because after it is entered it is just too late."

Now, don't ask me why they take that attitude, but we are going to come to you some time between now and we hope the time that the order in this case comes out, and ask your cooperation, because that is what you are dealing with. They just tell you. You don't tell them. And cer-

tainly we don't want to make any slip because we draw our technical order in a non-technical way that doesn't suit the tax people. I know that they are going at this thing next week, but I don't believe that there is a person living that can tell you, Mr. Commissioner, how long it is going to take to solve all of these problems and come out with an answer that the Government says, "This is what it is."

I don't believe that it will happen before October, 1948, when if the bank loans are put on we will have them paid off on the Virginia dividends. It just seems inconceivable to me that the Government is going to be satisfied with all of these problems before that. That's the best I can do.

Now, Mr. Kanton said that we chose the way that we were to go out, that we chose the dissolution method. I don't think that that is the problem here at all. Suppose we had followed the merger route—and with my own knowledge of tax laws which is not too great, I have no quarrel with what Mr. Zazove said about the reason we abandoned the merger plan, that this thing was set up in the alternative, either dissolution or merger—but it developed that there was no tax saving there and it just wasn't the plan that ought to be followed in our judgment. The point is that however we got out we were forced by this law to get out, and whether the merger route was followed or dissolution route—whatever route was followed—this law forces us out, and as an enterprise the enterprise is going to terminate, and would have terminated just as effectively from my point of view whether by one route or the other, for the reason that as an organization, a functional, going organization, the purposes which the organizers had in mind when they set this company up would thereby be frustrated.

To say that the purpose was to hold common stock is not true. The whole criticism of Congress was that that wasn't the purpose of a holding company; that the purpose of a holding company was control and managing and this

and that, not just holding. In fact, one of the suggestions made at the time the Act was passed was that these companies might conceivably turn themselves into investment companies if they were ingenious enough to think up a scheme which this Commission would approve which would divest them entirely of management and make them entirely a holding company. So that the fact is that we are by this law forced out of business, and this enterprise is forced to terminate by the Act.

I have no criticism of Mr. Kanton when he says that I am arguing here that if this dissolution matures the preferred stock contract matures the liquidation, but that is not my position. I am resting on very different grounds. I did take that position temporarily during the hearing, I will admit, but now I am resting on the ground that when all the equities in this situation are viewed, then the fair thing is to put the weight on this one thing which is one of the bundles of rights. And I don't go any further than that. If you folk don't believe it, I will expect equitably that you will decide against it, but I think equitably you ought to say that under all the circumstances it is fair and equitable that the preferred stockholders in this case should not get more than $100 and accrued dividends.

Now, it is said that this thing is reflected in the present investment value of the common stock. Sure it is. But my point is that if we hadn't been forced by the Act to take these losses, the common stock would have greater value, and if that isn't a loss as somebody said, I don't know what I am talking about. If we had not been forced to sell El Paso Natural Gas, if we hadn't been forced to sell Savannah, if we hadn't been forced to sell these other things, the common stock would have had a greater value now than it has, market-wise and investment-wise.

I am not going to take much time with this Western case. I tried to take the position in my brief, as clearly as I could, that I am not being inconsistent, and I even took

the trouble in the record, which my brothers failed to recognize, to get the background of the Western case in. The truth of the matter is that in my argument before this Commission in the Western case I anticipated the Supreme Court in the Otis case as applied to the facts of that case. I don't get any credit for it but that's what I did because in that case there wasn't enough assets to pay off the preferred stock and still leave something for the common stock. So I say as applied to that end of the case, all right; then you have got to follow the principle of the Otis case. But I say as applied to this kind of a case where there is a substantial equity left, the Supreme Court in my opinion would never take the same position. That is my position.

Now, about this five thousand dollars that Mr. Streeter asked the Board about. Mr. Streeter came to the Board and asked if we would assume that much, and we did. We can't be criticized for doing what the other fellow asked us to do, and that's all he asked us to do. Whether it should have been more or less, that's all he asked and we told him we would assume that much of the legal expense.

Mr. Zazove says that we never put in any evidence as to the market price, after the Act, of the preferred stock. That is not true. We did. Mr. Barnes testified flatly, and we admitted in our brief, that he testified flatly that in his opinion, ex the act, without giving any effect to these equities I have been talking about here today, the preferred stock would be selling at its call price approximately, maybe a little bit more. But on this little bit more business, Dr. Badger said the reason he added that was because it would take three months to get this thing wound up, but since we are going to pay accrued dividends to the time that we deposit the $100, and since we expect this Commission, if they allowed the preferred stockholders some additional amount, to give them something in the way of interest to compensate them for their not having the use of the money, I think our position on that is eminently sound.

Rebuttal Argument of Mr. Tucker (Cont'd).

Just one more thing and I am through. Mr. Zazove said in a footnote on Page 5 that in the Columbia situation they paid $110 for the $6 stock, and $105 for the $5 stock, and $100 for the $5 preferred. What Mr. Condon failed to notice, however, and which appears perfectly clearly in all of the services, is that those were the involuntary liquidation prices in those cases—every single one of them. They did not make the distinction that is made in this case. Talk about the North American Company being so generous, coming in and saying, "We will give our preferred stockholders a premium"; the record in this case shows that they had a lot of litigation pending and it is well known that they had a lot, and the record shows that probably the reason for that on the part of the North American Company was that it would take so long to settle that litigation that it was cheaper for them to do what they did, and they did what reasonable business men do under those circumstances.

I thank you.

Commissioner McEntire: Mr. Tucker, in my limited studies of this on reading the brief and delving a little bit into the record, I am having some trouble with my own thinking about the fact that the figures in the record seem to be pretty stale. I believe they all go back to June of 1945, or a little bit over a year.

Mr. Tucker: I think that is substantially right, except for the estimate for the year 1946. We did put those in in every instance, so that you have, I think, the picture which brings you up to the beginning of 1946.

Commissioner McEntire: There is no 1946 actual in the record, is there?

Mr. Tucker: No, we couldn't have 1946 actual.

Commissioner McEntire: I mean, there is no part of 1946 actual?

Mr. Tucker: The hearing closed on February 13, and I am informed we had full figures for 1945 with two months estimated, and we have an estimate for 1946 as to all of the

subsidiary companies. I don't regard those as stale records, Mr. Commissioner. I think that is pretty current, as current as one can get, because I think that since we ourselves put in the 1946 estimate the Commission can consider them admissions against interest and fairly say that those are what the results will show.

Commissioner McEntire: Do you know how those estimates have been borne out so far by actual experience?

Mr. Tucker: I think they have been borne out very well. I am informed that they are doing a little bit better than the estimate, and that shows conservatism in the estimates. But I think the record in this case shows that the estimate which the management makes usually check out pretty accurately, and my recollection is that there was some testimony along that line. They are not based on horseback opinions; they are based on reports, and I don't think I am going off the record at all when I say that they are based on reports that the local people make as to each one of these situations in an endeavor to apply whatever changes may be indicated by the circumstances that they see coming in the year. Whatever situations they see coming that will change the picture during the year are reflected in those. I think the record will show that the record of past earnings have been extremely accurate.

The Chairman: Is there something further to be presented?

Mr. Kanton: In connection with the off-the-record remarks of Mr. Tucker, I would like to supplement the record with a few off-the-record remarks also on the nature of that tax question.

As I said this morning, we felt that that whole argument was an afterthought that was never presented in the record so the staff took it upon itself to get in touch with the Bureau of Internal Revenue and we spoke to a Mr. Brown in Washington. He has advised us, after looking up the Engineers' report that the 1942 and the 1943 reports have been practically completed but that no attempt has been

made by the Engineers management to accelerate, ever since they have known about this case, the 1944 or the 1945 reports. And when Mr. Tucker says that he thinks the Internal Revenue people are coming around and going over the 1944 report, I think perhaps our questioning may have had something to do with that.

I would like to point out one thing, that we are not arguing that the management of Engineers should not iron out their tax refunds with the Treasury Department. Our argument is against the holding company status because of the holding of $75,000,000 of Virginia common stock. We don't know what the outside claim is on these tax problems. From what we hear they are all refunds. If there is an outside claim and it can be determined say in six months, why can't that amount be put in the escrow fund? Is it necessary to continue indefinitely a holding company, which it will be, in conflict with Section 11(b)(2) of the Act? That is the problem more than the question of ironing out the refunds. They should be ironed out but do you need $357,000 a year of expenses? Do you need a holding company organization in order to continue to do that?

Mr. Tucker: As I said on my main argument, Mr. Commissioner, if somebody will tell us how to resolve these problems, we will be glad to resolve them, but I don't know how to do it. I doubt if there is a living person that can do it.

The Chairman: All parties having been heard, the Commission will take the matter under advisement.

(The oral argument in the above-entitled matter was closed at 3:45 o'clock p.m.)

Hearing on January 3, 1947

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

IN THE MATTER OF: ENGINEERS PUBLIC SERVICE COMPANY	File No. 54-132
IN THE MATTER OF: EL PASO ELECTRIC COMPANY	File No. 70-1149
IN THE MATTER OF: GULF STATES UTILITIES COMPANY	File No. 70-1150

Hearing Rooms A and B,
Securities and Exchange Commission
Building,
Philadelphia, Pennsylvania,
Friday, January 3, 1947.

Met, pursuant to notice, at 10:30 o'clock a. m.
Before Commissioners:

JAMES J. CAFFREY, Chairman,
ROBERT K. MACCONNAUGHEY,
RICHARD B. MCENTIRE, and
EDWARD M. HANRAHAN.

Appearances:

BERNARD S. KANTON and HARLOW E. LESTER, on behalf of the Securities and Exchange Commission.

WILLIAM E. TUCKER, of Mudge, Stern, Williams & Tucker, 20 Pine Street, New York City, on behalf of the Applicant.

Oral Argument

LAWRENCE R. CONDON and FREDERICK ZAZOVE, for Thomas W. Streeter, Columbian National Life Insurance Company, and others.

FRANCIS H. SCHEETZ, of Evans, Bayard & Frick, 1335 Land Title Building, Philadelphia, Pennsylvania, on behalf of Home Insurance Company, *et al.*

MORTON SCHORR, for Louis Boehm, 60 Broad Street, New York, New York, counsel for Lucille Boehm and Frances White, common stockholders.

PROCEEDINGS

The Chairman: Commissioner McConnaughey will have to leave in a few minutes. Is there any objection to his participating in the decision of this matter if he reads the transcript of the argument that he doesn't happen to hear?

Mr. Tucker: No objection.

Mr. Condon: No objection.

The Chairman: I hear no objection.

I see here Mr. Kanton wishes to speak for a few minutes?

Mr. Kanton: Yes, sir.

I would suggest this, gentlemen, that counsel who wish to participate this morning would formally enter their appearances upon the record, and also other counsel who may be present and whom I don't know about who wish to be heard this morning.

The Chairman: Well, who would like to be heard or would like to make an appearance?

Mr. Condon?

Mr. Condon: Mr. Caffrey, I would like to appear, with Frederick Zazove, on behalf of the Streeter group of preferred stockholders of Engineers Public Service, and would like to make an opening statement which should not exceed five minutes in length.

The Chairman: Have you given the reporter your name?

Mr. Condon: I believe the reporter knows me, sir.

The Chairman: All right.

Mr. Scheetz: Mr. Chairman, Francis H. Sheetz, appearing on behalf of Home Insurance Company and Tradesmen's National Bank and Trust Company as trustee, both of them being preferred stockholders. I believe the stenographer has the names.

Mr. Tucker: William E. Tucker, appearing for Engineers Public Service Company, in connection with the Plan case and in connection with the U-1 applications for El Paso Electric Company, Gulf States Utilities Company and Virginia Electric and Power Company.

The Chairman: Anyone else?

Mr. Schorr: Morton Schorr, for Louis Boehm, appearing for Lucille Boehm and Frances White, common stockholders, who wish to make public objections to any prepayment or redemption that should be made.

Mr. Kanton: Counsel, have you filed a written request?

Mr. Schorr: No. I also ask for a stay of one week, since Mr. Boehm has been out of town for the past few weeks, in which to file a formal request, if you don't mind, sir.

Mr. Kanton: I have no objection; just the filing of a request to be heard?

Mr. Schorr: That is right.

Mr. Kanton: Counsel, may I ask you another question, please?

Mr. Schorr: Yes.

Mr. Kanton: How many shares of common stock do you represent?

Mr. Schorr: One thousand shares.

Mr. Kanton: Held by the two people you mentioned?

Mr. Schorr: That is right.

Mr. Kanton: Could you tell me now for the record when these shares were acquired?

Oral Argument (Cont'd)

Mr. Schorr: December, 1943.

Mr. Kanton: December, 1943?

Mr. Schorr: Yes.

Mr. Kanton: You do not wish to participate at this time before this Commission, is that correct?

Mr. Schorr: That is correct, sir.

The Chairman: Go ahead, Mr. Kanton.

Mr. Kanton: I have here a letter received from a Mr. Christian A. Johnson, who asks leave to file this application, wherein he states his objections to the payment by Engineers to the Preferred Stockholders of Engineers in any amount in addition to $100 per share. Mr. Christian advises that he couldn't be present this morning and formally requests that this letter be read into and made a part of the record.

It is my suggestion that Mr. Johnson's letter be placed in the record of action in this proceeding, and I will gladly give copies of this letter from Mr. Johnson to the Commission, if they so desire.

Mr. Tucker: I have no objection to its introduction with the understanding that it is no more than argument and isn't conceived as evidence.

Mr. Kanton: That is the only purpose, counselor. However, Mr. Johnson is not present, and I haven't had an opportunity to speak to him.

In that connection I would like to reserve an exhibit number, Commission's Exhibit 9, to keep the record open for that limited purpose, in order to show when and how Mr. Johnson acquired these Engineers' common stocks, in line with the questions I asked Mr. Schorr this morning.

Mr. Tucker: No objection.

The Chairman: It may be reserved.

(Commission's Exhibit No. 9 is RESERVED as noted.)

Mr. Kanton: We also received this morning a letter from Mr. Calvin Bullock, signed by Michael J. Kramer, wherein this gentleman voices objection to the payment of

dividends, so-called special dividends, up from the operating subsidiaries of Engineers, and requests that his remarks be placed in the record.

If there is no objection I would like to place Mr. Bullock's letter in the record of action in this proceeding.

Mr. Condon: Mr. Kanton, may I inquire, not having seen the letter, whether there is anything in that that affects the preferred stockholders?

Mr. Kanton: I don't think so, sir.

Mr. Scheetz: Mr. Kanton, does he do that in the capacity of a stockholder of the subsidiaries?

Mr. Kanton: No. He does that in the capacity of a stockholder of Engineers.

Mr. Tucker: I have no objection to the introduction of Mr. Bullock's letter, with the understanding that he just registers his objection.

Mr. Kanton: That is correct, Mr. Tucker.

At this time, gentlemen, I would like to offer in evidence the original notice of filing and order for hearing this morning, which is contained in File No. 54-132-1 which was issued by this Commission on December 19, 1946, and I offer it now in evidence as Commission's Exhibit No. 10.

The Chairman: It is received.

(Commission's Exhibit No. 10 is received in evidence.)

Mr. Kanton: I would like have marked for identification and offer in evidence as Commission's Exhibit No. 11, a copy of said notice of filing of amendment and order for hearing and argument on this Plan as amended, which was published in the Federal Register on Wednesday, December 25, 1946, in Volume 11, No. 250, page 14658, as Federal Register Document No. 46-21877.

I may also add that copies of this release were given to the press and sent to the Commission's mailing list.

The Chairman: It is received.

(Commission's Exhibit No. 11 is received in evidence.)

Oral Argument (Cont'd)

Mr. Kanton: Gentlemen, that is all I have at this time, and if anyone else wishes to go ahead, they may do so.

The Chairman: Mr. Tucker?

Mr. Tucker: I suppose it would be in order for me to formally introduce the documents, and so forth, which have been filed since the last hearing, and the first one is Amendment No. 5 to the Plan, which is File No. 52-132, and I ask this to be marked as Applicant's Exhibit No. 79 as the last exhibit, I think, is Applicant's Exhibit No. 78.

The Chairman: It is received.

(Applicant's Exhibit No. 79 is received in evidence.)

Mr. Tucker: Now, Division D-1 of the conditions to effectuation of the Plan, as included in Amendment No. 5 contained a provision which provided as a condition precedent to the effectuation of the Plan that the Charter of Gulf States should be amended so as to provide for cumulative voting in respect of the preferred and common stocks of Gulf States, as well as some other amendments. We didn't have time to check that with Texas counsel before the filing, but when we did so we got telegrams from Texas counsel which indicated that under the Texas law it would be impossible so to amend the charter of Gulf States without obtaining 100 per cent of the vote of the preferred stock as well as of the common. That would be possible as to the common but obviously utterly impossible as to the preferred.

If there is no objection, I would like to offer copies of the telegrams as Applicant's Exhibit No. 80.

Mr. Kanton: No objection.

The Chairman: It may be received.

(Applicant's Exhibit No. 80 is received in evidence.)

Mr. Tucker: Amendment No. 6 to the Plan, File No. 54-132, amends conditions of Paragraph No. 1 in Division D so as to strike therefrom the provision with respect to

cumulative voting for the election of directors for the preferred and common stocks since it was impossible, of course, to comply with that condition on account of the fact that the preferred stock was publicly held, and we couldn't possibly get 100 per cent, and I ask to have that amendment No. 6 marked as Applicant's Exhibit No. 81.

The Examiner: It is received.

(Applicant's Exhibit No. 81 is received in evidence.)

Mr. Tucker: The Commission's order for hearing and argument in connection with the filing of Amendment No. 5 required that we give notice to the preferred and common stockholders of Engineers of the hearing, and I would like to present at this time as Applicant's Exhibit 82, an affidavit of mailing, which I believe is in compliance with the Commission's order in this respect. It is signed by Richard N. Benjamin who is secretary of the Engineers Public Service Company. It is a letter to the stockholders of Engineers Public Service Company, dated the 20th, and the affidavit shows that with it was mailed the notice of filing of amendment and order for argument, and so forth, of the Commission, dated December 19th. I ask that that be received in evidence as Applicant's Exhibit 82.

(Applicant's Exhibit No. 82 is received in evidence.)

Mr. Tucker: Next I would like to offer in evidence Amendment No. 2 to the El Paso Electric Company's Form U-1 application, File No. 70-1149, as Applicant's Exhibit No. 83.

Next I would like to offer in evidence No. 3 to El Paso Electric Company's application on Form U-1, File No. 70-1149, as Applicant's Exhibit No. 84 and then Amendment No. 2 to Gulf States Utilities Company, Form U-1 application, File No. 70-1150 as Applicant's Exhibit No. 85; Amendment No. 3 to Gulf States Utilities Company Form No. U-1, File No. 70-1150, as Applicant's Exhibit No.

86, the original application on Form U-1 of Virginia Electric and Power Company, File No. 70-1419, as Applicant's Exhibit No. 87 and Amendment No. 1 to the application of Virginia Electric and Power Company, Form U-1, File No. 70-1419, as Applicant's Exhibit No. 88, and I have been requested by the staff, if I was willing to do so, and I am,—to offer in evidence an opinion given by myself and T. Justin Moore to the Board of Directors of the Engineers Public Service Company, on the basis of which they acted in authorizing the filing of Amendment No. 5.

I ask that it be received as Applicant's Exhibit No. 89. Do I understand these exhibits have all been received and will be marked?

The Chairman: Without objection they are received, and will be marked.

(Applicant's Exhibits Numbers 83, 84, 85, 86, 87, 88 and 89 are received in evidence.)

The Chairman: Mr. Condon, do you wish to speak?

ORAL ARGUMENT OF LAWRENCE R. CONDON

Mr. Condon: May it please your Honors, as counsel for the Streeter group of preferred stockholders, I respectfully maintain that the amended plan in its present form is not fair to such stockholders, and that this Commission should withhold its approval unless it is further amended in an appropriate manner.

The Company has stated that its amended plan is intended to comply with the Commission's findings and opinion of December 4th, 1946 in this matter. However, an examination of the Plan reveals that, in fact, it does not meet the requirements laid down by the Commission with respect to assuring the preferred stockholders adequate compensation for any sums that might be withheld from them during the period of possible litigation.

The letter from Mr. C. S. Johnson, incorporated in the Record of Action in this proceeding, by staff counsel this morning indicates an intention on the part of common stockholders to contest the Commission's findings. Counsel representing Mr. Boehm has also given similar indications this morning, indicates an intention on the part of common stockholders to contest the Commission's findings. Counsel representing Mr. Boehm has also given similar indications this morning.

The Plan as now amended contemplates that the Company will pay the full redemption price to the preferred stockholders, either in cash or by allowing that price for the preferred stock if it is exchanged in exercise of the warrants for the purchase of Gulf States stock.

There can be no guarantee that such amounts will actually be paid in accordance with the time schedule estimated by the Company. Although Engineers no longer affirmatively assert that it will contest the Commission's findings with respect to the treatment to be accorded the preferred stockholders there is no provision in the amended plan whereby Engineers waives its right to contest the Plan before the Enforcement Court.

I know that the proposed letter to be sent to the stockholders contains a statement that the Company will not litigate the plan, but it may well be that that letter is not a part of the Plan itself, and therefore is not binding on the Company.

At any rate, I feel that a minimum of protection to the preferred stockholders requires that a similar statement about the Company's intentions not to litigate should be incorporated in the Plan itself.

Even assuming that the Company were to amend the plan as indicated, there is still this very real possibility that the common stockholders may contest the company's proposal to pay the call prices.

As the Commission pointed out on page 23 of its opinion, the Court would have adequate power to assure that the

interests of all parties concerned are protected. With respect to the premium that the company is proposing to pay, the Court may, at the request of one or more common stockholders, enter a stay order, even though it agrees with this Commission, and finds that the preferred stockholders are entitled to the so-called premium. Such a stay might not necessarily delay the consummation of the entire plan, because the Company could go ahead and issue the warrants, which would be all exercised for cash, or, alternatively, in exchange for the preferred stock at the rate of $100 per share as the Plan formerly contemplated.

I am not saying that such will be the action of the Court, but I am urging the possibility of such a state of facts, and the Company should not be permitted to wash its hands of its obligations to compensate the preferred stockholders for any delay in receiving full payment, merely by proposing to accept preferred in exchange at the premium price or by depositing such an amount in cash and thereafter be relieved of all further obligation in the premises. In effect, what Engineers is now proposing, while not called an escrow, is, in fact, an escrow. The Commission was explicit when it said that such an escrow should be adequate should be sufficient to cover the compensation for any delay.

At this point I would like to mention the fact that Judge Leibell, in the United States District Court for the Southern District of New York, on December 20, held, in the Electric Bond and Share case that the preferred stockholders are entitled to compensation for delay in receiving the full payment where there is litigation over the amount to which they are entitled in these 11(e) cases, but the amended plan now before your Honors, makes no such provision, and it should not be approved until it does.

In the event litigation does not ensue there is no harm to anyone that I can conceive, or any valid objection to assertion of such a provision in the amended plan. On the other hand, if there is litigation, considerable sums might be lost to the preferred stockholders, if Engineers have

been liquidated, or its liability to pay such compensation terminated upon the deposit of the money with the trustee as the Plan now contemplates.

There is also a serious question in my mind as to whether the assets proposed to be retained by Engineers will be adequate to cover the compensation which the Commission has held must be paid to the preferred stockholders by the Company. According to the Company's Exhibits, it will retain approximately 5 per cent of Virginia's stock and it will have a balance of about $320,000 in cash. These items are intended to cover all contingencies which might arise. Obviously, since the obligation for added compensation for delay in full payment is not provided in the amended Plan, we feel that additional provision should be made to protect the preferred stockholders in the eventuality that might ensue. It is interesting to note that staff counsel suggested, and this Commission has indicated, that estimating the amount of said compensation for loss to the preferred stockholders would amount to $485,000 over a reasonably foreseeable period of litigation on this question. I respectfully suggest that Engineers be required to keep an additional amount, either in cash or in Government Securities, as this Commission feels would be adequate to protect the preferred stockholders in that regard, and as indicated in its opinion.

Now, I am not asking for anything that the Commission has not already held that the preferred stockholders are entitled to and, in my opinion, it would be a comparatively simple matter to amend the Plan so that it would be fair to the preferred stockholders.

A provision that the plan should not become effective in the event that any common stockholder objected, until the enforcement Court's order became final, would serve the purpose or, in the alternative, the Plan should provide that in the event that payment of the full amount due to the preferred stockholders is delayed, the company will pay an amount equal to the yield of each series of preferred

on the basis of its dividend rate at the price ultimately deemed payable. In this manner, as the Commission said on page 36 of its opinion, the preferred will receive for the period of any litigation, a return on the amount withheld which is measured by the return which would have been received by it if the stock remained outstanding.

As I said before, it may also be necessary to require security for the payment of this compensation, unless the Company can show that the assets it proposes to retain are adequate for this as well as for other purposes, including the contingent liabilities, fees and expenses.

Now, Mr. Chairman, there is an additional point to be made that does not relate to the amended Plan but it is something that I feel the record might well show, that might be brought up at this time, in view of the fact that a failure so to do might be embarrassing to us if we have to litigate this question in the District Court.

Page 18 of the Commission's opinion, it is stated, in effect, that all of the participants in this case agree that the Engineers liquidation is necessary under the Act.

At the trial before the Trial Examiner and in our briefs, and at the oral argument, we have consistently maintained that there was no impelling necessity by reason of the Act, or otherwise, for the dissolution of Engineers. Although we grant the Company's right under its charter to call the preferred for redemption, or to voluntarily liquidate, we believe that the record demonstrates that Engineers could well be continued, although, of course, with a contracted capital structure.

Dr. Badger, our expert witness, testified that Engineers could distribute the El Paso common, sell the Gulf States stock as contemplated, and with the use of only $40,000,000 of treasury cash could call all the preferred stock except 99,863 shares of the $5 preferred, with annual dividend requirements of slightly less than $500,000, which amount Dr. Badger said would be well within the earnings available

from Virginia if Engineers either remained as a holding company over Virginia, or if it were merged with that Company.

We still believe that actually the business of Engineers is continuing and that Engineers is merely voluntarily dissolving, within the meaning of its charter.

Of course, as far as this Commission is concerned, your findings that the preferred is entitled to the redemption price under the Act makes our contention academic here, but I think that the record should show our position clearly, so that we might not be embarrassed in the District Court.

The Chairman: Thank you, Mr. Condon.

Mr. Scheetz: Mr. Chairman, may I say a word?

ORAL ARGUMENT OF FRANCIS H. SCHEETZ.

Mr. Scheetz: It does seem to me that Mr. Condon's point with respect to the Division D clause 3 of the Plan is well taken, because it does not provide that the enforcing order of the Court shall have become final, and obviously, under the language of the Plan the Company could deposit the money for the payment of the preferred prior to the time when the order did become final.

I had presumed when I read the Plan first, of course, that Engineers would not be putting up the money until they were assured that the Plan would be approved, and there would be no litigation and in that event I assumed that the Engineers' preferred would continue to carry its dividend, so that practically it may come out to that end, but actually, as you do read the Plan there is the potential deficiency on that point.

The Chairman: All right, Mr. Kanton.

ORAL ARGUMENT BY MR. KANTON.

Mr. Kanton: May it please the Commission, in response to Mr. Condon and Mr. Scheetz, Mr. Condon this morning has made, as I see it, three points: He stated that he does not feel that adequate compensation for sums withheld during this period of litigation will be made for the preferred stockholders and in the same vein that there will be no guarantee of payment of the full amount to the preferred stockholders and that there is a possibility of Engineers dropping out of the picture and being relieved of all obligations. Now, at this point of the record, with the amendments to Engineers' plan now before us, it appears that Engineers—and I will let Mr. Tucker talk for himself on that point—does not wish to contest the payment to the preferred stockholders. If the Commission approves the amended plan and the amended plan goes before the District Court all parties will be given an opportunity, all interested persons will be given an opportunity to present their views. Now, let's say, for instance, that the District Court affirms the Commission's opinion or the amended plan which is approved by the Commission. At that point, if the preferred stockholders were paid out $110 and there was adequate compensation left to reimburse counsel for their fees and expenses, I don't see how any harm could be done to anyone, including preferred counsel or common counsel. However, at that point there is a possibility that either a preferred stockholder or a common stockholder or even the Commission itself may object to the District Court's opinion in connection with this amended plan. Now, at that point I would feel—and I would strongly recommend, unless counsel who possibly might feel that they had an appeal either waived an appeal or else unless an escrow agreement, as this Commission set forth very fully and in detail on Page 36 of this opinion, were entered into, that we couldn't go forward with the plan at that point, and I doubt very much that counsel for the company

would want to go forward at that point, in case there were an opinion by the District judge that there may be a litigation further on. In fact, if we felt that the District judge in approving the plan, in approving, say, a payment of $110 to the preferred stockholders, felt that such payments would be made, I am sure that the Commission counsel would ask for a stay of any payment to the preferred stockholders or that payment would be made to the preferred stockholders of $100 a share and the rest be placed in escrow, and in that event, like was done in the Laclede case, the rest of the Engineers' plan would be consummated, El Paso, Gulf States and Virginia would be passed out, but there would still be the protection, and I am sure the Commission would insist upon it, as so fully explained in our opinion, but I don't think that at this time or at this phase of the proceeding, recognizing the inclination of Engineers to go ahead and have this plan consummated in order to comply with demand made of Congress under Section 11(b), that the plan need be further amended in order to have an escrow agreement or something of that sort set up.

The Examiner: Do you wish to add anything, Mr. Tucker?

Mr. Tucker: Well, perhaps a little. I think, from the point of view of Engineers, I would like us to stand where we are and ask the Commission to approve the plan as amended by Amendments No. 5 and 6. I don't think it is necessary at this time to set up a lot of bugaboos about it. We can amend the plan readily later on if it becomes necessary to amend the plan, but it may not become necessary to amend it. It may be that these common stockholders will decide that they don't want to litigate. It seems to me if the Commission applies, as they are requested to apply, to the District Court for enforcement of the plan and the District Court hears argument and approves the plan, approves the order of the Commission—let's see what develops at that time. It still could be amended if it were necessary to amend it, if an appeal at that time were taken.

It seems to me quite within the realm of possibility that we might all agree that unless a stay was applied for, unless we were prevented from carrying out the plan, that we should go forward with it. The way I feel about it is, I would like it to go forward as it is and if it becomes necessary at that time to amend the plan, it carries its own provision for amendment. It says that as long as the plan is before the Commission it can be amended with the approval of the Commission, as long as it is before the court it can be amended with the approval of both the court and the Commission. Now, we may get into a situation where we will have to separate out these issues, if we can separate them out. I am not at all sure that we can.

I am a little surprised at Brother Condon's statement here this morning that he thinks an escrow arrangement is necessary, because, as I understood his position at the hearing and at the argument and in his brief, it was that if we set up an escrow, as I understood him, he would be unhappy with it unless—and I think I am stating his position, I haven't a copy of his brief here—he would be unhappy with it unless it provided for a continuation of full dividends on the preferred stock of Engineers until the full amount, $100 plus the premium plus dividends were deposited. Wasn't that your position in your brief, Mr. Condon?

Mr. Condon: It was, Mr. Tucker, and it still is and I will still urge that in the District Court. I restricted my remarks this morning to comments with respect to your amendment in so far as it sought to comply with what is my understanding of this Commission's findings and opinion.

Mr. Tucker: Well, I thought that was what your position was, and a more unreasonable or more unrealistic position I can hardly imagine from a legal point of view.

He wants to say that after his preferred stockholders get $100 paid to them in cash that they can go to the bank and get any time, by turning in their certificates—they are

entitled to get 5½ and 6 per cent interest on the money. In other words, he isn't willing that we should set up the usual escrow arrangement, apparently, which provides just that, that we pay $100, cut off the dividends as to the $100, litigate as to the balance and pay on the balance the $3,200,000, which represents in this case the premiums, as the Commission in its own opinion in this case suggested, the 5.3 average dividend until the premium is paid. Even that doesn't please him.

Now, this point that Mr. Condon makes with respect to some provision for continuation of the full dividends on this preferred stock after we make the deposit seems to me is another extremely illogical position for him to be taking. We could, if we wanted to, I take it—nobody at least has questioned the possibility that this could be done—we could call this preferred stock. In that event what would we do? We would give thirty days' notice of the call, we would take approximately $40,000,000 or $42,000,000, whatever it is, to a solvent bank and trust company, we would deposit the money with the bank and by virtue of that deposit, so long as we included preferred dividends to the date of deposit—that ends under its charter the responsibility of Engineers Service Company to its preferred stock. Now, you set up a plan that parallels that situation, exactly parallels it, because that is exactly what this plan says, and he is unhappy with respect to that. Now, it seems to me that once we get the money deposited in trust with a solvent bank and trust company it must be that we have no further obligation with respect to it. Let's canvass the possibilities of that situation after we have made the deposit. What does it mean? It means that if we aren't discharged, if Engineers, by virtue of the deposit in accordance with the plan, isn't discharged it has to withhold all of these distributions, as far as I can see it, until all of the preferred stockholders have come and gotten their money, because until they do you don't know.

whether they are coming to get it or not. You don't know whether the bank is going broke or whether it isn't. Now, I say that when we patented the plan—and I submit that we did—when we patented the plan after the exact situation that would have happened, if we had called the stock for payment certainly it is fair to the preferred stockholders and we have no criticism or objection about it. What this says is that Engineers will deposit in trust for the benefit of its preferred stockholders with a solvent bank or trust company an amount equal to $105 per share plus accrued dividends to the date of such deposit for each share of $5 preferred and $110 per share plus accrued dividends to the date of such deposit for each share of the $5.50 preferred and the $6 preferred not surrendered in exchange pursuant to Section B, Paragraph 1, and will give to all holders of such preferred stock five days' notice of such deposit at their respective registered addresses and such notice shall state that upon surrender by the preferred stockholders of their certificates for preferred stock to the transfer agent they will be paid the amounts that I have above specified, and I won't go on and read it, and that from and after the date of such deposits dividends on the preferred stock will cease and terminate and such deposits will be in cancellation of the whole of the outstanding preferred stock of Engineers. That is exactly the same thing that would happen if we called the stock and deposited the money. Now, why the preferred stockholders in this case should ask for more when all we are doing is trying to pay them off at par plus the premiums plus the dividends I don't understand and I think the plan as it stands is as fair in that respect as it possibly could be and not subject to objection.

Now, it may be, on the second point that Mr. Condon mentioned with respect to the Engineers' liquidation being necessary under the Act, that he didn't agree to it, I don't know. It says in the opinion that he did, but I don't see

that it makes much difference whether he agreed to it or whether he didn't. Perhaps he should come in and ask to have that statement taken out, but the Commission in effect finds that a continuation of Engineers over Virginia alone, which will be the situation after the El Paso and Gulf States distributions here—Engineers would be, to quote my words, in effect, an economic monstrosity, and the Commission does find in the December 4 opinion that its dissolution is necessary. Now, what he is objecting to apparently is that there may be some misstatement about his position and I don't care whether he asks the Commission to change that, but certainly the Commission has no occasion for changing its findings in that respect at all. It seems to me quite consistent with the truth of the situation, so I say that I think this thing should be approved as it is filed. I see no reason why it shouldn't be approved as it is filed, and let's see what develops. If it does develop that we have to have a long period of litigation, perhaps the plan will have to be amended to provide for an escrow. Maybe that won't happen. It can be done when and if the occasion arises for doing it. I don't think now is the time to do it and I think that the plan is perfectly fair without it and, in fact, as the plan is set up right now it seems to me that it gives these gentlemen everything they were asking and contending for and if during the hearings in this case I had offered them this plan I am quite sure that they would have all agreed that it is a fine idea and "we will take it," but they must keep on, I suppose, objecting and it seems to me that there is little, if any, substance in these objections.

The Chairman: Thank you, Mr. Tucker.

Any further—Mr. Scheetz?

Mr. Scheetz: After hearing Mr. Kanton and Mr. Tucker on that point about the decree becoming final, I think I will withdraw my objection to that. I have had some experience with having such a provision and I would be quite

content to go along with the arrangement suggested, confident that Engineers won't go ahead if they are threatened with litigation and the escrow arrangement could be set up.

Mr. Condon: May I respond most briefly?

I would like to correct one impression that I am sure Mr. Tucker gave to the Commission inadvertently, that I have ever contended at any time that the preferred stockholders were entitled to receive $100 in cash and to get dividends on the $100 during the course of the litigation. I am quite sure that his better judgment will indicate that that has never been my position. I do think the record as it stands now and after hearing Mr. Kanton and Mr. Tucker it is not denied that the plan fails signally to carry out one of the prerequisites of this Commission's opinion, to wit, providing a way of recompensing the preferred stockholders for the losses they will or may have during this period of litigation. There is no denial of that. I think it should be clearly understood that the sole effect of Mr. Tucker's argument is, "Well, perhaps the common stockholders will not appeal and, if they do, we will treat that problem when it comes up." Now, I say that that sale should carry out the mandate of this Commission as expressed in its findings and opinion. It also fails to carry out what Judge Leibell indicated was our right in the Electric Bond and Share case.

Mr. Kanton: If no one else wishes to be heard, I would move that the record be closed, unless you have a word, Mr. Tucker.

The Chairman: Do you wish to say something, Mr. Tucker?

Mr. Tucker: I would like to answer that statement that Mr. Condon just made. I want to point out that under this plan whenever we do make the deposit we have to include in it dividends to the date of deposit. I just read it. That is what it says. Now, I say after we have made the deposit it is out of our control. It seems to me that it

is absurd to say that Engineers should have any more responsibility after that. Now, it seems to me that that is where this plan provides for compensation to these preferred stockholders, it provides that when the deposit is made it has to carry the dividends to that date; and what more can one ask for? Now, if Mr. Condon has the fear that there may be litigation after we have made the deposit I say that is too bad, that is a risk that he has to take. I don't see how Engineers can take it. We can't go ahead and carry out this program and not be sure that we are relieved of any further obligation to the preferred stockholders.

The Chairman: I feel sure the Commission is fully aware of your position.

Mr. Schorr: Mr. Commissioners, I would like to know at this time if the Commission will hear further argument about the payment of premiums, or is that a closed issue?

Mr. Kanton: I would object to such argument at this time, Mr. Chairman, for the reason that we have had hearings on this matter now almost a year and a half and the matter has been explored fully and competently by the management of Engineers and if you have read the opinion of the Commission you will see that that has been considered and I see no reason now to keep this record open to have any further argument on that subject, sir.

The Chairman: Do you wish to make a motion?

Mr. Kanton: I make a motion, sir, that the hearing be closed.

The Chairman: The hearing is closed.

(Whereupon, at 11:35 o'clock a. m., the hearing in the above matter was closed.)

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Vol. IV

TRANSCRIPT OF RECORD

(Pages 1305a to 1721a)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 226

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

vs.

CENTRAL ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 227

THOMAS W. STREETER, ET AL., PETITIONERS,

vs.

CENTRAL ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 243

THE HOME INSURANCE COMPANY AND TRADESMENS NATIONAL BANK AND TRUST COMPANY, PETITIONERS,

vs.

CENTRAL ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 266

CENTRAL ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, PETITIONERS,

vs.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR CERTIORARI FILED — AUGUST 16, 1948 (Nos. 226 and 227). AUGUST 24, 1948 (No. 243). SEPTEMBER 8, 1948 (No. 266).

CERTIORARI GRANTED OCTOBER 25, 1948.

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

Nos. 9428, 9435, 9440.

IN THE MATTER

of

ENGINEERS PUBLIC SERVICE COMPANY

ON APPEAL FROM ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE, DATED MAY 29, 1945.

JOINT APPENDIX.

THOMAS W. STREETER, *et al.*,
THE HOME INSURANCE COMPANY, *et al.*,
SECURITIES AND EXCHANGE COMMISSION,
Appellants.

VOLUME IV.

Pages 1305a to 1721a, Inclusive.

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EXHIBITS FILED WITH SECURITIES AND EXCHANGE COMMISSION

Engineers' Exhibit No. 1.

SECURITIES AND EXCHANGE COMMISSION,

Philadelphia, Pennsylvania.

Application is made for approval of Plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for divestment of assets and related matters of Engineers Public Service Company (Incorporated) as more fully set forth in Exhibit A attached hereto and subject to the reservations set forth in Division F thereof.

Pursuant to the requirements of the Public Utility Holding Company Act of 1935, the Company set forth below caused this instrument to be duly executed on its behalf by its authorized officers on this the 10th day of September, 1945.

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

By D. C. BARNES.

D. C. Barnes,
President.

Attest:

R. N. BENJAMIN,
Secretary.

(SEAL)

Engineers' Exhibit No. 1 (Cont'd)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

The undersigned being duly sworn deposes and says that he has duly executed the attached instrument for and on behalf of the Company named therein; that he is the President of such Company; and that all action by stockholders, directors, and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and the transactions referred to therein, and that to the best of his knowledge, information and belief the statements made in such instrument are true.

D. C. BARNES

D. C. Barnes, President.

Subscribed and sworn to before me at New York, New York, this 10th day of September, 1945.

VIETTA E. GIBBS,

(SEAL)

VIETTA E. GIBBS,
Notary Public, Kings County
Kings Co. Clk's No. 229, Reg. No. 250-G-6
Certificates filed in New York County
N. Y. Co. Clk's No. 342, Reg. No. 201-G-6
Commission Expires March 30, 1946

My commission expires March 30, 1946.

Engineers' Exhibit No. 1 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY

(INCORPORATED)

PLAN PURSUANT TO SECTION 11(e) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

SEPTEMBER 10, 1945

Engineers' Exhibit No. 1 (Cont'd)

PLAN FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

OF

ENGINEERS PUBLIC SERVICE COMPANY

(Incorporated)

Pursuant to Section 11(e) of the

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

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Engineers' Exhibit No. 1 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY

(Incorporated)

Plan Pursuant to Section 11(e) of the

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

DIVISION A

Purposes of Plan

Part I has the following purposes:

1. Compliance with orders of the Securities and Exchange Commission ("the Commission") directing the divestment by Engineers Public Service Company (Incorporated), ("Engineers") of its interest in El Paso Electric Company ("El Paso") and Gulf States Utilities Company ("Gulf States").

2. The retirement of the Preferred Stock of Engineers at $100 per share and accrued dividends (the question as to whether or not any additional amount is payable to such Stockholders to be determined under Part II).

Part II has the following purpose:

The purpose of Part II is to request the Commission to issue a separate order finding that it is fair and equitable to the Preferred Stockholders of Engineers to pay $100 per share plus accrued dividends to the date of deposit in trust of funds therefor in complete liquidation of their stock. (This Part of the Plan

provides, in the event the Commission finds that some additional amount shall be payable, for the automatic amendment of this Part so as to provide for such additional payment, preserving to Engineers, however, the right to apply for a review of any order providing for or requiring any additional payment.)

Part III has the following purpose:

The purpose of Part III is to terminate the existence of Engineers as a separate corporation within one year after Engineers' liabilities have been determined and liquidated or otherwise provided for.

DIVISION B

Introductory Statement

Engineers, organized and existing under the laws of the State of Delaware, is a registered holding company under the Public Utility Holding Company Act of 1935 ("the Act"). Engineers holds the following securities:

150,000 shares of Common Stock without par value of El Paso, being all of the authorized and issued Common Stock of said Company. These shares are to be reclassified into 381,994 shares of Common Stock, without par value, prior to the consummation of Part I of the Plan.

280,000 shares of Common Stock without par value of Gulf States, being all of the issued Common Stock of said Company, there being 20,000 shares of such Common Stock authorized but unissued. The 280,000 outstanding shares of Common Stock are to be reclassified into 1,909,968 shares of Common Stock, without par value, prior to the consummation of Part I of the Plan.

Engineers' Exhibit No. 1 (Cont'd)

2,932,065 shares of Common Stock without par value of Virginia Electric and Power Company ("Virginia"), there being, in addition, 6,360 shares of such Common Stock in the hands of the public and 20 shares of such Common Stock reserved for scrip and 1,061,555 shares of such Common Stock authorized but unissued.

$563,800 principal amount of 5% note payable and 15,000 shares of capital stock of the par value of $40 per share of The Western Public Service Company ("Western"), being all of the authorized and outstanding amounts of such securities.

Engineers has outstanding the following securities:

143,951 shares of $5 Dividend Convertible Preferred Stock ("$5 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $105 per share, plus accrued dividends, on redemption or voluntary liquidation.

183,406 shares of $5.50 Cumulative Dividend Preferred Stock ("$5.50 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $110 per share, plus accrued dividends, on redemption or voluntary liquidation.

65,098 shares of $6 Cumulative Dividend Preferred Stock ("$6 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $110 per share, plus accrued dividends, on redemption or voluntary liquidation.

1,909,968 shares of Common Stock of the par value of $1 per share.

Engineers' Exhibit No. 1 (Cont'd)

Early in 1940 the Commission brought a proceeding against Engineers and its subsidiaries under Section 11(b)(1) of the Act. This Section provides for the restriction of integrated systems and incidental businesses which a holding company may control. On July 23, 1941, the Commission issued an order in that proceeding directing Engineers to dispose of its interest in The Key West Electric Company and Puget Sound Power & Light Company. This order has been fully complied with. On December 29, 1941, the Commission issued a further order under Section 11(b)(1) directing Engineers to dispose of its interest in Missouri Service Company, The Northern Kansas Power Company and Western. Engineers' interests in Missouri Service Company and The Northern Kansas Power Company have been sold and it is expected that Western will be offered for sale shortly. On September 16, 1942 and October 6, 1942, the Commission issued further orders under the same Section directing Engineers to dispose of all of its remaining investments except that in Virginia, which, if retained, must dispose of its gas and transportation operations. Engineers has complied with these 1942 orders by disposing of all of the investments ordered divested by those orders except its investments in Gulf States, El Paso and Virginia and with respect to the latter two companies, has partially complied with said orders by the disposal of their transportation properties. Engineers filed a petition with the United States Court of Appeals for the District of Columbia for a review of the 1942 orders and on November 22, 1943, the Court set these orders aside and remanded the case to the Commission for further proceedings in accordance with its opinion. Both the Commission and Engineers have applied to the Supreme Court of the United States for writs of certiorari which have been granted. The hearing in the Supreme Court has been delayed for lack of a quorum of Justices to hear the case. The appointment of a Justice to fill the vacancy caused by the recent resignation of Justice Roberts may

Engineers' Exhibit No. 1 (Cont'd)

make possible the hearing and decision of the case in the near future. It is not expected that any portion of this Plan shall be consummated until after the decision of this case.

There are annexed hereto the following financial statements of Engineers and its subsidiaries:

EXHIBIT A—Engineers balance sheet as at June 30, 1945, and income statement for the twelve months ended June 30, 1945, actual and pro forma giving effect to the consummation of Parts I and II of the Plan as proposed.

EXHIBIT B—Engineers and subsidiary companies consolidated balance sheet as at June 30, 1945 and consolidated income statement for the twelve months ended June 30, 1945, actual and pro forma giving effect to the consummation of Parts I and II of the Plan as proposed and to income tax adjustments made on the books of Virginia in August, 1945.

EXHIBIT C—Comparative balance sheets of Virginia, Gulf States and El Paso as at June 30, 1944 and June 30, 1945 and income statements for the 12 months ended June 30, 1944 and June 30, 1945.

EXHIBIT D—Income statements of Virginia, Gulf States and El Paso for the years 1939 through 1944.

EXHIBIT E—Income statements of Gulf States for the years 1939 through 1945 (last six months of 1945 estimated) pro forma giving effect to present fixed charges and preferred dividends and proposed number of shares of Common Stock.

Engineers' Exhibit No. 1 (Cont'd)

DIVISION C

The Plan

Part I

1. Engineers will sign an agreement with a bank to borrow, subject to the consummation of Part I of the Plan, $3,000,000 on a two-year note, payable $750,000 semi-annually. The agreement will provide that Engineers shall not, until the bank loan is fully paid, pay any dividends in cash on its Common Stock, or make any other distribution in respect thereof other than such as may be provided for in this Part I of the Plan. Provision will be made in this agreement to permit, if needed, the borrowing of additional amounts, which provision may be availed of, in the event Western is not sold before the effective date of Part I of the Plan or in the event that some delay is involved in selling shares of Gulf States Common Stock not subscribed for under subscription warrants or for any other reason.

2. Engineers will issue warrants to Common Stockholders of record on a date to be fixed by the Board of Directors of Engineers, each of which warrants will evidence the right to purchase from Engineers 1 share of Gulf States Common Stock at a subscription price of $11.50 per share for each share of Engineers Common Stock held by such Stockholder on such record date. The warrants must be exercised on or before a specified date (to be approximately three weeks after the date of mailing warrants). All warrants will be registered in the names of the Common Stockholders and will be transferable on the books of Engineers. Such warrants will be issued and distributed without the surrender by the Common Stockholders of Engineers of their Common Stock.

Engineers' Exhibit No. 1 (Cont'd)

3. Engineers will declare Part I of the Plan effective upon the expiration of the period during which subscription warrants can be exercised if 90% (or such lower percentage as shall be acceptable to Engineers) of all warrants are exercised, and, if and when Part I of the Plan is declared effective, the Transfer Agent will mail or deliver certificates for Gulf States Common Stock. To the extent warrants are not exercised, Engineers will sell shares of Gulf States Common Stock represented thereby as promptly thereafter and in such manner as the Board of Directors of Engineers deems to be in the best interests of Engineers, subject to the obtaining of the requisite regulatory approvals.

4. Engineers will issue its note to bank.

5. Engineers will deposit in trust for the benefit of its Preferred Stockholders with a solvent bank or trust company $39,245,500 plus an amount equal to accrued dividends on its Preferred Stock to the date of such deposit and give to its Preferred Stockholders five days' prior notice of such deposit at their respective registered addresses, and such notice shall state that upon surrender by the Preferred Stockholders of their certificates for Preferred Stock to the Transfer Agent, they will be paid $100 per share plus such accrued dividends; and from and after the date of such deposit, dividends on the Preferred Stock will cease and determine. Such distribution will be in cancellation of the whole of the outstanding Preferred Stock of Engineers and thereafter the only right remaining to the registered holder of each certificate of Preferred Stock will be the right to receive an additional amount if any is determined to be payable (See Part II). The President or a Vice President, and the Secretary or an Assistant Secretary of Engineers shall, without further action by Direc-

Engineers' Exhibit No. 1 (Cont'd)

tors and Stockholders of Engineers, file a certificate or certificates of Engineers reflecting the elimination of the capital represented by the Preferred Stock and the elimination of the authorized Preferred Stock in the Office of the Secretary of State of the State of Delaware and shall record in the Office of the Recorder of Deeds of New Castle County, Delaware, a copy or copies thereof certified by the Secretary of State.

6. Engineers will distribute as a dividend in partial liquidation Common Stock of El Paso pro rata to the Engineers Common Stockholders on the basis of 1/5th of a share of El Paso Common Stock for each share of Engineers Common Stock. No fractional shares of Common Stock will be issued or delivered, but in lieu thereof scrip will be issued and delivered. Such distribution, issue and delivery will be without the surrender by the Common Stockholders of Engineers of their Common Stock. Such scrip will not be entitled to dividends, voting rights or any other stockholders' rights. When combined in lots aggregating one or more full shares of stock, scrip may, up to the date of sale (hereinafter in this paragraph described) of such shares of stock, be exchanged for such shares, together with any dividends which shall have been paid to Stockholders of record on any date subsequent to the effective date of this Part I of the Plan. Engineers will undertake to provide facilities whereby any holder of scrip certificates may dispose of such scrip, or acquire additional scrip so as to enable the holder to exchange such scrip for full shares of stock. All shares of stock reserved for issuance and delivery upon the exchange of scrip which shall not have been issued or delivered in connection with such exchange within two years after the effective date of this Part I, shall, promptly after

Engineers' Exhibit No. 1 (Cont'd)

the expiration of such period, be sold by the Transfer Agent and the Transfer Agent shall, as soon as possible thereafter, distribute to the holders of scrip certificates not theretofore surrendered their proportionate part of the proceeds of sale, plus their proportionate part of any dividends which shall have been declared to holders of record as of a date prior to the date of sale.

7. In order to provide a reserve for the purpose of making the payment, if any, to which Engineers Preferred Stockholders shall, on final determination, be held to be entitled in addition to $100 per share and accrued dividends to the date of the deposit provided for in paragraph 5 of this Part I, Engineers will retain its interest in the Virginia Common Stock until such a final determination is made.

8. Epsco, Inc., the mutual service corporation, will cancel its service contracts with Engineers, Virginia, Gulf States and El Paso.

Engineers believes and alleges that the approval of this Part I of the Plan is necessary for compliance with the orders issued by the Commission on September 16, 1942 and October 6, 1942 under Section 11 of the Act and to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby, and if the Commission shall find Part I of the Plan necessary to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby, Engineers prays that the Commission shall enter a separate order approving Part I of the Plan containing a recitation that the relevant transactions of Part I of the Plan are necessary or appropriate to the integration or simplification of the holding company system of which Engineers is a member and necessary or appropriate to effectuate the provisions of subsection (b) of Sec-

tion 11 of the Act, all in accordance with the meaning and requirements of the Internal Revenue Code, as amended, including Sections 371 and 1808(f) and Supplement R thereof.

Part II

Engineers shall pay to its Preferred Stockholders no amount in addition to the $100 per share, plus accrued dividends to the date of deposit, provided to be paid under Part I of this Plan.

Engineers believes and alleges that the approval of this Part II of the Plan is necessary, if Part I of the Plan is consummated, to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby, and if the Commission shall find Part II of the Plan necessary to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby, Engineers prays that the Commission shall enter a separate order approving Part II of the Plan.

To the end that there may be determined by the Commission in the proceedings in connection with Part II of this Plan the amount, if any, which, in the opinion of the Commission, it is fair and equitable that Engineers shall pay to its Preferred Stockholders in addition to $100 per share plus accrued dividends to the date of deposit provided to be paid under Part I of this Plan, Engineers agrees that in the event the Commission shall in any findings or order respecting Part II of this Plan find that it is not fair and equitable to the persons affected thereby that Engineers shall pay to its Preferred Stockholders no amount in addition to $100 per share plus accrued dividends to the date of deposit provided to be paid under Part I of this Plan and shall in such findings or order specify an amount in addition thereto which Engineers should pay to its Preferred Stockholders, then and in such events this Part II

of the Plan shall be and thereby become automatically amended so as to provide that Engineers shall pay to its Preferred Stockholders such additional amount as the Commission shall have so specified; provided, however, that in respect of any order of the Commission which shall provide that Engineers shall, or require Engineers to, pay to its Preferred Stockholders any amount in addition to $100 per share plus accrued dividends to the date of deposit provided to be paid under Part I of this Plan, Engineers shall be a party aggrieved within the meaning of Section 24 of the Act, and may obtain a review of such order pursuant to said section.

Part III

Within one year after all liabilities of Engineers have been finally determined and liquidated, or otherwise provided for, Engineers will be legally dissolved and liquidated, with the Common Stock of Virginia and the other remaining assets of Engineers being distributed pro rata to the Engineers Common Stockholders, or Engineers will be merged with Virginia with the Engineers Common Stockholders receiving their pro rata interest in the merged Company.

Engineers believes and alleges that the approval of this Part III of the Plan is necessary to effectuate the provisions of subsection (b) of Section 11 of the Act if Parts I and II of the Plan are consummated and fair and equitable to the persons affected thereby, and Engineers prays that, after Engineers shall have filed an amendment to this Part III of the Plan, supplying the details in connection with the carrying out of this Part III of the Plan, if the Commission shall find Part III necessary to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby, the Commission shall enter a separate order approving Part III of the Plan containing a recitation that the relevant transac-

tions of Part III of the Plan are necessary and appropriate to the integration or simplification of the holding company system of which Engineers is a member and necessary or appropriate to effectuate the provisions of subsection (b) of Section 11 of the Act in accordance with the meaning and requirements of the Internal Revenue Code, as amended, including Sections 371 and 1808(f) and Supplement R thereof.

DIVISION D

Conditions to Effectuation of the Plan

Part I

The effectuation of Part I of the Plan is dependent upon the satisfaction of the following conditions:

1. Gulf States shall have reclassified its Common Stock into 1,909,968 shares of Common Stock, without par value; Gulf States shall have given to its Preferred Stock seven votes per share instead of the one vote per share it now carries; and El Paso shall have reclassified its Common Stock into 381,994 shares of Common Stock, without par value.

2. The Commission shall have issued the order prayed for in Part I of this Plan.

3. The Commission when requested by Engineers, shall have instituted a proceeding in a court of competent jurisdiction pursuant to Section 11(e) of the Act and such court shall have entered a separate decree or order finding Part I of the Plan to be fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act and such court shall have taken action to enforce and carry out the terms and provisions of Part I of the Plan.

4. There shall have been obtained from the United States Treasury Department (unless Engineers, in its dis-

cretion, shall waive this condition) a closing agreement or ruling or closing agreements or rulings as to the tax consequences of the transactions necessary to carry out Part I of the Plan and such agreements or rulings shall be satisfactory to counsel for Engineers.

5. Any corporate action in connection with Part I of the Plan, which may be deemed necessary by counsel for Engineers shall have been carried out in a manner satisfactory to such counsel.

6. Authorization satisfactory to counsel for Engineers shall have been given for the carrying out of Part I of the Plan and for the issuance for all securities provided to be issued pursuant to Part I by the Plan, by all regulatory commissions, the consent of which is legally necessary.

7. Engineers shall have made arrangements to borrow requisite funds to enable it, together with cash on hand and cash from the exercise of the warrants, to pay $100 per share plus accrued dividends to the date of deposit on the outstanding Engineers Preferred Stock.

8. At least 90% (or such lower percentage as shall be acceptable to Engineers) of the shares of Gulf States Common Stock shall have been purchased under the subscription warrants referred to in paragraph 2 of Part I of the Plan.

Part II

The effectuation of Part II of the Plan is dependent upon the satisfaction of the following conditions:

1. The Commission shall have taken the requisite action under Part II of this Plan.

2. Part I of the Plan shall have been consummated.

Engineers' Exhibit No. 1 (Cont'd)

Part III

The effectuation of Part III of the Plan is dependent upon the satisfaction of the following conditions:

1. The Commission shall have issued the order prayed for in Part III of this Plan.

2. There shall have been obtained from the United States Treasury Department (unless Engineers, in its discretion, shall waive this condition) a closing agreement or ruling or closing agreements or rulings as to the tax consequences of the transactions necessary to carry out Part III of the Plan, and such agreements or rulings shall have been satisfactory to counsel for Engineers.

3. Authorization satisfactory to counsel for Engineers shall have been given for the carrying out of Part III of the Plan and for the issuance of all securities provided to be issued pursuant to Part III of the Plan by all regulatory Commissions, the consent of which is legally necessary.

4. Any corporate action in connection with Part III of the Plan which may be deemed necessary by counsel for Engineers shall have been carried out in a manner satisfactory to such counsel.

DIVISION E

Amendments to the Plan and Other Provisions

Until approved by the Commission, the Plan or any Part thereof may be modified or amended in any respect or particular by Engineers. After being approved by the Commission and before being approved by a court, the Plan or any part thereof may be modified or amended in any respect or particular by Engineers with the approval of the Commission. After the approval by the Court and

before any Part of the Plan has been consummated, pursuant to the order or decree of a court of competent jurisdiction, such Part may be modified or amended in any respect or particular by Engineers with the approval of both the Commission and the Court. No amendments to the Plan or any Part thereof shall be made without the consent or agreement of Engineers.

Engineers may employ such agents, attorneys or others as it may deem desirable for the purpose of carrying out the Plan or any Part thereof. Engineers may from time to time delegate to others any power or discretion conferred upon it by the Plan.

The statements, opinions and conclusions contained in the Plan or in the Exhibits thereto, are intended solely for the purpose of assisting the Commission, any court and the Stockholders in any steps or proceedings with respect to the Plan and are not intended for use or information by prospective purchasers of the securities whether now existing or proposed to be issued or for any purposes other than the purposes set forth in this paragraph; and no one is authorized to make any statements regarding the Plan, whether with reference to any securities referred to herein or otherwise which are not set forth herein or in said Exhibits.

Figures appearing in this Plan have been compiled from those shown on the books of Engineers or its subsidiaries or predecessors. All figures reported not previously audited are subject to such adjustments as the annual audit by independent accountants may disclose to be necessary. Engineers, in publishing the information contained herein, does not make or intend to make any representation whatsoever as to the value of the assets or any of them shown in the balance sheets.

Engineers' Exhibit No. 1 (Cont'd)

DIVISION F

Reservation of Rights

In filing this Plan, Engineers does so solely under compulsion and upon the basis that such Plan constitutes a means whereby Engineers may comply with the orders of the Commission entered on September 16, 1942 and October 6, 1942 and otherwise comply with the Act. This Plan is filed without waiver and with full reservation of all constitutional and legal rights of Engineers and its subsidiaries to attack the validity and legality of any section or any subdivision of any section of, or any order, rule or regulation under, the Act, including, without limitation, the right to proceed with argument of their case involving Section 11 of the Act pending in the Supreme Court of the United States at any time hereafter when a quorum of such court may be available to participate in the decision of such case, and it is respectfully requested that the Commission's order or orders herein shall reserve to Engineers and its subsidiaries the rights hereinabove referred to.

By Order of the Board of Directors

Engineers Public Service Company
(Incorporated)

By D. C. Barnes,
President

Engineers' Exhibit No. 2.

SECURITIES AND EXCHANGE COMMISSION
Eighteenth and Locust Streets
Philadelphia 3, Pennsylvania

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)
File No. 54-132
Amendment No. 1 To Application Dated September 10, 1945

Engineers Public Service Company (Incorporated) hereby amends the Plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters of Engineers Public Service Company (Incorporated) filed as Exhibit A to application dated September 10, 1945, as follows:

1. Strike paragraphs 2 and 3 of Part I of Division C of said Exhibit A and insert in lieu thereof the following:

"2. Engineers will mail warrants to its Common Stockholders of record on a date to be fixed by the Board of Directors of Engineers, each of which warrants will evidence the right to purchase from Engineers one share of Gulf States Common Stock at the subscription price of $11.50 per share for each share of Engineers Common Stock held by such Common Stockholder on such date, payable in United States funds or in whole shares of Engineers Preferred Stock at the rate of $100 per share plus accrued dividends to the expiration date of the subscription period, with cash adjustment for balance, if any, of the subscription price, provided, however, that the Board of Directors of Engineers may withhold the mailing of such warrants in the event that, in its opinion, market conditions are such as to render it inadvisable to proceed with the issuance of the warrants. Upon the mailing of such warrants, Part I of the Plan shall be deemed to be effective. The

Engineers' Exhibit No. 2 (Cont'd)

warrants must be exercised on or before a specified date (to be approximately ten days after the date of mailing warrants). All warrants will be registered in the names of the Common Stockholders and will be transferable on the books of Engineers. Such warrants will be issued and distributed without the surrender by the Common Stockholders of Engineers of their Common Stock. Any holder of Engineers Preferred Stock who surrenders his stock in payment of the above subscription price will, in respect of such surrendered shares, retain the right to receive the same amount which Stockholders depositing their stock under the provisions of paragraph 5 of this Part I shall receive, in addition to $100 per share plus accrued dividends to the date of deposit therein provided for, if any such amount is determined to be payable.

"3. The Transfer Agent will mail or deliver certificates for Gulf States Common Stock to those persons who exercised the subscription warrants. To the extent warrants are not exercised, Engineers will sell shares of Gulf States Common Stock represented thereby as promptly thereafter and in such manner as the Board of Directors of Engineers deems to be in the best interests of Engineers, subject to the obtaining of the requisite regulatory approvals."

2. Strike paragraph 8 of Part I of Division D of said Exhibit A and insert in lieu thereof the following:

"8. The subscription warrants referred to in paragraph 2 of Part I of the Plan shall have been mailed to Engineers Common Stockholders."

This amendment is filed subject to the reservations set forth in Division F of said Exhibit A.

Pursuant to the requirements of the Public Utility Holding Company Act of 1935, the Company set forth below caused this instrument to be duly executed on its behalf by

Engineers' Exhibit No. 2 (Cont'd)

its authorized officers on this the 12th day of September, 1945.

ENGINEERS PUBLIC SERVICE COMPANY
(INCORPORATED)

By D. C. BARNES
D. C. Barnes,
President.

Attest:
R. N. BENJAMIN
Secretary
(CORPORATE SEAL)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

The undersigned being duly sworn deposes and says that he has duly executed the attached instrument for and on behalf of the Company named therein; that he is the President of such Company; and that all action by stockholders, directors, and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and the transactions referred to therein, and that to the best of his knowledge, information and belief the statements made in such instrument are true.

D. C. BARNES
D. C. Barnes, President

Subscribed and sworn to before me at New York, New York, this 12th day of September, 1945.

VIETTA E. GIBBS
Vietta E. Gibbs
Notary Public, Kings County
Kings Co. Clk's No. 229, Reg. No. 250-G-6
Certificates filed in New York County
N. Y. Co. Clk's No. 342, Reg. No. 201-G-6
Commission Expires March 30, 1946

(NOTARIAL SEAL)

My commission expires March 30, 1946

Engineers' Exhibit No. 3.

SECURITIES AND EXCHANGE COMMISSION
Eighteenth and Locust Streets
Philadelphia 3, Pennsylvania

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

File No. 54-132

Amendment No. 2 to Application Dated September 10, 1945

Engineers Public Service Company (Incorporated) hereby amends the Plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters of Engineers Public Service Company (Incorporated) filed as Exhibit A to application dated September 10, 1945, as follows:

1. Revoke Amendment No. 1 which is superseded in its entirety by Amendment No. 2.

2. Strike paragraphs 2, 3 and 5 of Part I of Division C of said Exhibit A and insert in lieu thereof the following:

"2. Engineers will mail warrants to its Common Stockholders of record on a date to be fixed by the Board of Directors of Engineers, each of which warrants will evidence the right to acquire from Engineers shares of Gulf States Common Stock on the basis of one share of Gulf States Common Stock for each share of Engineers Common Stock held by such Stockholders on such date either

(a) by purchasing from Engineers whole shares of such Gulf States Common Stock at the rate of $11.50 per share, payable in United States funds, or in the alternative,

(b) by exchanging with Engineers whole shares of Engineers Preferred Stock for shares of

Engineers' Exhibit No. 3 (Cont'd)

Gulf States Common Stock on the basis of equivalent values, assigning $11.50 per share for each share of Gulf States Common Stock and $100 plus accrued dividends to the expiration date of the warrant for each share of Engineers Preferred Stock; provided that, on the basis of the relative values above stated, the value of the whole shares of Engineers Preferred Stock surrendered in exchange shall not exceed the value of the shares of Gulf States Common Stock which the warrant holder is entitled to and intends to acquire, but to the extent that the value of such shares of Engineers Preferred Stock surrendered in exchange is less than the value of such shares of Gulf States Common Stock to which the warrant holder is entitled to and intends to acquire, the excess shall be paid by the warrant holder to Engineers in United States funds. Any holder of Engineers Preferred Stock who surrenders his stock in exchange for Gulf States Common Stock will, in respect of such surrendered shares, retain the right to receive the same amount which stockholders surrendering their stock under the provisions of Paragraph 5 of this Part I shall receive, in addition to $100 per share plus accrued dividends to the date of deposit therein provided for, if any such amount is finally determined to be payable.

The Board of Directors of Engineers may, however, withhold the mailing of such warrants in the exent that, in its opinion, market conditions are such as to render it inadvisable to proceed with the issuance of the warrants. Upon the mailing of such warrants, Part I of the Plan shall be deemed to be effective. In cases where the addresses of such Stockholders are outside continental United States and Canada, warrants will not be mailed to Common

Engineers' Exhibit No. 3 (Cont'd)

Stockholders of this Company of record on such date but will be held against instructions of the record owners, or their duly authorized agents, until the opening of business on the day before the expiration date of the warrant period, at which time all warrants so held with respect to which no such instructions have been received may be sold by the Company and the pro rata share of the aggregate net proceeds, if any, remitted to each Stockholder on whose behalf warrants are so sold, or, in cases where such remittance is not lawful, held for the account of each such Stockholder subject to payment upon receipt of lawful instructions. The warrants must be exercised on or before a specified date (to be approximately ten days after the date of mailing warrants). All warrants will be registered in the names of the Common Stockholders and will be transferable on the books of Engineers. Such warrants will be issued and distributed without the surrender by the Common Stockholders of Engineers of their Common Stock."

"3. The Transfer Agent will mail or deliver certificates for Gulf States Common Stock to those persons who exercise the warrants. To the extent warrants are not exercised, Engineers will sell shares of Gulf States Common Stock represented thereby as promptly thereafter and in such manner as the Board of Directors of Engineers deems to be in the best interests of Engineers, subject to the obtaining of the requisite regulatory approvals.

"'5. Engineers will deposit in trust for the benefit of its Preferred Stockholders with a solvent bank or trust company an amount equal to $100 per share plus accrued dividends to the date of such deposit for each share of Preferred Stock not surrendered in exchange pursuant to (b) of paragraph 2 of this

Engineers' Exhibit No. 3 (Cont'd)

Part I and will give to all holders of such Preferred Stock five days' prior notice of such deposit at their respective registered addresses, and such notice shall state that upon surrender by the Preferred Stockholders of their certificates for Preferred Stock to the Transfer Agent, they will be paid $100 per share plus such accrued dividends; and from and after the date of such deposit, dividends on the Preferred Stock will cease and determine. Such distribution will be in cancellation of the whole of the outstanding Preferred Stock of Engineers and thereafter the only right remaining to the registered holder of each certificate of Preferred Stock will be the right to receive an additional amount if any is determined to be payable (See Part II). The President or a Vice President and the Secretary or an Assistant Secretary of Engineers shall, without further action by Directors and Stockholders of Engineers, file a certificate or certificates of Engineers reflecting the elimination of the capital represented by the Preferred Stock and the elimination of the authorized Preferred Stock in the Office of the Secretary of State of the State of Delaware and shall record in the Office of the Recorder of Deeds of New Castle County, Delaware, a copy or copies thereof certified by the Secretary of State."

3. Strike paragraph 8 of Part I of Division D of said Exhibit A and insert in lieu thereof the following:

"8. The warrants referred to in paragraph 2 of Part I of the Plan shall have been mailed to Engineers Common Stockholders."

This amendment is filed subject to the reservations set forth in Division F of said Exhibit A.

Pursuant to the requirements of the Public Utility Holding Company Act of 1935, the Company set forth below

Engineers' Exhibit No. 3 (Cont'd)

caused this instrument to be duly executed on its behalf by its authorized officers on this the 16th day of October, 1945.

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

By D. C. BARNES
D. C. Barnes
President

Attest:

R. N. BENJAMIN
Secretary

(SEAL)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

The undersigned being duly sworn deposes and says that he has duly executed the attached instrument for and on behalf of the Company named therein; that he is the President of such Company; and that all action by stockholders, directors, and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and the transactions referred to therein, and that to the best of his knowledge, information and belief the statements made in such instrument are true.

D. C. BARNES
D. C. Barnes, President

Subscribed and sworn to before me at New York, New York, this 16th day of October, 1945.

Vietta E. Gibbs
VIETTA E. GIBBS
NOTARY PUBLIC KINGS CO.
Kings Co. Clk's No. 229, Reg. No. 250-G-6
Certificates filed in New York County
(SEAL) N. Y. Co. Clk's No. 342, Reg. No. 201-G-6
Commission Expires March 30, 1946

My commission expires March 30, 1946.

Engineers' Exhibit No. 4.

SECURITIES AND EXCHANGE COMMISSION
Eighteenth and Locust Streets
Philadelphia 3, Pennsylvania

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

File No. 54-132

Amendment No. 3 to Application Dated September 10, 1945

Engineers Public Service Company (Incorporated) hereby amends the Plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters of Engineers Public Service Company (Incorporated) filed as Exhibit A to application dated September 10, 1945, as follows:

1. Revoke Amendment No. 2 which is superseded in its entirety by Amendment No. 3.

2. Strike paragraphs 2, 3 and 5 of Part I of Division C of said Exhibit A and insert in lieu thereof the following:

"2. Engineers will mail warrants to its Common Stockholders of record on a date to be fixed by the Board of Directors of Engineers, each of which warrants will evidence the right to acquire from Engineers shares of Gulf States Common Stock on the basis of one share of Gulf States Common Stock for each share of Engineers Common Stock held by such Stockholders on such date either

(a) by purchasing from Engineers whole shares of such Gulf States Common Stock at the rate of $11.50 per share, payable in United States funds, or in the alternative,

(b) by exchanging with Engineers whole shares of Engineers Preferred Stock for shares of

Gulf States Common Stock on the basis of equivalent values, assigning $11.50 per share for each share of Gulf States Common Stock and $100 plus accrued dividends to the expiration date of the warrant for each share of Engineers Preferred Stock; provided that, on the basis of the relative values above stated, the value of the whole shares of Engineers Preferred Stock surrendered in exchange shall not exceed the value of the shares of Gulf States Common Stock which the warrant holder is entitled to and intends to acquire, but to the extent that the value of such shares of Engineers Preferred Stock surrendered in exchange is less than the value of such shares of Gulf States Common Stock to which the warrant holder is entitled and intends to acquire, the excess shall be paid by the warrant holder to Engineers in United States funds. Any holder of Engineers Preferred Stock who surrenders his stock in exchange for Gulf States Common Stock will, in respect of such surrendered shares, retain the right to receive the same amount which stockholders surrendering their stock under the provisions of Paragraph 5 of this Part I shall receive, in addition to $100 per share plus accrued dividends to the date of deposit therein provided for, if any such amount is finally determined to be payable.

The Board of Directors of Engineers may, however, withhold the mailing of such warrants in the event that, in its opinion, market conditions are such as to render it inadvisable to proceed with the issuance of the warrants. Upon the mailing of such warrants, Part I of the Plan shall be deemed to be effective. In cases where the addresses of such Stockholders are unknown or are outside continental United States and Canada, warrants will not be mailed to Common Stock-

Engineers' Exhibit No. 4 (Cont'd)

holders of this Company of record on such date but will be held against instructions of the record owners, or their duly authorized agents, until the opening of business on the day before the expiration date of the warrant period, at which time all warrants so held with respect to which no such instructions have been received may be sold by the Company and the pro rata share of the aggregate net proceeds, if any, remitted to each Stockholder on whose behalf warrants are so sold, or, in cases where such remittance is not lawful or the address is unknown, held for the account of each such Stockholder subject to payment upon receipt of lawful instructions. The warrants must be exercised on or before a specified date (to be approximately ten days after the date of mailing warrants). All warrants will be registered in the names of the Common Stockholders and will be transferable on the books of Engineers. Such warrants will be issued and distributed without the surrender by the Common Stockholders of Engineers of their Common Stock."

"3. The Transfer Agent will mail or deliver certificates for Gulf States Common Stock to those persons who exercise the warrants. To the extent warrants are not exercised, Engineers will sell shares of Gulf States Common Stock represented thereby as promptly thereafter and in such manner as the Board of Directors of Engineers deems to be in the best interests of Engineers, subject to the obtaining of the requisite regulatory approvals.

"5. Engineers will deposit in trust for the benefit of its Preferred Stockholders with a solvent bank or trust company an amount equal to $100 per share plus accrued dividends to the date of such deposit for each share of Preferred Stock not surrendered in

Engineers' Exhibit No. 4 (Cont'd)

exchange pursuant to (b) of paragraph 2 of this Part I and will give to all holders of such Preferred Stock five days' prior notice of such deposit at their respective registered addresses, and such notice shall state that upon surrender by the Preferred Stockholders of their certificates for Preferred Stock to the Transfer Agent, they will be paid $100 per share plus such accrued dividends; and from and after the date of such deposit, dividends on the Preferred Stock will cease and determine. Such distribution will be in cancellation of the whole of the outstanding Preferred Stock of Engineers and thereafter the only right remaining to the registered holder of each certificate of Preferred Stock will be the right to receive an additional amount if any is determined to be payable (See Part II). The President or a Vice President and the Secretary or an Assistant Secretary of Engineers shall, without further action by Directors and Stockholders of Engineers, file a certificate or certificates of Engineers reflecting the elimination of the capital represented by the Preferred Stock and the elimination of the authorized Preferred Stock in the Office of the Secretary of State of the State of Delaware and shall record in the Office of the Recorder of Deeds of New Castle County, Delaware, a copy or copies thereof certified by the Secretary of State."

3. Strike paragraph 8 of Part I of Division D of said Exhibit A and insert in lieu thereof the following:

"8. The warrants referred to in paragraph 2 of Part I of the Plan shall have been mailed to Engineers Common Stockholders."

4. Strike the caption "Taxes—Federal income" and footnote (b) of Exhibit B, page 6, and insert in lieu thereof the following:

Engineers' Exhibit No. 4 (Cont'd)

"Taxes—Federal income (excluding reductions (1) as shown separately below, and (2) of $4,424,813 (pro forma) related to and applied against items charged directly to surplus)."

"(b) Includes provision for estimated excess profits of $1,166,048 after giving effect to reductions (1) as shown separately above and (2) of $4,424,813 related to and applied against items charged directly to surplus."

5. Strike footnote (d) of Exhibit C-2 and insert in lieu thereof the following:

"(d) The Company has covenanted that, so long as any shares of its $4.40 dividend preferred stock remain outstanding, it will not declare or pay any dividend or make any other distribution to the holders of its common stock (other than a dividend in common stock of the Company) except out of net income (as defined in the Company's amended charter) accumulated subsequent to June 30, 1944, after deducting the sum of $18,190 per month in respect of such of the first 120 full calendar months after October 9, 1944 as shall have elapsed; provided, however, that no common stock dividend may be paid in excess of 75% of the net income available as aforesaid, if, after giving effect thereto, the common stock capital and surplus (excluding premiums) would be less than 25% of the Company's capitalization (including surplus but excluding premiums). Earned surplus unrestricted as to common stock dividends amounted to $608,000 at June 30, 1945."

This amendment is filed subject to the reservations set forth in Division F of said Exhibit A.

Pursuant to the requirements of the Public Utility Holding Company Act of 1935, the Company set forth below caused this instrument to be duly executed on its behalf by

Engineers' Exhibit No. 4 (Cont'd)

its authorized officers on this the 9th day of November, 1945.

ENGINEERS PUBLIC SERVICE COMPANY
(SEAL) (Incorporated)

By D. C. BARNES
D. C. Barnes
President

Attest:

R. N. BENJAMIN
Secretary

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

The undersigned being duly sworn deposes and says that he has duly executed the attached instrument for and on behalf of the Company named therein; that he is the President of such Company; and that all action by stockholders, directors, and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and the transactions referred to therein, and that to the best of his knowledge, information and belief the statements made in such instrument are true.

D. C. BARNES
D. C. Barnes, President

Subscribed and sworn to before me at New York, New York, this 9th day of November, 1945.

VIETTA E. GIBBS
Vietta E. Gibbs
Notary Public Kings Co.
Kings Co. Clk's No. 229, Reg. No. 250-G-6
Certificates filed in New York County
N. Y. Co. Clk's No. 342, Reg. No. 201-G-6
Commission Expires March 30, 1946

My commission expires March 30, 1946. (SEAL)

Engineers' Exhibit No. 9.

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

Information Requested by the Staff of the SEC on October 16, 1945 in Connection with Engineers Section 11(e) Plan is Being Furnished in Schedules Listed Below

Schedule A

Engineers Public Service Company (Incorporated) and subsidiary companies pro forma balance sheet consolidated as at June 30, 1945 giving estimated effect to (A) sale of investment in The Western Public Service Company and miscellaneous adjustments and (B) the consummation of Parts I and II of the Plan.

Schedule A-1

Engineers Public Service Company (Incorporated) and subsidiary companies pro forma balance sheet consolidated as at June 30, 1945 giving estimated effect to miscellaneous adjustments and the consummation of Parts I and II of the Plan but assuming sale of investment in The Western Public Service Company not accomplished prior to consummation of the Plan.

Schedule B.

Engineers Public Service Company (Incorporated) and subsidiary companies pro forma income statement for the 12 months ended June 30, 1945 giving estimated effect to (A) sale of investment in The Western Public Service Company and miscellaneous adjustments and (B) the consummation of Parts I and II of the Plan.

Schedule B-1

Engineers Public Service Company (Incorporated) and subsidiary companies pro forma income statement

Engineers' Exhibit No. 9 (Cont'd)

for 12 months ended June 30, 1945 giving estimated effect to miscellaneous adjustments and the consummation of Parts I and II of the Plan but assuming sale of investment in The Western Public Service Company not accomplished prior to consummation of the Plan.

Schedule C

Engineers Public Service Company (Incorporated) pro forma balance sheet as at June 30, 1945 giving estimated effect to (A) sale of investment in The Western Public Service Company and miscellaneous adjustment and (B) the consummation of Parts I and II of the Plan.

Schedule C-1

Engineers Public Service Company (Incorporated) pro forma balance sheet as at June 30, 1945 giving estimated effect to miscellaneous adjustments and the consummation of Parts I and II of the Plan but assuming sale of investment in The Western Public Service Company not accomplished prior to consummation of the Plan.

Schedule D

Engineers Public Service Company (Incorporated) pro forma income statement for 12 months ended June 30, 1945 giving estimated effect to (A) sale of investment in The Western Public Service Company and miscellaneous adjustments and (B) the consummation of Parts I and II of the Plan.

Schedule D-1

Engineers Public Service Company (Incorporated) pro forma income statement for 12 months ended June 30, 1945 giving estimated effect to miscellaneous ad-

Engineers' Exhibit No. 9 (Cont'd)

justments and the consummation of Parts I and II of the Plan but assuming sale of investment in The Western Public Service Company not accomplished prior to consummation of the Plan.

Schedule E

Engineers Public Service Company (Incorporated) detail of income from miscellaneous investments and miscellaneous revenue shown in the Engineers Corporate Income Statement.

Schedule F

Engineers Public Service Company (Incorporated) and subsidiary companies detail of the calculation of the tax items included in pro forma adjustments No. 1 and No. 2 to balance sheet consolidated as at June 30, 1945.

Schedule G

Detail of subsidiary companies notes payable and an explanation of $626,200 adjustment included in this item in Engineers Public Service Company (Incorporated) and subsidiary companies pro forma balance sheet consolidated as at June 30, 1945.

Schedule H

Explanation of pro forma adjustment No. 10 to Engineers Public Service Company (Incorporated) and subsidiary companies pro forma balance sheet consolidated.

Schedule I

Engineers Public Service Company (Incorporated) and subsidiary companies detail of earnings from other

Engineers' Exhibit No. 9 (Cont'd)

sources in the amount of $84,341 shown in the "Other" column in the combined income statement.

Schedule J

Engineers Public Service Company (Incorporated) and subsidiary companies consolidated income statement showing tax adjustment applied against taxes and reflecting the amortization of plant acquisition adjustments as a deduction from income (below the line).

Schedule J-1

Engineers Public Service Company (Incorporated) and subsidiary companies pro forma consolidated income statement showing tax adjustment applied against taxes and reflecting the amortization of plant acquisition adjustments as a deduction from income (below the line).

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Additional information requested by the staff of the SEC which is not being supplied in the form of schedules is being taken care of as follows:

A breakdown of utility plant by accounts is reflected in Schedules A and A-1.

For a breakdown of cash item in Engineers pro forma consolidated balance sheet showing the amount of Government securities owned by Engineers prior to the Plan, reference is made to Pro Forma Adjustment No. 4A shown on Page 4 of Schedule A and Pro Forma Adjustment No. 3A on Page 3 of Schedule C, reflecting the conversion of the total amount of Government securities held by Engineers into cash.

Engineers miscellaneous investments consist of excess profits tax refund bonds. This fact has been noted on Schedules C and C-1.

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES PRO FORMA BALANCE SHEET CONSOLIDATED AS AT JUNE 30, 1945 GIVING ESTIMATED EFFECT TO (A) SALE OF INVESTMENT IN THE WESTERN PUBLIC SERVICE COMPANY AND MISCELLANEOUS ADJUSTMENTS, AND (B) THE CONSUMMATION OF PARTS I AND II OF THE PLAN

* Denotes decrease

Assets	Actual	Western Pub.Serv.	Adjustments	Pro Forma Prior to Plan	Parts I and II of Plan — El Paso	Parts I and II of Plan — Gulf States	Parts I and II of Plan — Adjustments	Pro Forma
Plant and other investments								
Utility plant (including intangibles):								
Electric & common, at original cost	$186,794,647	1,436,759*	2,570,000 (2)	187,927,888	12,466,430*	56,761,267*	-0-	$118,700,191
Gas, at original cost	2,489,349	-0-	5,420,473 (2A)	7,909,822	-0-	-0-	-0-	7,909,822
Other, at cost	9,999,122	-0-	5,513,847* (2A)	4,485,275	-0-	4,485,275*	-0-	-0-
Plant acquisition adjustments	14,467,645	-0-	93,374 (2A)	14,561,019	-0-	3,230,176*	-0-	11,330,843
Investments in subsidiary co's (excess)	24,752,442	-0-	528,028* (2A-3)	24,224,414	-0-	-0-	11,609,919* (4)(7)	12,614,495
Total utility plant	238,503,205	1,436,759*	2,041,972	239,108,418	12,466,430*	64,476,718*	11,609,919*	150,555,351
Other physical prop. less reserve	1,922,754	-0-	-0-	1,922,754	42,850*	118,704*	-0-	1,761,200
Investment in associated company	63,295	470*	-0-	62,825	4,435*	18,410*	39,980* (9)	-0-
Excess profits tax refund bonds	650,858	-0-	-0-	650,858	35,797*	-0-	-0-	615,061
Total plant and other investments	241,140,112	1,437,229*	2,041,972	241,744,855	12,549,512*	64,613,832*	11,649,899*	152,931,612
Special funds	1,112,266	-0-	92,000* (3)	1,020,266	1,020,266*	-0-	-0-	-0-
Current assets:								
Cash in banks and on hand	17,770,223	296,001*	2,910,545 (2-3)	20,384,767	533,265*	3,263,028*	9,590,888* (4-6)(9)	6,997,586
United States treasury securities, at cost	10,536,500	22,000*	-0-	10,514,500	2,017,500*	2,075,000*	4,650,000* (4A)	1,772,000
Special deposits	65,355	-0-	-0-	65,355	15,002*	2,500*	-0-	47,853
Notes and warrants receivable	5,503	-0-	-0-	5,503	-0-	1,883*	-0-	3,620
Accounts receivable, less reserves	4,052,265	9,862*	-0-	4,042,403	226,693*	1,189,019*	-0-	2,626,691
Materials and supplies, less reserves	2,331,975	14,483*	-0-	2,317,492	142,123*	675,803*	-0-	1,499,566
Prepayments	1,054,904	2,143*	-0-	1,052,761	63,480*	181,862*	-0-	807,419
Total current assets	35,816,725	344,489*	2,910,545	38,382,781	2,998,063*	7,389,095*	14,240,888*	13,754,735
Deferred debits:								
Unamortized debt discount and expense	3,441,367	-0-	-0-	3,441,367	-0-	-0-	-0-	3,441,367
Post-war refund of Fed. excess profits tax	1,039,104	-0-	219,755* (1)	819,349	29,348*	137,180*	-0-	652,821
Capital stock expense	566,532	-0-	-0-	566,532	-0-	257,987*	-0-	308,545
Other deferred debits	720,638	243*	-0-	720,395	13,774*	79,429*	-0-	627,192
Total deferred debits	5,767,641	243*	219,755*	5,547,643	43,122*	474,596*	-0-	5,029,925
	$283,836,744	1,781,961*	4,640,762	286,695,545	16,610,963*	72,477,523*	25,890,787*	$171,716,272

Engineers' Exhibit No. 9 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES PRO FORMA BALANCE SHEET CONSOLIDATED AS AT JUNE 30, 1945 GIVING ESTIMATED EFFECT TO (A) SALE OF INVESTMENT IN THE WESTERN PUBLIC SERVICE COMPANY AND MISCELLANEOUS ADJUSTMENTS AND (B) THE CONSUMMATION OF PARTS I AND II OF THE PLAN

* Denotes Decrease

LIABILITIES	Actual	Western Pub. Serv.	Adjustments	Pro Forma Prior To Plan	Parts I And II Of Plan: El Paso	Gulf States	Adjustments	Pro Forma
Capital stock:								
Preferred stock	$ 39,245,500	-0-	-0-	39,245,500	-0-	-0-	39,245,500*(6)	$ -0-
Common stock	1,909,968	-0-	-0-	1,909,968	-0-	-0-	-0-	1,909,968
Subsidiary companies:								
Preferred stock	42,447,100	-0-	-0-	42,147,100	1,500,000*	12,000,000*	-0-	28,947,100
Premium on preferred stock	340,620	-0-	-0-	340,620	33,750*	306,870*	-0-	-0-
Total capital stock	83,943,188	-0-	-0-	83,047,188	1,533,750*	12,306,870*	39,245,500*	30,857,068
Long-term debt:								
Contract payments	81,812	-0-	-0-	81,812	-0-	-0-	-0-	81,812
Note payable	-0-	-0-	-0-	-0-	-0-	-0-	1,500,000 (5)	1,500,000
Subsidiary companies:								
Bonds	92,843,000	43,000*	-0-	92,800,000	6,500,000*	27,300,000*	-0-	59,000,000
Notes payable	10,435,000	508,800*	626,200* (2-3)	9,300,000	140,000*	-0-	-0-	9,160,000
Total long-term debt	103,359,812	551,800*	626,200*	102,181,812	6,640,000*	27,300,000*	1,500,000	69,741,812
Current liabilities:								
Bonds and notes payable, due within one year	2,742,000	182,000*	-0-	2,560,000	140,000*	-0-	1,500,000 (5)	3,920,000
Accounts payable	1,607,496	9,885*	-0-	1,597,611	101,159*	563,471*	-0-	932,981
Customers' deposits	1,229,829	12,091*	-0-	1,216,738	135,113*	176,369*	-0-	905,256
Taxes accrued	11,429,437	42,560*	1,268,122* (1-2)	10,118,755	1,048,759*	4,331,556*	-0-	4,738,420
Interest accrued	1,029,421	5,831*	-0-	1,019,590	39,272*	192,181*	-0-	788,137
Other current liabilities	465,159	100*	18,459* (1)	446,600	1,302*	16,714*	-0-	428,586
Total current liabilities	18,198,342	252,487*	1,286,581*	16,959,274	1,465,603*	5,280,291*	1,500,000	11,713,380
Deferred credits:								
Unamortized premium less expense on bonds	1,350,836	-0-	-0-	1,350,836	159,873*	951,917*	-0-	239,050
Customers' advances for construction	699,358	-0-	-0-	699,358	3,376*	276,504*	-0-	419,478
Other deferred credits	364,085	15*	-0-	364,070	263*	44,103*	-0-	319,704
Total deferred credits	2,414,279	15*	-0-	2,414,264	163,512*	1,272,520*	-0-	978,232
Reserves:								
Depreciation	32,957,634	277,560*	1,633,600 (2)	34,313,674	2,162,199*	11,859,127*	-0-	20,292,348
Amortization of plant acquisition adjustments	3,028,818	-0-	93,374 (2A)	3,122,192	-0-	807,653*	-0-	2,314,539
Injury and damage claims	513,945	9,554*	-0-	504,391	14,909*	141,660*	-0-	347,822
Taxes on income of prior years	1,668,283	16,831*	-0-	1,651,452	320,235*	139,752*	-0-	1,191,465
Other	430,486	-0-	194,590* (2)	235,896	-0-	-0-	-0-	235,896
Total reserves	38,599,166	303,945*	1,532,384	39,827,605	2,497,343*	12,948,092*	-0-	24,382,170
Parent Company's reserve for depreciation in value of investments in subsidiaries	3,160,535	-0-	1,160,535 (3)	2,000,000	-0-	-0-	2,000,000* (8)	-0-
Capital surplus	16,158,041	-0-	916,535 (3)	17,076,576	-0-	-0-	1,220,351* (7-8)(10)	15,856,225
Earned surplus, minority interest	18,352	-0-	6,585 (1-2A)	24,937	-0-	-0-	-0-	24,937
Earned surplus 5/31/38, Parent Company's proportion	3,661,847	-0-	-0-	3,661,847	78,189*	158,620*	3,425,038* (10)	-0-
Earned surplus since 5/31/38, Parent Company's proportion	13,991,531	61,714*	4,644,574 (1-2)	18,574,391	383,874*	2,110,005*	2,050,285 (4)	18,130,797
Common stock, minority interests	31,651	612,000*	612,000 (3)	31,651	3,848,692*	11,101,125*	14,949,817 (4)(7)	31,651
	$283,836,744	1,781,961*	4,640,762	286,695,545	16,610,963*	72,477,523*	25,890,787*	$171,716,272

Schedule 1 Page 2

Engineers' Exhibit No. 9 (Cont'd)

Schedule A
Page 3

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES

Pro Forma Adjustments to Balance Sheet Consolidated as at June 30, 1945 Giving Estimated Effect to (A) Sale of Investment in The Western Public Service Company and Miscellaneous Adjustments and (B) The Consummation of Parts I and II of The Plan.

(1)

Dr.	Taxes accrued	$ 3,004,512	
Dr.	Other current liabilities	18,459	
Cr.	Post-war refund of Federal excess profits tax		$ 219,755
Cr.	Earned surplus, minority interest		6,067
Cr.	Earned surplus since 5/31/38, Parent Company's proportion		2,797,149

Restore to earned surplus a portion of overaccrual for 1944 Federal income taxes of Virginia and Citizens Rapid Transit Corporation.

(2)

Dr.	Utility plant	$ 2,570,000	
Dr.	Cash	1,318,545	
Dr.	Subsidiary companies notes payable	1,135,000	
Dr.	Other reserves	194,590	
Cr.	Taxes accrued		1,736,390
Cr.	Reserve for Depreciation		1,633,600
Cr.	Earned surplus, minority interest		720
Cr.	Earned surplus since 5/31/38, Parent Co.'s proportion		1,847,425

Estimated cash transactions of Engineers and Virginia from July 1 to December 31, 1945, inclusive.

(2A)

Dr.	Utility plant, gas, at original cost	$ 5,420,473	
Dr.	Plant acquisition adjustments	93,374	
Dr.	Investments in subsidiary companies (excess)	$ 93,172	
Dr.	Earned surplus, minority interest	202	
Cr.	Utility plant, other, at cost		5,513,847
Cr.	Amortization of plant acquisition adjustments		93,374

To state Norfolk, Va., gas plant at original cost and to provide for disposition of excess of book cost of such plant over original cost in accordance with Report on original cost filed in September 1945 with State regulatory body having jurisdiction, subject to such changes, if any, as may be necessary upon examination by such regulatroy body of the company's records.

Engineers' Exhibit No. 9 (Cont'd)

(3)

Dr.	Cash	$ 1,592,000	
Dr.	Parent Company's reserve for depreciation in value of investments in subsidiaries	1,160,535	
Cr.	Investments in subsidiary companies (excess)		621,200
Cr.	Special funds		92,000
Cr.	Common stock, minority interest		612,000
Cr.	Subsidiary companies notes payable		508,800
Cr.	Capital surplus		918,535

Sale by Engineers of investment in securities of The Western Public Service Company for $1,500,000 cash and release of special funds originally deposited at the time of sale of securities of The Western Public Service Company (Maryland), and transfer to capital surplus unused portion of reserve for depreciation in value of investments applicable to securities of The Western Public Service Company.

Schedule A
Page 4

(4)

Dr.	Cash	$21,964,632	
Cr.	Investments in subsidiary companies (excess)		$ 8,813,222
Cr.	Common stock, minority interests		11,101,125
Cr.	Earned surplus since 5/31/38 Parent Co.'s proportion		2,050,285

Sale by Engineers of investment in common stock of Gulf States to common stockholders under rights. 1,909,968 shares @ $11.50 = $21,964,632.

(4A)

Dr.	Cash	$ 4,650,000	
Cr.	United States treasury securities, at cost		4,650,000

Conversion of United States treasury securities held by Engineers into cash.

(5)

Dr.	Cash	$ 3,000,000	
Cr.	Note payable, long-term debt		1,500,000
Cr.	Note payable, due within one year		1,500,000

Borrowing by Engineers of $3,000,000 on a note payable to bank, bearing interest at the rate of 1½% per annum, payable $750,000 semi-annually.

Engineers' Exhibit No. 9 (Cont'd)

(6)

Dr.	Preferred stock	$39,245,500	
Cr.	Cash		39,245,500

Liquidation of Engineers preferred stock at $100 per share.

(7)

Dr.	Capital surplus	$ 6,645,389	
Cr.	Investments in subsidiary companies (excess)		2,796,697
Cr.	Common stock, minority interests		3,848,692

Distribution by Engineers as a partial dividend in liquidaton from the captal of the Company the common stock of El Paso Electric Company pro rata to common stockholders.

(8)

Dr.	Parent Company's reserve for depreciation in value of investments in subsidiaries	$ 2,000,000	
Cr.	Capital surplus		2,000,000

Transfer to capital surplus of unused portion of Engineers reserve for depreciation in value of investments applicable to securities of El Paso Electric Co.

(9)

Dr.	Cash	$ 39,980	
Cr.	Investment in associated company		39,980

Sale by Virginia of its investment in Epsco, Inc. for book value.

(10)

Dr.	Earned surplus 5/31/38, Parent Co.'s proportion	$ 3,425,038	
Cr.	Capital surplus		3,425,038

Transfer to capital surplus of Engineer's proportion of consolidated earned surplus at May 31, 1938.

Engineers' Exhibit No. 9 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES PRO FORMA INCOME STATEMENT FOR 12 MONTHS ENDED JUNE 30, 1945 GIVING ESTIMATED EFFECT TO (A) SALE OF INVESTMENT IN THE WESTERN PUBLIC SERVICE COMPANY AND MISCELLANEOUS ADJUSTMENTS AND (B) THE CONSUMMATION OF PARTS I AND II OF THE PLAN

* Denotes red figure

Combined Income Statement of Subsidiary Companies

	Actual	Western Pub. Serv.	Adjustments (a)	Pro Forma Prior to Plan	Parts I and II of Plan — El Paso	Parts I and II of Plan — Gulf States	Parts I and II of Plan — Adjustments	Pro Forma
Operating revenues	$72,375,574	330,636*	2,636,926*	69,408,012	3,962,035*	18,245,479*	-0-	$47,200,498
Operation	27,490,731	136,213*	1,281,509*	26,073,009	1,298,563*	6,438,216*	8,400 (1)	18,344,630
Maintenance	4,786,285	11,915*	185,468*	4,588,902	194,895*	891,037*	-0-	3,502,970
Depreciation	5,451,368	33,716*	221,035*	5,196,617	290,622*	1,532,417*	-0-	3,373,578
Amortization of plant acquisition adjustments	886,978	-0-	-0-	886,978	-0-	193,810*	-0-	693,168
Taxes - Federal income (excluding reductions (1) as shown separately below, and (2) of $4,424,813 (pro form) related to and applied against items charged directly to surplus)	14,275,035	24,577*	379,586*	13,870,872	902,342*	4,300,859*	7,182* (2)	8,660,489 (b)
Taxes - Other	5,666,747	31,812*	174,126*	5,460,809	384,784*	1,316,367*	-0-	3,759,658
Net operating revenues	13,818,430	92,403*	395,202*	13,330,825	890,829*	3,572,773*	1,218*	8,866,006
Other income - net	56,457*	345	17,732*	73,944*	32,620*	37,707	-0-	68,857*
Gross income	13,761,973	92,158*	412,934*	13,256,881	923,449*	3,535,066*	1,218*	8,797,148
Interest and amortization	4,418,721	37,232*	211,528*	4,169,960	239,047*	1,014,877*	-0-	2,916,036
Net income before reduction in taxes shown below	9,343,252	54,926*	201,405*	9,086,921	684,402*	2,520,189*	1,218*	5,881,112
Reduction in Federal income taxes resulting from amortization of emergency facilities under the Internal Revenue Code, which facilities are expected to be employed throughout their normal life and not to replace existing facilities	1,387,701	-0-	3,526*	1,384,175	-0-	533,599*	-0-	850,576
Net income	10,730,953	54,926*	204,931*	10,471,096	684,402*	3,053,788*	1,218*	6,731,688
Preferred dividend requirements	2,208,180	-0-	132,414*	2,075,766	67,501*	560,917*	-0-	1,447,348
Balance	8,522,773	54,926*	72,517*	8,395,330	616,901*	2,492,871*	1,218*	5,284,340
Amount applicable to minority interests	11,652	-0-	135*	11,517	-0-	-0-	-0-	11,517
Balance applicable to Parent Company	$8,511,121	54,926*	72,382*	8,383,813	616,901*	2,492,871*	1,218*	$ 5,272,823
Income Statement of Parent Company Including Undistributed Earnings of Subsidiary Companies Applicable to Parent Company								
Balance of earnings applicable to Parent Company, as above	$8,511,121	54,926*	72,382*	8,383,813	616,901*	2,492,871*	1,218*	$5,272,823
Earnings from subsidiary companies, included as deductions above:								
Preferred dividends declared	23,500	-0-	23,500*	-0-	-0-	-0-	-0-	-0-
Interest	48,440	25,440*	23,000*	-0-	-0-	-0-	-0-	-0-
Earnings from other sources	105,909	-0-	84,341*	21,568	-0-	-0-	21,568* (3)	-0-
Total	8,688,970	80,366*	203,223*	8,405,381	616,901*	2,492,871*	22,786*	5,272,823
Expenses, taxes and interest	532,654	4,000*	44,845	573,499	59,625*	79,800*	76,574* (3)	357,500
Balance applicable to stocks of Parent Company	8,156,316	76,366*	248,068*	7,831,882	557,276*	2,413,071*	53,788	4,915,323
Dividends on preferred stock of Parent Company	2,119,092	-0-	-0-	2,119,092	-0-	-0-	2,119,092* (3)	-0-
Balance for common stock and surplus	$6,037,224	76,366*	248,068*	5,712,790	557,276*	2,413,071*	2,172,880	$ 4,915,323

(a) Represents operations of former subsidiary companies which were disposed of during the 12 months period ended June 30, 1945 and misc. adjustments.

(b) Includes provision for estimated excess profits of $1,166,048 after giving effect to reductions (1) as shown separately above and (2) of $4,424,813 related to and applied against items charged directly to surplus.

(1) Increased expenses of Virginia Electric and Power Company due to cancellation of service contract with Epsco, Inc.

(2) Reduction in Federal income taxes due to above increased expenses.

(3) Elimination of nonrecurring income, expenses, taxes and preferred dividends of Engineers less interest on $3,000,000 bank loan.

Schedule M

ENGINEERS PUBLIC SERVICE COMPANY
(INCORPORATED)

Pro Forma Balance Sheet, as at June 30, 1945 Giving Estimated Effect to (A) Sale of Investment in the Western Public Service Company and Miscellaneous Adjustment and (B) the Consummation of Parts I and II of the Plan

* Denotes Decrease

ASSETS	Actual	Sale of Western Pub.Serv.	Adjustments	Pro Forma Prior To Plan	Parts I and II of Plan: El Paso	Parts I and II of Plan: Gulf States	Parts I and II of Plan: Adjustments	Pro Forma
Investments:								
Investments in subsidiary companies:								
Common stocks:								
El Paso Electric Co.	$ 6,645,389	-0-	-0-	6,645,389	6,645,389*(6)	-0-	-0-	$ -0-
Gulf States Utilities Co.	19,914,347	-0-	-0-	19,914,347	-0-	19,914,347*(3)	-0-	-0-
Virginia Electric and Power Co.	27,762,261	-0-	-0-	27,762,261	-0-	-0-	-0-	27,762,261
The Western Public Service Co.	1,233,200	1,233,200*(2)	-0-	-0-	-0-	-0-	-0-	-0-
	55,555,197	1,233,200*	-0-	54,321,997	6,645,389*	19,914,347*	-0-	27,762,261
Note - The Western Public Service Co.	508,800	508,800*(2)	-0-	-0-	-0-	-0-	-0-	-0-
	56,063,997	1,742,000*	-0-	54,321,997	6,645,389*	19,914,347*	-0-	27,762,261
Less reserve for depreciation in value of investments	3,160,535	1,160,535*(2)	-0-	2,000,609	-0-	-0-	2,000,000*(7)	-0-
	52,903,462	581,465*	-0-	52,321,997	6,645,389*	19,914,347*	2,000,000	27,762,261
Miscellaneous investments #	6,079	-0-	-0-	6,079	-0-	-0-	-0-	6,079
Total investments	52,909,541	581,465*	-0-	52,328,076	6,645,389*	19,914,347*	2,000,000	27,768,340
Special fund	92,000	92,000*(2)	-0-	-0-	-0-	-0-	-0-	-0-
Current assets:								
Cash in banks and on hand	6,935,768	1,592,000(2)	1,515,545(1)	10,043,313	-0-	21,964,632(3)	31,595,500*(3A-5)	412,445
United States treasury securities, at cost	4,650,000	-0-	-0-	4,650,000	-0-	-0-	4,650,000*(3A)	-0-
Accounts receivable	401	-0-	-0-	401	-0-	-0-	-0-	401
Interest receivable	3,971	-0-	-0-	3,971	-0-	-0-	-0-	3,971
Total current assets	11,590,140	1,592,000	1,515,545	14,697,685	-0-	21,964,632	36,245,500*	416,817
Deferred charges	246,688	-0-	-0-	246,688	-0-	-0-	-0-	246,688
	$64,838,369	918,535	1,515,545	67,272,449	6,645,389*	2,050,285	34,245,500*	$28,471,845

Represents excess profits tax refund bonds.

Engineers' Exhibit No. 9 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY
(INCORPORATED)

Pro Forma Balance Sheet, as at June 30, 1945 Giving Estimated Effect to (A) Sale of Investment in The Western Public Service Company and Miscellaneous Adjustment and (B) the Consummation of Parts I and II of the Plan

• Denotes Decrease

LIABILITIES	Actual	Sale of West. Public	Adjustment	Pro Forma Prior To Plan	Parts I and II of Plan — El Paso	Gulf States	Adjustments	Pro Forma
Capital stock:								
Preferred stock	$39,245,500	-0-	-0-	39,245,500	-0-	-0-	39,245,000 (5)	$ -0-
Common stock (a)	1,909,968	-0-	-0-	1,909,968	-0-	-0-	-0-	1,909,968
Total capital stock	41,155,468	-0-	-0-	41,155,468	-0-	-0-	39,245,500	1,909,968
Long-term debt:								
Contract payments	81,812	-0-	-0-	81,812	-0-	-0-	-0-	81,812
Note payable	-0-	-0-	-0-	-0-	-0-	-0-	1,500,000 (4)	1,500,000
Total long-term debt	81,812	-0-	-0-	81,812	-0-	-0-	1,500,000	1,581,812
Current liabilities:								
Note payable, due within one year	-0-	-0-	-0-	-0-	-0-	-0-	1,500,000 (4)	1,500,000
Accounts payable	999	-0-	-0-	999	-0-	-0-	-0-	999
Taxes accrued	331,359	-0-	-0-	331,359	-0-	-0-	-0-	331,359
Other current liabilities	218	-0-	-0-	218	-0-	-0-	-0-	218
Total current liabilities	332,576	-0-	-0-	332,576	-0-	-0-	1,500,000	1,832,576
Reserve for taxes on income of prior years	15,450	-0-	-0-	15,450	-0-	-0-	-0-	15,450
Surplus:								
Capital surplus	16,158,041	918,535(2)		17,076,576	6,645,389• (6)	-0-	2,000,000 (7)	12,431,187
Earned surplus (since May 31, 1938)	7,095,022	-0-	1,515,545(1)	8,610,567	-0-	2,050,285(3)	-0-	10,660,852(b)
	$64,838,369	918,535	1,515,545	67,272,449	6,645,389•	2,050,285	34,245,500•	$28,431,845

Contingent liability, pro forma:

Redemption premiums up to $3,204,795 may be payable to the preferred stockholders if the Securities and Exchange Commission and the Courts so determine. It is the opinion of Company cousel that no such redemption premium is payable.

(a) Represented by 1,909,968 shares of $1 par value. Authorized 1,909,963 shares.
(b) Engineers will covenant that it will not pay any dividends on its common stock until the $3,000,000 note payable is fully paid.

Schedule G
Page 2

Engineers' Exhibit No. 9 (Cont'd)

Schedule C
Page 3

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

Pro Forma Adjustments to Balance Sheet as at June 30, 1945 Giving Estimated Effect to (A) Sale of Investment in The Western Public Service Company and Miscellaneous Adjustment and (B) the Consummation of Parts I and II of the Plan.

(1)

Dr.	Cash	$ 1,515,545	
Cr.	Earned surplus		$1,515,545

Estimated cash from income, July 1 to December 31, 1945, inclusive.

(2)

Dr.	Cash	$ 1,592,000	
Dr.	Reserve for depreciation in value of investments	1,160,535	
Cr.	Investment in common stock of The Western Public Service Company		1,233,200
Cr.	Investment in note of The Western Public Service Company		508,800
Cr.	Special Fund		92,000
Cr.	Capital surplus		918,535

Sell investment in securities of The Western Public Service Company for $1,500,000 cash and release special funds originally deposited at time of sale of securities of The Western Public Service Company (Maryland), and transfer to capital surplus unused portion of reserve for depreciation in value of investments applicable to securities of The Western Public Service Company.

(3)

Dr.	Cash	$21,964,632	
Cr.	Investment in common stock of Gulf States Utilities Company		19,914,347
Cr.	Earned surplus		2,050,285

Sell common stock of Gulf States Utilities Company to common stockholders under rights.
1,909,968 shares @ $11.50 = $21,964,632.

Engineers' Exhibit No. 9 (Cont'd)

(3A)

Dr.	Cash	$ 4,650,000	
Cr.	United States treasury securities, at cost		4,650,000

Conversion of United States treasury securities held by Engineers into cash.

(4)

Dr.	Cash	$ 3,000,000	
Cr.	Note payable, long-term debt		1,500,000
Cr.	Note payable, due within one year		1,500,000

Borrow $3,000,000 on a note payable to bank bearing interest at the rate of 1½% per annum, payable $750,000 semi-annually.

(5)

Dr.	Preferred stock	$39,245,500	
Cr.	Cash		39,245,500

Liquidate preferred stock at $100 per share.

Schedule C
Page 4

(6)

Dr.	Capital surplus	$ 6,645,389	
Cr.	Investment in common stock of El Paso Electric Co.		6,645,389

Distribute as a partial dividend in liquidation from the capital of the Company the common stock of El Paso Electric Company pro rata to common stockholders.

(7)

Dr.	Reserve for depreciation in value of investments	$ 2,000,000	
Cr.	Capital surplus		2,000,000

Transfer unused portion of reserve for depreciation in value of investments applicable to securities of El Paso Electric Company to capital surplus.

Engineers' Exhibit No. 9 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) PRO FORMA INCOME STATEMENT FOR 12 MONTHS ENDED JUNE 30, 1945 GIVING ESTIMATED EFFECT TO (A) SALE OF INVESTMENT IN THE WESTERN PUBLIC SERVICE COMPANY AND MISCELLANEOUS ADJUSTMENTS AND (B) THE CONSUMMATION OF PARTS I AND II OF THE PLAN

* Denotes red figure

Income	Actual	Western Pub. Serv.	Adjustments	Pro Forma Prior to Plan	Parts I and II of Plan — El Paso	Parts I and II of Plan — Gulf States	Parts I and II of Plan — Adjustments	Pro Forma
From subsidiary companies:								
Common dividends	$5,091,739	41,250*	205,326 (1)	5,255,815	993,750*	1,330,000*	-0-	$2,932,065
Preferred dividends	24,999	-0-	24,999* (2)	-0-	-0-	-0-	-0-	-0-
Interest	48,440	25,440*	23,000* (2)	-0-	-0-	-0-	-0-	-0-
From miscellaneous investments	534,155	-0-	534,155* (2)	-0-	-0-	-0-	-0-	-0-
Miscellaneous revenue	21,568	-0-	-0-	21,568	-0-	-0-	21,568* (2)	-0-
Total income	5,720,901	66,690*	376,828*	5,277,383	993,750*	1,330,000*	21,568*	2,932,065
Expenses, taxes and interest								
Expenses	256,779	-0-	-0-	256,779	-0-	-0-	124,779* (2)	132,000
Taxes - Federal income (a)	259,880	4,000*	44,740 (3)	300,620	59,625*	79,800*	3,205 (5)	164,400
- Other	15,995	-0-	105 (4)	16,100	-0-	-0-	-0-	16,100
Interest	-0-	-0-	-0-	-0-	-0-	-0-	45,000 (6)	45,000
Total expenses, taxes and interest	532,654	4,000*	44,845	573,499	59,625*	79,800*	76,574*	357,500
Balance for dividends and surplus	5,188,247	62,690*	421,673*	4,703,884	934,125*	1,250,200*	55,006	2,574,565
Preferred dividends	2,119,092	-0-	-0-	2,119,092			2,119,092* (2)	-0-
Balance for common stock and surplus	$3,069,155	62,690*	421,673*	2,584,792	934,125*	1,250,200*	2,174,098	$2,574,565

(a) The Company does not consider that it has any liability for excess profits taxes.
(1) Increase in Vepco common dividend.
(2) Elimination of nonrecurring income, expenses and preferred dividends.
(3) Increase to reflect taxes pro forma prior to Plan computed on separate return basis.
(4) Increase due to New York state and city taxes.
(5) Increase due to reduction in expenses less interest charges.
(6) Interest on $3,000,000 bank loan.

Sched

Engineers' Exhibit No. 9 (Cont'd)

Schedule E

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

Detail of Income From Miscellaneous Investments and Miscellaneous Revenue Shown in Engineers Corporate Income Statement

From Miscellaneous Investments

Savannah Electric and Power Co.	Preferred dividends	$ 11,000
" " " " "	Common "	458,555
Missouri Service Co.	Bond interest	64,475
The Northern Kansas Power Co.	Open Acct. interest	125
Total		$534,155

Miscellaneous Revenue

Interest on U. S. Treasury securities	$ 19,447
Premium on sale U. S. " "	1,987
Interest on overpayment of Federal income taxes	421
Unearned insurance premium	11
Dividend from defunct bank	2
Total	$ 21,568

Schedule F

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES

Detail of the Calculation of the Tax Items Included in Pro Forma Adjustments No. 1 and No. 2 to Balance Sheet Consolidated as at June 30, 1945

(1)

Virginia Electric and Power Company (Vepco) Federal income taxes accrued in 1944	$3,963,762.00
Less contribution toward payment made with tentative consolidated return of Engineers Public Service Company and affiliated corporations, including Vepco 3/15/45	959,250.00
Balance	$3,004,512.00

Completed consolidated returns as finally filed disclosed no tax due. Claim for refund has been filed for overpayment made with tentative returns, Vepco's interest in said claim being $959,250. Pro Forma Adjustment No. 1 shows the reversal of the balance of the overaccrual of $3,004,512.00.

(2)

Virginia Electric and Power Company estimated Federal income tax for 1945	$3,901,921
Less amount accrued thru June 30, 1945	1,018,121
Balance to be accrued, July-December 1945	$2,883,800
Less 85.5% of deduction for estimated payment of $1,342,000 for pensions for former transportation department employees	1,147,410
Net credit to accrued taxes per Pro Forma Adjustment No. 2	$1,736,390

Engineers' Exhibit No. 9 (Cont'd)

Schedule G

DETAIL OF SUBSIDIARY COMPANIES NOTES PAYABLE AND EXPLANATION OF $626,200 ADJUSTMENT INCLUDED IN ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES PRO FORMA BALANCE SHEET CONSOLIDATED AS AT JUNE 30, 1945

* Denotes Decrease

	Long-Term	Current	Total
Notes Payable			
Virginia Electric and Power Company (Vepco)	$10,295,000	2,420,000	$12,715,000
El Paso Electric Company	140,000	140,000	280,000
The Western Public Service Company (Western)	508,800	-0-	508,800
Bonds Payable			
The Western Public Service Company (Assumed)	-0-	182,000	182,000
	10,943,800	2,742,000	$13,685,800
Owned by Engineers Public Service Company (Incorporated)			
The Western Public Service Company.	508,800*	-0-	508,800*
Actual at June 30, 1945	$10,435,000	2,742,000	$13,177,000
Eliminate bonds assumed and note due to dropping Western in consolidation (per Schedule A)	$ 508,800*	182,000*	$ 690,800*
Adjustments			
Payment on notes by Virginia Electric and Power Company per pro forma adjustment No. 2 of Schedule A	$ -0-	1,135,000*	$ 1,135,000*
Transfer from Long-Term to Current of Vepco notes due within one year	1,135,000*	1,135,000	-0-
Reinstate notes eliminated in column for Western (per Schedule A) but not included in actual consolidated figure because intercompany	508,800	-0-	508,800
	626,200*	-0-	626,200*
Pro Forma prior to Plan	9,300,000	2,560,000	11,860,000

Engineers' Exhibit No. 9 (Cont'd)

Schedule H

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES

Explanation of Pro Forma Adjustment No. 10 to Balance Sheet Consolidated as at June 30, 1945

Engineers Public Service Company (Incorporated) went through an accounting reorganization as at May 31, 1938 which had the effect of reducing the earned surplus of Engineers to zero and as a result the earned surplus of its subsidiaries at that date became "frozen" and unavailable to Engineers as earnings since dividends from subsidiary companies declared subsequent to May 31, 1938 may be credited to Engineers earned surplus only to the extent that such dividends were earned subsequent to that date. These accounting adjustments were in accord with suggestions received from the Director of the Public Utilities Division of the Securities and Exchange Commission in letter dated May 25, 1938.

Pro forma adjustment No. 10 to the Engineers and Subsidiaries consolidated balance sheet represents an adjustment made in consolidating the balance sheets of Engineers and its subsidiary companies whereby Engineers' interest in the earned surplus of subsidiary companies at May 31, 1938 is combined or transferred to capital surplus. This is a consolidating entry only and no such adjustment is recorded on the books of Engineers or its subsidiary companies. The amount of $3,425,038 included in such transfer in the aforesaid balance sheet is made up of the following:

Portion of Virginia Electric and Power Company earned surplus at May 31, 1938 applicable to the parent company after excluding minority interests therein	$4,116,066
Amount included above representing acquired surplus to Engineers	691,028
Earned surplus of Virginia Electric and Power Company at May 31, 1938 earned subsequent to date of acquisition and prior to May 31, 1938 but unavailable to Engineers as earnings since dividends from subsidiary companies declared subsequent to May 31, 1938 may be credited to Engineers earned surplus only to the extent that such dividends were earned subsequent to that date	$3,425,038

Engineers' Exhibit No. 9 (Cont'd)

Schedule I

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED)
AND SUBSIDIARY COMPANIES

Detail of Earnings From Other Sources in the Amount of $84,341 Shown in the "Other" Column in the Combined Income Statement

	Total Received by Engineers Corporate	Portion Assigned to Consolidated Surplus	Earnings From Other Sources
Savannah Electric and Power Co. Preferred dividends	$ 11,000	-0-	$11,000
" " " Common dividend	458,555	415,315	43,240
Missouri Service Co. Bond interest	64,475	34,499	29,976
The Northern Kansas Power Co. Open Acct. interest	125	-0-	125
	$534,155	449,814	$84,341

Note

Engineers Public Service Company sold its interests in Savannah Electric and Power Company in April 1945 and sold its interests in Missouri Service Company and The Northern Kansas Power Company in June 1945. Consequently, the consolidated income statement does not include the operations of such companies subsequent to December 31, 1944 and the amount of income received by Engineers Public Service Company from such companies subsequent to December 31, 1944 is included in consolidated earnings from other sources only to the extent of the net income of such companies accruing to Engineers Public Service Company between December 31, 1944 and the date of sale.

Engineers' Exhibit No. 9 (Cont'd)

Schedule J

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES CONSOLIDATED INCOME STATEMENT 12 MONTHS ENDED JUNE 30, 1945

Showing Tax Adjustment Applied Against Taxes and Reflecting Amortization of Plant Acquisition Adjustments as a Deduction From Income

Operating revenues	$72,375,574
Operation	27,747,243
Maintenance	4,786,285
Depreciation	5,451,368
Taxes - Federal income (after reduction of $4,424,813 shown separately below) related to and applied against items charged directly to surplus (a)	8,722,401
Taxes - Other	5,682,742
Net operating revenues	19,985,535
Other income - net	49,452
Gross income	20,034,987
Special charges of those portions of premium and expenses on redemption of bonds ($2,367,940) and of loss on sale of property ($2,056,873) which are equivalent to resulting reduction in Federal excess profits taxes	4,424,813
Interest and amortization	4,370,548
Amortization of plant acquisition adjustments	886,975
Net income	10,352,648
Preferred dividend requirements subsidiary companies	2,184,680
Balance	8,167,968
Amount applicable to minority interests	11,652
Balance	8,156,316
Dividends on preferred stock of Parent Company	2,119,092
Balance for common stock and surplus Parent Company	$ 6,037,224

(a) The provision for Federal income taxes includes provision for estimated excess profits taxes of $4,836,481 after reductions (1) of $1,387,701 resulting from amortization of emergency facilities and (2) of $4,424,813 related to and applied against items charged directly to surplus and after deducting estimated post-war credit of $537,385.

Engineers' Exhibit No. 9 (Cont'd)

Schedule J-1

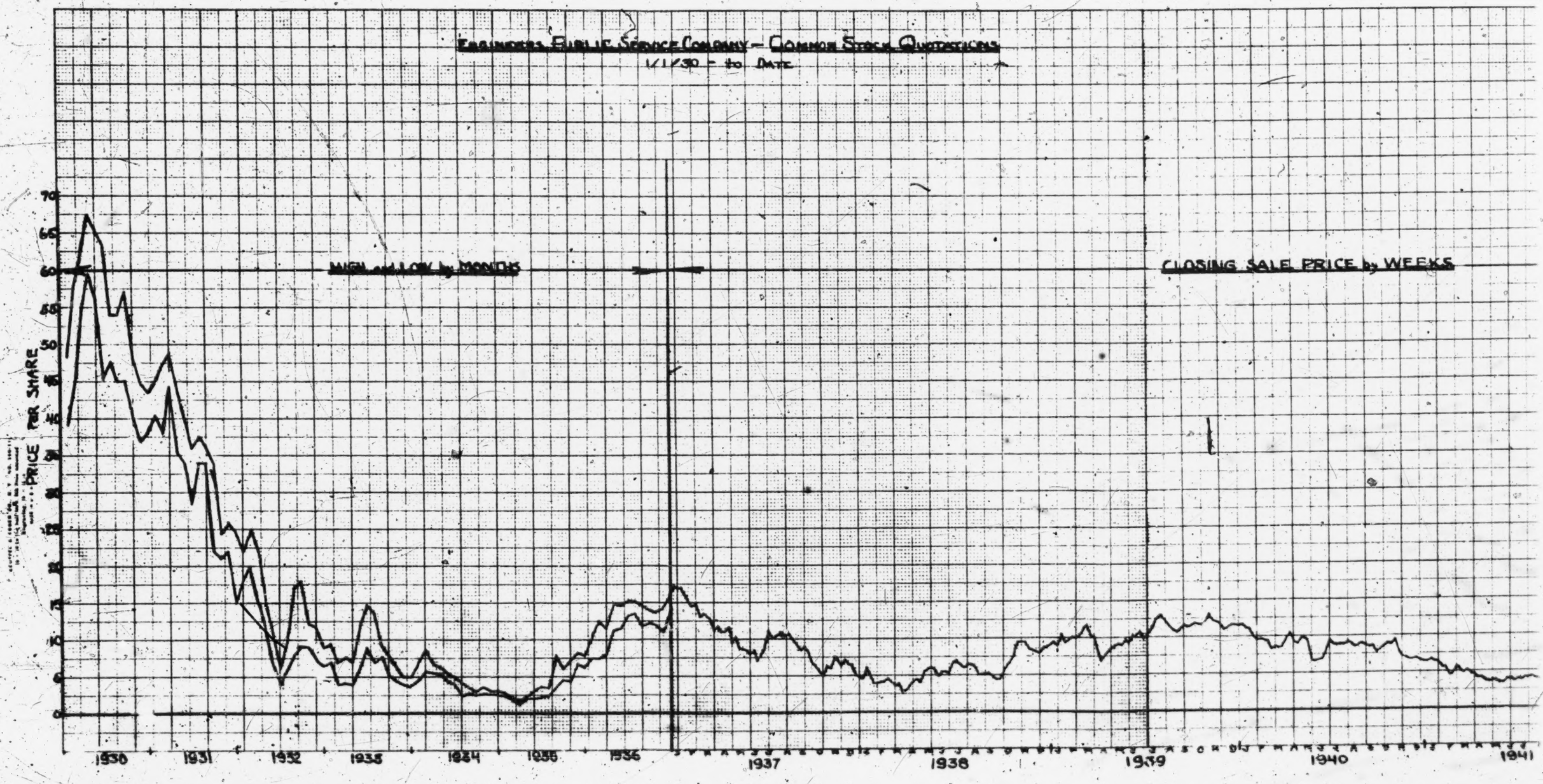
ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED)
AND SUBSIDIARY COMPANIES PRO FORMA CONSOLIDATED INCOME
STATEMENT 12 MONTHS ENDED JUNE 30, 1945

Showing Tax Adjustment Applied Against Taxes
and Reflecting Amortization of Plant Acquisition
Adjustments as a Deduction From Income

Operating revenues	$47,200,498
Operation	18,476,630
Maintenance	3,502,970
Depreciation	3,373,578
Taxes - Federal income (after reduction of $4,424,813 shown separately below) related to and applied against items charged directly to surplus (a)	3,549,500
Taxes - Other	3,775,758
Net operating revenues	14,522,062
Other income - net loss	68,857
Gross income	14,453,205
Special charges of those portions of premium and expenses on redemption of bonds ($2,367,940) and of loss on sale of property ($2,056,873) which are equivalent to resulting reduction in Federal excess profits taxes	4,424,813
Interest and amortization	2,961,036
Amortization of plant acquisition adjustments	693,168
Net income	6,374,188
Preferred dividend requirements subsidiary company	1,447,348
Balance	4,926,840
Amount applicable to minority interests	11,517
Balance	4,915,323
Dividends on preferred stock of Parent Company	-0-
Balance for common stock and surplus Parent Company	$ 4,915,323

(a) The provision for Federal income taxes includes provision for estimated excess profits taxes of $1,166,048 after reductions (1) of $850,576 resulting from amortization of emergency facilities and (2) of $4,424,813 related to and applied against items charged directly to surplus and after deducting estimated post-war credit of $129,561.

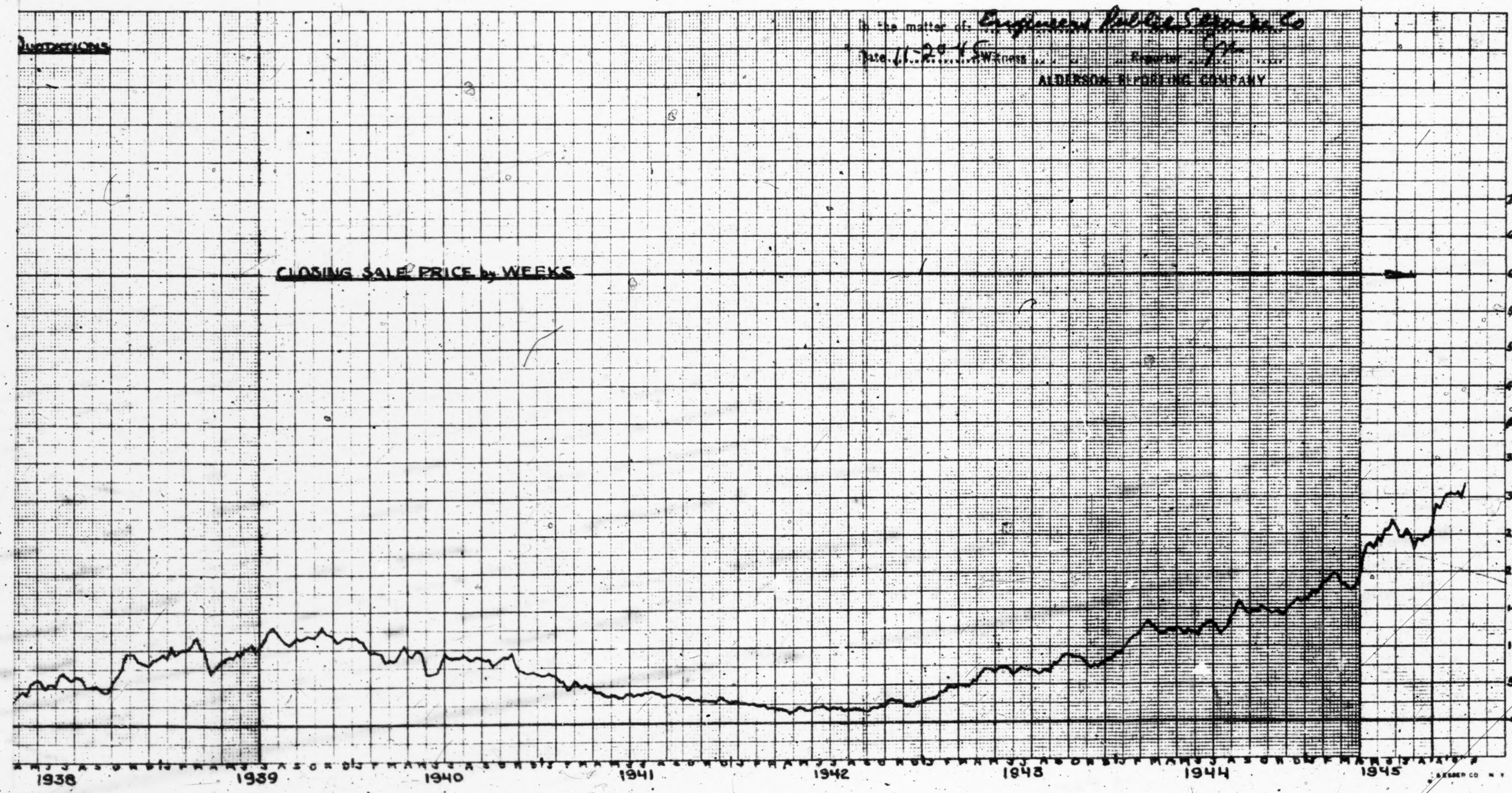
Engineers' Exhibit No. 13.



Engineers' Exhibit No. 13.

In the matter of Engineers Public Service Co
Date 11-20-45 Witness ... Examiner ...
ALDERSON REPORTING COMPANY

CLOSING SALE PRICE by WEEKS



Engineers' Exhibit No. 14.

PUBLIC UTILITY COMMON STOCK

COMPARISON OF PRICE EARNINGS RATIOS

	Houston Lighting and Power Co.	Idaho Power Co.	Indianapolis Power & Light Co.	Tampa Electric Co.	
Earnings per Share (a)					
Yearly Average 1938-41 incl.	5.00	2.41	2.22	2.38	
Yearly Average 1942-44, incl. plus 12 mos. ended June 30, 1945	5.04 (b)	2.20	1.89	1.97 (b)	
Yearly Average 1938-44, incl. plus 12 mos. ended June 30, 1945	5.02 (b)	2.30	2.06	2.16 (b)	
Year 1944	4.96	2.39	1.83	2.14	
12 Months ended June 30, 1945	5.45 (b)	2.53	1.93	2.08 (b)	
Based on Sale	**Times Earnings Ratios**				**Average**
Price or Bid 10/6/45	80	37	29¼	31⅓	
Yearly Average 1938-41, incl.	16.00	15.35	13.18	13.24	14.44
Yearly Average 1942-44, incl. plus 12 months ended June 30, 1945	15.87 (b)	16.82	15.48	15.99 (b)	16.04
Yearly Average 1938-44, incl. plus 12 months ended June 30, 1945	15.94 (b)	16.09	14.20	14.58 (b)	15.20
Year 1944	16.13	15.48	15.98	14.72	15.58
12 Months ended June 30, 1945	14.68 (b)	14.62	15.16	15.14 (b)	14.90

(a) Does not include any Tax Reduction from Amortization of Emergency Facilities.

(b) Year ended July 31, 1945

Engineers' Exhibit No. 14 (Cont'd)

GULF STATES UTILITIES COMPANY

Valuation of Common Stock
Based on Average of Four Companies

	Times Earnings Ratio-Average	Total Earnings for Common Stock (b)	Total Value
Yearly Average 1938-41, incl.	14.44	$2,075,000	$29,963,000
Yearly Average 1942-44, incl. plus 12 months ended June 30, 1945 (a)	16.04	1,882,000	30,187,000
Yearly Average 1938-44, incl. plus 12 months ended June 30, 1945 (a)	15.20	1,979,000	30,081,000
Year 1944	15.58	1,952,000	30,412,000
12 Months ended June 30, 1945 (a)	14.90	1,964,000	29,264,000
Average			29,981,000
Value per share - based on 1,909,968 shares outstanding			15.70

(a) For Gulf States Utilities Company this figure is, or includes, 1945 estimated and for Houston Lighting and Power Company and Tampa Electric Company it is, or includes, 12 months ended July 31, 1945.

(b) Excluding Tax Reduction from Amortization of Emergency Facilities.

Engineers' Exhibit No. 15.

Market Action—Newly Issued Utility Common Stocks

Company	Offering Date	Offering Price per Share	Price Aug. 11, 1945	Ratio of Price August 11, 1945 to Offering Price
Central Illinois Electric and Gas Co.	Feb. 17, 1944	19⅛	22½**	117.6
Public Utility Oper. Co. Index*		79.0	101.4	128.4
Derby Gas and Electric Corp.	Jan. 6, 1944	18	24**	133.3
Public Utility Oper. Co. Index*		80.6	101.4	125.8
Empire District Electric Co.	Sept. 13, 1944	14⅞	18⅛**	121.8
Public Utility Oper. Co. Index*		86.3	101.4	117.5
Houston Lighting and Power Co.	May 12, 1943	54	83	153.7
Public Utility Oper. Co. Index*		75.0	101.4	135.2
Idaho Power Co.	Sept. 1, 1943	24⅝	35¼	143.1
Public Utility Oper. Co. Index*		83.6	101.4	121.3
Public Service Co. of Colorado	Nov. 23, 1943	25	30½**	122.0
Public Utility Oper. Co. Index*		79.4	101.4	127.7

* Index compiled by Securities and Exchange Commission.
** Latest bid prior to August 11, 1945.

Engineers' Exhibit No. 15-A.

Opinion of Mudge, Stern, Williams & Tucker
Dated August 31, 1945.

MUDGE, STERN, WILLIAMS & TUCKER
(Rushmore, Bisbee & Stern)
20 Pine Street
New York 5, N. Y.

August 31, 1945.

Dear Mr. Barnes:

In accordance with your request, we have considered from the standpoint of Federal Income Taxes with respect both to the stockholders of Engineers Public Service Company (Incorporated) ("Engineers") and the Corporation itself, the program for the divestment by Engineers of its assets and its ultimate dissolution and liquidation or merger into Virginia Electric and Power Company ("Virginia").

Engineers' Exhibit No. 15-A (Cont'd)

The essential steps in the program which have a tax significance may be summarized as follows:

1. The 280,000 shares of Common Stock of Gulf States Utilities Company ("Gulf States"), all of which are held by Engineers, are to be reclassified into 1,909,968 shares.

2. The shares of Preferred Stock of Gulf States, none of which are held by Engineers, are to be granted 7 votes per share.

3. The 150,000 shares of Common Stock of El Paso Electric Company ("El Paso"), all of which are owned by Engineers, are to be reclassified into 381,994 shares.

4. Engineers will issue, pro rata, 1,909,968 warrants to its Common Stockholders, each of which warrants will represent the right to purchase from Engineers 1 share of Gulf States Common Stock at $11.50 per share, and to the extent that warrants are not exercised Engineers will sell the shares of Gulf States Stock represented thereby. Such warrants will be issued and distributed without the surrender by the Common Stockholders of Engineers of their Common Stock.

5. Engineers will deposit $39,245,500 plus accrued dividends to date of deposit for payment to the holders of the 392,455 shares of its Preferred Stock. Such distribution will be in cancellation of the whole of the outstanding Preferred Stock of Engineers, and thereafter the only right remaining to the record holder of each certificate of Preferred Stock will be the right to receive any amount in addition to $100 per share, plus such accrued dividends, if any is determined to be payable. Engineers will file a certificate or certificates reflecting the elimination of the capital represented by its Preferred Stock and the elimination of all of its authorized Preferred Stock.

6. Engineers will distribute as a dividend in partial liquidation the Common Stock of El Paso on the basis of

Engineers' Exhibit No. 15-A (Cont'd)

1/5 of a share of El Paso Common for each share of Engineers Common, scrip to be issued and delivered in lieu of fractions of shares. Such distribution, issue and delivery will be without the surrender by the Common Stockholders of Engineers of their Common Stock.

7. After all its liabilities have been liquidated or otherwise provided for, Engineers will either (a) be legally dissolved and liquidated and will distribute its Common Stock in Virginia and other remaining assets pro rata to its Common Stockholders, or (b) be merged into Virginia, with the Engineers Common Stockholders receiving their pro rata interest in the merged company.

The tax consequences of the above described transactions, except the reclassification of the Gulf States and El Paso Stocks, are largely governed by the provisions of Sections 371, 372 and 373 constituting Supplement R of the Internal Revenue Code. Supplement R was enacted by the Revenue Act of 1938 and, to broaden its scope was amended by the Revenue Act of 1942. These provisions create new exceptions to the general rule that the entire amount of gain or loss from the disposition of property shall be recognized. As stated in the Finance Committee Report on the Revenue Bill of 1938:

> "These new exceptions should be strictly construed as in the case of the exceptions in existing law. Unless the requirements of section 371 are clearly met, gain or loss will be recognized upon the exchange or distribution.
>
> * * * * * * *
>
> "It is contemplated that the application of the provisions of this supplement will result only in postponing the recognition of gain or loss until a disposition of property is made which is not covered by such provisions. * * * Although the time of recognition may be shifted, there must be a true reflection

Engineers' Exhibit No. 15-A (Cont'd)

> of income in all cases, and it is intended that the provisions of this supplement shall not be construed or applied in such a way that this purpose will be defeated. * * * Furthermore, the general principles of law with respect to tax avoidance and evasion, including the doctrine enunciated by the Supreme Court in *Gregory* v. *Helvering* (1935) 293 U. S. 465, will be applicable to any transaction arising in the form of a simplification or integration of a holding-company system, notwithstanding any order pertaining to the transaction which may be entered by the Securities and Exchange Commission."

The above mentioned principles are also reflected in The Treasury Department Regulations under Supplement R. In accordance with the Statute (Sec. 371(f)), such Regulations (Reg. 111, Sec. 29.371-8) also provide with respect to the term "order of the Securities and Exchange Commission", that the provisions of Sec. 371, which postpone the recognition of taxable gain, shall not apply to any exchange, expenditure, investment, distribution or sale unless each of the following requirements is met:

> "(a) The order of the Securities and Exchange Commission must recite that the exchange, expenditure, investment, distribution, or sale is necessary or appropriate to effectuate the provisions of section 11(b) of the Public Utility Holding Company Act of 1935.
>
> (b) The order shall specify and itemize the stocks and securities and other property (including money) which are ordered to be acquired, transferred, received or sold upon such exchange, acquisition, expenditure, distribution, or sale, and, in the case of an investment, the investment to be made, so as clearly to identify such property.

Engineers' Exhibit No. 15-A (Cont'd)

(c) The exchange, acquisition, expenditure, investment, distribution, or sale shall be made in obedience to such order and shall be completed within the time prescribed in such order."

The Regulations further state that these

"requirements were not designed merely to simplify the administration of the provisions of section 371, and they are not to be considered as pertaining only to administrative matters. Each one of the three requirements is of the essence, and must be met if gain or loss is not to be recognized upon the transaction."

From the foregoing you will appreciate the absolute necessity of the most strict compliance with provisions of Supplement R, particularly in view of the circumstance that in the last analysis gain from the contemplated transactions is as to Engineers not merely postponed but avoided.

Supplement R speaks in terms of exchanges, distributions, etc. "in obedience to an order of the Securities and Exchange Commission" and not, like Code Sec. 112, in terms of a "plan". We think it can successfully be argued that such transactions which comply with any such order, meet the provisions of Supplement R whether they constitute a "plan" or a part of a "plan". Nevertheless, viewing the matter solely from a tax standpoint, it may become advisable later to amend the program so as to set up at least two plans, one of which would include the distribution of the Gulf States warrants, the sale of the Gulf States Stock and the distribution of the El Paso Stock, and the other of which would include the distribution of the Virginia Stock. As set forth below, such transactions in respect of Gulf States and El Paso fall within the provisions of Sec. 371(c) which requires that the distribution be "without the surrender by such shareholder of stock or

securities in such corporation * * *" (Engineers), while the distribution of the Virginia Stock in liquidation of Engineers would fall within the provisions of Sec. 371(a) which contemplate an exchange, that is, the exchange of the Virginia stock upon the surrender of the Engineers Common Stock. Moreover, the transactions relating to Gulf States and El Paso are presumbly to be completed in the near future while it is evident that the liquidation or merger of Engineers may require a considerably longer period.

We note that the steps in relation to the reclassification of the Gulf States and El Paso Stock are not part of the Plan pursuant to Sec. 11(e) and will be taken pursuant to orders of the Securities and Exchange Commission other than orders in compliance with Sec. 11(b). We approve of this procedure. Otherwise a technical argument could be advanced that the reclassification of each of such stocks was an exchange within a system group (that is, an exchange of the presently existing number of shares for the number of reclassified shares), followed by a sale of the property received in exchange (the reclassified shares), and as Sec. 371(d) exempts a subsequent sale of property so received only in case the property is Preferred Stock, it could be argued that the sale by Engineers of the Gulf States Common Stock and the sale by Engineers of the El Paso Common Stock (if market conditions should make the latter step necessary), would not be exempt. The representative of the Internal Revenue Bureau, with whom informally we discussed this point, did not regard it as particularly troublesome, but nevertheless suggested that it could be avoided by effecting the reclassification pursuant to an order or orders of the Securities and Exchange Commission other than an order in compliance with Sec. 11(b). This practice we understand has recently been followed in other cases.

In addition to the facts stated above, we premise our opinion upon the following:

Engineers' Exhibit No. 15-A (Cont'd)

1. Engineers is a registered holding company under Sec. 2 of the Public Utility Holding Company Act.

2. Each of the transactions referred to in the Plan will be made pursuant to an order of the Securities and Exchange Commission which by Statute (Sec. 373(a)) is defined as

> "an order issued after May 28, 1938, by the Securities and Exchange Commission which requires, authorizes, permits, or approves transactions described in such order to effectuate the provisions of section 11(b) of the Public Utility Holding Company Act of 1935, 49 Stat. 820 (U. S. C., title 15, sec. 79k (b)), which has become or becomes final in accordance with law."

3. None of the shares of Gulf States, El Paso or Virginia to be distributed or sold by Engineers under the Plan is nonexempt property which by Statute (Sec. 373(e)) means:

> "(1) Any consideration in the form of evidences of indebtedness owned by the transferor or a cancellation or assumption of debts or other liabilities of the transferor (including a continuance of encumbrances subject to which the property was transferred);
>
> "(2) Short-term obligations (including notes, drafts, bills of exchange, and bankers' acceptances) having a maturity at the time of issuance of not exceeding twenty-four months, exclusive of days of grace;
>
> (3) Securities issued or guaranteed as to principal or interest by a government or subdivision thereof (including those issued by a corporation which is an instrumentality of a government or subdivision thereof);

Engineers' Exhibit No. 15-A (Cont'd)

(4) Stock or securities which were acquired from a registered holding company or an associate company of a registered holding company which acquired such stock or securities after February 28, 1938, unless such stock or securities (other than obligations described as nonexempt property in paragraph (1), (2), or (3)) were acquired in obedience to an order of the Securities and Exchange Commission or were acquired with the authorization or approval of the Securities and Exchange Commission under any section of the Public Utility Holding Company Act of 1935, 49 Stat. 820 (U. S. C., title 15, sec. 79k (b));

(5) Money, and the right to receive money not evidenced by a security other than an obligation described as nonexempt property in paragraph (2) or (3).

4. Engineers has a net capital loss carry-over from 1944 in excess of $31,000,000.

5. As of December 31, 1944, Engineers had a deficit in accumulated earnings and profits computed on a tax basis in excess of $20,000,000.

Following is our opinion with respect to the tax consequence of each of the steps enumerated above.

1. The reclassification of the Common Stock of Gulf States will not be a transaction within the scope of Supplement R. It will, however, be a tax-free exchange under Code Sec. 112(b)(2), which provides:

"No gain or loss shall be recognized if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation."

2. The grant of additional voting rights to the Preferred Stock of Gulf States does not constitute an exchange,

Engineers' Exhibit No. 15-A (Cont'd)

but, even if it did, it would be a nontaxable exchange under the last-quoted section.

3. The reclassification of the Common Stock of El Paso will result in neither gain nor loss to Engineers under the last-quoted section.

4. No gain to the Engineers Common Stockholders will be recognized upon the issuance and distribution to them of warrants to purchase Gulf States Stock. Sec. 371(c) provides:

> "DISTRIBUTION OF STOCK OR SECURITIES ONLY.—If there is distributed, in obedience to an order of the Securities and Exchange Commission, to a shareholder in a corporation which is a registered holding company or a majority-owned subsidiary company, stock or securities (other than stock or securities which are nonexempt property), without the surrender by such shareholder of stock or securities in such corporation, no gain to the distributee from the receipt of the stock or securities so distributed shall be recognized."

The distribution of warrants will be in obedience to an order of the Securities and Exchange Commission as defined above; it will be made to shareholders of Engineers which is a registered holding company, and it will consist of "stock or securities", which term, by Sec. 373(f), is defined as

> "shares of stock in any corporation, certificates of stock or interest in any corporation, notes, bonds, debentures, and evidences of indebtedness (*including any evidence of an interest in or right to subscribe to or purchase any of the foregoing*)." (Italics supplied)

Such warrants will not be nonexempt property as defined above. Such distribution will be made without the sur-

Engineers' Exhibit No. 15-A (Cont'd)

render by the Engineers Common Stockholders of their stock. Thus there will be a compliance with all of the requirements of Sec. 371(c).

Although it has been held by the Circuit Court for the Second Circuit, in *Choate* v. *Commissioner*, 129 Fed. 2d, 684, that the issuance of rights by a corporation to its own stockholders to subscribe to its Preferred Stock, resulted in a taxable dividend when the rights were exercised, to the extent that the option price was less than the fair market value of the optioned stock, we do not think that the principle of the case is applicable in this instance, in view of the express provisions of Secs. 371(c) and 373(f). We are accordingly of the opinion that no taxable gain will be realized by the Engineers Common Stockholders upon exercise of their warrants.

As authorized by the Statute, the Commissioner has prescribed regulations for the determination of the tax basis of securities acquired by shareholders upon tax-free distributions under Sec. 371(c). Under the Regulations (Reg. 111, Sec. 29.372-4), the cost or other basis of Engineers Common Stock must be apportioned between such Stock and the above mentioned warrants so distributed, as nearly as may be to the respective values of such Stock and warrants at the time of the distribution. Such requirement of apportionment would be a further answer to an argument that dividend income is realized on the exercise of the warrants, since in that event the same income would be taxed twice, once as a dividend and again on the sale of the stock, the tax basis of which was reduced on receipt of the warrants.

If the stockholder exercises his warrants, the basis to him of the Gulf States Stock will be the subscription price plus the basis so apportioned to the warrants.

For the purpose of determining capital gains and losses on the sale of warrants, the period during which was held the Engineers Stock in respect of which the warrants were issued, is to be added to the period during which the war-

rants were held. The basis of this opinion is Code Sec. 117(h)(3) which provides that in

> "determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain was recognized to the distributee under the provisions of * * * section 371(c) of * * * this chapter, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon distribution."

However, irrespective of the period during which the Engineers Stock or such warrants were held, any loss resulting from the failure to exercise warrants will be a short-term loss in view of Code Sec. 117(g), which provides that

> "gains or losses attributable to the failure to exercise privileges or options to buy or sell property shall be considered as short-term capital gains or losses."

For the purpose of determining capital gains and losses on the sale of Gulf States Stock acquired through the exercise of warrants, the holding period will begin with, and include, the day upon which the warrants to acquire such stock or securities were exercised. This opinion is based upon Reg. 111, Sec. 29.117-4, which provides:

> "The period for which the taxpayer has held stock or securities issued to him by a corporation pursuant to the exercise by him of rights to acquire such stock or securities from the corporation will, in every case and whether or not the receipt of taxable gain was recognized in connection with the distribution of the rights, begin with and include the day upon which the rights to acquire such stock or securities were exercised."

We now come to the tax effect upon Engineers of the issuance of warrants to purchase the Gulf States Common Stock, and of the sale of such Stock. Engineers will realize

Engineers' Exhibit No. 15-A (Cont'd)

no gain on the issuance of the Gulf States warrants. Although the Commissioner of Internal Revenue has in a number of cases urged that a corporation may realize gain on the distribution of assets to its stockholders measured by the difference between the basis of such assets to the Corporation and the value thereof at the time of distribution, the Courts have quite unanimously rejected the Commissioner's theory. Moreover, in no reported case has the Commissioner ever taken such a position in the case of issuance of warrants.

The sale by Engineers of the Gulf States Stock will not result in the recognition to Engineers of any gain. This is a transaction under Sec. 371(b), which we quote in full:

> "EXCHANGES AND SALES OF PROPERTY BY CORPORATIONS.—No gain shall be recognized to a transferor corporation which is a registered holding company or an associate company of a registered holding company, if such corporation, in obedience to an order of the Securities and Exchange Commission transfers property in exchange for property and such order recites that such exchange by the transferor corporation is necessary or appropriate to the integration or simplification of the holding company system of which the transferor corporation is a member. If any such property so received is nonexempt property, gain shall be recognized unless such nonexempt property or an amount equal to the fair market value of such property at the time of the transfer is, within 24 months of the transfer, under regulations prescribed by the Commissioner with the approval of the Secretary, and in accordance with an order of the Securities and Exchange Commission, expended for property other than nonexempt property or is invested as a contribution to the capital, or as paid-in surplus, of another corporation, and such order recites that such expenditure or investment by the transferor corporation is necessary or appropriate

Engineers' Exhibit No. 15-A (Cont'd)

to the integration or simplification of the holding company system of which the transferor corporation is a member. If the fair market value of such nonexempt property at the time of the transfer exceeds the amount expended and the amount invested, as required in the second sentence of this paragraph, the gain, if any, to the extent of such excess, shall be recognized. Any gain, to the extent that it cannot be applied in reduction of basis under section 372(a)(2) shall be recognized. For the purposes of this subsection, a distribution in cancellation or redemption (except a distribution having the effect of a dividend) of the whole or a part of the transferor's own stock (not acquired on the transfer) and a payment in complete or partial retirement or cancellation of securities representing indebtedness of the transferor or a complete or partial retirement or cancellation of such securities which is a part of the consideration for the transfer, shall be considered an expenditure for property other than nonexempt property, and if, on the transfer, a liability of the transferor is assumed, or property of the transferor is transferred subject to a liability, the amount of such liability shall be considered to be an expenditure by the transferor for property other than nonexempt property. This subsection shall not apply unless the transferor corporation consents, at such time and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe, to the regulations prescribed under section 372 (a)(2) in effect at the time of filing its return for the taxable year in which the transfer occurs."

The Regulations (Reg. 111, Sec. 29.371-3) recognize a sale as an exchange and recognize money as property. Sec. 29.371-3(b) of such Regulations provides:

Engineers' Exhibit No. 15-A (Cont'd)

"No gain is recognized to a transferor corporation upon the sale or other disposition of property transferred by such transferor corporation in exchange solely for property other than nonexempt property, as defined in section 373(e), but only if all of the following requirements are satisfied:

(1) the transferor corporation is, under the definition in section 373(b), a registered holding company or an associate company of a registered holding company;

(2) such transfer is in obedience to an order of the Securities and Exchange Commission (as defined in section 373(a)) and such order satisfies the requirements of section 371(f);

(3) the transferor corporation has filed the required consent to the regulations under section 372(a)(2) * * *; and

(4) the entire amount of the gain, as determined under section 111, can be applied in reduction of basis under section 372(a)(2)."

Engineers is a registered holding company under requirement (1). The sale of Gulf States Stock will be in obedience to an order of the Securities and Exchange Commission as defined above, which complies with the specifications of Sec. 371(f), summarized above, and thus the sale will meet requirement (2). Engineers will presumably file the consent to the regulations under Sec. 372(a)(2), and thus meet requirement (3). A form of consent (Form 982A) is enclosed herewith. The entire amount of the gain can be applied by Engineers in reduction of the basis (which, it is understood, is very substantially in excess of the amount of such gain) of other assets under Sec. 372 (a)(2), and thus comply with requirement (4). However, the transfer of the Gulf States Stock will not be "solely for property other than nonexempt property". The exchange

Engineers' Exhibit No. 15-A (Cont'd)

will be for cash which is nonexempt property and thus falls short of the provisions of Sec. 29.371-3(b). Therefore, recourse must be made to Sec. 29.371-3(c), which provides in part:

> "If the transaction would be within the provisions of subsection (b) of this section if it were not for the fact that the property received in exchange consists in whole or in part of nonexempt property (as defined in section 373(e)), then no gain is recognized if such nonexempt property, or an amount equal to the fair market value of such nonexempt property at the time of the transfer,
>
> (1) is expended within the required 24-month period for property other than nonexempt property; or
>
> (2) is invested within the required 24-month period as a contribution to the capital, or as paid-in surplus, of another corporation; but only if the expenditure or investment is made
>
> (3) in accordance with an order of the Securities and Exchange Commission (as defined in section 373(a)) which satisfies the requirements of section 371(f) and which recites that such expenditure or investment by the transferor corporation is necessary or appropriate to the integration or simplification of the holding-company system of which the transferor corporation is a member; and
>
> (4) the required consent, waiver and bond have been executed and filed. See subsections (f) and (g) of this section."

In accordance with the Statute (Sec. 371(b)), the Regulations also provide (Sec. 29.371-3(c)) that an expenditure for property other than nonexempt property includes "a distribution in cancellation or redemption (except a distribution having the effect of a dividend) of the whole or a part of the transferor's own stock (not acquired on the

Engineers' Exhibit No. 15-A (Cont'd)

transfer) * * *". Under the program the entire amount received from the exercise of warrants plus cash from other sources, is to be deposited and used to pay to Preferred Stockholders $100. per share of such Stock plus accrued dividends to the date of deposit. The amount so paid will be a distribution in cancellation of the whole of the outstanding Preferred Stock of Engineers, and after such deposit the only remaining right to the registered holder of such certificates will be the right to receive such additional amount, if any, as may be determined to be payable. If such distribution is made within the required 24-month period, it is our opinion that Engineers will have satisfied requirement (1) last-quoted above. Alternative requirement (2) is not applicable. The expenditure will be in accordance with an order of the Securities and Exchange Commission as defined above, and which will satisfy the requirements of Sec. 371(f) summarized above, and recite that such expenditure by Engineers is necessary or appropriate to the integration or simplification of the holding-company system of which Engineers is a member. Thus requirement (3) last-quoted above will be met. The consent referred to in requirement (4) is one which must be filed with Engineers' return for the taxable year in which the transaction occurs, and in that consent Engineers must agree to have the basis of its property adjusted in accordance with the regulations in effect at the time the return is filed. If the full amount of the expenditure required for the application of Sec. 29.371-3(c) of the Regulations has not been made by the close of the year in which the sale of the Gulf States stock occurs, Engineers will be required to file with its return for such year an application for the benefit of the 24-month period for expenditure, reciting the nature and time of the proposed expenditure. When requested by the Commissioner, Engineers must execute and file a waiver of the Statute of Limitations with respect to the assessment of deficiencies (for the taxable year of the Gulf States sale and for all succeeding taxable years in any of which falls any part of the period beginning with

the day of the transfer and ending 24 months thereafter) as the Commissioner may specify, and such bond with such surety as the Commissioner may require, in an amount not in excess of double the estimated maximum taxes which would be payable if Engineers did not make the required expenditure within the 24-month period. Upon the filing by Engineers of such consent, waiver and bond, requirement (4) last-above quoted will have been met. Thus, the sale of the Gulf States Stock will be exempt under Code Sec. 371(b) and Sec. 29.371-3(c) of the Regulations. The same rule as to the non-recognition of gains applies both as to the Gulf States Stock sold pursuant to the exercise of warrants and the Gulf States Stock sold following the failure to exercise warrants.

5. The $100. per share of Preferred Stock to be distributed to each Preferred Stockholder, should for the tax purposes of such stockholders be treated as a payment in exchange for stock, and any resulting gain should be treated as a capital gain if the stock constituted a capital asset in the hands of such stockholder. Our authority for this opinion is Code Sec. 115(c) and 29.115-9 of the Regulations. The latter provides in part:

> "A bona fide distribution in complete cancellation or redemption of all ~~of the stock~~ of a corporation, or one of a series of bona fide distributions in complete cancellation or redemption of all of the stock of a corporation, is not essentially equivalent to the distribution of a taxable dividend."

Moreover, while it may be contended that the foregoing regulation would have no application in the event that Engineers was not dissolved and liquidated, further support for the opinion expressed above may be had in a decision of the Circuit Court for the 7th Circuit in *Shellabarger Grain Products Co. v. Commissioner,* 146 Fed. 2d, 177, in view of the very substantial deficit in accumulated earnings and profits of Engineers. We are also inclined to

the view that the accrued dividend will be similarly treated, although there is less assurance on this point. The Preferred Stockholders will not be entitled to any deduction for loss on the surrender of their stock until the question as to whether they are entitled to any amount over and above the $100. plus accrued dividends is decided, and they are paid such amount if found entitled thereto. Such loss will be a capital loss if the stock constituted a capital asset in the hands of the stockholder.

6. The distribution of the El Paso Stock to shareholders will be a non-taxable distribution under Sec. 371(c), quoted above. The distribution will be pursuant to an order of the Securities and Exchange Commission as defined above; it will be made to shareholders of Engineers, which is a registered holding company; it will consist of stock which is not nonexempt property as defined above; and it will be made without the surrender by the Engineers Common Stockholders of their stock. Thus, all the requirements of Sec. 371(c) appear to be met.

The distribution of scrip in lieu of fractions would likewise be non-taxable under Sec. 371(c) since the term "stock or securities" as defined in Sec. 371(f) includes "any evidence of an interest in" stock.

The basis to the Engineers Common Stockholders of this Common Stock is to be apportioned between such Stock and the El Paso Stock in accordance with the respective market values of each at the time of the distribution, just as in the case of the distribution of the Gulf States warrants mentioned above.

For the purpose of determining capital gains and losses on the sale by a shareholder of Engineers of El Paso Stock so distributed to him, the period during which his Engineers Stock was held is to be added to the period during which the El Paso Stock was held by him. This is in accordance with Sec. 117(h) (3), to which reference has been made above. Engineers will neither realize taxable gain nor sustain deductible loss on the distribution of the El Paso Common Stock, since the rule is clear that a corporation

Engineers' Exhibit No. 15-A (Cont'd)

realizes no taxable gain and sustains no deductible loss on the distribution of its assets in liquidation of stock. In explanation of amendments to Supplement R, the foregoing rule was stated in the Finance Committee Report of the Revenue Act of 1942, as follows:

> "A corporation realizes no gain or loss in the mere distribution of its assets in kind in partial or complete liquidation."

7. The liquidation of Engineers, through the distribution of the Virginia Stock to stockholders, would be a non-taxable exchange on which stockholders would not realize gain or sustain loss. Such liquidation is covered by Sec. 371(a), which provides as follows:

> "No gain or loss shall be recognized to the transferor if stock or securities in a corporation which is a registered holding company or a majority-owned subsidiary company are transferred to such corporation or to an associate company thereof which is a registered holding company or a majority-owned subsidiary company solely in exchange for stock or securities (other than stock or securities which are non-exempt property), and the exchange is made by the transferee corporation in obedience to an order of the Securities and Exchange Commission."

The "transferor" will be the Engineers Common Stockholder. His Common Stock qualifies as stock in a corporation which is a registered holding company. It will be transferred solely in exchange for stock which is other than nonexempt property, that is, it will be exchanged for Virginia Stock, which is not nonexempt property. The exchange will be made by Engineers in obedience to an order of the Securities and Exchange Commission as defined above. Thus the transaction will be within the ambit of Sec. 371(a).

If upon dissolution and liquidation Engineers distributes not only Virginia Stock but also cash or other assets,

Engineers' Exhibit No. 15-A (Cont'd).

the transaction will not fall within Sec. 371(a), but will fall within Sec. 371(c), in which event gain will be recognized to stockholders measured by the difference between the tax basis of their Engineers Stock and the value of the Virginia Stock so distributed, plus the cash or the value of other assets distributed in liquidation, *but not in excess of the cash or the value of such assets other than the Virginia Stock.* It is also our opinion that under the *Shellabarger* case mentioned above, and for the reasons stated above, no part of such distribution should be treated as having the effect of a distribution of a taxable dividend.

The basis of the Engineers Stockholders of their Virginia Stock will be the same as the basis of their Engineers Stock decreased in the amount of any money received, and increased in the amount of gain or decreased in the amount of loss recognized upon the exchange.

For the purpose of determining gains and losses on the sale of the Virginia Stock, the period during which an Engineers Common Stockholder held the Engineers Common Stock is to be added to the period in which such stockholder held his Virginia Stock. This opinion is based upon Code Sec. 117(h) (1), which provides that in determining the period for which the taxpayer has held property received on an exchange, there shall be included the period for which he held the property exchanged if under the provisions of Code Sec. 113 the property has the same basis in whole or in part in his hands as the property exchanged. Code Sec. 113(a)(17) provides that if the property was acquired in any manner described in Sec. 372, other than subsection (a)(2), the basis shall be that prescribed in such section.

As to Engineers, it is our opinion that it will realize no taxable gain on the distribution of the Virginia Stock or other assets for the reason that a corporation realizes no gain on a distribution in kind in liquidation of its stock. Moreover, even if capital gain were realized the unused net capital loss carried over from 1944 would be applicable if the transaction occured within the required 5-year period.

Engineers' Exhibit No. 15-A (Cont'd)

There are no specific provisions in Supplement R or in the regulations thereunder in relation to mergers, but the Internal Revenue officials with whom informally we discussed the matter, expressed the thought, which appears to us to be reasonable, that a merger would be treated no differently from a liquidation. On this basis it is our view that in the event of a merger of Engineers and Virginia (an associate company which is a majority-owned subsidiary, 99.8% of the voting stock of which is held by Engineers), if all of Engineers' debts were previously satisfied, the tax effect upon Engineers and its stockholders would be the same for the purpose of determining gain or loss as a liquidation, and that if Virginia assumed any debts of Engineers, such assumption would be treated as the equivalent of cash under Sec. 371(e) and Engineers would realize gain on the transaction measured by the difference between the cost to it of the Virginia Stock and its value at the time of the merger, plus the amount of debts assumed, *but not in excess of the amount of such debts.*

In order to obtain the benefit of Supplement R, it will be necessary both for Engineers and its stockholders in their tax returns to supply certain details of information in relation to the transactions, all of which are set forth in Reg. 111, Sec. 29.371-10.

You will, of course, appreciate that the foregoing opinion is based upon existing law and regulations, and that it is virtually certain that there will be new tax legislation effective in 1946 and subsequent years, when the contemplated transactions will occur. We think it well also to add that there are no decided Court cases under Supplement R; that there are practically no published rulings of the Internal Revenue Bureau under this Supplement, and that the officials of the Internal Revenue Bureau are quite reluctant even informally to discuss the Supplement and the Regulations thereunder in the absence of a specific order of the Securities and Exchange Commission.

Engineers' Exhibit No. 15-A (Cont'd)

We note that one of the conditions to effectuation of the Plan is the obtaining from the Treasury Department of a closing agreement or ruling as to the tax consequences of the transactions. We expect to be able to obtain a ruling as to the effect of the transactions upon Engineers and its stockholders and a closing agreement as to the effect of the transactions upon Engineers. It will not be possible to obtain a closing agreement as to the effect of the transactions upon the stockholders of Engineers. A closing agreement with respect to any taxable period ending subsequent to the date of the agreement is subject to change in or modification of the law enacted subsequent to the date of the agreement and applicable to such taxable period.

As soon as the Plan has been submitted to the Securities and Exchange Commission, and after the preparation of the order but before the entry thereof, it is advisable that application be made to the Internal Revenue Bureau for such ruling and closing agreement.

In view of all of the foregoing, we think that you may properly make the following statement to the Engineers Stockholders:

> "In the opinion of Counsel, the Plan if carried out as contemplated, will not result in any taxable gain to Engineers Common Stockholders in respect of the distribution of warrants to purchase Gulf States Common Stock, the exercise of such warrants, the distribution of the El Paso Common Stock or the distribution of the Virginia Stock."

Yours very truly,

MUDGE, STERN, WILLIAMS & TUCKER

MR. DONALD C. BARNES, President,
ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated),
90 Broad Street,
New York 4, N. Y.
Enc. 1

Engineers' Exhibit No. 15-A (Cont'd)

Form 982A
U. S. TREASURY DEPARTMENT
Internal Revenue Service
(March 1943)

(To be executed and filed in duplicate)

Consent of Corporation to Adjustment of Basis of its Property under Section 372(a) (2) of the Internal Revenue Code

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..... of .....
(Name of corporation) (Address of corporation)

has excluded under section 371 (b) of the Internal Revenue Code the amount of $..... from its gross income for the taxable year beginning ....., and ended ..... Under that section such corporation consents to have the basis of its property adjusted in accordance with the regulations prescribed under section 372(a)(2) of the Internal Revenue Code in effect at the time of filing its return for that year. Such corporation is organized under the laws of .....
(State of Incorporation)
....., and has its principal office or place of business at .....
(Street and number, post office, State)

.....
(Name of corporation)

.....
(Name and title of officer)

.....
(Name and title of officer)

.....
(Name and title of officer)

(SEAL)

Engineers' Exhibit No. 15-A (Cont'd)

INSTRUCTIONS

(1) This form is to be used by a corporation excluding from gross income under section 371 (b) of the Internal Revenue Code, any amounts of income attributable to the transfer of property described therein.

(2) This form should be executed in duplicate and filed with the return.

(3) The consent shall be signed with the corporate name, followed by the signature and title of at least two officers of the corporation empowered to sign for the corporation, in addition to which the corporate seal must be affixed. If the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving such officers authority to sign the consent.

(4) If the taxpayer desires to have the basis of its property adjusted in any manner different from the general rule set forth in the regulations, in effect at the time of filing the return, prescribed under section 372 (a) (2) of the Internal Revenue Code, the precise method (including allocation of amounts) should be set forth in detail on separate sheets attached to this form. Consent by the Commissioner of Internal Revenue to any departure from such general rule shall be effected only by a closing agreement entered into under the provisions of section 3760 of the Internal Revenue Code.

(5) The consent filed on this form shall be deemed to be a consent to the application of the general rule stated above and such general rule shall prevail in the determination of the basis of the taxpayer's property, unless the taxpayer specifically states on this form or on a separate sheet attached hereto and made a part hereof that it does not consent to the application of the general rule.

(6) There shall be attached to this form a complete statement and description of the transactions resulting in the nonrecognition of gain under section 371 (b).

Engineers' Exhibit No. 15-B.

Opinion of Mudge, Stern, Williams & Tucker
Dated September 26, 1945.

MUDGE, STERN, WILLIAMS & TUCKER
20 Pine Street
New York 5, N. Y.

"Allervick" New York
Cable Address

September 26, 1945.

JBL: FI

Dear Mr. Barnes:

In our letter of August 31, we set forth our detailed opinion as to the tax results of the liquidation program, part of which later took the form of the Plan of September 10, 1945, pursuant to Section 11(e) of the Public Utility Holding Company Act. Subsequently there was submitted to us Amendment No. 1 to the application dated September 10, accompanying the above mentioned Plan, with the request that we render a legal opinion as to the tax results thereof.

We understand that the Amendment contemplates the surrender by Engineers Preferred Stockholders to Engineers of (a) Gulf States warrants plus (b) Engineers Preferred Stock (at the stated valuation) in exchange for Gulf States Common Stock. The Amendment speaks in terms of the "purchase from Engineers * * * at the subscription price of $11.50 per share" and the surrender of the Preferred Stock "in payment of the above subscription price", thus indicating, in form at least a purchase and sale rather than an exchange. If the transaction were a sale, the tax results to Engineers Preferred Stockholders would be the same as on any sale for cash. However, for the purpose of this opinion we assume that it will ultimately be made unmistakably clear in the Plan, and by action thereunder, that the transaction in form, as well as in substance, is an exchange and not a sale. On this basis, and subject to the

qualifications mentioned in our original letter, we are of the opinion:

(1) That no taxable gain or deductible loss will result to Engineers from the exchange of Gulf States Common Stock for Gulf States warrants and Engineers Preferred Stock;

(2) That under Section 371(a) of the Internal Revenue Code no taxable gain or deductible loss will result to Engineers Preferred Stockholders who make the exchange;

(3) That under Section 372(a) of the Internal Revenue Code the tax basis to any Engineers Preferred Stockholder of the Gulf States Common Stock so received in exchange will be the basis to him of the Gulf States warrants surrendered, plus the basis of the Engineers Preferred Stock surrendered.

On the foregoing basis we think that in communicating with Engineers Preferred Stockholders in this matter you may properly incorporate in your statement the following:

"In the opinion of Counsel, no taxable gain will be realized by Engineers Preferred Stockholders upon the surrender of Gulf States warrants and Engineers Preferred Stock in exchange for Gulf States Common Stock."

Yours very truly,

MUDGE, STERN, WILLIAMS & TUCKER

Mr. Donald C. Barnes, President
Engineers Public Service Company,
(Incorporated)
90 Broad Street
New York 4.

Engineers' Exhibit No. 16.

ENGINEERS PUBLIC SERVICE COMPANY

Common Stock Holdings

June 30, 1945

	Shares			Stockholders		
		% of Total				
Holdings	Shares Held	%	% Cumulative	Number	%	% Cumulative
1 to 10 shares	31,046	1.63	1.63	5,984	44.69	44.69
11 to 50 "	108,020	5.66	7.29	4,364	32.59	77.28
51 to 100 "	151,701	7.94	15.23	1,735	12.96	90.24
101 to 500 "	233,592	12.23	27.46	970	7.25	97.48
Over 500 "	1,385,609	72.54	100.00	338	2.52	100.00
	1,909,968			13,391		

1391 a · (Engineers' Exhibit No. 26)

ENGINEERS PUBLIC SERVICE COMPANY

$5.00 DIVIDEND PREFERRED STOCK

$5.00 DIVIDEND CONVERTIBLE PREFERRED STOCK

DEFINITIVELY SOLD TO PUBLIC @ $104.00

ARREARS - JANUARY 15, 1938 $10.00

CONVERTED:

OCTOBER 15, 1936 ISSUE.

1 SHARE CLASS A TO 1 SHARE PREF. 14,000

OCTOBER 15, 1937 - JANUARY 15, 1938

1 SHR. CLASS A TO 1 SHR. PREF. 6,488

1 SHR. CLASS B TO 1 SHR. PREF. 6,500

FEBRUARY - AUGUST 1938

1 SHR. CLASS A TO 1 SHR. PREF. 10,000

NOVEMBER, 1938

1 SHR. CLASS A TO 1 SHR. PREF. 1,500 | 38,488

NOT CONVERTED 16,012

CONVERSION PRIVILEGE EXPIRED JANUARY 15, 1939

SOURCE OF HIGH AND LOW PRICES AND ANNUAL SALES: SHARES — NEW YORK TIMES, THE COMMERCIAL AND FINANCIAL CHRONICLE AND BOND AND QUOTATION RECORD.

DIVIDENDS IN ARREARS AT END OF YEAR — PREFERRED $5.00 $6.00 $7.00

CONVERSION PRIVILEGE EXPIRED

MONTHLY HIGH AND LOW SALE PRICES

ANNUAL SALES - SHARES

1928 1929 1930 1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946

21,000 69,000 28,700 3,500 1,000 33,000 32,500 72,500 23,000 14,000 17,000 27,500 18,500 12,500 4,000 24,000 35,000

70-1144

Engineers Public Service Co

11-20-45

ENGINEERS PUBLIC SERVICE COMPANY

$5.50 DIVIDEND PREFERRED STOCK

Engineers' Exh. No 27 (p 1392a)

DIVIDENDS IN ARREARS AT JANUARY 1 - PER SHARE $27½ $16½ $11 $5½

WARRANTS ATTACHED TO $5.50 DIVIDEND PREFERRED STOCK

EACH SHARE HAD A WARRANT ATTACHED WHICH GAVE THE RIGHT TO BUY ONE SHARE OF ENGINEERS COMMON STOCK AT $15 PER SHARE

STOCK WITH WARRANTS ORIGINALLY SOLD TO PUBLIC @ $55 PER SHARE

NONE OF RIGHTS EVER EXERCISED

WARRANTS TO BUY COMMON STOCK AT $15 PER EXPIRED 11-1-32

MONTHLY HIGH AND LOW SALES PRICES

ANNUAL SALES - SHARES

SOURCE OF HIGH AND LOW PRICES AND SALES - SHARES = NEW YORK TIMES, THE COMMERCIAL AND FINANCIAL CHRONICLE AND BANK AND QUOTATION RECORD.

1928 1929 1930 1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946

39,400 27,400 13,700 6,800 39,400 27,400 [illegible] 39,400 13,700 19,300 22,100 13,700 19,700 1,900 29,300 35,700

SECURITIES AND EXCHANGE COMMISSION

File No. 70-1145 Commission's EXHIBIT NO. 27

Applicant

Case ..... of .....

Engineers Public Service Co.

Date 11-20-45 Witness ..... Reporter JM

Engineers' Exhibit No. 28 (p. 1393a)

ENGINEER'S PUBLIC SERVICE COMPANY

$6.00 DIVIDEND PREFERRED STOCK

DIFFERENCE IN BROKERAGE RATE IS = FOR 1 SHARE

OTHER ADJUSTMENTS REFERRED TO PRODUCE $ FOR PER SHARE

SOURCE OF HIGH AND LOW PRICES AND ANNUAL SALES - STANDARD — NEW YORK TIMES, THE CHRONICLE AND FINANCIAL CHRONICLE AND BANK AND QUOTATION RECORD.

MONTHLY HIGH AND LOW SALES PRICES

ANNUAL SALES SHARES

110
100
90
80
70
60
50
40
30
20
10
70,000
60,000
50,000
40,000
30,000
20,000
10,000
0

1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946 1947

Engineers Public Service Co

Ripley & Co

Engineers' Exhibit No. 29.

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED)

Average Market Price of Preferred Stocks

(Based on Total Transactions on New York Stock Exchange)

Weighted Average Based on Average Monthly High and Low Prices		$5.00 Div. Series	$5.50 Div. Series	$6.00 Div. Series
Conversion Period:	Average Price	$60.94	$53.98	Not Applicable
	Shares Traded	341,900	279,000	
Post-Conversion Period:	Average Price	$80.30	$85.23	
	Shares Traded	162,010	142,030	
Over-all:	Average Price	$67.16	$64.52	$62.77
	Shares Traded	503,910	421,030	144,510
Number of Shares outstanding 11/20/45		143,951	183,406	65,098
Turn-over—Times		3.5	2.3	2.2

Engineers' Exhibit No. 30.

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

AMOUNTS ACCRUING TO THE INTEREST OF ENGINEERS' COMMON STOCKHOLDERS AND UNDISTRIBUTED

	Balance for Common									
	El Paso (Texas)	Mesilla	Gulf States Utilities	Baton Rouge Electric	Virginia & Sub. Less Minority	The Western Public (Del.)	Louisiana Steam Gen. Corp.	Engineers	Intercompany Common Dividends	Consolidated
September 1935	12,909.51	7,013.60	36,626.65	9,057.68	163,061.98		17,163.21	183,908.78*		61,923.85
October	22,486.13	8,214.42	329.12	2,586.07	154,053.14		18,066.67	195,623.00*		10,112.55
November	29,185.42	29,427.63*	4,400.17	10,233.77	191,524.37		27,147.82	798,083.51	1,002,548.50	28,898.93
December	27,835.36	6,111.99	11,026.35*	13,783.11	185,731.58		29,062.26	188,884.55*		62,611.40
September to December 1935, inclusive	92,416.42	8,087.62*	30,327.59	35,660.53	694,671.07		91,439.96	229,667.18	1,002,548.50	163,546.73
1936	187,448.64	16,493.59	323,066.51	189,411.92	1,975,046.79		346,509.45	214,353.68	2,315,343.75	936,986.83
1937	273,756.41	19,336.93	632,110.73	249,436.37	2,215,156.12		397,465.05	418,128.71	2,624,722.00	1,580,668.32
1938	308,769.24	20,429.64	1,006,395.13	213,285.25	2,304,817.84		370,636.14	645,209.75	3,070,884.37	1,800,660.62
1939	330,762.41	12,607.77	2,053,126.64		2,652,746.62			1,162,624.06	3,617,468.00	2,594,399.70
1940	429,704.46		1,641,366.61		2,946,690.49			1,108,977.08	3,579,218.00	2,747,520.86
1941	597,327.01		1,318,651.97		2,650,088.37			917,850.18	3,495,671.20	1,988,246.33
1942	438,870.96		1,118,202.36		2,574,592.45	58,312.55		115,840.58	2,642,716.30	1,663,102.60
1943	543,720.73		1,624,132.45		3,367,241.01	64,177.17		1,318,023.66	3,844,214.45	3,073,080.57
1944	605,822.50		2,168,462.29		4,337,575.31	61,306.78		1,325,179.85	3,915,699.60	4,582,647.13
January 1945	50,980.00		231,341.05		593,491.55	3,850.62		219,974.89*		659,688.33
February	43,957.35		202,422.23		534,142.86	5,944.70		1,637,996.68	1,643,913.00	580,520.82
March	37,802.10		180,002.22		456,971.95	2,777.47		226,552.63*		451,000.91
April	39,820.42		192,632.27		393,389.29	2,272.48		824,250.42	586,413.00	865,757.86
May	38,621.53		205,326.16		378,196.77	2,597.24		295,192.46	451,250.00	468,684.18
June	43,652.02		225,268.48		353,748.50	2,974.91		229,973.06*		395,570.85
January to June 1945, inclusive	254,833.42		1,236,998.41		2,709,910.92	20,417.42		2,080,938.80	2,681,576.00	3,421,322.97
Total, September 1935 to June 1945, inclusive	4,063,232.22	60,790.31	13,354,640.89	687,794.17	28,428,537.19	704,213.92	1,206,052.60	9,536,723.53	32,990,062.17	24,552,162.66

* Red figure

10/15/45

Engineers' Exhibit No. 31.

Letter to Stockholders of Engineers Dated September 10, 1945.

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)
90 Broad Street,
New York 4, N. Y.

September 10, 1945

To the Stockholders:

Pursuant to authorization of the Board of Directors (one Director dissenting) of Engineers Public Service Company (Incorporated) ("Engineers"), a Plan under Section 11(e) of the Public Utility Holding Company Act of 1935 (the "Act") for the divestment by Engineers of assets and related matters was filed with the Securities and Exchange Commission (the "Commission"), on September 10, 1945. You will be notified as soon as the Commission fixes a date for the hearing on the Plan.

We advised you in the 1944 Annual Report of the latest developments in connection with the proceedings before the Commission relating to compliance with Section 11(b)(1) of the Act. Since the date of mailing such Annual Report, the Supreme Court of the United States set October 8, 1945 as the date for oral argument on the pending appeals of Engineers and the Commission in connection with the orders of the Commission issued in 1942, directing Engineers to divest itself of its interest in its principal subsidiaries, except Virginia Electric and Power Company ("Virginia"). Due to the resignation of Justice Roberts, this date has been postponed but it seems likely that an early date will be set for the hearing promptly upon the appointment of his successor and that, therefore, an early determination of the validity of the 1942 divestment orders of the Commission will be had.

In the last Annual Report as well as in previous Annual Reports, the management has advised the Stockholders that if the outcome of the present litigation involving Section

Engineers' Exhibit No. 31 (Cont'd)

11(b)(1) made it necessary or desirable to do so, it was hoped that it would be possible to develop a plan which would meet with the approval of the Commission under which Engineers' interest in Virginia, Gulf States Utilities Company ("Gulf States") and El Paso Electric Company ("El Paso") would be distributed to its security holders through liquidating holding companies, the Preferred Stock of which would be distributed to the Preferred Stockholders of Engineers and the Common Stock of which would be distributed to the Common Stockholders of Engineers, the net income of such liquidating holding companies to be used exclusively for payment of preferred dividends and retirement of their preferred stock. Further consideration and discussion with personnel of the staff and the Commission of that liquidating holding company plan led to the conclusion by the Directors that such a plan would not be likely to receive the approval of the Commission under the conditions existing in the Engineers system. In lieu thereof the Board of Directors has concluded that it was in the best interests of the stockholders to file a plan which would give to the Common Stockholders of Engineers, within a relatively brief period, the direct ownership of the Common Stocks of Virginia, Gulf States and El Paso. In order to expedite the divestment of Gulf States and El Paso the plan was divided into three parts and Engineers requested the Commission to issue a separate order for each of the three parts of the Plan. A copy of the Plan is enclosed herewith and a brief description of the Plan follows:

Part I.—This part of the Plan is conditioned, among other things, upon the prior reclassification by Gulf States of its Common Stock into 1,909,968 shares, the number of shares of Engineers Common Stock outstanding, and the granting to Gulf States Preferred Stock of seven votes per share instead of the one vote per share it now carries in order to maintain approximately the same relative voting

Engineers' Exhibit No. 31 (Cont'd)

power between the two classes of stock as existed prior to such reclassification.

This Part I of the Plan provides that the holder of each share of Engineers Common Stock may acquire one share of the reclassified Common Stock of Gulf States at $11.50 per share through the exercise of subscription warrants, the proceeds of which, together with the estimated cash in the treasury of Engineers at the time Part I becomes effective and cash to be raised by a short term bank loan, will provide sufficient funds to pay $100 per share to the Preferred Stockholders of Engineers, as follows:

Cash from exercise of subscription warrants	$21,964,632
Cash from bank loan	3,000,000
Cash from Treasury—estimated 12/31/45	14,280,868
Total amount required to pay $100 per share to Preferred Stockholders (accrued dividends to the deposit date will also be paid)	$39,245,500

Upon the deposit in trust for the benefit of the Preferred Stockholders of an amount equal to $100 per share plus accrued dividends to the deposit date on the Preferred Stock, all rights of the Preferred Stockholders will cease except the right to receive such amount, if any, in excess of $100 per share plus accrued dividends to the deposit date as may finally be determined to be payable. With reference to this matter, see Part II of the Plan outlined below.

After Part I of the Plan shall have become effective, there will be distributed to the Engineers Common Stockholders, as a dividend in partial liquidation, in respect of each share of Engineers Common Stock held by them, 1/5th of a share of El Paso Common Stock which, prior to the consummation of this Part I of the Plan, shall have been reclassified into 381,994 shares. The Engineers Common Stockholders who acquire Gulf States Common Stock and

Engineers' Exhibit No. 31 (Cont'd)

El Paso Common Stock will then be entitled to receive directly current dividends on such Common Stocks in amounts declared by the respective Boards of Directors. Gulf States is presently paying common dividends at an annual rate approximating 80¢ per new share and El Paso at an annual rate approximating $1 per new share, so that, based on present rates, annual dividends on the Common Stocks of these two companies which are to be distributed immediately under the Plan, are, in total, equivalent to approximately $1 per share of Engineers Common Stock. Virginia is presently paying dividends at an annual rate of $1 per share on its present stock equivalent to approximately $1.50 per share of Engineers Common Stock, but Engineers will use this income for retirement of the proposed bank loan and corporate expense until the bank loan and any other liabilities have been paid in full or provided for.

Part II—This part of the Plan requests an order of the Commission that it is fair and equitable that no amount in addition to $100 per share and accrued dividends be paid the Preferred Stockholders but provides, in the event the Commission finds that some additional amount shall be payable, for the automatic amendment of this Part so as to provide for such additional payment, preserving to Engineers, however, the right to apply for a review of any order providing for or requiring any additional payment. Pending the final determination of this question, Engineers will retain its interest in the Common Stock of Virginia. If upon the final determination of this question an amount in excess of $100 per share plus accrued dividends is payable then such amount will be paid by Engineers to the Preferred Stockholders.

Part III—When all of Engineers' liabilities have been finally determined, the Plan will be amended to supply the details of the steps for the dissolution and liquidation of Engineers or the merger of Engineers with Virginia, which

Engineers' Exhibit No. 31 (Cont'd)

will then be its sole remaining subsidiary. At that time the Engineers Common Stockholders would obtain a direct interest in the Common Stock of Virginia either through distribution or merger and would receive directly current dividends on the Common Stock in amounts declared by the Board of Directors of Virginia.

The Plan was filed without waiver and with full reservation of all constitutional and legal rights of Engineers and its subsidiaries to attack the validity and legality of any section, order, rule or regulation under the Act, including without limitation, the right to proceed with argument of their case involving Section 11 of the Act pending in the Supreme Court of the United States at any time hereafter when a quorum of such court may be available to participate in the decision of such case. It is not expected that any portion of this Plan shall be consummated until after such decision.

In the opinion of Counsel, the Plan if carried out as contemplated, will not result in any taxable gain to Engineers Common Stockholders in respect of the distribution of warrants to purchase Gulf States Common Stock, the exercise of such warrants, the distribution of the El Paso Common Stock or the distribution of the Virginia Stock.

It is expected that Part I of the Plan will not become effective prior to December 31, 1945, but you will be kept advised of any important developments. In the meantime, if you have any questions or suggestions regarding the Plan, do not hesitate to write the undersigned.

Yours very truly,

D. C. Barnes,
President.

Engineers' Exhibit No. 32.

Letter to Stockholders of October 30, 1945.

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)
90 Broad Street
New York 4, N. Y.

October 30, 1945.

To the Stockholders:

The Securities and Exchange Commission has fixed November 20, 1945, at 10:00 A.M. as the date and time for beginning hearings on the Plan of Engineers Public Service Company (Incorporated), pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935, for Divestment of Assets and Related Matters, such hearings to be held at the Commission's offices at 18th and Locust Streets, Philadelphia, Pennsylvania. This hearing was originally called for November 13, 1945, but was postponed because the Supreme Court of the United States fixed that date as the date on which argument is to begin on the Company's pending case involving the Commission's divestment orders under Section 11 of the Act. Copies of the Notice and Order for Hearing and the amendment thereto issued by the Commission will be furnished on request to the undersigned.

Since the filing of the Plan on September 10, 1945, an amendment was filed for the purpose of making three changes in the warrants to be issued to the Common Stockholders of Engineers evidencing the right to acquire, at the rate of $11.50 per share, one share of Gulf States Utilities Company Common Stock for each share of Engineers Common Stock held.

The first change provided that in addition to acquiring the Gulf States Common Stock for cash, holders of warrants could exchange Engineers Preferred Stock at the rate of $100 per share plus accrued dividends to the expiration date of the warrants for Gulf States Common Stock,

Engineers' Exhibit No. 32 (Cont'd)

retaining the right to receive, with respect to the shares of Preferred Stock so exchanged, any amount in excess of $100 per share plus accrued dividends, if and when any excess amount is finally determined to be payable to the Preferred Stockholders: Thus an Engineers Common Stockholder who also owns Engineers Preferred Stock may exchange his Preferred Stock for the Gulf States Common Stock, to the extent his warrants permit, or an Engineers Preferred Stockholder may buy the requisite "Rights" in the market and acquire Gulf States Common Stock in exchange for his Engineers Preferred Stock.

In the opinion of Counsel, no taxable gain will be realized by Engineers Preferred Stockholders upon the surrender of Gulf States warrants and Engineers Preferred Stock in exchange for Gulf States Common Stock.

The second change was to eliminate from the Plan the condition that at least 90% (or such lower percentage as shall be acceptable to Engineers) of the shares of Gulf States Common Stock shall have been purchased under the warrants, and to provide that Part I of the Plan shall be deemed to be effective upon the mailing of the warrants.

The third change was to shorten the warrant period from three weeks to ten days.

If the Plan is approved by the Commission and the Court, we will advise you later of the procedure to be followed in carrying it out.

Yours very truly,

D. C. Barnes,
President.

Engineers' Exhibit No. 33.

CERTIFICATE OF INCORPORATION†
of
ENGINEERS PUBLIC SERVICE COMPANY
(Reflecting all changes to May 6, 1942.)

FIRST: The name of this Corporation is

ENGINEERS PUBLIC SERVICE COMPANY.

SECOND: Its principal office in the State of Delaware is located at No. 7 West Tenth Street, in the City of Wilmington, County of New Castle. The name and address of its resident agent is Andrew C. Gray, No. 7 West Tenth Street, Wilmington, Delaware.*

THIRD: The nature of the business or objects or purposes proposed to be transacted, promoted or carried on by this Corporation are as follows:

1. To subscribe for, or cause to be subscribed for, buy, own, hold, purchase, receive, or acquire, and to sell, negotiate, guarantee, assign, deal in, exchange, transfer, mortgage, pledge or otherwise dispose of, shares of the capital stock, scrip, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, acceptances, drafts and evidences of indebtedness issued or created by other corporations, joint stock companies or associations, whether

† Original certificate of incorporation duly filed and recorded June 23, 1925.

* Pursuant to resolutions duly adopted by the Board of Directors January 30, 1930 and certificate duly filed February 3, 1930 and duly recorded February 4, 1930, E. Ennalls Berl became resident agent of the Corporation. By certificate duly filed on July 21, 1930 and duly recorded on July 22, 1930, the principal office in the State of Delaware and address of the resident agent was changed to 900 Market Street, in the City of Wilmington, County of New Castle, Delaware.

Pursuant to resolutions adopted by the Board of Directors July 26, 1945 and certificate filed and recorded on July 27, 1945, Prentice-Hall, Inc. became resident agent and principal office was changed to No. 317-325 South State Street, City of Dover, County of Kent, Delaware.

Engineers' Exhibit No. 33 (Cont'd)

public, private or municipal, or any corporate body, and while the owner thereof, to possess and to exercise in respect thereof all the rights, powers and privileges of ownership, including the right to vote thereon; to guarantee the payment of dividends on any shares of the capital stock of any of the corporations, joint stock companies or associations in which this Corporation has or may at any time have an interest, and to become surety in respect of, endorse or otherwise guarantee the payment of the principal of or interest on any scrip, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, drafts, bills of exchange or evidences of indebtedness, issued or created by any such corporations, joint stock companies or associations; to become surety for or guarantee the carrying out and performance of any and all contracts, leases and obligations of every kind of any corporations, joint stock companies or associations, and in particular of any corporation, joint stock company or association any of whose shares, scrip, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, drafts, bills of exchange or evidences of indebtedness, are at any time held by or for this Corporation, and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such shares, scrip, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, drafts, bills of exchange or evidences of indebtedness.

2. To generate, produce, buy, or in any manner acquire, and to sell, dispose of and distribute electricity for light, heat, power and other purposes and to carry on the business of furnishing, supplying and vending light, heat, power and water and any and all businesses incident thereto, and to build, construct, develop, improve, acquire, hold, own, lease,

Engineers' Exhibit No. 33 (Cont'd)

maintain and operate plants, facilities and works for the manufacture, generation, production, accumulation, transmission and distribution of electric energy, gas and steam, for light, heat, power and other purposes, and to acquire, construct, maintain and operate systems of water works for the supply of water. To purchase, acquire and lease, and to sell, lease and dispose of water, water rights, water records, power privileges and appropriations for power, light, heat, mining, milling, irrigation, agricultural, domestic or any other use or purpose. To build, construct, develop, improve, acquire, hold, own, lease, maintain and operate, by electricity, gasoline or other power, street railways and interurban railways, omnibusses, automobiles, trackless trolleys, motors, airships, aeroplanes and systems thereof and other transportation facilities for the transportation of passengers, mail, express, merchandise or other freight in any part of the world, except that this Corporation shall not have power to construct, maintain or operate railroads or railways within the State of Delaware. To produce, mine, buy, sell, store, market, deal in and prospect for coal and minerals of all kinds and the products and by-products thereof. To carry on in all its branches the business of manufacturing, preparing, cutting, storing, buying, selling and otherwise dealing in and with, all kinds of ice, and to erect, establish, operate, manufacture, construct, sell and deal in all kinds of ice and refrigerating plants, machines, apparatus and refrigerating processes. To prospect for, produce, mine, buy, sell, store, market and otherwise deal in and with, iron ore, and to construct, complete, lease, buy and otherwise acquire, own, maintain, operate, sell, lease, and otherwise dispose of, iron foundries and steel mills and to produce, and manufacture any and all things of which iron or steel

Engineers' Exhibit No. 33 (Cont'd)

form a part. To construct, purchase, lease or otherwise acquire, to own, hold, manage, control, maintain and operate, and to sell, lease and otherwise dispose of, radio and other broadcasting and receiving apparatus. To build, construct, enlarge, develop, improve, extend and repair light, heat, power, transmission and hydraulic plants, electrical works, machinery and appliances, telegraph and telephone lines, dams, reservoirs, canals for navigation, power, irrigation and other purposes, bridges, piers, docks, mines, shafts, tunnels, wells, water works, foundries, mills, street railways, interurban railways, railways and buildings.

3. To obtain the grant of, purchase, lease, or otherwise acquire any concessions, rights, options, privileges, lands, rights of way, sites, properties, undertakings or businesses, or any right, option or contract in relation thereto, and to perform, carry out and fulfill the terms and conditions thereof, and to carry the same into effect, and to develop, maintain, lease, sell, transfer, dispose of and otherwise deal with the same. To apply for, purchase or acquire by assignment, transfer or otherwise, and to exercise, carry out and enjoy any license, power, authority, franchise, ordinance, order, right or privilege, which any government or authority, supreme, municipal or local, or any corporation or other public body shall enact, make or grant. To secure, purchase, acquire, apply for, register, own, hold, sell or dispose of any and all copyrights, trade-marks and other trade rights. To purchase, apply for, obtain or otherwise acquire any and all letters patent, licenses, patent rights, patented processes and similar rights granted by the United States or any other government or country, or any interest therein, or any inventions which may seem capable of being

Engineers' Exhibit No. 33 (Cont'd)

used for or in connection with any of the objects or purposes of this Corporation, and to use, exercise, develop, sell, dispose of, lease, grant licenses in respect to, or other interests in the same, and otherwise turn the same to account, and to carry on any business, manufacturing or otherwise, which may be deemed to directly or indirectly aid, effectuate or develop the objects or any of them of this Corporation.

4. To acquire by purchase, lease, own, hold, sell, mortgage and encumber both improved and unimproved real estate wherever situate; to survey, subdivide, plat, colonize, and improve the same for purposes of sale or otherwise; and to construct and erect thereon factories, works, plants, stores, mills, hotels, houses and buildings.

5. To manufacture, buy, sell and generally deal in, goods, wares, merchandise, property and commodities of any and every class and description, and all articles used or useful in connection therewith, insofar as may be permitted by the laws of the State of Delaware. To engage in any business, whether manufacturing or otherwise which this Corporation may deem advantageous or useful in connection with any or all of the foregoing, and to purchase, acquire, manufacture, market or prepare for market, sell and otherwise dispose of any article, commodity or thing which this Corporation may use in connection with its business.

6. To borrow money for any of the purposes of this Corporation, and to issue bonds, debentures, debenture stock, notes and other obligations therefor, and to secure the same by pledge or mortgage of the whole or any part of the property of this Corporation, either real or personal, or to issue bonds,

Engineers' Exhibit No. 33 (Cont'd)

debentures, debenture stock, notes or other obligations without any such security. To draw, make, accept, endorse, discount, guarantee, execute and issue promissory notes, bills of exchange, drafts, warrants, and all kinds of obligations and certificates and negotiable or transferable instruments.

7. To enter into, make, perform and carry out contracts of every kind for any lawful purpose, without limit as to amount, with any person, firm, association or corporation.

8. To have one or more offices, to carry on any or all of its operations and business, and, without restriction or limit as to amount, to purchase, lease, or otherwise acquire, hold and own, and to mortgage, sell, convey, lease or otherwise dispose of, real and personal property of every class and description, in any of the states or territories of the United States and in the District of Columbia, and in any and all foreign countries, subject to the laws of such state, district, territory or country.

9. To do any and all things herein set forth, and in addition such other acts and things as are necessary or convenient to the attainment of the purposes of this Corporation, or any of them, to the same extent as natural persons lawfully might or could do in any part of the world, insofar as such acts are permitted to be done by a corporation organized under the General Corporation Laws of the State of Delaware.

The foregoing clauses shall be construed, both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this Corporation, and are in furtherance of, and in addition to,

and not in limitation of the general powers conferred by the laws of the State of Delaware.

It is the intention that the purposes, objects and powers specified in this Article Third and all subdivisions thereof shall, except as otherwise expressly provided, in nowise be limited or restricted by reference to or inference from the terms of any other clause or paragraph of this Article Third, and that each of the purposes, objects and powers specified in this Article Third shall be regarded as independent purposes, objects and powers.

*Notwithstanding anything to the contrary in this Certificate of Incorporation contained, this Corporation shall not have the power or be authorized to underwrite or participate in the marketing of securities of a public utility within the meaning of Section 305(b) of the Federal Power Act.

**FOURTH: The total number of authorized shares of capital stock of this Corporation is two million three hundred forty thousand nine hundred sixty-eight (2,340,968), divided into two classes, namely, preferred stock and common stock.

The total number of shares of such preferred stock authorized is four hundred thirty-one thousand (431,000) shares without nominal or par value. The total number of shares of such common stock authorized is one million nine hundred nine thousand nine hundred sixty-eight (1,909,968) shares of the par value of $1 per share.

The description of said classes of stock, and the designations, preferences and restrictions, if any, and voting powers, or restrictions or qualifications thereof, of such preferred stock and common stock (together with certain related provisions for the regulation of the business and for the conduct of the affairs of this Corporation, its direc-

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* Reflects amendment effective April 22, 1939.

** Reflects amendments effective May 24, 1926, April 12, 1928, July 3, 1928, October 25, 1928, May 28, 1929, January 7, 1933, May 25, 1936 and April 22, 1939.

tors and stockholders), are as hereinafter in this Article Fourth set forth:

DIVISION A.—THE PREFERRED STOCK.

I. *Series and limits of variations between series.* The preferred stock may be issued from time to time in series, as may from time to time be determined by resolution of the Board of Directors of this Corporation, with variations as between each series in any one or more of the following particulars:

(a) the designation of such series, which may be by distinguishing number, letter or title as the Board of Directors may deem appropriate;

(b) the rate (to be expressed in terms of dollars, and not exceeding $7 per share per annum) at which dividends are to accrue thereon, hereinafter referred to as the "fixed dividend rate";

(c) the amount (expressed in terms of dollars, not exceeding $10 per share) payable in respect of the shares of such series as a premium in case of the redemption thereof or upon a voluntary liquidation, dissolution or winding up of this Corporation, or reduction of its capital stock, resulting in any distribution of its assets to its stockholders, which amount in respect of any series may, but need not, vary according to the time or circumstances of such action, the amount or amounts so fixed being hereinafter referred to as the "fixed redemption premium"; and

(d) the existence or non-existence of the right to exchange or convert the shares of such series into shares of any other series of the preferred stock or into shares of any other class of stock of this Corporation, and the rate or basis, time, manner and conditions of exchange or conversion.

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If and whenever from time to time the Board of Directors shall determine to issue preferred stock of any series, it shall, prior to the issuance of any shares of each such series, by resolution or resolutions fix the terms of such series in the particulars above mentioned and shall cause the same to be set forth in such additional certificate or certificates, if any, as shall at the time be required by law.

II. *Dividends.* Out of the assets of this Corporation available for dividends, the holders of the preferred stock of each series shall be entitled to receive, as and when declared payable by the Board of Directors, dividends at but not exceeding the fixed dividend rate for such series, payable quarterly on the first day of the months of January, April, July and October in each year, before any dividends shall be paid upon or set apart for the common stock; and such dividends on the preferred stock shall be cumulative, so that if in any dividend period or periods full dividends upon the outstanding preferred stock at the fixed dividend rate or rates therefor shall not have been paid, the deficiency (without interest) shall be paid or declared and set apart for payment before any dividends shall be paid upon or set apart for the common stock. Dividends on all shares of the preferred stock of each series shall commence to accrue and be cumulative from the quarterly dividend date on or next preceding which the first shares of such series shall have been issued; but in the event of the issue of additional shares of preferred stock of any series subsequently to the date of the first issue of shares of such series, all dividends paid on the preferred stock of such series prior to the issue of such additional shares, and all dividends declared payable to holders of record of preferred stock of such series of a date prior to such issue, shall be

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deemed to have been paid in respect of the additional shares so issued. Any dividends paid upon the preferred stock in an amount less than full cumulative dividends accrued or in arrears upon all preferred stock outstanding shall, if more than one series be outstanding, be divided between the different series in proportion to the aggregate amounts which would be distributable to the preferred stock of each series if full cumulative dividends were declared and paid thereon.

III. *Preference on Liquidation, etc.* In the event of any liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, the holders of the preferred stock of each series shall be entitled to receive, for each share thereof, an amount equal to $100, together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premium for such series, if any, before any distribution of the assets shall be made to the holders of the common stock; but the holders of the preferred stock shall be entitled to no further participation in such distribution. If upon any such liquidation, dissolution or winding up or reduction, the assets distributable among the holders of the preferred stock shall be insufficient to permit the payment of the full preferential amounts aforesaid, then the entire assets of this Corporation to be distributed shall be distributed among the holders of the preferred stock then outstanding, ratably in proportion to the full preferential amounts to which they are respectively entitled. As used in this Article Fourth the expression "dividends accrued or in arrears" means, in respect of each share of the preferred stock of any series, an amount equal to simple interest upon the sum of $100 at an

annual rate equal to the fixed dividend rate for such series, from the date from which cumulative dividends thereon commence to accrue to the date as of which the computation is to be made, less the aggregate amount (without interest thereon) of all dividends theretofore paid (or deemed to have been paid) or declared and set aside for payment in respect thereof. Nothing in this Paragraph III shall be deemed to prevent the purchase or redemption of preferred stock in any manner permitted by Paragraph IV of Division A of this Article Fourth or to prevent the purchase by this Corporation of shares of its own common stock. A consolidation or merger of this Corporation with any other corporation or corporations shall not be regarded as a liquidation, dissolution or winding up of this Corporation within the meaning of this Paragraph III, provided such consolidation or merger does not substantially impair the rights and preferences of the preferred stock. The rights of the holders of the preferred stock under this Paragraph III are, however, subject to the provisions of Paragraph IV of Division C of this Article Fourth.

IV. *Redemption and Repurchase.* The Corporation may, at its option, at any time or from time to time, redeem the whole or any part of the preferred stock or of any series thereof, at a price for each share thereof equal to $100, plus the fixed redemption premium therefor, if any, together with the amount of any dividends accrued or in arrears thereon. Notice of any proposed redemption of preferred stock shall be given by this Corporation by mailing a copy of such notice, at least thirty (30) days prior to the date fixed for such redemption, to the holders of record of the preferred stock to be redeemed, at their respective addresses appearing on the books of this Corporation, and also, if so provided in the certificates for the preferred stock to be redeemed or in the by-laws of this

Engineers' Exhibit No. 33 (Cont'd)

Corporation, by publication in such manner as shall have been so provided. Any such redemption of preferred stock shall be in such amount, at such place and by such method, whether by lot or *pro rata*, as shall from time to time be provided by the by-laws of this Corporation, or be determined by resolution of its Board of Directors. On and after the date fixed in any such notice as the date of redemption, unless default shall be made by this Corporation in providing funds at the time and place specified for the payment of the redemption price pursuant to said notice, all dividends on the preferred stock thereby called for redemption shall cease to accrue; and from and after the date so fixed, unless default be made as aforesaid, or the date of the earlier deposit by this Corporation in trust, with a solvent bank or trust company doing business in the Borough of Manhattan, City and State of New York, of funds sufficient for such redemption, all rights of the holders of the shares of preferred stock so called for redemption as stockholders of this Corporation shall cease and determine, except (a) the right to receive the redemption price when due and (b) such right, if any, as may then exist to exchange or convert the shares called for redemption into other shares of this Corporation. This Corporation may also from time to time repurchase shares of its preferred stock at not exceeding the price or prices at which the same may be redeemed. This Corporation shall not, however, at any time redeem or repurchase less than the whole of its then outstanding preferred stock unless full cumulative dividends due to the date of such redemption or repurchase, upon all shares of the preferred stock then outstanding and not then to be redeemed or repurchased, shall have been paid or declared and set apart for payment. Shares of preferred stock redeemed or purchased by this Corporation may from time to time be reissued by it, and the shares so reissued may be either

Engineers' Exhibit No. 33 (Cont'd)

of the same or different series as the Board of Directors of this Corporation may determine.

V. *Voting Power.* The holders of the preferred stock shall not be entitled to vote, except in statutory proceedings as to which their vote is at the time required by law, and except that, in case at any time this Corporation shall fail to declare and pay or set aside for payment in full any quarterly dividend on any of the preferred stock and shall not on or before the eighth succeeding quarterly dividend payment date declare and pay or set aside for payment in full said dividend and also all subsequently accrued dividends on all of the outstanding preferred stock, then the holders of the preferred stock shall thereupon have and continue to have the right, voting as a class, by plurality vote, to elect such number of directors of this Corporation as will constitute one less than a majority of the members of the Board of Directors, until all accrued dividends on the preferred stock shall have been fully paid; and, during the continuance of such right of the preferred stockholders, the holders of the common stock shall have the right, voting together as one class, by plurality vote, to elect the remaining members of the Board of Directors. The term of office of all persons who may be directors of this Corporation at any time when such right shall accrue to the preferred stockholders shall terminate upon the election and qualification of their successors at a special meeting of the stockholders of this Corporation, which shall be held, at any time after the accrual of such right, upon the notice provided in the by-laws of this Corporation for the annual meeting of the stockholders, at the request in writing of the holders of record of at least five per cent. of the number of shares of the preferred stock then outstanding. In default of the calling of said meeting by a proper officer of this Corporation, within five days after the making of such request, such

Engineers' Exhibit No. 33 (Cont'd)

meeting may be called on like notice by any holder of record of preferred stock for which purpose any preferred stockholder shall have the right to have access to the stock books of this Corporation. If such special meeting be not called prior to the next annual meeting, the preferred stockholders as one class, and the holders of the common stock as a second class, shall respectively elect a minority and a majority of the members of the Board of Directors, at such annual meeting, unless previously thereto all such dividend defaults shall have been made good. Upon the termination at any time of such right of the preferred stockholders to elect a minority of the Board of Directors, the term of office of all directors elected by vote of the preferred stockholders (or to fill a vacancy which might have been so filled) shall end upon the election and qualification of their successors by the common stockholders, which election may be held on like notice at a special meeting of such stockholders, which shall be called at the request in writing of the holders of record of at least five per cent. of the number of shares of common stock then outstanding, or, if such special meeting is not called prior to the next annual meeting, at such annual meeting. Such special meeting may be called by the holders of record of at least five per cent. of the common stock of this Corporation if not called promptly by a proper officer of this Corporation upon such request, for which purpose they shall have access to the stock books of this Corporation. Whenever, by reason of the resignation, death or removal of any director or directors or any increase in the number of directors, at any time while the holders of the preferred stock are entitled to vote as aforesaid, the number of directors in office who have been elected by the holders of stock of either class shall become less than the total number subject to election by such class, the vacancy or vacancies so resulting may be filled by plurality vote of

such class of stockholders at a meeting thereof called for the purpose, or, pending such action, by the affirmative vote of the directors at the time in office who were elected by vote of such class of stockholders, although less than a quorum. During the continuance of such voting rights a director elected by the holders of the preferred stock (or to fill a vacancy which might have been so filled) shall be subject to removal either by a vote of a majority of the entire Board of Directors, including at least a majority of the directors elected by the holders of the preferred stock, or by vote of the holders of a majority of the shares of preferred stock at the time outstanding at a special meeting called for the purpose, but not otherwise. A special meeting to fill a vacancy or to remove a director as last above provided may be called at any time by the holder or holders of record of at least five per cent. of the outstanding shares of the class of stock entitled to vote thereat or in such other manner as may be provided for in the by-laws. The term of office of any officer of this Corporation shall terminate upon the election and qualification of his successor at any meeting of the Board of Directors following any special meeting of stockholders held upon the accrual or termination of the voting rights of the preferred stockholders, so that the new directors elected at any such meeting of stockholders shall be empowered to choose new officers of this Corporation or any thereof in their discretion.

DIVISION B.—THE COMMON STOCK.

I. *Dividends.* Out of any assets of this Corporations available for dividends remaining after full cumulative dividends on the preferred stock shall have been paid or declared and set aside for payment as required by Paragraph II of Division A of this Article Fourth, and after making such provision, if any, as the Board of Directors may deem necessary for working capital

and reserves, then, and not otherwise, dividends may be paid upon the common stock, to the exclusion of the preferred stock.

II. *Distribution of Assets.* In the event of any liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, after there shall have been paid to or set aside for the holders of the preferred stock the full preferential amounts to which they are respectively entitled under the provisions of Paragraph III of Division A of this Article Fourth, the holders of the common stock shall be entitled to receive, *pro rata,* all of the remaining assets of this Corporation available for distribution to its stockholders.

III. *Voting Power.* Subject to the voting rights expressly conferred upon the preferred stock by Paragraph V of Division A of this Article Fourth, the holders of the common stock shall possess full voting power for the election of directors and for all other purposes.

DIVISION C.—GENERAL PROVISIONS.

I. *Consideration receivable for no par value Stock.* Shares of capital stock of this Corporation without nominal or par value, of any class or classes hereby or hereafter authorized, may be issued by this Corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors thereof. Said Board shall have authority, as provided by statute, to determine that only a part of the consideration which shall be received by this Corporation for any of the shares of its capital stock which it shall issue from time to time shall be capital; *provided, however,* that the entire consideration received by this Corporation for shares of its preferred stock (exclusive of an amount equal to dividends accrued thereon to the date of issue) shall be capital, unless such consideration

Engineers' Exhibit No. 33 (Cont'd)

is in excess of $100 per share, in which event such excess of consideration may be received as surplus.

II. *Waiver of preemptive rights, etc.* No holder of stock of this Corporation of any class shall have any preemptive or preferential right of subscription to any shares of any class of stock of this Corporation, whether now or hereafter authorized, or to any obligations convertible into stock of this Corporation, issued or sold, or any right of subscription to any thereof other than such, if any, as the Board of Directors in its discretion may from time to time determine, and at such price as the Board of Directors may from time to time fix pursuant to the authority conferred by this certificate: and any shares of stock or convertible obligations which the Board of Directors may determine to offer for subscription to the holders of stock may, as said Board shall determine, be offered to holders of any class or classes of stock exclusively or to the holders of all classes of stock, and, if offered to more than one class of stock, in such proportions as between said classes of stock, as the Board of Directors in its discretion may determine. As used in this Paragraph II the expression "convertible obligations" shall include any notes, bonds or other evidences of indebtedness to which are attached or with which are issued warrants or other rights to purchase or receive stock of this Corporation of any class or classes; and the Board of Directors is hereby expressly authorized, in its discretion, in connection with the issue of any obligations or stock of this Corporation (but without intending hereby to limit its general powers so to do in any other cases), to grant rights or options to purchase or receive stock of this Corporation of any class upon such terms and during such period as the Board of Directors shall determine, and to cause such rights or options to be evidenced by such warrants or other instruments as it may deem advisable.

Engineers' Exhibit No. 33 (Cont'd)

III. *Directors not disqualified from contracting, etc.* A director of this Corporation shall not in the absence of fraud be disqualified by his office from dealing or contracting with this Corporation either as a vendor, purchaser or otherwise, nor in the absence of fraud shall any transaction or contract of this Corporation be void or voidable or affected by reason of the fact that any director, or any firm of which any director is a member, or any corporation of which any director is an officer, director or stockholder, is in any way interested in such transaction or contract; provided that at the meeting of the Board of Directors or of a committee thereof having authority in the premises, authorizing or confirming said contract or transaction, the existence of an interest of such director, firm or corporation is disclosed or made known and there shall be present a quorum of the Board of Directors or of the directors constituting such committee, and such contract or transaction shall be approved by a majority of such quorum, which majority shall consist of directors not so interested or connected. Nor shall any director be liable to account to this Corporation for any profit realized by him from or through any such transaction or contract of this Corporation ratified or approved as aforesaid, by reason of the fact that he or any firm of which he is a member, or any corporation of which he is an officer, director or stockholder, was interested in such transaction or contract. Directors so interested may be counted when present at meetings of the Board of Directors or of such committee for the purpose of determining the existence of a quorum. Any contract, transaction or act of this Corporation or of the Board of Directors or of any committee thereof which shall be ratified by a majority in interest of a quorum of the stockholders having voting power at any annual meeting or any special meeting called for such purpose, shall be as valid and as binding as though ratified by every stockholder of this Corporation.

Engineers' Exhibit No. 33 (Cont'd)

*IV. *Indemnification of directors and officers.* The Company shall reimburse or indemnify each present and future director and officer of the Company (and his heirs, executors and administrators) for or against all expenses reasonably incurred by him or imposed on him, subsequent to the adoption of this amendment to the Certificate of Incorporation, in connection with, or arising out of any action, suit or proceeding in which he may be involved by reason of his being or having been a director or officer of the Company, where disposition of such action, suit, or proceeding is made in favor of such director or officer; provided that no reimbursement shall be made until such time has elapsed that appeal can no longer be taken and unless, in the judgment of the Board of Directors, such action, suit or proceeding will not be recommenced.

No present or future director or officer of the Company (or his heirs, executors and administrators) shall be liable for any act, omission, step or conduct taken or had in good faith, subsequent to the adoption of this amendment to the Certificate of Incorporation, which (whether by condition or otherwise) is required, authorized or approved by any order or orders issued pursuant to; the Public Utility Holding Company Act of 1935; the Federal Power Act; or any state statute regulating the Company or its subsidiaries by reason of their being public utility companies, public utility holding companies, public service companies or subsidiaries of public utility or public utility holding companies; or any amendments to any thereof. In any action, suit or proceeding based on any act, omission, step or conduct, as in this paragraph described, the provisions hereof shall be brought to the attention of the court. In the event that the foregoing provisions of this paragraph are found by the court not to constitute a valid defense on the grounds of not being applicable to the

* Reflects amendment effective May 6, 1942.

particular class of plaintiff, each such director and officer (and his heirs, executors and administrators) shall be reimbursed for, or indemnified against, all expenses and liabilities incurred by him or imposed on him, in connection with, or arising out of, any such action, suit or proceeding based on any act, omission, step or conduct taken or had in good faith as in this paragraph described. Such expenses and liabilities shall include, but shall not be limited to, judgments, court costs and attorneys' fees, but shall not include fines and penalties imposed pursuant to such statutes.

The foregoing rights shall not be exclusive of other rights to which any director or officer may otherwise be entitled and shall be available whether or not the director or officer continues to be a director or officer at the time of incurring such expenses and liabilities.

V. *Re-incorporation privilege, etc.* The Board of Directors of this Corporation is hereby authorized, upon the affirmative vote or written consent of the holders of a majority of the voting stock of this Corporation issued and outstanding, to sell and convey as an entirety and as a going concern all the property and assets of this Corporation to a new corporation organized under the laws of the State of Delaware or of any other state or jurisdiction for the purpose of acquiring the same, provided such new corporation shall have the same authorized amounts and classes of stock as this Corporation shall then have, with substantially the same series, preferences, voting powers and restrictions and qualifications thereof, and that the consideration for such sale and conveyance shall be the assumption by such new corporation of all liabilities and obligations of this Corporation then outstanding and the issuance and delivery by such new corporation to this Corporation or upon its order for distribution as hereinafter provided of such amounts and classes of stocks of such new corporation as will enable this Corporation

Engineers' Exhibit No. 33 (Cont'd)

to exchange, class for class, series for series and share for share, the outstanding stock of this Corporation for like stock of such new corporation; and in case any such exchange shall be authorized as aforesaid, each holder of stock of this Corporation, by becoming such a stockholder, consents and agrees to receive and accept in such case the stock of such new corporation in exchange on the basis aforesaid as a full and final distributive share of the proceeds in liquidation of such sale, and further agrees that in such case his stock in this Corporation of whatever class shall thereafter have no rights and privileges whatsoever except the right and privilege of being exchanged for stock of such new corporation of like class and series on the basis aforesaid. This provision, however, is not intended in any way to limit the general power of the Board of Directors of this Corporation to sell, lease or exchange any or all of its property and assets, upon such terms and conditions as said Board may deem expedient and for the best interests of this Corporation, provided that no sale, lease or exchange of all of its property and assets, including its good will and its corporate franchises, as an entirety, shall be made except when and as authorized by the affirmative vote of the holders of a majority of the stock of this Corporation issued and outstanding having voting power given at a stockholders' meeting duly called for that purpose, or when authorized by the written consent of the holders of a majority of the voting stock issued and outstanding.

VI(a). *Amendments.* This Corporation reserves the right to amend the provisions contained in this certificate in the manner now or hereafter prescribed by law, and all rights conferred upon stockholders hereunder are granted subject to such reservation.

*VI. The payment of dividends or the making of other distribntions to stockholders declared or made

Engineers' Exhibit No. 33 (Cont'd)

from earned surplus existing at the date of any reduction of capital or capital stock or from income or surplus earned after the date of such reduction shall not, for the purpose of Paragraph III of Division A of this Article Fourth and for the purpose of Paragraph II of Division B of this Article Fourth, be construed or deemed to be a distribution of assets resulting from such reduction.

FIFTH: The names and places of residence of each of the original subscribers to the capital stock of this Corporation are as follows:

Name	*Residence*	*Common Shares*
E. E. BERL	Wilmington, Delaware	4
K. M. DALÆY	Wilmington, Delaware	3
M. M. STIRLING	Wilmington, Delaware	3

SIXTH: The existence of this Corporation is to be perpetual.

SEVENTH: The private property of the stockholders of this Corporation shall not be subject to the payment of corporate debts to any extent whatever.

**EIGHTH: The following additional provisions are inserted for the regulation of the business and for the conduct of the affairs of this Corporation and its directors and stockholders:

(1) The by-laws of this Corporation may fix and alter the number of directors and may prescribe their term of office and from time to time the number of directors may be increased or decreased by amend-

* Reflects amendment effective May 25, 1936.

** Reflects amendment effective July 3, 1928; such amendment striking out the whole of the former Article Ninth.

Engineers' Exhibit No. 33 (Cont'd)

ment of the by-laws, provided that the number of directors shall always be an odd number not less than three. In case of any increase in the number of directors the additional directors shall be chosen by the directors or stockholders at the time having voting power as may be prescribed in the by-laws of this Corporation, subject to the provisions of Paragraph V. of Division A of Article Fourth hereof. Directors need not be stockholders.

(2) The Board of Directors shall have power to make, alter or repeal the by-laws of this Corporation except as otherwise expressly provided in a by-law adopted by the incorporators or stockholders entitled to vote; but by-laws so made or altered by the directors may be altered or repealed by such stockholders.

(3) The Board of Directors shall have authority from time to time to set apart out of any assets of this Corporation otherwise available for dividends a reserve or reserves as working capital or for any other proper purpose or purposes, and to abolish or add to any such reserve or reserves from time to time as said Board may deem to be in the interests of this Corporation; and said Board shall likewise have power to determine in its discretion what part of the assets of this Corporation available for dividends in excess of such reserve or reserves shall be declared in dividends and paid to the stockholders of this Corporation.

(4) The Board of Directors shall have power from time to time to determine to what extent and at what times and places and under what conditions and regulations the accounts and books of this Corporation, or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right to inspect any account or book or

Engineers' Exhibit No. 33 (Cont'd)

document of this Corporation, except as conferred by the laws of the State of Delaware, unless and until authorized so to do by resolution of the Board of Directors or of the stockholders of this Corporation.

(5) At every meeting of the stockholders of this Corporation, shares of stock entitled to be voted thereat shall entitle the holders thereof to one vote for each share held by them.

We, the undersigned, being each of the original subscribers to the capital stock hereinbefore named for the purpose of forming a corporation to do business both within and without the State of Delaware and in pursuance of an act of the Legislature of the State of Delaware entitled "An Act Providing a General Corporation Law" (approved March 10, 1899), and the acts amendatory thereof and supplemental thereto, do make and file this certificate hereby declaring and certifying that the facts herein set forth are true and do respectively agree to take the number of shares of stock hereinbefore set forth and accordingly do hereunto set our hands and seals this 23rd day of June, A. D. 1925.

E. E. Berl (L. S.)
K. M. Daley (L. S.)
M. M. Stirling (L. S.)

In Presence of:

Herbert H. Ward, Jr.,
As to all.

Engineers' Exhibit No. 33 (Cont'd)

STATE OF DELAWARE
COUNTY OF NEW CASTLE } ss.:

BE IT REMEMBERED that on this 23rd day of June, A. D. 1925, personally came before me, HERBERT H. WARD, JR., a Notary Public for the State of Delaware, E. E. BERL, K. M. DALEY and M. M. STIRLING all of the parties to the foregoing certificate of incorporation, known to me personally to be such, I having first made known to them and to each of them the contents of said certificate, and they did severally acknowledge that they signed, sealed and delivered said certificate as their several voluntary act and deed, and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

HERBERT H. WARD, JR.,
Notary Public,
State of Delaware.

HERBERT H. WARD, JR.,
Notary Public Delaware,
Appointed July 20, 1923,
for two years.

Filed and Recorded June 23, 1925.

Engineers' Exhibit No. 33 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)

Terms of

$5 Dividend Convertible Preferred Stock As Fixed by Directors on July 3, 1928

RESOLVED, that the Board of Directors hereby fixes the terms of such series in the particulars required by said amended Certificate of Incorporation, as follows:

(a) The designation of such series shall be "$5 Dividend Convertible Preferred Stock".

(b) The fixed dividend rate thereof shall be $5 per share per annum.

(c) The fixed redemption premium thereof shall be $10 per share for shares redeemed on or before June 30, 1938 and shall be $5 per share for shares redeemed thereafter.

(d) Shares of such series shall be convertible, but only in blocks of 10 shares or any multiple of 10 shares, into Common Stock of this Company as constituted at the time of such conversion, on the basis, at the time, in the manner and under the conditions hereinafter set forth:

Basis: Respecting the first 40,000 shares of such series surrendered for conversion, for each 10 such shares, 21 shares of Common Stock; respecting the second 40,000 shares of such series surrendered for conversion, for each 10 such shares, 19 shares of Common Stock; respecting the third 40,000 shares of such series surrendered for conversion, for each 10 such shares, 17 shares of Common Stock; respecting the fourth 40,000 shares of such series surrendered for conversion, for each 10 such shares, 16 shares of

Engineers' Exhibit No. 33 (Cont'd)

Common Stock; respecting the last 160,000 shares of such series surrendered for conversion, for each 10 such shares, 15 shares of Common Stock. The term "shares of such series surrendered for conversion" shall for purposes of this paragraph be deemed to include any such shares represented by interim receipts surrendered for conversion.

Time: Shares of such series shall be convertible up to and including June 30, 1938 but not thereafter; provided, however, that with respect to any shares of such series called to be redeemed prior to June 30, 1938, the right to convert shall terminate on the tenth day next preceding the date fixed for redemption of such shares.

Manner and Conditions: The conversion right may be exercised by the surrender of certificates for shares of such series to the New York Transfer Agent of this Company (and/or to such officer or other agent of this Company as may hereafter be designated by its Board of Directors, notice of such designation to be mailed to each then holder of record of shares of such series), subject to such regulations as may at any time or from time to time be adopted by resolution or resolutions of the Board of Directors of this Company, of which certified copy or copies shall be filed with the New York Transfer Agent (and/or with any alternative or additional officer or other agent that may have been designated as above provided). Regulations so adopted may at any time or from time to time similarly be amended or repealed. Unless and until provisions for dividend adjustments shall be so adopted, no dividend adjustment shall be made upon any conversion.

Engineers' Exhibit No. 33 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)

Terms of

$5.50 Cumulative Dividend Preferred Stock As Fixed by Directors on October 5, 1928

RESOLVED, that the Board of Directors hereby fixes the terms of such series in the particulars required by the Amended Certificate of Incorporation, as follows:

(a) The designation of such series shall be "$5.50 Cumulative Dividend Preferred Stock".

(b) The fixed dividend rate thereof shall be $5.50 per share per annum.

(c) The fixed redemption premium thereof shall be $10 per share.

(d) Shares of such series shall have no right of exchange or conversion into shares of any other series of the Preferred Stock or into shares of any other class of stock of the Company.

Engineers' Exhibit No. 33 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY
(DELAWARE)

Terms of

$6 Cumulative Dividend Preferred Stock
As Fixed by Directors on September 30, 1930

RESOLVED, that the Board of Directors hereby fixes the terms of such series in particulars not set forth in the Certificate of Incorporation or in any amendment thereto, as follows:

(a) The designation of such series shall be "$6 Cumulative Dividend Preferred Stock".

(b) The fixed dividend rate thereof shall be $6 per share per annum.

(c) The fixed redemption premium thereof shall be $10 per share.

(d) Shares of such series shall have no right of exchange or conversion into shares of any other series of the Preferred Stock or into shares of any other class of stock of the Company.

Engineers' Exhibit No. 37-A.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1933.

Page 4:

ENGINEERS PUBLIC SERVICE COMPANY

DIRECTORS

HOMER L. FERGUSON
President, Newport News Shipbuilding and Dry Dock Company, Newport News, Va.

ANDREW FLETCHER
Vice President, St. Joseph Lead Company, New York

PHILIP A. S. FRANKLIN
President, International Mercantile Marine Company, New York

CHARLES W. KELLOGG
Chairman of the Board, Engineers Public Service Company, New York

GEORGE O. MUHLFELD
President, Stone & Webster, Inc., New York

ARTHUR W. PAGE
Vice President, American Telephone and Telegraph Company, New York

HENRY S. PRITCHETT
President Emeritus, The Carnegie Foundation, New York

CHARLES A. STONE
Chairman of the Board, Stone & Webster, Inc., New York

SAMUEL B. TUELL
President, Engineers Public Service Company, New York

WALTER B. WALKER
of Leonard & Walker, New York

EDWIN S. WEBSTER
Vice Chairman of the Board, Stone & Webster, Inc., Boston

WILLIAM E. WOOD
Executive Vice President, Engineers Public Service Company, New York

EXECUTIVE COMMITTEE

ANDREW FLETCHER — GEORGE O. MUHLFELD
PHILIP A. S. FRANKLIN — ARTHUR W. PAGE
CHARLES A. STONE

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
Chairman of the Board

SAMUEL B. TUELL
President

WILLIAM E. WOOD
Executive Vice President

THOMAS J. HANLON, JR.
Vice President

JASON C. LEIGHTON
Treasurer

WILLIAM T. CRAWFORD
Secretary

Engineers' Exhibit No. 37-A (Cont'd)

Pages 5-6:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,
February 21, 1934.

TO THE STOCKHOLDERS:

The consolidated earnings statement of your Company and its constituent companies for 1933, appearing on Page 12 of this report, shows a decrease in gross earnings of 7% under 1932. Electric department gross earnings were 76% of the total and declined 4% under the previous year. In this department residential earnings showed the greatest stability, declining only 2%. All classifications showed an improved trend toward the end of the year, although commercial and industrial revenues were still declining. Transportation department earnings, contributing 14% of the gross, decreased 15% under the previous year but increased slightly in December as compared with December, 1932. Part of this decrease was due to the elimination of three transportation subsidiaries as reported last year.

* * * * *

Three constituent companies failed to earn their preferred dividend requirements by a total of approximately $1,300,000. All the other constituent companies earned their preferred dividend requirements and reported balances totalling approximately $2,600,000 applicable to their common stocks, which are largely owned by your Company. The balance of consolidated earnings in the amount of $1,376,600 for the preferred stock of your Company, as reported on Page 12, is the net result of combining the deficits and balances set forth above, after adjusting for holding company expenses, inter-company items and minority interest, and failed by $946,900 to cover its preferred dividend requirements.

Engineers' Exhibit No. 37-A (Cont'd)

Engineers Public Service Company, the Parent Company, however, (whose income was derived principally from dividends of companies in the above group, which showed balances for common stock) had income of $2,354,000 in 1933 compared with $4,119,000 in the previous year. The balance available for preferred dividends was $2,141,800, which was $181,700 less than the total preferred dividend requirements. Consistent with this showing, no dividends were paid on the preferred stocks of your Company after July 1, 1933.

Bank debt of the Parent Company was reduced from $1,700,000 to $800,000; and total notes payable, including those of the Parent Company, decreased from $6,470,000 to $3,298,000. The reduction in these notes was made possible to a large extent by the sale of $1,050,000 face value of bonds of Louisiana Steam Generating Corporation and by the deferring of preferred dividends.

Reserves and Surplus

The combined reserves and surplus of the Company and its constituent companies on December 31, 1933, excluding from surplus cumulative preferred dividends not declared, amounted to 88.1% of the annual gross earnings or 12.3% of the book values of the properties. During 1933, 16.3% of the gross earnings was expended for maintenance or set aside for retirements.

Carrying the record back as far as figures are available on each of the companies of the Engineers group, for a period averaging about 29 years, a total of 9.1% of the entire gross earnings has been expended for maintenance and, in addition, during the same period, a total of 9.9% of these gross earnings has been set aside for reserves or retained as surplus after allowance for cumulative preferred dividends not declared.

Engineers' Exhibit No. 37-A (Cont'd)

Monthly Reports

For the more complete information of stockholders the Parent Company statements have been included in the regular monthly financial reports since December, 1932. Copies of these monthly reports will be sent to any stockholder or other person requesting them.

El Paso Natural Gas Company

In 1931 your Company purchased $3,500,000 First Mortgage 6% Bonds of Western Gas Company, a subsidiary of El Paso Natural Gas Company, together with an option which, if exercised, would give control of the latter company. During 1933 these bonds, were exchanged for $3,313,600 of Second Mortgage 6% Bonds of Western Gas Company and $186,400 of 6% Debentures of El Paso Mortgage Corporation. This was done as part of an arrangement through which funds were obtained from the R. F. C. for the construction of a natural gas pipe line extension to Tucson and Phoenix, Arizona. The Second Mortgage Bonds of Western Gas Company are guaranteed by El Paso Natural Gas Company. The terms of the option to purchase the controlling interest in El Paso Natural Gas Company were changed to a more favorable basis in connection with the exchange of these bonds.

The extension to Tucson and Phoenix was completed early in January, 1934. Western Gas Company has contracted to sell gas to the distributing companies in these communities.

* * * * *

Pages 8-9:

Puget Sound Power & Light Company

Gross earnings for the year decreased 7%, but for the last six months decreased only 2%. Better conditions in the lumber industry and in foreign commerce were im-

portant factors in this relative improvement. During the last two years new taxes have been levied against the company amounting to more than $600,000 on an annual basis. These include City of Seattle occupational tax, $120,000; State occupational tax, $325,000, and Federal 3% tax on electricity, $200,000. The City of Seattle occupational tax is being contested in the Supreme Court of the United States.

The company paid off $1,924,000 of bonds maturing on June 1, 1933 and, in addition, reduced its bank debt from $2,850,000 to $1,960,000 during the year. This was made possible to a large extent by deferring cumulative preferred dividends in the amount of $2,134,000 for the year.

Two orders of the Department of Public Works of the State of Washington, to reduce certain rates, have been reversed by the courts. The Department recently instituted a state-wide investigation of all electric rates and is at present engaged in an examination of this company's accounts and records.

The Public Works Administration has approved two major hydroelectric projects in the State of Washington which may affect the business of this company. The Grand Coulee development, estimated to be completed in 1938 at a cost of $63,000,000 and to furnish 250,000 kilowatts of primary power, is situated on the Columbia River about 70 miles from this company's system at its nearest point and 160 miles from Seattle. The other project, the Bonneville development, is estimated to cost $21,000,000 for the original installation which will furnish 90,000 kilowatts of capacity. While this project is also on the Columbia River it affects more directly utilities serving the Portland, Oregon, area since it is located about 40 miles from that city.

Engineers' Exhibit No. 37-A (Cont'd)

Page 12

ENGINEERS PUBLIC SERVICE COMPANY AND CONSTITUENT COMPANIES

Comparative Consolidated Income Statement

	1933	Per Cent of Earnings	1932	Per Cent of Earnings	Increase
EARNINGS					
Light and Power	$31,611,798.65	75.6	$32,999,052.54	73.6	$1,387,253.89*
Transportation	5,852,539.70	14.0	6,869,901.11	15.3	1,017,361.41*
Gas	1,308,676.80	3.1	1,480,163.95	3.3	171,487.15*
Steam	1,660,209.86	4.0	1,890,896.69	4.2	230,686.83*
Ice	679,396.78	1.6	686,651.95	1.6	7,255.17*
Other	729,040.74	1.7	908,411.54	2.0	179,370.80*
Total Earnings	$41,841,662.53	100.0	$44,835,077.78	100.0	$2,993,415.25*
EXPENSES					
Operation	$16,816,635.33	40.2	$17,909,660.69	40.0	$1,093,025.36*
Maintenance	2,197,071.69	5.2	2,481,047.56	5.5	283,975.87*
Taxes—Incl. Federal income taxes of $489,578.01 (1932—$470,534.09)	4,315,142.31	10.3	3,971,424.83	8.8	343,717.48
Total Oper. Exp. and Taxes	$23,328,849.33	55.7	$24,362,133.08	54.3	$1,033,283.75*
Balance	$18,512,813.20	44.3	$20,472,944.70	45.7	$1,960,131.50*
Income from Other Sources ‡	509,700.62	1.2	1,348,841.04	3.0	839,140.42*
Balance	$19,022,513.82	45.5	$21,821,785.74	48.7	$2,799,271.92*
Interest and Amortization	8,649,901.99	20.7	8,685,650.54	19.4	35,748.55*
Balance	$10,372,611.83	24.8	$13,136,135.20	29.3	$2,763,523.37*
Reserve for Retirements	4,658,360.25	11.1	4,589,182.72	10.2	69,177.53
Balance	$ 5,714,251.58	13.7	$ 8,546,952.48	19.1	$2,832,700.90*
Dividends on Preferred Stock of Constituent Companies, Declared	2,122,402.10	5.1	3,669,330.96	8.2	1,546,928.86*
Balance	$ 3,591,849.48	8.6	$ 4,877,621.52	10.9	$1,285,772.04*
Dividends on Preferred Stock of Constituent Companies, Not Declared (Cumulative)	2,212,546.50**	5.3	665,475.00	1.5	1,547,071.50
Balance	$ 1,379,302.98	3.3	$ 4,212,146.52	9.4	$2,832,843.54*
Amount Applicable to Common Stock of Constituent Companies in Hands of Public	2,675.88		22,094.72	.1	19,418.84*
Balance for Dividends of Engineers Public Service Company	$ 1,376,627.10	3.3	$ 4,190,051.80	9.3	$2,813,424.70*
Dividends on Preferred Stock, Declared	1,161,774.83	2.8	2,323,549.29	5.1	1,161,774.46*
Balance	$ 214,852.27	.5	$ 1,866,502.51	4.2	$1,651,650.24*
Dividends on Preferred Stock, Not Declared (Cumulative)	1,161,763.00**	2.8			1,161,763.00
Balance for Common Stock	$ 946,910.73§	2.3§	$ 1,866,502.51	4.2	$2,813,413.24*

Comparative Consolidated Surplus Statement
(Minority Interest Excluded)

	1933	1932	Increase
Earned Surplus at Beginning of Year	$5,179,539.77	$5,292,091.16	$ 112,551.39*
Balance for Dividends of Engineers Public Service Company as above	1,376,627.10	4,190,051.80	2,813,424.70*
Total	$6,556,166.87	$9,482,142.96	$2,925,976.09*
Net Direct Charges			
Operating Items Applicable to Prior Years	443,651.40	260,636.28	183,015.12
Adjustment of Constituent Companies' Taxes for Prior Years	410,815.24	529,317.19	118,501.95*
Non-Operating Adjustments	250,231.85	43,247.73	206,984.12
Balance	$5,451,468.38	$8,648,941.76	$3,197,473.38*
Dividends Declared on Stocks of Engineers Public Service Company			
Preferred	1,161,774.83	2,323,549.29	1,161,774.46*
Common		1,145,852.70	1,145,852.70*
Earned Surplus at End of Year§§	$4,289,693.55	$5,179,539.77	$ 889,846.22*

* Decrease.

‡ Interest on funds for construction purposes of $90,444.30 (1932—$929,281.45) and income from miscellaneous investments.

** These amounts were earned except for $1,313,230.21 in the case of certain Constituent Companies and for $181,741.36 in the case of Engineers Public Service Company. Adjusting for minority interest and inter-company eliminations $1,304,278.38 of the former amount would be applicable to Engineers Public Service Company.

§ Deficit. This deficit adjusted for unearned preferred dividends of certain Constituent Companies, which are not a claim against either Engineers Public Service Company or its other Constituent Companies, would show a balance for the common stock of Engineers Public Service Company of $357,367.65.

§§ Before provision for cumulative dividends on Preferred Stock of Engineers Public Service Company not declared, $1,161,763.00 (1932—none). Excludes surplus of Constituent Companies accumulated prior to acquisition in the amount of $8,541,690.79.

Engineers' Exhibit No. 37-A (Cont'd)

Page 13:

ENGINEERS PUBLIC SERVICE COMPANY AND CONSTITUENT COMPANIES

Comparative Consolidated Balance Sheet

ASSETS	Dec. 31, 1933	Dec. 31, 1932	Increase
Plant and Property¶	$324,010,082.10	$326,116,384.54	$2,106,302.44*
Investments	13,177,163.04§	13,207,383.53	30,220.49*
Cash	5,844,380.50	5,344,389.43	499,991.07
Notes Receivable	824,525.30	666,058.06	158,467.24
Accounts Receivable	6,049,751.75	6,591,212.71	541,460.96*
Materials and Supplies	2,323,439.84	2,437,003.80	113,563.96*
Prepayments	300,612.01	263,754.20	36,857.81
Subscribers to Stock		2,593.61	2,593.61*
Sinking Funds	161,729.79	148,864.82	12,864.97
Special Deposits	313,598.17	234,712.07	78,886.10
Unamortized Debt Discount and Expense	7,833,709.14	8,330,544.75	496,835.61*
Unadjusted Debits	397,215.81	402,606.43	5,390.62*
	$361,236,207.45	$363,745,507.95	$2,509,300.50*
LIABILITIES			
Preferred Stock†	$ 41,075,434.00	$ 41,075,434.00	
Preferred Stock Scrip	696.50	696.50	
Common Stock‡	58,057,852.85	58,057,522.85	$ 330.00
Common Stock Scrip	5,342.50	5,672.50	330.00*
Constituent Companies			
Preferred Stock (1933—741,150 shares; 1932—741,163 shares) (Liquidation Value 1933—$74,469,597; 1932—$74,467,925)¶	69,621,866.39	69,620,590.79	1,275.60
Premium on Stock	49,519.00	49,519.00	
Stock Subscribed For		3,761.00	3,761.00*
Bonds**	146,239,000.00	148,800,800.00	2,561,800.00*
Coupon Notes††	2,919,500.00	2,919,500.00	
Notes Payable‡‡	3,298,329.48	6,470,181.42	3,171,851.94*
Accounts Payable	1,390,460.73	1,055,166.20	335,294.53
Customers' Deposits	795,742.46	805,483.57	9,741.11*
Dividends Declared		54,480.50	54,480.50*
Interest and Taxes Accrued	3,927,976.68	3,448,503.05	479,473.63
Sundry Liabilities	118,076.99	196,733.81	78,656.82*
Retirement Reserve	24,190,390.99	23,679,516.52	510,874.47
Contributions for Extensions	414,920.62	386,735.96	28,184.66
Operating Reserves	923,194.56	304,676.82	618,517.74
Unadjusted Credits	434,018.50	338,455.71	95,562.79
Cumulative Preferred Dividends (Constituent Cos.)	2,878,021.50	665,475.00	2,212,546.50
Minority Interest in Common Capital and Surplus of directly controlled companies (Earned Surplus $82,257.06; 1932—$103,149.89)	606,170.15	627,062.98	20,892.83*
Earned Surplus§§	4,289,693.55	5,179,539.77	889,846.22*
	$361,236,207.45	$363,745,507.95	$2,509,300.50*

Engineers' Exhibit No. 37-A (Cont'd)

* Decrease.

¶ Includes: $1,657,821.03 originating from an appraisal of the property of a subsidiary company of Virginia Electric and Power Company at date of merger, which was correspondingly credited to the Preferred Stock account.

§ Includes:

City of Seattle Municipal Street Railway 5% Bonds of 1919 (Pledged under the First and Refunding Mortgage of Puget Sound Power & Light Company)	$8,336,000.00
Mortgage Notes due 1935 (Pledged under First Mortgage of Pacific Coast Power Company)	200,000.00
6,870 shares Stone & Webster, Incorporated, Capital Stock (market value $45,513.75)	436,157.42
Western Gas Company, Second Mortgage 6% Bonds due 1936/38	3,313,600.00
El Paso Mortgage Corporation, 6% Debentures due 1936/38	186,400.00
Miscellaneous stocks, bonds and notes (no quoted value)	705,005.62

† Represented by: 158,080 shares $5 (Cumulative) Dividend Convertible Preferred; 196,932 shares $5.50 Cumulative Dividend Preferred and 75,000 shares $6 Cumulative Dividend Preferred, of no par value (entitled in liquidation to $110 per share if voluntary, otherwise $100 per share). Total Preferred Stock authorized 431,000 shares.

‡ Represented by: 1,909,802 shares (1932—1,909,769 shares), of no par value. Authorized 2,349,000 shares.

** Excludes:

$12,856,500 (1932—$11,068,000) bonds held in Sinking Funds, Escrow and Treasury, uncancelled.

3,670,000 (1932—$1,500,000) including $3,430,000 bonds pledged as security for a portion of notes payable to banks and $240,000 deposited as security for the performance of certain contractual obligations.

4,950,000 (1932—$5,000,000) principal amount of 5% bonds pledged as security, to the extent of $1,250 for each $1,000 principal amount, for $3,960,000 (1932—$4,000,000) principal amount of 5½% bonds, which are convertible into a like principal amount of the pledged bonds, plus $50 cash per $1,000 principal amount of bonds so converted.

Includes: $9,986,000 Virginia Railway and Power Company 5% Bonds due July 1, 1934.

†† Excludes: $80,500 (1932—$80,500) coupon notes held in Treasury, uncancelled.

‡‡ Includes: $2,760,000 (1932—$2,900,000) notes secured by pledge of stock and/or bonds of Constituent Companies.

§§ Before provision for cumulative dividends on Preferred Stock of Engineers Public Service Company not declared, $1,161,763.00 (1932—none).

Excludes surplus of Constituent Companies accumulated prior to acquisition in the amount of $8,541,690.79.

There are also contingent liabilities of certain Constituent Companies for possible claims for additional Federal income taxes for the years 1930 to date, in excess of claims for refunds which have been filed, but not finally settled; as surety on a bond of Richmond Bridge Corporation for an amount not exceeding $400,000 to the Trustee under the Virginia Electric and Power Company's mortgages of July 1, 1909 and October 1, 1925, to complete the reconstruction or improvements of three viaducts transferred to the Richmond Bridge Corporation in May, 1933; and for possible assessment, not exceeding $20,000, on national bank stock owned by Gulf States Utilities Company.

Page 16: *Engineers' Exhibit No. 37-A* (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY

Comparative Income Statement

	1933	1932	Increase
EARNINGS			
Revenue from Constituent Companies			
Dividends	$2,070,843.25	$3,497,781.20	$1,426,937.95*
Interest	281,891.69	617,552.43	335,660.74*
Miscellaneous Revenue	1,442.70	3,675.04	2,232.34*
Total Earnings	$2,354,177.64	$4,119,008.67	$1,764,831.03*
EXPENSES			
Operating Expenses	$ 94,384.30	$ 82,707.48	$ 11,676.82
Taxes—Incl. Federal income taxes of $56,651.00 (1932—$52,391.88)	64,469.42	65,445.14	975.72*
Total Oper. Exp. and Taxes	$ 158,853.72	$ 148,152.62	$ 10,701.10
Balance	$2,195,323.92	$3,970,856.05	$1,775,532.13*
Interest	53,527.45	171,722.22	118,194.77*
Balance for Dividends	$2,141,796.47	$3,799,133.83	$1,657,337.36*
Dividend on Preferred Stock, Declared	1,161,774.83	2,323,549.29	1,161,774.46*
Balance	$ 980,021.64	$1,475,584.54	$ 495,562.90*
Dividends on Preferred Stock, Not Declared (Cumulative)	1,161,763.00		1,161,763.00
Balance for Common Stock	*$ 181,741.36*§	$1,475,584.54	$1,657,325.90*

Comparative Surplus Statement

	1933	1932	Increase
Earned Surplus at Beginning of Year	$3,253,419.89	$2,923,688.05	$ 329,731.84
Balance for Dividends as above	2,141,796.47	3,799,133.83	1,657,337.36*
Total	$5,395,216.36	$6,722,821.88	$1,327,605.52*
Dividends Declared			
Preferred	1,161,774.83	2,323,549.29	1,161,774.46*
Common		1,145,852.70	1,145,852.70*
Earned Surplus at End of Year§§	$4,233,441.53	$3,253,419.89	$ 980,021.64

Comparative Balance Sheet

	1933	1932	Increase
ASSETS			
Investments in Constituent Companies	$ 94,170,663.70	$ 95,116,675.96	$ 946,012.26*
Cash	219,106.47	262,701.58	43,595.11*
Notes Receivable (Constituent Companies)	9,805,000.00	8,630,000.00	1,175,000.00
Interest and Dividends Receivable (Constituent Companies)	16,124.00	128,840.50	112,716.50*
Unadjusted Debits	33,110.66	33,110.66	
	$104,244,004.83	$104,171,328.70	$ 72,676.13
LIABILITIES			
Preferred Stock†	$ 41,075,434.00	$ 41,075,434.00	
Preferred Stock Scrip	696.50	696.50	
Common Stock‡	58,057,852.85	58,057,522.85	$ 330.00
Common Stock Scrip	5,342.50	5,672.50	330.00*
Notes Payable‡‡	800,000.00	1,700,000.00	900,000.00*
Accounts Payable	2,149.88	2,884.13	734.25*
Interest and Taxes Accrued	69,087.57	75,698.83	6,611.26*
Earned Surplus§§	4,233,441.53	3,253,419.89	980,021.64
	$104,244,004.83	$104,171,328.70	$ 72,676.13

Contingent Liability:

This Company has agreed to furnish funds sufficient to meet any deficiency in payments of sinking fund, interest, principal and/or other mortgage requirements for $2,961,000 principal amount of First Mortgage 6% Bonds due 1939 of Louisiana Steam Generating Corporation, a Constituent Company.

* Decrease.

§ Deficit.

† Represented by: 158,080 shares $5 (Cumulative) Dividend Convertible Preferred; 196,932 shares $5.50 Cumulative Dividend Preferred and 75,000 shares $6 Cumulative Dividend Preferred, all of no par value (entitled in liquidation to $110 per share if voluntary, otherwise $100 per share). Total Preferred Stock authorized 431,000 shares

‡ Represented by: 1,909,802 shares (1932—1,909,769 shares), of no par value. Authorized 2,349,000 shares.

‡‡ Notes payable to banks secured by pledge of stock of a Constituent Company.

§§ Before provision for cumulative dividends on Preferred Stock not declared, $1,161,763.00 (1932—none).

Engineers' Exhibit No. 37-B.

Page 4:

Excerpts from Annual Report of Engineers Public Service Company for the Year 1935

ENGINEERS PUBLIC SERVICE COMPANY

DIRECTORS

HOMER L. FERGUSON
ANDREW FLETCHER
PHILIP A. S. FRANKLIN
CHARLES W. KELLOGG
GEORGE O. MUHLFELD
ARTHUR W. PAGE
CHARLES A. STONE
WHITNEY STONE
SAMUEL B. TUELL
WALTER B. WALKER
EDWIN S. WEBSTER
ROBERT WINTHROP
WILLIAM E. WOOD

EXECUTIVE COMMITTEE

ANDREW FLETCHER
PHILIP A. S. FRANKLIN
GEORGE O. MUHLFELD
ARTHUR W. PAGE
CHARLES A. STONE

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
Chairman of the Board

SAMUEL B. TUELL
President

WILLIAM E. WOOD
Executive Vice President

THOMAS J. HANLON, JR.
Vice President

ALAN W. HASTINGS
Vice President

JASON C. LEIGHTON
Treasurer

WILLIAM T. CRAWFORD
Secretary

Engineers' Exhibit No. 37-B (Cont'd)

Pages 5-6:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,
March 18, 1935.

Combined Earnings

The combined earnings statement of Engineers Public Service Company and its subsidiary companies for 1934, appearing on Page 14, shows an increase in gross earnings of subsidiaries of $1,952,477 or 4.7% over 1933, the first increase in annual gross earnings since 1930. However, this gain was more than offset by increases in operating expenses and taxes. These increases in expenses and taxes were due to causes most of which were mentioned in the 1933 Annual Report, namely, higher prices of fuel and other materials, increased labor costs and increased taxation of various kinds. The increase in taxes alone, amounting to $1,053,229, absorbed more than half the increase in gross earnings. The combined balance after operating expenses and taxes decreased $526,966 or 2.8%.

The conventional consolidated statement, such as the Company has heretofore issued, furnished a convenient and informative summary of system earnings during normal periods. Under present conditions, however, when certain subsidiaries are failing by substantial amounts to earn their cumulative preferred dividend requirements, this conventional statement in some respects fails to present a clear picture of the earnings of the system. The amount by which an individual subsidiary does not earn its cumulative preferred dividend requirements, which deficiency is deducted in the conventional consolidated statement, is not a claim against the earnings of other subsidiaries or against the holding company, although it constitutes a claim against the subsidiary in arrears to the extent that it must be satisfied before such subsidiary can pay any common dividend.

Engineers' Exhibit No. 37-B (Cont'd)

The Company has heretofore called this condition to the attention of stockholders by comment in the Annual Report and by notes in the monthly reports, but in order further to clarify the situation, certain changes have been made in the consolidated statement on Page 14 and a second compilation of earnings figures is also presented on Page 16, which, by showing additional details, should be helpful to stockholders in appraising the earnings position of the Company.

It will be noted on Page 16 that two subsidiaries had deficiencies, totaling $1,384,523, for their common stocks owned by the Parent Company on account of failure fully to cover their cumulative preferred dividend requirements, which total deficiency is not a claim against the Parent Company or the other subsidiaries. The combined balances for common stocks owned by the Company of all other subsidiaries totaled $2,493,184. These 1934 totals compare with total deficiencies of $1,301,394 and total balances of $2,728,193 for 1933. In a sense Engineers Public Service Company, as the owner of the common stocks of the two subsidiaries which had such deficiencies, suffers a loss on its investment therein equal to the sum of such deficiencies. The question whether such a loss should be shown as a deduction before arriving at the consolidated balance of the Company and its subsidiaries carried to Surplus for the year is one on which judgments might differ. Since, however, the loss occurred during the year and results from a definite known cause, the Company's auditors have advised, and there has been made, an allowance for such unearned preferred dividends in arriving at the balance for the year carried to Surplus which balance amounted to $1,111,859 for 1934 as compared with $1,376,627 for 1933. Thus the Earned Surplus as reported on the Consolidated Balance Sheet reflects the deduction of these deficiencies.

If allowance for the deficiencies resulting from unearned preferred dividends had not been made in the 1934 income statement, a balance of $2,496,261 applicable to

Engineers' Exhibit No. 37-B (Cont'd)

Engineers Public Service Company for the year would have been shown instead of the balance above stated. The balance for 1933 on the same basis would be $2,677,941.

Three subsidiaries failed to pay cumulative preferred dividends in 1934 totaling $2,188,348 on shares held by the public. The total accumulated and unpaid preferred dividends of all subsidiaries at the end of the year amounted to $5,011,931. Notes Payable of subsidiaries were reduced from $2,498,329 to $853,754, largely by this deferring of preferred dividends.

Preferred Dividends

No dividends have been declared or paid on the preferred stocks of Engineers Public Service Company since July 1, 1933. Resumption of preferred dividend payments depends on many considerations. The Company has, during the year, retired all its own bank debt. However, increasing labor, fuel and material costs, increasing taxes, the existing antagonistic attitude of the Federal administration towards utilities, and the proposed Federal legislation to eliminate holding companies and stringently regulate operating companies, all suggest a cautious policy with respect to preferred dividends. At January 1, 1935 six quarterly cumulative preferred dividend payments had been deferred, representing a total accumulated unpaid amount of $3,485,289.

Legislation

There has already been mailed to you a short letter calling your attention to the serious effect on the Company and on its subsidiaries of the proposed Public Utilities Act of 1935 now before Congress if it is enacted in its original proposed form.

The Engineers Company holds no brief for any abuses in the utility industry, but it earnestly urges that proper regulation and not destruction is the fair and reasonable

Engineers' Exhibit No. 37-B (Cont'd)

course to pursue with respect to holding companies and that there is no justification for the drastic proposals contained in the original draft of the Act, which proposes to eliminate holding companies such as Engineers Public Service Company and to oppress operating companies.

* * * * *

Pages 7-9:

Retirement Reserve

The subsidiaries of Engineers Public Service Company, in general, follow a policy of providing for retirement of property through the retirement reserve method. This method does not provide for so-called depreciation by setting aside each year some fixed percentage of the value of depreciable property, but seeks to provide for retirements as they seem likely to occur. The useful life of well-maintained electric or gas property is indefinite and can not be accurately estimated because retirements usually are rendered expedient by development of the business or obsolescence rather than by wear. The flexibility of the retirement reserve method is a distinct advantage because in good years, when the growth of the business or some other factor is apt to accelerate retirements, it enables the setting aside of larger appropriations than in poor years. We believe this method is sound and its application to the subsidiaries of Engineers Public Service Company has been founded upon judgment based on intimate knowledge of the properties. The retirement reserve method of accounting is authorized by the Uniform Classification of Accounts prescribed by those public service commissions under whose jurisdictions the major subsidiaries operate. Officials of the Bureau of Internal Revenue, for income tax purposes, use a different method known as the straight-line method of determining depreciation which is based on an assumed life of the property or of its component parts, and in filing

income tax returns the subsidiaries have conformed to this method. This results in the Federal income tax returns of the subsidiaries showing as deductions for depreciation sums which vary considerably from their appropriations to Retirement Reserve. It is estimated that the subsidiaries will claim in their 1934 Federal income tax returns as deductions for depreciation a total of approximately $7,700,000, while the appropriations from earnings to Retirement Reserve for that year totaled $4,805,711. Similarly, the total of the depreciation reserves accumulated on the straight-line basis used for income tax purposes would now substantially exceed the total of the companies' reserves based on the retirement reserve method.

It should be remembered that maintenance is designed to keep up original operating efficiency. It is an entirely separate account from the Retirement Reserve, which through its credits and charges provides for the discarding of property from service.

During a period averaging about 30 years, for which records are available, the companies in the Engineers group have expended for maintenance a total of 8.9% of the entire gross earnings for the period, and in addition have set aside for Retirement Reserve or retained as Surplus, after allowance for preferred dividends not declared, a total of 9.6% of these gross earnings.

Service Arrangements with Affiliated Companies

Over 91.5% of the common stock of Engineers Public Service Company (Delaware) is owned by Stone & Webster, Incorporated. The Engineers Company and its subsidiaries have certain service arrangements with Stone & Webster, Incorporated and with several of that company's subsidiaries, which arrangements are reviewed hereinafter.

Engineers Public Service Company, Inc., a mutual service organization wholly owned by the operating subsidiary companies of Engineers Public Service Company, provides

Engineers' Exhibit No. 37-B (Cont'd)

to these subsidiaries the economies of group operation with respect to certain facilities and services, which, through centralized handling, offer savings in expense and more effective service. These services are furnished on a non-profit basis. Certain of them are obtained from Stone & Webster, Incorporated and several of its subsidiaries on a non-profit basis. The cost of all services to operating subsidiaries is allocated proportionately among them. In 1934, the aggregate of these charges was $279,449 (1933—$269,296). The mutual service organization also furnishes certain services to Engineers Public Service Company. Charges for these services are based on cost, and in 1934 amounted to $58,000 (1933—$60,000). A more complete statement in regard to these arrangements and a detail of costs and charges, together with an Income Statement and a Balance Sheet of the mutual service organization, appears on Pages 24 and 25.

Each of the principal operating subsidiaries has a so-called term contract with Stone & Webster Engineering Corporation covering consulting engineering and construction service, under which, if it elects to use such service, it pays the Engineering Corporation for consulting engineering on an approximate cost basis, namely, at two-thirds of the per diem rates regularly charged by this Corporation and for construction service on a percentage fee basis which, by reason of the contract, is slightly lower than the regular fee schedule of the Engineering Corporation. In 1934, the total paid under these contracts amounted to $55,190 (1933—$23,650).

In addition to employing a New York transfer agent, the Company employs Stone & Webster Service Corporation as transfer agent in Boston. To the Service Corporation, the Company pays for transfer service, fees in substantial conformity with the customary charges made for similar services by other Boston transfer agents. In 1934, the Company paid to the Service Corporation for this transfer work and related services $8,483 (1933—$10,282). A num-

Engineers' Exhibit No. 37-B (Cont'd)

ber of the subsidiaries also employ the Service Corporation in this same capacity and the total paid for these services by these subsidiaries in 1934 was $24,059 (1933—$28,103).

Lybrand, Ross Bros. & Montgomery examined the accounts of the Company and of its subsidiaries; their report thereon appears on Page 12. In addition, each of the operating subsidiaries (except Puget Sound Power & Light Company and its subsidiaries, which maintain their own facilities for this purpose) employs Stone & Webster Service Corporation to make examinations of the methods and details of accounting practice as well as of the efficiency of the accounting personnel. There are no formal contracts covering these arrangements with the Service Corporation and this work is done substantially at cost. In 1934, the total paid by the subsidiaries to the Service Corporation for this service amounted to $14,645 (1933—$37,560).

Practically all the securities sold by the Company or by its subsidiaries since they have had this status, have been sold through investment banking groups, which included, in each case, Stone & Webster and Blodget, Inc. or its predecessors.

Page 10:

Puget Sound Power & Light Company

Gross earnings for the year increased $624,780 or 5%, this being the first increase for any year since 1930. While business conditions in the area served by this company continued at subnormal levels, there was an improvement over the previous year. The improvement in gross earnings was more than offset by increases in expenses and taxes. The largest factor contributing to the increase in expenses was the general rate investigation instituted by the State Commission, the cost of which recent legislation places on the company. Costs of preparation of inventor information for the commission and the cost of work done

Engineers' Exhibit No. 37-B (Cont'd)

in preparing a defense against rate cases amounted to $450,000 in 1934, an increase of $340,000 over 1933. Taxes increased $501,215 or 35.9% and now represent 14.3% of total gross earnings. This increase reflects the operation of the Federal 3% tax and the Washington occupational tax over the full year's period.

Because of the financial condition of this company, the deferment of all dividends has been continued, enabling the company to reduce its bank debt from $1,960,000 to $750,000 during the year and this debt has since been completely discharged. On January 1, 1935, the company paid at maturity $169,000 of Twin City Light and Traction Company bonds. On November 1, 1935, $1,167,000 of Whatcom County Railway & Light Company bonds, an underlying issue assumed by the Puget Sound company, will mature, but thereafter the company will have no important maturity until March 1, 1939.

Load building on the existing distribution system is essential to meet rising costs and the company has launched an aggressive sales campaign for 1935, including a long-term monthly payment plan to promote the sale of major appliances. The construction of two Federal hydroelectric plants on the Columbia River was discussed in the 1933 Annual Report. While the construction of these plants has proceeded according to schedule, no agency has as yet been created to handle the distribution of the power to be produced. An amendment to the State constitution providing for the entry of the State into the power business has been passed by the State legislature and will be voted on in the 1936 general election.

Engineers' Exhibit No. 37-B (Cont'd)

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ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)
(Parent Company Only)

Comparative Income Statement

GROSS EARNINGS	1934	1933	Increase
Revenue from Subsidiary Companies			
Interest—Income Notes	$ 207,000.00	$ 209,700.00	$ 2,700.00*
Interest—Time Notes	71,041.71	69,958.35	1,083.36
Interest—Bonds	—0—	2,233.34	2,233.34*
Dividends—Preferred	94,171.25	82,506.50	11,664.75
Dividends—Common	887,077.50	1,988,336.75	1,101,259.25*
Miscellaneous Revenue	1,321.87	1,442.70	120.83*
Total Gross Earnings	$1,260,612.33	$2,354,177.64	$1,093,565.31*
OPERATING EXPENSES AND TAXES			
Operating Expenses	$ 81,031.79	$ 94,384.30	$ 13,352.51*
Taxes—Incl. Federal income taxes of $33,878.06 (1933—$56,651.00)	48,507.94	64,469.42	15,961.48*
Total Oper. Exp. and Taxes	$ 129,539.73	$ 158,853.72	$ 29,313.99*
Balance	$1,131,072.60	$2,195,323.92	$1,064,251.32*
Interest	27,930.43	53,527.45	25,597.02*
Balance for Dividends and Surplus	$1,103,142.17	$2,141,796.47	$1,038,654.30*
Preferred Dividend Requirements	$2,323,526.00	$2,323,526.00	$ —0—

Comparative Surplus Statement

	1934	1933	Increase
Earned Surplus at Beginning of Year	$4,233,441.53	$3,253,419.89	$ 980,021.64
Balance for Dividends and Surplus, as above	1,103,142.17	2,141,796.47	1,038,654.30*
Total	$5,336,583.70	$5,395,216.36	$ 58,632.66*
Net Direct Charges	$ 33,110.66	$ —0—	$ 33,110.66
Preferred Dividends Declared	—0—	1,161,774.83	1,161,774.83*
Earned Surplus at End of Year	$5,303,473.04	$4,233,441.53	$1,070,031.51

Comparative Balance Sheet

ASSETS	Dec. 31, 1934	Dec. 31, 1933	Increase
Investments in Subsidiary Companies (a)	$ 94,167,203.35	$ 94,170,663.70	$ 3,460.35*
Notes Receivable (Subsidiary Companies)			
Income Notes	8,655,000.00	8,655,000.00	—0—
Time Notes	1,175,000.00	1,150,000.00	25,000.00
Cash in Banks	718,223.99	219,106.47	499,117.52
Dividends Receivable (Subsidiary Companies)	22,045.75	16,124.00	5,921.75
Unadjusted Debits	13.00	33,110.66	33,097.66*
	$104,737,486.09	$104,244,004.83	$ 493,481.26

Engineers' Exhibit No. 37-B (Cont'd)

LIABILITIES	Dec. 31, 1934	Dec. 31, 1933	Increase
Preferred Stock (b)	$ 41,075,434.00	$ 41,075,434.00	$ —0—
Preferred Stock Scrip (Expires Apr. 1, 1935)	696.50	696.50	—0—
Common Stock (c)	58,058,002.85	58,057,852.85	150.00
Common Stock Scrip (Expires Apr. 1, 1935)	5,192.50	5,342.50	150.00*
Notes Payable	—0—	800,000.00	800,000.00*
Accounts Payable	3,364.40	2,149.88	1,214.52
Taxes Accrued	34,208.85	69,087.57	34,878.72*
Unadjusted Credits	257,113.95	—0—	257,113.95
Earned Surplus (d)	5,303,473.04	4,233,441.53	1,070,031.51
	$104,737,486.09	$104,244,004.83	$ 493,481.26

Contingent Liabilities:

Agreement to furnish funds suffient to meet any deficiency in payments of sinking fund, interest, principal and/or other mortgage requirements for $2,732,000 principal amount of First Mortgage 6% Bonds due 1939 of Louisiana Steam Generating Corporation, a Subsidiary Company, and for possible claims for additional Federal income taxes for the years 1932 to date.

* Decrease.

(a) Investments in Subsidiary Companies are carried at an amount representing the stated value of securities of the Parent Company issued, and cash paid, to acquire stocks of Subsidiaries and an amount of $5,263,498 arising from revaluation.

(b) Represented by: 158,080 shares $5 (Cumulative) Dividend Convertible Preferred, 196,932 shares $5.50 Cumulative Dividend Preferred and 75,000 shares $6 Cumulative Dividend Preferred, of no par value (entitled in liquidation to $110 per share if voluntary, otherwise $100 per share). Total Preferred Stock authorized 431,000 shares.

(c) Represented by: 1,909,817 shares (1933—1,909,802 shares) of no par value. Authorized 2,349,000 shares.

(d) Before provision for cumulative dividends not declared, including those normally payable on:

	Jan 1, 1935	Jan. 1, 1934
$5 (Cumulative) Dividend Convertible Preferred, $7.50 (1933—$2.50) per share	$1,185,600.00	$ 395,200.00
$5.50 Cumulative Dividend Preferred, $8.25 (1933—$2.75) per share	1,624,689.00	541,563.00
$6 Cumulative Dividend Preferred, $9.00 (1933—$3.00) per share	675,000.00	225,000.00
	$3,485,289.00	$1,161,763.00

NOTE: There are outstanding Common Stock Purchase Warrants, which were originally issued attached to certificates for the $5.50 Cumulative Dividend Preferred Stock, to purchase 196,932 shares of Common Stock at $68 per share on or before November 1, 1938.

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Combined Income Statement of Subsidiary Companies

(Inter-company Items Eliminated)

	1934	Per Cent of Earnings	1933	Per Cent of Earnings	Increase
GROSS EARNINGS					
Electric Department (a)	$33,040,651.64	75.6	$31,611,798.65	75.8	$1,428,852.99
Transportation Department (a)	6,422,584.93	14.7	5,852,539.70	14.0	570,045.23
Gas Department (a)	1,356,620.08	3.1	1,308,676.80	3.1	47,943.28
Steam Department	1,557,831.51	3.6	1,660,209.86	4.0	102,378.35*
Ice Department	781,090.01	1.8	679,396.78	1.6	101,693.23
Other	528,918.90	1.2	622,598.04	1.5	93,679.14*
Total Gross Earnings	$43,687,697.07	100.0	$41,735,219.83	100.0	$1,952,477.24
OPERATING EXPENSES AND TAXES					
Operation	$17,885,166.21	41.0	$16,722,251.03	40.1	$1,162,915.18
Maintenance	2,460,370.96	5.6	2,197,071.69	5.2	263,299.27
Taxes—Incl. Federal income taxes of $522,804.13 (1933—$432,927.01) (a)	5,303,901.45	12.1	4,250,672.89	10.2	1,053,228.56
Total Oper. Exp. and Taxes	$25,649,438.62	58.7	$23,169,995.61	55.5	$2,479,443.01
Balance	$18,038,258.45	41.3	$18,565,224.22	44.5	$ 526,965.77*
Income from Other Sources (b)	731,800.00	1.7	614,700.62	1.5	117,099.38
Balance	$18,770,058.45	43.0	$19,179,924.84	46.0	$ 409,866.39*
Interest and Current Amortization of Debt Discount and Expense	8,429,529.14	19.3	8,668,566.23	20.8	239,037.09*
Balance	$10,340,529.31	23.7	$10,511,358.61	25.2	$ 170,829.30*
Appropriations for Retirement Reserve (c)	4,805,711.46	11.0	4,658,360.25	11.2	147,351.21
Balance	$ 5,534,817.85	12.7	$ 5,852,998.36	14.0	$ 318,180.51*
Dividends on Preferred Stocks, Declared	2,234,861.88		2,265,335.60		30,473.72*
Balance	$ 3,299,955.97		$ 3,587,662.76		$ 287,706.79*
Cumulative Preferred Dividends Earned But Not Declared	794,528.09		847,899.21		53,371.12*
Balance	$ 2,505,427.88		$ 2,739,763.55		$ 234,335.67*
Amount Applicable to Minority Interests	12,243.56		11,570.71		672.85
Balance Applicable to Engineers Public Service Company, Before Allowing for Unearned Cumulative Preferred Dividends of Certain Subsidiary Companies	$ 2,493,184.32		$ 2,728,192.84		$ 235,008.52*
Cumulative Preferred Dividends of Certain Subsidiary Companies, Not Earned	$ 1,393,941.91		$ 1,310,289.29		$ 83,652.62

Comparative Income Statement of Engineers Public Service Company Including Undistributed Earnings of Subsidiary Companies Applicable to Engineers Public Service Company

	1934	1933	Increase
Balance of Earnings Applicable to Engineers Public Service Company, as above	$2,493,184.32	$2,728,192.84	$ 235,008.52*
Earnings from Subsidiary Companies, deducted above			
Interest	71,041.71	72,191.69	1,149.98*
Preferred Dividends, Declared	88,183.00	88,494.75	311.75*
Miscellaneous Revenue	1,321.87	1,442.70	120.83*
Total	$2,653,730.90	$2,890,321.98	$ 236,591.08*
Expenses, Taxes and Interest	157,470.16	212,381.17	54,911.01*
Balance of Earnings of Parent and Subsidiary Companies Applicable to Engineers Public Service Company Stocks, Before Allowing for Loss, as below	$2,496,260.74	$2,677,940.81	$ 181,680.07*
Allowing for Loss in Investment in Common Stocks of Subsidiary Companies, Measured by Cumulative Dividends on Preferred Stocks of Such Companies Not Earned Within the Year, Less Minority Interests and Inter-company Eliminations. Such Amounts Are Not a Claim Against Engineers Public Service Company or Its Other Subsidiary Companies	1,384,401.50	1,301,313.71	83,087.79
Balance Applicable to Stocks of Engineers Public Service Company, After Allowing for Loss, as above	$1,111,859.24	$1,376,627.10	$ 264,767.86*
Preferred Dividend Requirements of Engineers Public Service Company	$2,323,526.00	$2,323,526.00	$ —0—

Comparative Consolidated Surplus Statement
(Minority Interests Excluded)

	1934	1933	Increase
Earned Surplus at Beginning of Year	$4,289,693.55	$5,179,539.77	$ 889,846.22*
Balance, as above	1,111,859.24	1,376,627.10	264,767.86*
Total	$5,401,552.79	$6,556,166.87	$1,154,614.08*
Net Direct Credits	126,612.98	1,104,698.49(d)	1,231,311.47
Balance	$5,528,165.77	$5,451,468.38	$ 76,697.39
Dividends Declared on Preferred Stock of Engineers Public Service Company	—0—	1,161,774.83	1,161,774.83*
Earned Surplus at End of Year(e)	$5,528,165.77	$4,289,693.55	$1,238,472.22

* Decrease.

(a) See page 17 for detail.

(b) Income from miscellaneous investments.

(c) These amounts have been appropriated to provide a reserve (see Retirement Reserve account in Balance Sheet) against which property retirements will be charged as they occur. The amounts so appropriated are less than the depreciation deductions claimed or to be claimed on Federal income tax returns which are based on a straight-line method and the resulting reserve is less than a Depreciation Reserve would be if based on such straight-line method.

(d) Charges.

(e) Excludes surplus of Subsidiary Companies accumulated prior to acquisition in the amount of $8,141,540.21.

Engineers' Exhibit No. 37-B (Cont'd)

Page 15:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

	Dec. 31, 1934	Dec. 31, 1933	Increase
ASSETS			
Plant and Property (a)	$319,533,380.85	$324,004,795.74	$4,471,414.89*
Investments, at cost or written-down amounts	13,006,665.60 (b)	13,177,163.04	170,497.44*
Cash in banks and on hand	6,661,697.52	5,844,380.50	817,317.02
Notes and Warrants Receivable	628,472.57	824,525.30	196,052.73*
Accounts Receivable	5,781,377.04	5,832,989.67	51,612.63*
Interest Receivable	304,675.02	214,712.10	89,962.92
Materials and Supplies	2,436,501.73	2,271,963.58	164,538.15
Appliances on Rental	250,117.71	53,526.24	196,591.47
Prepayments of insurance, taxes, etc.	312,033.06	300,612.01	11,421.05
Sinking Funds, representing cash held by bond trustees	177,650.14	161,729.79	15,920.35
Special Deposits, including mortgage notes of approximately $200,000 guaranteed by a Subsidiary Company, and $225,000 of that company's bonds	567,833.93	537,598.17	30,235.76
Unamortized Debt Discount and Expense	8,192,702.55	7,833,709.14	358,993.41
Unadjusted Debits	138,551.00	397,215.81	258,664.81*
	$357,991,658.72	$361,454,921.09	$3,463,262.37*
LIABILITIES			
Preferred Stock (c)	$ 41,075,434.00	$ 41,075,434.00	$ —0—
Preferred Stock Scrip (Expires Apr. 1, 1935)	696.50	696.50	—0—
Common Stock (d)	58,058,002.85	58,057,852.85	150.00
Common Stock Scrip (Expires Apr. 1, 1935)	5,192.50	5,342.50	150.00*
Subsidiary Companies:			
Preferred Stock (Represented by 741,150 shares; entitled in involuntary liquidation to $74,469,622) (e)	69,621,938.29	69,621,866.39	71.90
Premium on Stocks	49,519.00	49,519.00	—0—
Bonds (f)	144,580,900.00	146,463,000.00	1,882,100.00*
Coupon Notes (g)	2,919,500.00	2,919,500.00	—0—
Notes Payable			
Banks	800,000.00 (h)	2,910,000.00	2,110,000.00*
Others	53,754.30	388,329.48	334,575.18*
Accounts Payable	1,494,394.70	1,390,460.73	103,933.97
Customers' Deposits	826,116.57	795,742.46	30,374.11
Dividends Declared	54,438.75	54,438.75	—0—
Interest and Taxes Accrued	3,686,843.89	3,927,976.68	241,132.79*
Sundry Liabilities	173,083.25	118,076.99	55,006.26
Retirement Reserve, representing provision for future property retirements (i)	21,928,494.50	24,290,236.76	2,361,742.26*
Contributions for Extensions	18,148.98	414,920.62	396,771.64*
Operating Reserves, including provision for losses on doubtful notes and accounts, injury and damage claims, etc.	1,074,215.95	823,348.79	250,867.16
Unadjusted Credits	424,643.23	434,018.50	9,375.27*
Cumulative Preferred Dividends (Subsidiary Cos.)	5,011,931.00	2,823,582.75	2,188,348.25
Minority Interests in Common Capital Stocks and Surplus of directly controlled companies (Earned Surplus $82,853.53; 1933—$76,970.70)	606,244.69	600,883.79	5,360.90
Earned Surplus	5,528,165.77 (j)	4,289,693.55	1,238,472.22
	$357,991,658.72	$361,454,921.09	$3,463,262.37*

Engineers' Exhibit No. 37-B (Cont'd)

Contingent Liabilities:

There are possible claims for additional Federal income taxes for the years 1927 to date, in excess of claims for refunds which have been filed, and suits and assessments pending (not provided for in the above balance sheet) on which the final recoveries, as estimated by counsel, will not materially affect the Companies' financial condition.

* Decrease.

(a) The consolidated plant and property account, as stated above, is based on (1) the stated value of securities issued and cash paid by Engineers Public Service Company for securities of its subsidiaries, (2) the par or stated value of securities of subsidiaries outstanding in the hands of the public at date of acquisition by Engineers Public Service Company of its interest in these subsidiaries, with proper adjustment for net assets (other than plant and property) of such subsidiaries at such date of acquisition and for minority capital stock interest in the preacquisition surplus of such subsidiaries, (3) the cost of additions to plant and property since the acquisition of such interest in subsidiaries, less abandonments or other property retirements, and (4) amounts aggregating $8,749,745 arising from revaluations since acquisition, less retirements applicable thereto.

(b) Includes: City of Seattle Municipal Street Railway 5% Bonds of 1919 (Pledged under the First and Refunding Mortgage of Puget Sound Power & Light Company) $8,336,000.00; Mortgage Notes due 1935 (Pledged under First Mortgage of Pacific Coast Power Company) $200,000.00; 6,870 shares Stone & Webster, Inc., Capital Stock (quoted market value $32,632.50) $436,157.42; Western Gas Company, Second Mortgage 6% Bonds due 1936/8, $3,313,600.00; El Paso Mortgage Corporation, 6% Debentures due 1936/8, $186,400.00; Miscellaneous stocks, bonds and notes (no quoted value), less reserve of $168,111.70, $534,508.18.

(c) Represented by: 158,080 shares $5 (Cumulative) Dividend Convertible Preferred, 196,932 shares $5.50 Cumulative Dividend Preferred and 75,000 shares $6 Cumulative Dividend Preferred, of no par value (entitled in liquidation to $110 per share if voluntary, otherwise $100 per share). Total Preferred Stock authorized 431,000 shares.

(d) Represented by: 1,909,817 shares (1933—1,909,802 shares) of no par value. Authorized 2,349,000 shares.

(e) Includes: $1,657,821 transferred from surplus, representing the increase in plant and property account originating from an appraisal made of the properties of a Subsidiary Company at date of merger.

(f) Excludes: $10,070,000 (1933—$12,632,500) bonds held in Sinking Funds and Treasury, uncancelled; $1,312,500 (1933—$3,670,000) treasury bonds pledged as security for a portion of notes payable to banks; $6,392,000 bonds reacquired and pledged as security under indentures securing bonds outstanding; $15,630,000 (1933—$4,950,000) mortgage bonds pledged as security, to the extent of $1,250 for each $1,000, for $12,504,000 (1933—$3,960,000) convertible bonds which are convertible into a like principal amount of the pledged bonds, plus $50 in cash per $1,000 of bonds so converted. Includes: $1,178,000 bonds due in 1935.

(g) Excludes: $80,500 (1933—$80,500) coupon notes held in Treasury, uncancelled.

(h) Payable by Subsidiaries, against $750,000 of which bonds of a Subsidiary Company are pledged.

(i) See note (c) on preceding page.

(j) Before provision for cumulative dividends on Preferred Stock of Engineers Public Service Company not declared, $3,485,289.00; Excludes surplus of Subsidiary Companies accumulated prior to acquisition in the amount of $8,141,540.21.

Note: Engineers Public Service Company has outstanding Common Stock Purchase Warrants, which were originally issued attached to certificates for the $5.50 Cumulative Dividend Preferred Stock, to purchase 196,932 shares of Common Stock at $68 per share on or before November 1, 1938. Virginia Electric and Power Company, a Subsidiary Company, has outstanding an issue of bonds due in 1944 which carry the right of conversion into common stock of said Virginia Electric and Power Company on a present basis of 100 shares of common stock for each $1,000 principal amount of bonds, or a total of 902,600 shares.

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Statement of Preferred Dividends and Balance for Common

12 Months Ending December 31, 1934

Note:—Deficits are indicated by *Italics*

Subsidiary Companies Which Have Earned Their Preferred Dividends:

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Not Declared	Balance for Common	Minority Interest	Balance Applicable to Common Owned by Parent Company 1934	1933
Baton Rouge Electric Co.	$ 129,063.05	$ 37,254.00		$ 91,809.05	$ 559.25	$ 91,249.80	$ 99,125.04
Eastern Texas Electric Co. & Sub. Cos.	1,056,892.76	579,624.06		477,268.70	*913.02*	478,181.72(c)	384,615.95(c)
El Paso Elec. Co. & Sub. Cos.	380,862.61	241,708.00		139,154.61	7,127.72	132,026.89	93,076.21
Engineers Securities Corp.	284,505.49	No Pref.		284,505.49		284,505.49	73,370.70
Louisiana Steam Generating Corp.	*62,678.62*	No Pref.		*62,678.62*		*62,678.62*	73,878.23
Ponce Electric Co.	28,372.37	25,550.00		2,822.37	71.91	2,750.46	60,415.23
Savannah Elec. and Pr. Co.	254,846.01	179,114.82	$ 30,000.00	45,731.19	78.21	45,652.98	79,481.11
Virginia Electric & Power Co. & Sub. Cos.	2,698,426.09	1,171,611.00		1,526,815.09	5,319.49	1,521,495.60	1,864,230.37
Total	$4,770,289.76	$2,234,861.88	$ 30,000.00	$2,505,427.88	$12,342.56	$2,493,184.32	$2,728,192.84

Subsidiary Companies Which Have Not Earned Their Preferred Dividends:

(The Deficits in Balance for Common are not a claim against either Engineers Public Service Company or its other subsidiary Companies)

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Not Declared	Deficiency for Common	Minority Interest	Deficiency Applicable to Common Owned by Parent Company 1934	1933
The Key West Electric Co.	$ 2,651.69		$ 24,500.00	*$ 21,848.31*		*$ 21,848.31*	*$ 14,506.43*
Puget Sound Power & Light Co. & Sub. Cos.	761,876.40		2,133,970.00	*1,372,093.60*	*$ 9,418.66*	*1,362,674.94*	*1,286,888.03*
Total	$ 764,528.09	—0—	$2,158,470.00	*$1,393,941.91*	*$ 9,418.66*	*$1,384,523.25*	*$1,301,394.46*
Balance for Dividends and Surplus, as above	$5,534,817.85						

ENGINEERS PUBLIC SERVICE COMPANY

Ten Year Summary of Operations of Subsidiary Companies

Gross Earnings

Year Ended Dec. 31	Baton Rouge Electric Co.	El Paso Electric Co. and Sub. Cos.	(a) Gulf States Utilities Co.	The Key West Electric Co.	Louisiana Steam Generating Corp.	Ponce Electric Co.	Puget Sound Power & Light Co. and Sub. Cos.	Savannah Electric and Power Co.	Virginia Electric and Power Co. and Sub. Cos.	(a) The Western Public Service Co. and Sub. Cos.	Total (b)
1925	$ 799,614	$2,552,617	$ 198,660	$267,857		$331,843	$12,842,275	$1,959,671	$12,162,252		$31,114,789
1926	960,479	2,836,915	2,065,638	287,356		334,926	13,533,748	2,233,704	14,378,199		36,630,965
1927	1,017,110	2,998,271	4,029,820	260,049		341,308	14,925,482	2,227,380	15,471,570		41,270,990
1928	1,111,802	3,195,134	4,490,813	251,331		339,834	15,141,396	2,231,955	16,244,501		43,006,766
1929	1,252,094	3,528,345	6,603,108	226,431		346,604	16,375,536	2,211,378	17,091,490	$1,372,298	49,007,284
1930	1,366,596	3,659,556	7,100,667	226,108	$1,142,242	387,514	17,056,347	2,184,645	17,150,297	2,399,473	52,673,445
1931	1,438,205	3,421,726	6,354,347	209,999	2,354,477	336,148	15,765,898	2,071,669	16,957,180	2,475,542	51,385,191
1932	1,444,117	2,754,165	5,311,236	186,093	2,217,889	329,203	13,549,978	1,896,536	15,428,448	2,058,813	45,176,478
1933	1,311,390	2,555,749	5,192,014	150,021	1,901,814	322,378	12,599,281	1,751,040	14,648,481	1,907,375	42,339,543
1934	1,417,095	2,680,948	5,642,982	152,258	1,829,274	329,052	13,224,060	1,772,391	15,147,330	2,010,563	44,205,953

Balance After Operating Expenses and Taxes

1925	$ 271,630	$ 908,911	$ 67,349	$102,429		$115,616	$ 4,940,144	$ 708,790	$ 5,131,013		$12,245,882
1926	362,878	1,069,424	820,118	102,255		97,324	5,792,795	831,023	5,693,777		14,769,594
1927	372,216	1,134,868	1,634,452	97,749		101,608	6,462,585	917,347	6,282,609		17,003,434
1928	412,760	1,289,565	2,075,407	101,674		141,317	6,859,192	993,997	7,052,932		18,926,844
1929	457,130	1,505,619	3,061,246	82,264		142,069	6,656,771	1,028,104	7,753,974	$ 506,695	21,193,872
1930	480,937	1,652,625	3,077,295	92,099	$ 340,375	157,722	7,700,766	1,003,033	7,660,131	878,092	23,043,075
1931	522,806	1,517,106	2,783,123	91,616	660,935	136,142	7,287,882	1,025,589	7,779,655	920,803	22,725,657
1932	507,425	1,148,574	2,287,565	71,239	710,430	145,277	6,565,558	922,600	7,370,017	723,771	20,452,456
1933	424,854	1,006,141	2,360,776	57,068	571,229	128,709	5,789,983	841,572	6,752,276	670,287	18,602,895
1934	410,049	1,071,041	2,533,960	47,623	415,700	69,938	5,642,399	802,197	6,396,861	684,855	18,074,623

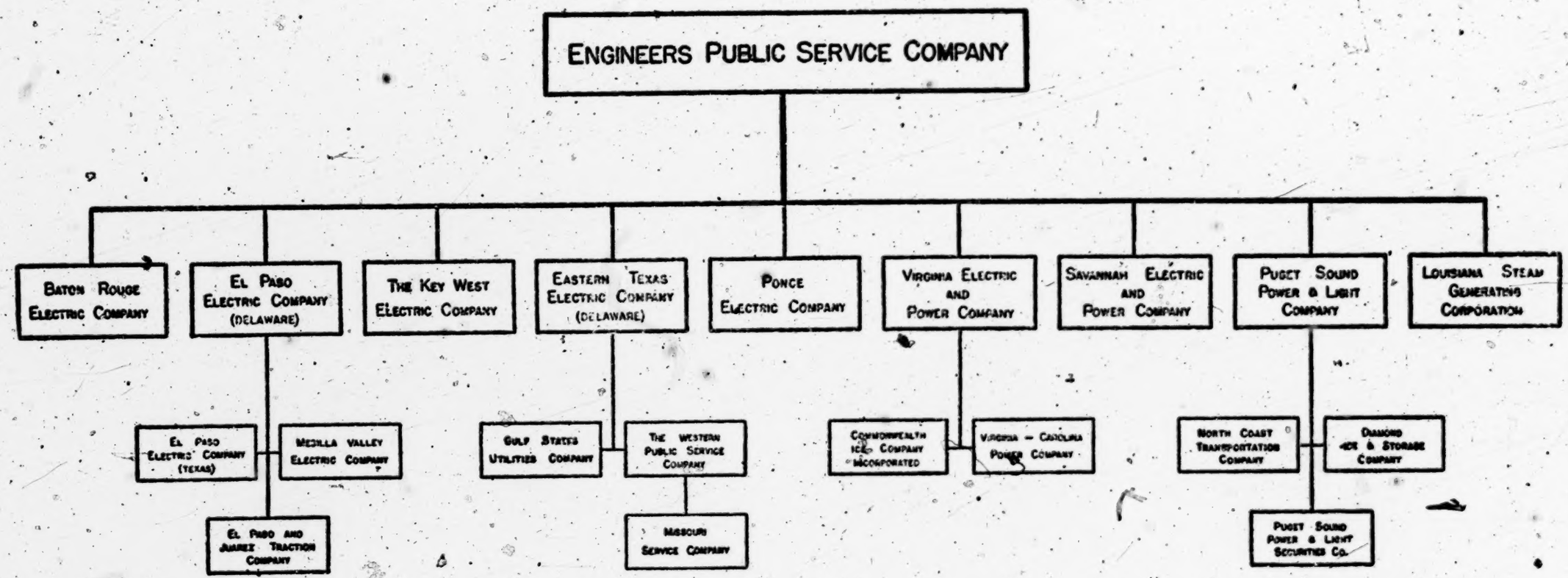
Balance for Retirements, Dividends and Surplus

1925	$ 199,918	$ 718,590	$ 23,069	$ 72,115		$114,633	$ 2,754,601	$ 339,194	$ 3,564,309		$ 7,786,429
1926	293,386	904,030	374,785	70,960		96,553	3,034,723	468,930	4,073,664		9,317,031
1927	301,852	961,258	975,644	67,608		100,427	3,620,000	474,300	4,719,308		11,220,397
1928	337,594	1,070,489	1,564,075	72,631		138,665	4,297,518	543,482	5,174,965		13,199,419
1929	355,922	1,248,234	2,137,308	53,719	$ 210	135,184	4,201,542	585,820	5,937,062	$ 302,235	14,957,236
1930	350,525	1,266,874	2,056,068	63,886	209,287	155,580	4,751,790	571,259	5,945,564	465,167	15,836,000
1931	359,318	1,025,735	1,710,138	63,780	336,944	135,092	4,361,857	605,026	5,985,540	428,919	15,012,349
1932	334,210	703,674	1,196,925	43,874	358,333	144,385	3,771,462	512,458	5,469,949	224,721	12,759,991
1933	251,955	569,812	1,268,395	29,994	339,143	127,804	2,219,563	438,732	4,842,295	290,593	10,378,285
1934	244,063	635,863	1,452,967	22,652	201,321	68,372	2,120,588	404,846	4,498,426	319,287	9,968,385

(a) Subsidiary Companies of Eastern Texas Electric Company (Delaware).
(b) Inter-company items not eliminated.

Engineers' Exhibit No. 37-B (Cont'd).

Page 63:



CORPORATE CHART
ENGINEERS PUBLIC SERVICE COMPANY

ENGINEERS SECURITIES CORPORATION AND
A FEW MINOR SUBSIDIARY COMPANIES ARE OMITTED

Engineers' Exhibit No. 37-C.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1935

Page 4:

ENGINEERS PUBLIC SERVICE COMPANY

ORGANIZED IN 1925 UNDER THE LAWS OF DELAWARE

DIRECTORS

HOMER L. FERGUSON
ANDREW FLETCHER
PHILIP A. S. FRANKLIN
CHARLES W. KELLOGG
GEORGE O. MUHLFELD
ARTHUR W. PAGE
CHARLES A. STONE
WHITNEY STONE
SAMUEL B. TUELL
WALTER B. WALKER
EDWIN S. WEBSTER
ROBERT WINTHROP
WILLIAM E. WOOD

EXECUTIVE COMMITTEE

ANDREW FLETCHER
PHILIP A. S. FRANKLIN
GEORGE O. MUHLFELD
ARTHUR W. PAGE
CHARLES A. STONE

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
Chairman of the Board

SAMUEL B. TUELL
President

WILLIAM E. WOOD
Executive Vice President

THOMAS J. HANLON, JR.
Vice President

ALAN W. HASTINGS
Vice President

JASON C. LEIGHTON
Treasurer

WILLIAM T. CRAWFORD
Secretary

GENERAL COUNSEL

MUDGE, STERN, WILLIAMS & TUCKER
New York

AUDITORS

LYBRAND, ROSS BROS. & MONTGOMERY
New York

Engineers' Exhibit No. 37-C (Cont'd)

Pages 5-7:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,

March 16, 1936.

TO THE STOCKHOLDERS:

Engineers Public Service Company is a public utility holding company whose income is derived exclusively from interest and dividends on securities owned. It received total income of $1,396,170 in 1935, as compared with $1,260,612 in 1934. After deduction of expenses, taxes and interest, there was a balance of $1,233,923 applicable to preferred dividend requirements of $2,323,537. In 1934 the corresponding balance amounted to $1,103,142. The income statement and balance sheet appear on pages 14 and 15.

The combined gross earnings of subsidiary companies for 1935, as shown in the statement on page 16, were $45,085,533, an increase of $1,397,836, or 3.2%, over 1934, and the combined balance after operating expenses and taxes was $18,875,700, an increase of $837,442, or 4.6%. Part of the improvement in this balance was the result of reductions in Federal income taxes of more than $300,000 due largely to non-recurring deductions from income for tax purposes allowable in connection with the calling of substantial amounts of the bonds of certain subsidiary companies.

Two subsidiary companies failed to earn their preferred dividend requirements for the year 1935 and reported deficiencies for their common shares totaling $1,058,369, of which $1,051,236 is applicable to the shares owned by Engineers Public Service Company. Although this deficiency is not a claim against the Engineers Company or its other subsidiaries, it must be included in the consolidated earnings. All the other subsidiaries earned their preferred

dividend requirements and in addition had balances totaling $2,676,686 for their common shares, of which $2,669,829 is applicable to shares owned by the Engineers Company and this amount is included in the consolidated earnings. To this balance is added the other earnings of the Engineers Company and from the total is deducted its expenses, taxes and interest, and the deficiency of earnings of the two subsidiaries hereinbefore mentioned, to produce the consolidated balance of earnings applicable to the stocks of the Engineers Company. This consolidated balance was $1,605,868 in 1935 compared with $1,111,859 in 1934. The complete earnings statement which appears on pages 16 and 17 is further supported by the tabulation on page 21 showing the contribution by each subsidiary company to the consolidated balance.

Although only two subsidiaries failed to earn their preferred dividends in 1935, three did not pay full cumulative preferred dividends; the total of these unpaid dividends was $2,173,344. The total unpaid cumulative preferred dividends on shares of subsidiaries held by the public at the end of the year amounted to $7,185,275.

Preferred Dividends

No dividends have been declared or paid on the preferred stocks of Engineers Public Service Company since July 1, 1933. The total unpaid cumulative preferred dividends at the end of the year amounted to $5,808,843. Resumption of the payment of preferred dividends depends primarily upon earnings and upon the ability of the Company to comply with applicable laws. Any such consideration is further complicated by the uncertainty which exists with respect to the application to the Company and to its subsidiaries of the provisions of the Public Utility Act of 1935 and with respect to the legal steps taken by the Company and by certain of its subsidiaries to determine their status thereunder, which steps are discussed hereafter.

Engineers' Exhibit No. 37-C (Cont'd)

Public Utility Act of 1935

The Public Utility Act of 1935 (Wheeler-Rayburn Bill) was proposed and enacted to provide Federal regulation of both holding and operating utility companies. During the period when this Bill was before the Congress for consideration, the Company and certain of its subsidiaries sent several communications to stockholders calling to their attention certain destructive and unfair features proposed, which particularly affected these companies. A very drastic measure was finally enacted by the Congress and became a law on August 26, 1935.

This Act actually undertakes far more than filling the existing gaps in regulation, namely, the regulation of holding companies and of interstate transmission and sale of electric energy; it undertakes, except as to narrowly restricted regional systems, the elimination of public utility holding companies, and, in addition, a domination over subsidiaries of registered holding companies (whether engaged in interstate commerce or not) and over public utilities engaged in interstate transmission or sale of electric energy so complete as to threaten the effectiveness of local regulation of utilities and to threaten to supplant the functions of private management.

Since its enactment the officers and directors of the Company have been giving careful consideration to the effect of this far-reaching Act upon the Company and its subsidiaries. The Company consulted counsel who advised that Title I of the Act was unconstitutional. Accordingly, the Company brought a Bill of Complaint in the Federal District Court at Wilmington, Delaware, alleging the unconstitutionality of Title I of the Act and the irreparable injury that the Company would sustain by compliance with its provisions and praying for injunctive relief. Three subsidiaries directly affected by Title I also started actions in the Federal courts. Stockholders were advised of these actions in letters dated November 27, 1935. Counsel advise

that the defendant local Federal officers do not intend to defend the suits. In the opinion of counsel, such action by said defendants will result in the entry of injunctions against the local Federal officers and such injunctions will be effective to preserve the existing status as to the plaintiff companies until final determination by the United States Supreme Court as to the validity of Title I of the Act.

Title II of the Act applies broadly to four subsidiary companies, since they are "public utilities" as defined therein. In its declaration of policy this Title proposes to regulate only those interstate phases of business of operating utilities not subject to regulation by State or local authorities, which phases, therefore, are properly a concern of the Federal government. However, as the full provisions of this Title are studied, it becomes clear that its effect far exceeds this declaration of policy. Under certain of these provisions this Title attempts to give the Federal Power Commission authority to compel all operating companies, whether interstate or not in their operations, to file certain information and reports and comply with certain regulations of the Commission.

Should it develop, in the administration of Title II, that these companies or other subsidiaries would be subjected to requirements which were both injurious and, in the opinion of counsel, beyond the constitutional power of the Federal government, it might become necessary to institute court proceedings to prevent such damaging and unconstitutional encroachment of Federal regulation.

Simplification of Corporate Structure

Since its organization in 1925, the Company has endeavored to simplify its corporate structure by eliminating subsidiaries whenever practicable. Further progress was made in this respect during the past year in the Puget Sound and Virginia Companies. Twenty-eight underlying companies, existing when the properties were acquired by the Engineers Company, have been eliminated until at

Engineers' Exhibit No. 37-C (Cont'd)

present seven of its ten directly owned companies have no underlying subsidiaries.

Puget Sound Power & Light Company is now the only directly owned operating company which has subsidiaries. This company has two operating subsidiaries, one of which conducts an interstate transportation business and the other a small ice and cold storage business.

The remaining two directly owned companies which have subsidiaries are intermediate holding companies, namely, Eastern Texas Electric Company (Delaware) and El Paso Electric Company (Delaware). These two companies were in existence prior to the organization of the Engineers Company. It has been the purpose of the Engineers Company for some time to eliminate the Eastern Texas Company, but the high cost, largely in transfer and stamp taxes, and the difficulties now presented under the Public Utility Act of 1935 have delayed this elimination. This company has an operating subsidiary, The Western Public Service Company, which, in turn, has two small operating subsidiaries, one a Missouri company and the other a Kansas company, which are maintained because of State laws.

The other intermediate holding company, El Paso Electric Company (Delaware), has three operating subsidiaries which form one integrated system operating in Texas, New Mexico and Mexico. The requirements of State and other laws make impracticable the consolidation of this system into one company. Also El Paso Electric Company (Delaware) has outstanding in the hands of the public a substantial amount of preferred stock and a small amount of common stock.

The corporate relationship of the companies comprising the Engineers group is shown in chart form on page 67.

El Paso Natural Gas Company and Western Gas Company

Engineers Public Service Company has held options to purchase common stock of El Paso Natural Gas Company

Engineers' Exhibit No. 37-C (Cont'd)

and, through its subsidiary Engineers Securities Corporation, has owned $3,313,600 principal amount of second mortgage bonds of Western Gas Company, a subsidiary of El Paso Natural Gas Company, and $182,000 principal amount of debentures of El Paso Mortgage Corporation.

As of July 1, 1935 arrangements were effected for the extension to January 1, 1944 of the indebtedness of Western Gas Company including its second mortgage bonds and also of the indebtedness of El Paso Mortgage Corporation, all of which indebtedness would have matured in 1936 subject to a possible extension to 1938. The options held by the Engineers Company to purchase common stock of El Paso Natural Gas Company were modified and extended to January 1, 1944 and in addition Engineers Public Service Company acquired an option to purchase the common stock of El Paso Mortgage Corporation exercisable on or before the same date. El Paso Natural Gas Company has also executed new guarantee agreements with respect to principal, interest and sinking fund payments on the second mortgage bonds of Western Gas Company and debentures of El Paso Mortgage Corporation.

Pages 9-10:

Service Arrangements with Affiliates

Over 91.5% of the common stock of Engineers Public Service Company (Delaware) is owned by Stone & Webster, Incorporated. The Engineers Company and its subsidiaries, directly or through a mutual service organization, Engineers Public Service Company, Inc., have certain service arrangements with Stone & Webster, Incorporated and with certain of that company's subsidiaries, which arrangements are reviewed hereafter.

The mutual service organization is wholly owned by the operating subsidiaries of Engineers Public Service Company and provides to these subsidiaries the economies of group operation with respect to certain facilities and services, since centralized handling enables savings in ex-

Engineers' Exhibit No. 37-C (Cont'd)

penses and more effective service. These services are furnished on a non-profit basis by the mutual service organization. The services obtained from Stone & Webster, Incorporated and from certain of that company's subsidiaries, are obtained substantially on a non-profit basis. The cost of all services applicable to the operating subsidiaries is allocated proportionately among them on the basis of their respective gross earnings. In 1935, the aggregate of these charges was $286,528, equivalent to six tenths of one percent of combined gross earnings (1934—$279,449). The mutual service organization also furnishes certain services to the holding companies in the Engineers group at cost and to other companies. The fees for such services in 1935 amounted to $75,478 (1934—$70,444), of which Engineers Public Service Company paid $61,500 (1934—$58,000). A comparative statement showing charges made to each of the companies served is set forth on page 30.

Each of the principal operating subsidiaries has a so-called "term contract" with Stone & Webster Engineering Corporation covering consulting engineering and construction service to the extent permitted by law, under which the subsidiary, if it elects to use such service, pays the Engineering Corporation for consulting engineering on an approximate cost basis, namely, at two-thirds of the per diem rates regularly charged by that corporation and for construction service on a percentage fee basis which, by reason of the contract, is slightly lower than the regular fee schedule of the Engineering Corporation. In 1935, the total charges under these contracts amounted to $35,080 (1934—$55,190).

The Company employs Stone & Webster Service Corporation as Transfer Agent in Boston, in addition to a New York transfer agent, and pays the Service Corporation for transfer service, fees in substantial conformity with the customary charges made for similar services by other Boston transfer agents. In 1935, the Company paid to the Service Corporation for this transfer work and related

Engineers' Exhibit No. 37-C (Cont'd)

services $6,844 (1934—$8,483). A number of the subsidiaries also employ the Service Corporation as Transfer Agent and the total paid by these subsidiaries in 1935 was $24,318 (1934—$24,059).

Each of the operating subsidiary companies (except Puget Sound Power & Light Company and its subsidiaries) employs Stone & Webster Service Corporation to make examinations of the methods and details of accounting practice as well as of the efficiency of the accounting personnel. There are no formal contracts covering these arrangements with the Service Corporation and this work is done substantially at cost. In 1935, the total paid by the subsidiaries to the Service Corporation for this service amounted to $21,549 (1934—$14,645). This work is supplementary to the independent audits of the accounts of these companies by Lybrand, Ross Bros. & Montgomery.

Practically all of the securities sold by the Company, or by its subsidiaries since they have had this status, have been sold through investment banking groups which included, in each case, Stone & Webster and Blodget, Incorporated, or its predecessors. Neither the Company nor any of its subsidiaries has a contract for financing service with this affiliate. During 1935 Savannah Electric and Power Company sold $4,500,000 principal amount of 5% bonds at 97 to an underwriting group which in turn offered them to the public at par. Virginia Electric and Power Company sold $37,500,000 principal amount of 4% bonds at 99 to another underwriting group which in turn offered these bonds to the public at 101¼. Stone & Webster and Blodget, Incorporated was a member of each of these groups, underwriting $1,665,000 principal amount of the Savannah bonds and $7,687,000 principal amount of the Virginia bonds.

Engineers' Exhibit No. 37-C (Cont'd)

Page 11:

Puget Sound Power & Light Company

Combined gross earnings for the year increased $627,790, or 4.7%, reflecting the improvement in business conditions. Electric department earnings increased $459,456, or 4.2%, despite rate reductions, some of which became effective when the State Commission agreed to suspend the general rate case in August 1935. Transportation earnings increased $121,194, or 8.5%. Total expenses increased $503,725, or 8.9%, largely as a result of salary and wage restorations. Taxes decreased $138,551, or 7.3%, under 1934, as a result of reduced real estate and personal property taxes under the new 40-mill limit law.

A maturity of $1,167,000 of underlying bonds was met on November 1, 1935 and bank debt at the end of the year was $300,000 as compared with $750,000 at the end of 1934. No dividends were paid during the year. The company has maturities in 1939 and 1940 totaling approximately $8,600,000.

Construction of the Grand Coulee and Bonneville projects on the Columbia River with Federal money is proceeding steadily but as yet there has been no agency created to market the power to be produced. The State Grange organization is active in promoting the formation of county-wide power districts to be voted upon in the general 1936 elections and an amendment to the State constitution will also be voted upon at that time which provides for the entry of the State into the power business.

It has been proposed that the city of Seattle acquire a substantial portion of the company's property thereby eliminating this competitive situation, but no formal offer has been made. The city is also trying to secure a Federal loan with which to refund, at a substantial discount, the Municipal Street Railway bonds owned by this company.

Engineers' Exhibit No. 37-C (Cont'd)

Page 14:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)

(Parent Company Only)

Comparative Income Statement

	1935	1934	Increase
GROSS REVENUES			
Revenue from Subsidiary Companies:			
Interest—Income Notes	$ 78,000.00	$ 207,000.00	$ 129,000.00*
Interest—Time Notes	61,597.94	71,041.71	9,443.77*
Dividends—Preferred	87,924.00	94,171.25	6,247.25*
Dividends—Common	1,168,648.50	887,077.50	281,571.00
Miscellaneous Revenue	—0—	1,321.87	1,321.87*
Total Gross Revenues	$1,396,170.44	$1,260,612.23	$ 135,558.11
EXPENSES AND TAXES			
Expenses	$ 142,088.29	$ 81,031.79	$ 61,056.50
Taxes—Including Federal income taxes of $3,878.00 (1934—$33,878.06)	19,979.70	48,507.94	28,528.24*
Total Expenses and Taxes	$ 162,067.99	$ 129,539.73	$ 32,528.26
Balance	$1,234,102.45	$1,131,072.60	$ 103,029.85
Interest	179.17	27,930.43	27,751.26*
Balance for Dividends and Surplus	$1,233,923.28	$1,103,142.17	$ 130,781.11
Preferred Dividend Requirements	$2,323,537.00	$2,323,526.00	$ 11.00

Comparative Surplus Statement

	1935	1934	Increase
Earned Surplus at Beginning of Year	$5,303,473.04	$4,233,441.53	$1,070,031.51
Balance for Dividends and Surplus, as above	1,233,923.28	1,103,142.17	130,781.11
Total	$6,537,396.32	$5,336,583.70	$1,200,812.62
Net Direct Charges:			
Write-down of Investments	$ 348,581.84(a)	$ —0—	$ 348,581.84
Miscellaneous	3,435.00(b)	33,110.66	36,545.66*
Total Deductions	$ 345,146.84	$ 33,110.66	$ 312,036.18
Earned Surplus at End of Year	$6,192,249.48	$5,303,473.04	$ 888,776.44

* Decrease.

(a) Includes $347,141.84 representing write-down of investment in wholly owned subsidiary to give effect to loss sustained by that company through the sale on the New York Stock Exchange of 6,864 shares of Stone & Webster, Incorporated, Capital Stock originally acquired in connection with employees' stock purchase plan which expired in 1931.

(b) Credit.

Engineers' Exhibit No. 37-C (Cont'd)

Page 15:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)

(Parent Company Only)

Comparative Balance Sheet

ASSETS	Dec. 31, 1935	Dec. 31, 1934	Increase
Investments in Subsidiary Companies (a)	$ 93,746,483.08	$ 94,167,203.35	$ 420,720.27*
Notes Receivable (Subsidiary Companies) (b):			
Income Notes	8,655,000.00	8,655,000.00	—0—
Time Notes	2,025,000.00	1,175,000.00	850,000.00
Cash in Banks	1,198,549.43	718,223.99	480,325.44
Dividends Receivable (Subsidiary Companies)	21,981.00	22,045.75	64.75*
Unadjusted Debits	—0—	13.00	13.00*
	$105,647,013.51	$104,737,486.09	$ 909,527.42
LIABILITIES			
Preferred Stock (c)	$ 41,075,633.00	$ 41,075,434.00	$ 199.00
Preferred Stock Scrip	—0—	696.50	696.50*
Common Stock (d)	58,059,512.85	58,058,002.85	1,510.00
Common Stock Scrip	—0—	5,192.50	5,192.50*
Accounts Payable	7,930.81	3,364.40	4,566.41
Taxes Accrued	23,573.42	34,208.85	10,635.43*
Sundry Liabilities	288,113.95	—0—	288,113.95
Unadjusted Credits	—0—	257,113.95	257,113.95*
Earned Surplus (e)	6,192,249.48	5,303,473.04	888,776.44
	$105,647,013.51	$104,737,486.09	$ 909,527.42

Contingent Liabilities:

Possible claims for additional Federal income taxes for the years 1932 to date. Agreement, jointly and severally with Eastern Texas Electric Company (Del.), to indemnify a surety company against all losses and expenses it might incur as guarantor of the payment, on various maturity dates between 1936 and 1948, inclusive, of $351,500 principal amount of municipal bonds assumed by The Western Public Service Company, with interest thereon until paid; and to guarantee payment of annual premium of the surety company.

* Decrease.

(a) Investments in Subsidiary Companies are carried at an amount based on the stated value of securities of the Parent Company issued, and cash paid, to acquire stocks of Subsidiaries and an amount of $5,263,498 arising from revaluation.

(b) See page 24 for detail.

(Notes Continued on Following Page)

Engineers' Exhibit No. 37-C (Cont'd)

(c) Represented by: 158,080 shares $5 (Cumulative) Dividend Convertible Preferred, 196,934 shares (1934—196,932 shares) $5.50 Cumulative Dividend Preferred and 75,000 shares $6 Cumulative Dividend Preferred, of no par value (entitled to $110 per share upon redemption or voluntary liquidation, or $100 per share upon involuntary liquidation, plus accrued dividends, except that after June 30, 1938 the $5 Preferred is entitled to $105 per share upon redemption or voluntary liquidation). Total Preferred Stock authorized 431,000 shares.

(d) Represented by: 1,909,968 shares (1934—1,909,817 shares) of no par value. Authorized 2,349,000 shares.

(e) Before provision for cumulative dividends not declared, including those normally payable on:

	Jan. 1, 1936	Jan. 1, 1935
$5 (Cumulative) Dividend Convertible Preferred, $12.50 (1935—$7.50) per share	$1,976,000.00	$1,185,600.00
$5.50 Cumulative Dividend Preferred, $13.75 (1935—$8.25) per share	2,707,842.50	1,624,689.00
$6 Cumulative Dividend Preferred, $15.00 (1935—$9.00) per share	1,125,000.00	675,000.00
	$5,808,842.50	$3,485,289.00

NOTE: There are outstanding Common Stock Purchase Warrants, which were originally issued attached to certificates for the $5.50 Cumulative Dividend Preferred Stock, to purchase 196,934 shares of Common Stock at $68 per share on or before November 1, 1938; and 158,080 shares of $5 (Cumulative) Dividend Convertible Preferred Stock convertible at option of holders up to June 30, 1938 into one and one-half shares of Common Stock for each share of Preferred.

See page 25 for detailed Statement of Capitalization.

Engineers' Exhibit No. 37-C (Cont'd)

Page 17:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Income Statement of Engineers Public Service Company Including Undistributed Earnings of Subsidiary Companies Applicable to Engineers Public Service Company

(Inter-company Items Eliminated)

	1935	1934	Increase
Balance of Earnings Applicable to Engineers Public Service Company, from page 16	$2,669,828.98	$2,493,184.32	$ 176,644.66
Earnings from Subsidiary Companies, deducted above:			
Interest	61,597.94	71,041.71	9,443.77*
Preferred Dividends, Declared	87,924.00	88,183.00	259.00*
Miscellaneous Revenue	—0—	1,321.87	1,321.87*
Total	$2,819,350.92	$2,653,730.90	$ 165,620.02
Expenses, Taxes and Interest	162,247.16	157,470.16	4,777.00
Balance of Earnings of Parent and Subsidiary Companies Applicable to Engineers Public Service Company Stocks, Before Allowing for Loss, as below	$2,657,103.76	$2,496,260.74	$ 160,843.02
Allowing for Loss in Investment in Common Stocks of Subsidiary Companies, Measured by Cumulative Dividends on Preferred Stocks of Such Companies Not Earned Within the Year, Less Minority Interests. Such Amounts Are Not a Claim Against Engineers Public Seriec Company or Its Other Subsidiary Companies	1,051,236.11	1,384,401.50	333,165.39*
Balance Applicable to Stocks of Engineers Public Service Company, After Allowing for Loss, as above	$1,605,867.65	$1,111,859.24	$ 494,008.41
Preferred Dividend Requirements of Engineers Public Service Company	$2,323,537.00	$2,323,526.00	$ 11.00

* Decrease.

Engineers' Exhibit No. 37-C (Cont'd)

Comparative Consolidated Surplus Statement

(Minority Interests Excluded)

	1935	1934	Increase
Earned Surplus at Beginning of Year	$5,528,165.77	$4,289,693.55	$1,238,472.22
Balance, as above	1,605,867.65	1,111,859.24	494,008.41
Total	$7,134,033.42	$5,401,552.79	$1,732,480.63
Net Direct Charges:			
Loss upon Liquidation of Subsidiaries	$ 380,209.95	$ —0—	$ 380,209.95
Premium and Expenses on Bonds Reacquired by Redemption or Purchase	330,267.73	145,192.04(a)	475,459.77
Loss on Sale of Investments and Land, and Abandonment of Property	484,738.75	126,738.08	358,000.67
Miscellaneous	136,720.01	108,159.02(a)	244,879.03
Total Deductions	$1,331,936.44	$ 126,612.98(a)	$1,458,549.42
Earned Surplus at End of Year	$5,802,096.98(b)	$5,528,165.77	$ 273,931.21

(a) Credit.

(b) Excludes surplus of Subsidiary Companies accumulated prior to acquisition in the amount of $7,875,643.05.

Engineers' Exhibit No. 37-C (Cont'd)

Page 18:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

ASSETS	Dec. 31, 1935	Dec. 31, 1934	Increase
Property, Plant and Equipment (a)	$319,321,561.32	$319,533,380.85	$ 211,819.53*
Investments, at Cost or Written-down Amounts	12,681,911.07 (b)	13,006,665.60	324,754.53*
Cash in Banks and on Hand	7,884,158.66	6,661,697.52	1,222,461.14
United States Treasury Bills, at Cost	2,000,156.25	—0—	2,000,156.25
Notes and Warrants Receivable	573,029.77	628,472.57	55,442.80*
Accounts Receivable from Customers and Miscellaneous Sources	6,476,840.86	5,781,377.04	695,463.82
Interest Receivable	248,805.20	304,675.02	55,869.82*
Materials and Supplies, at Cost or Written-down Amounts	2,590,556.94	2,436,501.73	154,055.21
Appliances on Rental Less Rentals Charged	585,408.38	250,117.71	335,290.67
Prepayments of Insurance, Taxes, Etc.	330,364.56	312,033.06	18,331.50
Sinking Funds, Representing Cash, Held by Bond Trustees	93,156.85	177,650.14	84,493.29*
Special Deposits with Trustees under Mortgages consisting of Cash, Mortgage Notes and $225,000 Bonds of a Subsidiary Company	520,133.98	567,833.93	47,699.95*
Unamortized Debt Discount and Expense, Including $2,551,542 on Issues Refunded in 1935	10,294,980.54	8,192,702.55	2,102,277.99
Unadjusted Debits	224,517.13	138,551.00	85,966.13
	$363,825,581.51	$357,991,658.72	$5,833,922.79

Engineers' Exhibit No. 37-C (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

LIABILITIES	Dec. 31, 1935	Dec. 31, 1934	Increase
Preferred Stock (c)	$ 41,075,633.00	$ 41,075,434.00	$ 199.00
Preferred Stock Scrip	—0—	696.50	696.50*
Common Stock (d)	58,059,512.85	58,058,002.85	1,510.00
Common Stock Scrip	—0—	5,192.50	5,192.50*
Subsidiary Companies:			
Preferred Stock (Represented by 739,432 shares; entitled in involuntary liquidation to $74,297,822) (e). (detail on page 22)	69,450,138.29	69,621,938.29	171,800.00*
Premium and Discount on Preferred Stock	78,679.10	49,519.00	29,160.10
Bonds (detail on page 23)	146,498,500.00 (f)	144,580,900.00	1,917,600.00
Coupon Notes	2,919,500.00 (g)	2,919,500.00	—0—
Notes Payable:			
Banks	675,000.00	800,000.00	125,000.00*
Others	320,378.13	53,754.30	266,623.83
Accounts Payable	1,891,985.23	1,494,394.70	397,590.53
Customers' Deposits	749,355.79	826,116.57	76,760.78*
Dividends Declared	51,432.25	54,438.75	3,006.50*
Interest and Taxes Accrued	3,359,944.27	3,686,843.89	326,899.62*
Sundry Liabilities	463,577.79	173,083.25	290,494.54
Retirement Reserve, Representing Provision for Future Property Retirements (h)	22,931,380.61	21,928,494.50	1,002,886.11
Contributions for Extensions	—0—	18,148.98	18,148.98*
Operating Reserves, Including Provision for Losses on Doubtful Notes and Accounts, Injury and Damage Claims, Etc.	1,431,481.57	1,074,215.95	357,265.62
Unadjusted Credits	305,203.22	424,643.23	119,440.01*
Cumulative Preferred Dividends Not Declared (Subsidiary Companies)	7,185,275.00	5,011,931.00	2,173,344.00
Minority Interests in Common Capital Stocks and Surplus of Directly Controlled Companies (Including Earned Surplus $59,366.27; 1934—$82,853.53)	576,507.43	606,244.69	29,737.26*
Earned Surplus	5,802,096.98 (i)	5,528,165.77	273,931.21
	$363,825,581.51	$357,991,658.72	$5,833,922.79

* Decrease.

NOTE: See explanatory notes on page 19, opposite, which are to be read as an integral part of the above consolidated balance sheet.

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Detail by Subsidiary Companies of Balance for Dividends and Surplus, Preferred Dividends and Balance for Common Stock Owned by Engineers Public Service Company

12 Months Ending December 31, 1935

Note:—Deficiencies are indicated by *Italics*

Subsidiary Companies Which Have Earned Their Preferred Dividends:

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Not Declared	Balance for Common	Minority Interest	Balance Applicable to Parent Company 1935	Balance Applicable to Parent Company 1934
Baton Rouge Electric Co.	$ 159,361.81	$ 37,254.00		$ 122,107.81	$ 597.51	$ 121,510.30	$ 91,249.80
Eastern Texas Electric Co. & Sub. Cos.	868,340.12	579,622.59		288,717.53(a)	*5,008.89*	293,726.42	478,181.72
El Paso Electric Co. & Sub. Cos.	318,240.41	231,288.50		86,951.91	4,447.40	82,504.51	132,026.89
Engineers Securities Corp.	178,248.52	No Pref.		178,248.52		178,248.52	284,505.49
Louisiana Steam Generating Corp.	207,777.85	No Pref.		207,777.85		207,777.85	*62,678.62*
Ponce Electric Co.	54,722.97	25,291.00		29,431.97	749.92	28,682.05	2,750.46
Savannah Electric and Power Co.	250,450.94	194,114.85	$ 15,000.00	41,336.09	70.69	41,265.40	45,652.98
Virginia Electric and Power Co.	2,893,745.84	1,171,632.00		1,722,113.84	5,999.91	1,716,113.93	1,521,495.60
Total	$4,930,888.46	$2,239,202.94	$ 15,000.00	$2,676,685.52	$ 6,856.54	$2,669,828.98	$2,493,184.32

Subsidiary Companies Which Have Not Earned Their Preferred Dividends:

(The Deficiencies in Balance for Common are not a claim against either Engineers Public Service Company or its other Subsidiary Companies)

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Not Declared	Deficiency for Common	Minority Interest	Deficiency Applicable to Parent Company 1935	Deficiency Applicable to Parent Company 1934
The Key West Electric Co.	$ 5,042.00		$ 24,374.00	*$ 19,332.00*		*$ 19,332.00*	*$ 21,726.56*
Puget Sound Power & Light Co. & Sub. Cos.	1,094,933.49		2,133,970.00	*1,039,036.51*	*$ 7,132.40*	*1,031,904.11*	*1,362,674.94*
Total	$1,099,975.49	—0—	$2,158,344.00	*$1,058,368.51*	*$ 7,132.40*	*$1,051,236.11*	*$1,384,401.50*
Balance for Dividends and Surplus (see page 16)	$6,030,863.95						

(a) Balance for Interest on Demand Income Notes of Eastern Texas Electric Company (Delaware) held by Engineers Public Service Company.

Engineers' Exhibit No. 37-C (Cont'd)

Page 67:

CORPORATE CHART
ENGINEERS PUBLIC SERVICE COMPANY

Engineers Securities Corporation, and a Few Minor Subsidiary Companies are Omitted

Engineers' Exhibit No. 37-D.

Page 4:

Excerpts from Annual Report of Engineers Public Service Company for the Year 1936.

ENGINEERS PUBLIC SERVICE COMPANY

ORGANIZED IN 1925 UNDER THE LAWS OF DELAWARE

DIRECTORS

*HOMER L. FERGUSON
*ANDREW FLETCHER
*ALEXANDER C. FORBES
*PHILIP A. S. FRANKLIN
CHARLES W. KELLOGG
GEORGE O. MUHLFELD
*ARTHUR W. PAGE
*HUGH J. PRITCHARD
CHARLES A. STONE
WHITNEY STONE
SAMUEL B. TUELL
WALTER B. WALKER
EDWIN S. WEBSTER
*ROBERT WINTHROP
WILLIAM E. WOOD

*Elected by Preferred Stockholders.

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
Chairman of the Board

SAMUEL B. TUELL
President

WILLIAM E. WOOD
Executive Vice President

THOMAS J. HANLON, JR.
Vice President

ALAN W. HASTINGS
Vice President

JASON C. LEIGHTON
Treasurer

WILLIAM T. CRAWFORD
Secretary

GENERAL COUNSEL

MUDGE, STERN, WILLIAMS & TUCKER
New York

AUDITORS

LYBRAND, ROSS BROS. & MONTGOMERY
New York

Engineers' Exhibit No. 37-D (Cont'd)

Pages 5-7:

Wilmington; Delaware.

March 11, 1937.

TO THE STOCKHOLDERS:

Engineers Public Service Company is a public utility holding company whose income is derived primarily from dividends and interest on securities owned. It received total income of $2,763,564 in 1936, as compared with $1,396,170 in 1935. After deduction of expenses, taxes and interest, there remained a balance of $2,537,891, which amount was $214,354 in excess of annual preferred dividend requirements of $2,323,537. In 1935 the corresponding balance for dividends amounted to $1,233,923. The above figures for 1936 do not include a net profit of $609,460, credited direct to earned surplus, realized in connection with its holdings in El Paso Natural Gas Company.

The combined gross earnings of subsidiary companies for 1936, as shown in the statement on page 16, were $48,721,361, an increase of $3,635,828 or 8.1% over 1935, and the combined balance after operating expenses and taxes was $20,223,764, an increase of $1,348,063 or 7.1%.

Two subsidiary companies, Puget Sound Power & Light Company and The Key West Electric Company, failed to earn their full preferred dividend requirements for the year 1936 and reported deficiencies for their common shares of which $474,496 was applicable to the shares owned by Engineers Public Service Company. Although this deficiency is not a claim against the Engineers Company, it reduces the consolidated earnings. All other subsidiaries earned their preferred dividend requirements and in addition had balances for their common shares of which $3,451,241 was applicable to shares owned by the Engineers

Company. The other earnings of the Engineers Company are added to this balance and from this total are deducted its expenses, taxes and interest and the deficiency of earnings of the two subsidiaries hereinbefore mentioned. The balance so produced is the consolidated balance applicable to the stocks of the Engineers Company. In 1936 this balance was $2,946,392 as compared with $1,605,868 in 1935. The complete earnings statement which appears on pages 16 and 17 is further supported by the tabulation on page 21 showing the contribution by each subsidiary to the consolidated balance.

In addition to the two subsidiaries which failed to earn their full preferred dividend requirements in 1936, a third had cumulative preferred dividends in arrears at the end of the year. The total unpaid cumulative preferred dividends on shares of these three subsidiaries held by the public amounted to $8,881,455 at the end of the year, of which amount $8,788,870 was unpaid by Puget Sound Power & Light Company.

Reduction in Capital

At the annual meeting of Engineers Public Service Company in May 1936, the stockholders voted to reduce the amount of capital of the Company from $99,135,146 to $42,985,601 by reducing the amount of capital represented by the outstanding shares of common stock from $58,059,513 to $1,909,968. The stockholders also voted to reclassify the shares of common stock without par value by changing the same into shares of common stock with a par value of $1 per share. The number of shares outstanding was not changed. The result of this action was to create a capital surplus which permitted an allowance for possible shrinkage in the value of the security holdings of the Company brought about by changed conditions and also placed the Directors in a position where they might consider the declaration of dividends.

Engineers' Exhibit No. 37-D (Cont'd)

Preferred Dividends

During the year payments were made aggregating two full years' dividend requirements on account of cumulative dividends accrued and in arrears on the preferred stocks of Engineers Public Service Company, as follows: A dividend of 80% of a full year's requirement was paid August 1 to stockholders of record July 15, and a dividend of 120% of a full year's requirement was paid November 2 to stockholders of record October 15.

A dividend of 75% of a full year's requirement has been declared payable April 1, 1937 to stockholders of record March 10, 1937. After the payment of this dividend, accumulated and unpaid dividends will amount to a total of $2,323,537 or one year's requirement.

Public Utility Act of 1935

The status of Engineers Public Service Company and its subsidiaries with respect to this Act did not change greatly during 1936. The Bill of Complaint brought by the Company alleging the unconstitutionality of Title I of the Act, damage to the Company from compliance therewith and praying for injunctive relief, remains undefended by the defendant local Federal officers in the Federal District Court at Wilmington, Delaware, and no action has been taken toward enforcement of the law against the Company. A similar situation exists with respect to two subsidiaries, namely, Eastern Texas Electric Company (Delaware) and El Paso Electric Company (Delaware), which also filed Bills of Complaint in this same court. A Bill of Complaint brought by a third subsidiary, The Western Public Service Company, was not defended by the defendant local Federal officers in the Federal District Court at Baltimore, Maryland, and a final decree was entered on April 27, 1936 permanently enjoining said Federal officers from the enforcement of the law against that company. With minor exceptions, the provisions of Title I of this Act did not apply

Engineers' Exhibit No. 37-D (Cont'd)

during 1936 to any subsidiaries other than the three mentioned above, since no holding company in the group had registered under this Title.

During 1936 and since the beginning of the current year two decisions of importance have been rendered in cases involving the constitutionality of Title I. The United States Circuit Court of Appeals for the Fourth Circuit, in the case of Burco, Inc. v. Whitworth, et al., held that the Act was unconstitutional so far as it related to a holding company which was not engaged in interstate commerce. Subsequently, the United States District Court for the Southern District of New York, in the case of Securities and Exchange Commission v. Electric Bond & Share Company et al., rendered a decision upholding the separability of the provisions requiring registration of holding companies from the rest of Title I of the Act and holding such registration provisions to be constitutional, at least so far as they apply to a holding company directly or indirectly engaged in interstate commerce. In view of these decisions the Company and its three above-mentioned subsidiaries are reviewing their status with respect to registration. The stockholders will be informed if any change is brought about as a result.

Counsel has advised that five subsidiaries, namely, El Paso Electric Company (Texas), Gulf States Utilities Company, Virginia Electric and Power Company, The Western Public Service Company and Missouri Service Company are "public utilities" as defined in Title II of the Act and that, therefore, they are subject to the provisions of this Title. Puget Sound Power & Light Company is a "licensee" under the Federal Water Power Act of 1917 and is therefore subject to the provisions of Title II of the Act insofar as they apply to "licensees".

In accordance with a requirement of this Title, Gulf States Utilities Company obtained approval from the Federal Power Commission for the issuance of the securities sold during the past year to refund its outstanding funded

Engineers' Exhibit No. 37-D (Cont'd)

debt as more fully described below under "Refunding Operations". Up to the present time the only additional requirement of the Commission under this Title which is likely to affect appreciably the subsidiaries of the Company is an order which required "public utilities" and "licensees" to adopt on January 1, 1937 a new System of Accounts promulgated by the Commission, with which order these subsidiaries are undertaking to comply. These subsidiaries have taken no action attacking the validity of this Title, and it has been their policy to comply fully with the requirements of the Federal Power Commission under this Title so long as such requirements do not encroach upon their constitutional rights.

* * * * *

El Paso Natural Gas Company

For several years Engineers Public Service Company had held two options to purchase common stock of El Paso Natural Gas Company. These options were obtained as part consideration for the investment by the Company of $3,500,000 in bonds of a subsidiary of that company to assist in financing an extension of its system. The first of these options covered 92,119 shares of outstanding common stock which had been deposited in escrow, equivalent to about 95% of the common shares then outstanding, and the second option covered 100,000 authorized but unissued shares. In connection with an adjustment of the debt of the Gas Company in 1933 to enable the financing of its Tuscon-Phoenix extension, lower option prices were obtained and a 20% participation in the options was granted to another holder of bonds.

These options provided that should El Paso Natural Gas Company be able and decide to refund the bonds owned by the Company, the Gas Company could give notice terminating these options in thirty days. Such notice was given to the Company on March 19, 1936. Greatly improved

Engineers' Exhibit No. 37-D (Cont'd)

earnings and prospects of El Paso Natural Gas Company obviously made it desirable for the Company to take some action before the expiration of the options. Accordingly arrangements were effected whereby 57,119 shares of the escrowed stock were taken up at $25 per share under the first option with funds provided by the Company and it became entitled to receive the net proceeds realized upon the ultimate disposition thereof. For $125,760 the Company assigned to persons active in the management and financing of El Paso Natural Gas Company the right to buy 16,576 shares not covered by the participation previously granted. As it was not considered advisable to exercise the second option on the unissued shares, that option was cancelled.

Early in June 1936, El Paso Natural Gas Company refunded its entire outstanding funded debt, including that of its said subsidiary, through the issue and sale of $7,500,000 principal amount of 15-year 4½% bonds and $3,750,000 principal amount of 10-year 4¾% convertible debentures. As a result of this refunding operation, Engineers Public Service Company was repaid its original investment.

Early in September, each common share without par value of El Paso Natural Gas Company was changed into three shares of the par value of $3 each. Later that same month 60,000 of the 171,357 new common shares received in exchange for old common stock purchased under the option were sold to an underwriting syndicate at $19 per share, which shares in turn were sold by the syndicate at public offering at $20 per share. The Company is entitled to the net proceeds, when the same are sold, of the remaining 111,357 new common shares, equivalent to about 20% of the common shares of El Paso Natural Gas Company outstanding at the end of the year.

Engineers' Exhibit No. 37-D (Cont'd)

Pages 9-10:

Ownership and Voting Power

Over 91.5% of the common stock of Engineers Public Service Company is owned by Stone & Webster, Incorporated. The charter of the Company provides that the preferred stock shall be non-voting except in statutory proceedings as to which the vote thereof is at the time required by law and except that in case at any time the Company shall fail to pay or set aside for payment eight succeeding quarterly dividends, the holders of the preferred stock shall thereupon have the continuing right to elect one less than a majority of the Board of Directors until all accrued dividends shall have been fully paid. By reason of the fact the Company had failed to pay or set aside for payment eight succeeding quarterly dividends on the preferred stock, the holders of said stock, at the annual meeting of the stockholders of the Company in May 1936, elected seven of the fifteen members comprising the Board of Directors.

Service Arrangements with Affiliates

Engineers Public Service Company (Delaware) and its subsidiaries, directly or through a mutual service organization, Engineers Public Service Company, Inc. (N. Y.), have certain service arrangements with Stone & Webster, Incorporated and with certain of that company's subsidiaries, which arrangements are reviewed hereafter.

The mutual service organization is wholly owned by the operating subsidiaries of Engineers Public Service Company and affords these subsidiaries the economies of group operation with respect to certain facilities and services which, through centralized handling, enable savings in expenses and more effective service. These services are furnished on a non-profit basis. The services obtained by the mutual service organization from Stone & Webster, Incorporated and from certain of that company's subsidi-

aries are obtained substantially on a non-profit basis. The cost of all services furnished to the operating subsidiaries is allocated proportionately among them on the basis of their respective gross earnings. In 1936 the aggregate of these charges was $303,293, equivalent to six-tenths of one per cent of combined gross earnings. (1935—$286,528). The mutual service organization also furnishes certain services to the holding companies in the Engineers group on a non-profit basis. The fees for such services in 1936 amounted to $70,800 (1935—$67,300), of which Engineers Public Service Company (Delaware) paid $65,000 (1935—$61,500). A comparative statement showing charges made to the companies served is set forth on page 30.

Each of the principal operating subsidiaries has a so-called "term contract" with Stone & Webster Engineering Corporation under which it is furnished, when it so directs, consulting engineering and construction service. The fees specified for consulting engineering services, which are on an approximate cost basis, are two-thirds of the per diem rates regularly charged by that corporation. The fees for construction work are on a percentage basis and are slightly lower than that corporation's regular fee schedules to clients not having a term contract with it. In 1936 these subsidiaries paid $17,813 (1935—$24,762) to the Engineering Corporation for consulting engineering services under these contracts. Fees for construction work during 1936 were $184,524 ($1935—$10,318).

The Company employs Stone & Webster Service Corporation as its stock Transfer Agent in Boston, Massachusetts, paying fees in substantial conformity with the customary charges made for similar services by other Boston transfer agents. In 1936 the Company paid $8,489 (1935—$6,844) to the Service Corporation for this transfer work and related services. A number of the subsidiaries also employ the Service Corporation as Transfer Agent and in 1936 these subsidiaries paid $23,867 (1935—$24,318)

Engineers' Exhibit No. 37-D (Cont'd)

to the Service Corporation for this service. There are no formal contracts covering these arrangements.

Certain of the operating subsidiary companies employ Stone & Webster Service Corporation to make examinations of the methods and details of accounting practice as well as of the efficiency of the accounting personnel. There are also no formal contracts covering these arrangements and the work is done substantially at cost. In 1936 the Service Corporation was paid $25,983 (1935—$21,549) for these services. This work is in addition to the examination and certification of the accounts of these subsidiaries by Lybrand, Ross Bros. & Montgomery, independent public accountants.

Practically all of the securities sold by the Company, or by its subsidiaries since they have had this status, have been sold through investment banking groups which included Stone & Webster and Blodget, Incorporated or its predecessors. Neither the Company nor any of its subsidiaries has a contract with that affiliate for financing service. During 1936 Gulf States Utilities Company sold $17,300,000 principal amount of 4% bonds and $4,000,000 principal amount of 4½% debentures to an underwriting group, receiving 100¾% and 100½% of the principal amounts, respectively, for these securities. The underwriting group in turn offered these securities to the public at 103% and 102½% of the principal amounts, respectively. Stone & Webster and Blodget, Incorporated was a member of this underwriting group, underwriting $3,705,000 principal amount of the bonds and $860,000 principal amount of the debentures.

Stone & Webster and Blodget, Incorporated also participated to the extent of 12,000 shares in the syndicate which sold the 60,000 shares of El Paso Natural Gas Company common stock as described on page 7.

Engineers' Exhibit No. 37-D (Cont'd)

Pages 11-12:

Puget Sound Power & Light Company

Gross earnings increased $1,306,362 or 9.4% over 1935 due to improved business conditions. Electric department revenues increased $1,085,753 or 9.5%, the largest gain being in industrial sales. Transportation revenues exceeded those of 1935 by $227,205 or 14.7%. Total operating expenses for the year increased $537,155 or 8.7% due principally to higher wage costs and to increased steam generation by reason of unfavorable water conditions at the hydroelectric plants.

Construction of the Federal projects at Grand Coulee and Bonneville on the Columbia River is proceeding although funds to complete the former have not been appropriated, and no definite arrangements have yet been made for the marketing of the power to be produced. At the last general election, of the thirteen counties in the company's territory where the matter was an issue, nine voted to form county-wide power districts. The proposal to amend the constitution so that the State could engage in the power business was defeated. The proposal to form a public power district in King County outside of Seattle has been delayed by action of the State Supreme Court and will not come before the electorate until the general election in November, 1938. City officials are studying further the proposed acquisition of the company's property in Seattle to eliminate competition with the municipal plant. At an election on March 9, 1937 a plan for refinancing and rehabilitating the Seattle Municipal Street Railway system was defeated by a vote of 53,501 to 39,069. This plan included the refunding at a substantial discount of the Municipal Street Railway bonds owned by the company.

In December 1936 the capital represented by the common stock of the company without par value was reduced from $24,805,995 to $14,000,000 without any change in the number of shares outstanding.

Engineers' Exhibit No. 37-D (Cont'd)

Page 14:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)

(Parent Company Only)

Comparative Income Statement

	12 Months Ending December 31		
	1936	1935	Increase
GROSS REVENUES			
Revenue from Subsidiary Companies:			
Interest—Income Notes	$ 225,000.00	$ 78,000.00	$ 147,000.00
Interest—Time Notes	63,056.82	61,597.94	1,458.88
Interest—Miscellaneous	48.75	—0—	48.75
Dividends—Preferred	87,672.00	87,924.00	252.00*
Dividends—Common	2,343,243.75	1,168,648.50	1,174,595.25
Revenue from Miscellaneous Investment	44,542.80	—0—	44,542.80
Total Gross Revenues	$2,763,564.12	$1,396,170.44	$1,367,393.68
EXPENSES AND TAXES			
Expenses	$ 105,226.64	$ 142,088.29	$ 36,861.65*
Taxes—Including Federal income taxes of $78,119.18 (1935—$3,878.00) (a)	118,853.46	19,979.70	98,873.76
Total Expenses and Taxes	$ 224,080.10	$ 162,067.99	$ 62,012.11
Balance	$2,539,484.02	$1,234,102.45	$1,305,381.57
Interest Paid	1,593.34	179.17	1,414.17
Balance for Dividends and Surplus	$2,537,890.68	$1,233,923.28	$1,303,967.40
Preferred Dividend Requirements	$2,323,537.00	$2,323,537.00	$ —0—

Comparative Earned Surplus Statement

	1936	1935	Increase
Earned Surplus at Beginning of Year	$6,192,249.48	$5,303,473.04	$ 888,776.44
Balance for Dividends and Surplus, as above	2,537,890.68	1,233,923.28	1,303,967.40
Direct Credits	609,460.33(b)	3,435.00	606,025.33
Total	$9,339,600.49	$6,540,831.32	$2,798,769.17
Direct Charge	$ —0—	$ 348,581.84	$ 348,581.84*
Preferred Dividends Declared	4,647,074.00	—0—	4,647,074.00
Total Deductions	$4,647,074.00	$ 348,581.84	$4,298,492.16
Earned Surplus at End of Year	$4,692,526.49	$6,192,249.48	$1,499,722.99*

* Decrease.

(a) Excludes Federal income tax of $107,551.82 on transactions described in note (b) below, charged to Earned Surplus. The company is of the opinion that it has no liability for Federal surtax on undistributed profits for 1936.

(b) Represents net profit arising from assignment by the company of a partial interest in an option to purchase El Paso Natural Gas Company common stock and sale of 60,000 shares of common stock of that company held by Trustee under Declaration of Trust, less Federal income tax and expenses applicable thereto.

Engineers' Exhibit No. 37-D (Cont'd)

Page 15:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)

(Parent Company Only)

Comparative Balance Sheet

ASSETS	Dec. 31, 1936	Dec. 31, 1935	Increase
Investments in Subsidiary Companies (a)	$ 90,504,157.28	$ 93,746,483.08	$ 3,242,325.80*
Miscellaneous Investment, at Cost (b)	927,975.00	—0—	927,975.00*
Notes Receivable (Subsidiary Companies): (c)			
Income Notes	8,655,000.00	8,655,000.00	—0—
Time Notes	2,011,000.00	2,025,000.00	14,000.00*
Cash in Banks	1,944,437.28	1,198,549.43	745,887.85
Accounts Receivable	425.24	—0—	425.24
Dividends Receivable (Subsidiary Companies)	21,918.00	21,981.00	63.00*
Unadjusted Debits	3,085.90	—0—	3,085.90
	$104,067,998.70	$105,647,013.51	$ 1,579,014.81*
LIABILITIES			
Preferred Stock (d)	$ 41,075,633.00	$ 41,075,633.00	$ —0—
Common Stock (e)	1,909,968.00	58,059,512.85	56,149,544.85*
Accounts Payable	4,645.34	7,930.81	3,285.47*
Taxes Accrued	210,861.84	23,573.42	187,288.42
Sundry Liabilities	24,819.18	288,113.95	263,294.77*
Capital Surplus (f)	56,149,544.85	—0—	56,149,544.85
Earned Surplus (g)	4,692,526.49	6,192,249.48	1,499,722.99*
	$104,067,998.70	$105,647,013.51	$ 1,579,014.81*

Contingent Liability:

Agreement, jointly and severally with Eastern Texas Electric Company (Del.), to indemnify a surety company against all losses and expenses it might incur as guarantor of the payment, on various maturity dates between 1937 and 1948, inclusive, of $340,000 principal amount of municipal bonds assumed by The Western Public Service Company, with interest thereon, until paid; and to guarantee payment of the annual premiums of the surety company.

* Decrease.

(a) Investments in subsidiary companies are carried at an amount based on the stated value of securities of the Parent Company issued, and cash paid, to acquire stocks of subsidiaries and an amount of $5,263,498 arising from revaluation.

(b) Represented by 111,357 shares of common stock of El Paso Natural Gas Company held by Trustee under Declaration of Trust. The quoted market price on December 31, 1936 when applied to such shares indicates an amount of approximately $3,000,000.

(c) See page 24 for detail.

(Notes Continued on Following Page)

Engineers' Exhibit No. 37-D (Cont'd)

(d) Represented by 158,080 shares $5 (Cumulative) Dividend Convertible Preferred, 196,934 shares $5.50 Cumulative Dividend Preferred and 75,000 shares $6 Cumulative Dividend Preferred, of no par value (entitled to $110 per share upon redemption or voluntary liquidation, or $100 per share upon involuntary liquidation, plus accrued dividends, except that after June 30, 1938 the $5 Preferred is entitled to $105 per share upon redemption or voluntary liquidation). Total Preferred Stock authorized 431,000 shares.

(e) Represented by 1,909,968 shares of $1 par value (1935—1,909,968 shares of no par value). Authorized 2,349,000 shares. (See footnote).

(f) Capital Surplus arising from the reduction of capital represented by Common Stock, as authorized at a meeting of the stockholders held May 18, 1936. The stockholders also authorized the reclassification of the Common Stock from no par to a par value of $1 per share.

(g) Before provision for cumulative dividends not declared, including those normally payable on:

	Jan. 1, 1937	Jan. 1, 1936
$5 (Cumulative) Dividend Convertible Preferred, $7.50 (1936—$12.50) per share	$1,185,600.00	$1,976,000.00
$5.50 Cumulative Dividend Preferred, $8.25 (1936—$13.75) per share	1,624,705.50	2,707,842.50
$6 Cumulative Dividend Preferred, $9.00 (1936—$15.00) per share	675,000.00	1,125,000.00
	$3,485,305.50	$5,808,842.50

NOTE: There are outstanding Common Stock Purchase Warrants, which were originally issued attached to certificates for the $5.50 Cumulative Dividend Preferred Stock, to purchase 196,934 shares of Common Stock at $68 per share on or before November 1, 1938. The 158,080 shares of $5 (Cumulative) Dividend Convertible Preferred Stock are convertible at option of holders up to June 30, 1938 into one and one-half shares of Common Stock for each share of Preferred.

See page 25 for detailed Statement of Capitalization.

Engineers' Exhibit No. 37-D (Cont'd)

Page 17:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Income Statement of Engineers Public Service Company Including Undisturbed Earnings of Subsidiary Companies Applicable to Engineers Public Service Company

(Inter-company Items Eliminated)

	12 Months Ending December 31		
	1936	1935	Increase
Balance of Earnings Applicable to Engineers Public Service Company, from page 16	$3,451,240.79	$2,669,828.98	$ 781,411.81
Earnings from Subsidiary Companies, deducted above:			
Interest	63,105.57	61,597.94	1,507.63
Preferred Dividends, Declared	87,672.00	87,924.00	252.00*
Revenue from Miscellaneous Investment	44,542.80	—0—	44,542.80
Total	$3,646,561.16	$2,819,350.92	$ 827,210.24
Expenses, Taxes and Interest	225,673.44	162,247.16	63,426.28
Balance of Earnings of Parent and Subsidiary Companies Applicable to Engineers Public Service Company Stocks, Before Allowing for Loss, as below	$3,420,887.72	$2,657,103.76	$ 763,783.96
Allowing for Loss in Investment in Common Stocks of Subsidiary Companies, Measured by Cumulative Dividends on Preferred Stocks of Such Companies Not Earned Within the Year, Less Minority Interests. Such Amounts Are Not a Claim Against Engineers Public Service Company or Its Other Subsidiary Companies	474,495.57	1,051,236.11	576,740.54*
Balance Applicable to Stocks of Engineers Public Service Company, After Allowing for Loss, as above	$2,946,392.15	$1,605,867.65	$1,340,524.50
Preferred Dividend Requirements of Engineers Public Service Company	$2,323,537.00	$2,323,537.00	$ —0—

Engineers' Exhibit No. 37-D (Cont'd)

Page 17:

Comparative Consolidated Earned Surplus Statement

(Minority Interests Excluded)

	1936	1935	Increase
Earned Surplus at Beginning of Year	$5,802,096.98	$5,528,165.77	$ 273,931.21
Balance, as above	2,946,392.15	1,605,867.65	1,340,524.50
Direct Credit	609,460.33(a)	—0—	609,460.33
Total	$9,357,949.46	$7,134,033.42	$2,223,916.04
Net Direct Charges:			
Loss upon Liquidation of Subsidiaries	$ —0—	$ 380,209.95	$ 380,209.95*
Premium and Expenses on Bonds Reacquired	26,397.49	330,267.73	303,870.24*
Loss on Sale of Investments and Land, and Abandonment of Property	75,352.12	484,738.75	409,386.63*
Miscellaneous	12,243.04	136,720.01	124,476.97*
Preferred Dividends Declared	4,647,074.00	—0—	4,647,074.00
Total Deductions	$4,761,066.65	$1,331,936.44	$3,429,130.21
Earned Surplus at End of Year	$4,596,882.81	$5,802,096.98	$1,205,214.17*

* Decrease.

(a) Represents net profit arising from assignment by Engineers Public Service Company of a partial interest in an option to purchase El Paso Natural Gas Company common stock and sale of 60,000 shares of common stock of that company held by Trustee under Declaration of Trust, less Federal income tax and expenses applicable thereto.

Engineers' Exhibit No. 37-D (Cont'd)

Page 18:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

ASSETS	Dec. 31, 1936	Dec. 31, 1935	Increase
Property, Plant and Equipment (a)	$323,887,212.03	$319,321,561.32	$ 4,565,650.71
Investments, at Cost or Written-down Amounts	10,092,868.56 (b) (c)	12,681,911.07	2,589,042.51*
Cash in Banks and on Hand	8,670,361.87	7,884,158.66	786,203.21
United States Treasury Bills, at Cost	—0—	2,000,156.25	2,000,156.25*
Notes and Warrants Receivable	638,537.01	573,029.77	65,507.24
Accounts Receivable from Customers and Miscellaneous Sources, Including Installment Accounts	7,318,637.23 (d)	6,476,840.86	841,796.37
Interest Receivable	166,006.07	248,805.20	82,799.13*
Materials and Supplies, at Cost or Written-down Amounts	2,707,918.60	2,590,556.94	117,361.66
Appliances on Rental Less Rentals Charged	468,411.79	585,408.38	116,996.59*
Prepayments of Insurance, Taxes, Etc.	267,630.09	330,364.56	62,734.47*
Sinking Funds, Representing Cash Held by Bond Trustees	291,662.25	93,156.85	198,505.40
Special Deposits with Trustees under Mortgages	1,620,208.17 (e)	520,133.98	1,100,074.19
Unamortized Debt Discount and Expense, Including Unamortized Discount and Expense and Call Premium on Refunded Issues	10,408,169.15	10,294,980.54	113,188.61
Unadjusted Debits	182,896.78	224,517.13	41,626.35*
	$366,720,519.60	$363,825,581.51	$ 2,894,938.09

Engineers' Exhibit No. 37-D (Cont'd)

Page 18:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

LIABILITIES	Dec. 31, 1936	Dec. 31, 1935	Increase
Preferred Stock (f)	$ 41,075,633.00	$ 41,075,633.00	$ —0—
Common Stock (g)	1,909,968.00	58,059,512.85	56,149,544.85*
Subsidiary Companies:			
Preferred Stock (Represented by 739,429 shares; entitled in involuntary liquidation to $74,297,455) (h) (Detail on page 22)	69,449,796.43	69,450,138.29	341.86*
Premium and Discount on Preferred Stock	78,679.10	78,679.10	—0—
Bonds (Detail on page 23)	142,871,000.00 (i)	146,498,500.00	3,627,500.00*
Debentures	4,000,000.00	—0—	4,000,000.00
Coupon Notes	2,919,500.00 (j)	2,919,500.00	—0—
Notes Payable:			
Banks	788,032.27	675,000.00	113,032.27
Others	74,045.00	320,378.13	246,333.13*
Accounts Payable	1,871,683.70	1,891,985.23	20,301.53*
Customers' Deposits	766,224.34	749,355.79	16,868.55
Dividends Declared	188,932.25	51,432.25	137,500.00
Interest and Taxes Accrued	3,877,474.94	3,359,944.27	517,530.67
Sundry Liabilities	189,283.28	463,577.79	274,294.51*
Retirement Reserve, Representing Provision for Future Property Retirements (k)	24,434,630.31 (l)	22,931,380.61	1,503,249.70
Operating Reserves, Including Provision for Losses on Doubtful Notes and Accounts, Injury and Damage Claims, Etc.	1,571,739.30	1,431,481.57	140,257.73
Unadjusted Credits	424,803.65	305,203.22	119,600.43
Cumulative Preferred Dividends Not Declared (Subsidiary Companies)	8,881,454.75	7,185,275.00	1,696,179.75
Minority Interests in Common Capital Stocks and Surplus of Subsidiary Companies (Including Earned Surplus $63,810.13; 1935—$59,366.27)	601,211.62	576,507.43	24,704.19
Capital Surplus (m)	56,149,544.85	—0—	56,149,544.85
Earned Surplus (c)	4,596,882.81 (l) (n)	5,802,096.98	1,205,214.17*
	$366,720,519.60	$363,825,581.51	$ 2,894,938.09

* Decrease.

NOTE: See explanatory notes on page 19, opposite, which are to be read as an integral part of the above consolidated balance sheet.

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Detail by Subsidiary Companies of Balance for Dividends and Surplus, Preferred Dividends, and Balance for Common Stock Owned by Engineers Public Service Company

12 Months Ending December 31, 1936

Subsidiary Companies Which Have Earned Their Preferred Dividends:

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Not Declared	Balance for Common	Minority Interest	Balance Applicable to Parent Company 1936	Balance Applicable to Parent Company 1935
Baton Rouge Electric Co.	$ 226,665.92	$ 37,254.00		$ 189,411.92		$ 189,411.92	$ 121,510.30
Eastern Texas Electric Co. & Sub. Cos.	1,157,146.04	579,623.41		577,522.63(a)	$ 1,264.76	576,257.87	293,726.42
El Paso Electric Co. & Sub. Cos.	327,269.38	229,682.00		97,587.38	4,982.15	92,605.23	82,504.51
Engineers Securities Corp.	89,201.06	No Pref.		89,201.06		89,201.06	178,248.52
Louisiana Steam Generating Corp.	346,509.45	No Pref.		346,509.45		346,509.45	207,777.85
Ponce Electric Co.	90,199.70	25,039.00		65,160.70	1,660.27	63,500.43	28,682.05
Savannah Electric and Power Co.	328,026.08	209,114.70		118,911.38	203.34	118,708.04	41,265.40
Virginia Electric and Power Co.	3,153,506.01	1,171,554.00		1,981,952.01	6,905.22	1,975,046.79	1,716,113.93
Total	$5,718,523.64	$2,252,267.11	—0—	$3,466,256.53	$15,015.74	$3,451,240.79	$2,669,828.98

Subsidiary Companies Which Have Not Earned Their Preferred Dividends:

Note:—Deficiencies are indicated by *Italics*

(The Deficiencies in Balance for Common are not a claim against either Engineers Public Service Company or its other Subsidiary Companies)

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Not Declared	Deficiency for Common	Minority Interest	Deficiency Applicable to Parent Company 1936	Deficiency Applicable to Parent Company 1935
The Key West Electric Co.	$ 18,012.27		$ 24,374.00	*$ 6,361.73*		*$ 6,361.73*	*$ 19,332.00*
Puget Sound Power & Light Co. & Sub. Cos.	1,662,600.47	$412,500.00	1,721,470.00	*471,369.53*	*$3,235.69*	*468,133.84*	*1,031,904.11*
Total	$1,680,612.74	$412,500.00	$1,745,844.00	*$477,731.26*	*$3,235.69*	*$474,495.57*	*$1,051,236.11*
Balance for Dividends and Surplus (See page 16)	$7,399,136.38						

(a) Balance for Interest on Demand Income Notes of Eastern Texas Electric Company (Delaware) held by Engineers Public Service Company.

Engineers' Exhibit No. 37-E.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1937

Page 4:

ENGINEERS PUBLIC SERVICE COMPANY

ORGANIZED IN 1925 UNDER THE LAWS OF DELAWARE

DIRECTORS

DONALD C. BARNES
HOMER L. FERGUSON
ANDREW FLETCHER
ALEXANDER C. FORBES
PHILIP A. S. FRANKLIN
CHARLES W. KELLOGG
ARTHUR W. PAGE
SAMUEL B. TUELL
WALTER B. WALKER

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
Chairman of the Board

DONALD C. BARNES
President

SAMUEL B. TUELL
Vice President and Comptroller

THOMAS J. HANLON, JR.
Vice President

ALAN W. HASTINGS
Vice President

JASON C. LEIGHTON
Treasurer

RICHARD N. BENJAMIN
Secretary

GENERAL COUNSEL

MUDGE, STERN, WILLIAMS & TUCKER
New York

AUDITORS

LYBRAND, ROSS BROS. & MONTGOMERY
New York

Engineers' Exhibit No. 37-E (Cont'd)

Page 5-7:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware.

March 30, 1938.

TO THE STOCKHOLDERS:

Engineers Public Service Company is a public utility holding company whose income is derived primarily from dividends and interest on securities owned. It received total income of $2,976,522 in 1937 as compared with $2,763,564 in 1936. After deduction of expenses, taxes and interest, there remained a balance available for dividends and surplus of $2,741,670, which amount was $418,133 in excess of the annual preferred dividend requirements of $2,323,537. In 1936 the corresponding balance for dividends and surplus was $2,537,891. The above figures for 1937 do not include credits to earned surplus as follows: a net profit of $830,843 realized from the sale of 60,000 shares of common stock of El Paso Natural Gas Company, and a net profit of $104,080 from the liquidation of Ponce Electric Company, a former subsidiary, following the sale of its property.

The combined operating revenues of subsidiary companies for 1937, as shown in the combined income statement on page 16, were $52,456,910, an increase of $4,333,352 or 9.0% over 1936. On January 1, 1937 the major subsidiary companies adopted the Federal Power Commission System of Accounts and certain others made changes in their accounting procedure to conform more nearly with this classification, with the result that certain items in the income statement are not exactly comparable with the previous year's figures. This is more fully explained on page 7. However, the balance after operating expenses, taxes and

Engineers' Exhibit No. 37-E (Cont'd)

non-operating income—net is substantially comparable. This balance was $21,616,195 in 1937, an increase of $733,137 or 3.5% over the previous year. Substantial increases in wages, cost of fuel and materials, and taxes prevented the larger gain in this balance which would otherwise have been expected from the gain in operating revenues.

Two of the subsidiary companies, Puget Sound Power & Light Company and The Key West Electric Company, failed to earn their full preferred dividend requirements for the year 1937 and reported deficiencies for their common shares of which $361,451 was applicable to the shares owned by Engineers Public Service Company. Although this deficiency is not a claim against the Engineers Company, it reduces the consolidated earnings. All other subsidiaries earned their preferred dividend requirements and in addition had balances for their common shares of which $4,066,618 was applicable to shares owned by the Engineers Company. The consolidated balance applicable to the stocks of the Engineers Company is arrived at by adding to this balance of $4,066,618, the income which the Company receives from notes and preferred stocks owned and from dividends on El Paso Natural Gas Company common stock, and by deducting from this total its expenses, taxes and interest, and the deficiency of earnings, after inter-company eliminations, of the two subsidiaries hereinbefore mentioned. The consolidated balance so produced was $3,768,777 in 1937 as compared with $2,946,392 in 1936. The complete income statement which appears on pages 16 and 17 is further supported by the tabulation on page 21 showing the contribution by each subsidiary to the consolidated balance.

In addition to the two subsidiaries which failed to earn their full preferred dividend requirements in 1937, a third, The Western Public Service Company, had cumulative preferred dividends in arrears at the end of the year. The total cumulative preferred dividends not declared on shares

of these three subsidiaries held by the public amounted to $10,436,070 at the end of the year of which amount $10,372,840 was not declared by Puget Sound Power & Light Company.

Preferred Dividends

During the year dividends aggregating two and a half years' dividend requirements were declared as follows: A dividend of 75% of a full year's requirement was declared payable April 1 to stockholders of record March 10; a dividend of 25% of a full year's requirement was declared payable July 1 to stockholders of record June 15; a dividend of 75% of a full year's requirement was declared payable October 1 to stockholders of record September 20, and a dividend of 75% of a full year's requirement was declared payable January 3, 1938 to stockholders of record December 10, 1937. The dividend paid on January 3, 1938 included the regular quarterly payment due at that time and there are now no dividends in arrears on the preferred stock.

Ownership of Common Stock

On December 27, 1937 Stone & Webster, Incorporated distributed to its stockholders substantially all of its 91% interest in the common stock of the Company, which it had owned for more than seven years. In connection with this distribution, changes in personnel were effected in order that there no longer would be directors and officers common to both the Company and Stone & Webster, Incorporated. The present Directors and officers are shown on page 4 of this report.

Public Utility Act of 1935

The Directors of Engineers Public Service Company authorized the registration of the Company as a public utility holding company under the Public Utility Holding

Engineers' Exhibit No. 37-E (Cont'd)

Company Act of 1935, which registration was effected on February 21, 1938. The two public utility holding company subsidiaries of the Company, El Paso Electric Company (Delaware) and The Western Public Service Company, also registered on February 21, 1938, pursuant to authorization of the Boards of Directors of the respective companies. In making these registrations, the Company and the two holding company subsidiaries reserved their constitutional rights for protection against any action taken in the future under the Act which might encroach on such constitutional rights and cause serious damage to these companies and their security holders. The above action was taken by the Company because it was deemed desirable to proceed without further delay with the consolidation of the properties of Gulf States Utilities Company, Baton Rouge Electric Company and Louisiana Steam Generating Corporation, and counsel had advised that such action should not be taken until after registration as a public utility holding company. The proposed consolidation of properties is referred to in more detail below under "Simplification of Corporate Structure".

The United States Supreme Court, on March 28, 1938, upheld the provisions of the Act requiring the registration of all public utility holding companies.

Engineers Public Service Company, Inc., the mutual service organization whose operations are outlined on page 9, has filed an application with the Securities and Exchange Commission for approval of the continuance of substantially its present service arrangements. It has operated as a mutual service organization since May 1, 1931.

Simplification of Corporate Structure

In February 1926 the Engineers Company acquired a controlling interest in Eastern Texas Electric Company (Delaware) and at December 31, 1937 owned 97.8% of its

Engineers' Exhibit No. 37-E (Cont'd)

common stock. That company was a holding company controlling the present properties of Gulf States Utilities Company and The Western Public Service Company. Since the continuance of this holding company was no longer required, arrangements were completed for its dissolution and on February 9, 1938 the common stock of Gulf States Utilities Company and the common stock and certain other securities of The Western Public Service Company were transferred to Engineers Public Service Company. The minority common stockholders of Eastern Texas Electric Company received $46 in cash per share for their holdings in accordance with the Plan of Liquidation. The removal of this intermediate holding company is in accordance with the purposes of the Public Utility Holding Company Act of 1935.

To simplify further its corporate structure Engineers Public Service Company has taken steps to consolidate the properties of its three subsidiaries operating in the Gulf Coast area, namely, Gulf States Utilities Company, Baton Rouge Electric Company and Louisiana Steam Generating Corporation. Applications were filed with the Securities and Exchange Commission and the Federal Power Commission on February 25, 1938 requesting their approval of the consolidation. All of the common stocks of these companies are now owned by the Company. A substantial program of construction is under way for each of these companies. The proposed consolidation would result in the formation of a stronger financial unit, thereby facilitating the raising of funds for present and future construction requirements, and would permit economies in operation. A reduction in rates is contemplated in connection with the consolidation in anticipation of such economies. Since Gulf States Utilities Company, which would be the corporation that continued its existence through the consolidation, does not have and cannot obtain the charter right to engage in a transportation business, it is planned to transfer the bus

property of Baton Rouge Electric Company to a new corporation which would be organized to continue this operation. This new corporation would be a direct subsidiary of the Engineers Company. In connection with the above consolidation it is proposed that the charter of Gulf States Utilities Company be amended so as to give the preferred stockholders one vote per share for election of directors and for all other purposes. The special voting rights now held by them would not be disturbed.

El Paso Natural Gas Company

At the beginning of 1937 the Company owned the beneficial interest in 111,357 common shares of El Paso Natural Gas Company held by a Trustee for liquidation. In August the Trustee received an offer to purchase 60,000 shares of this stock at $25 per share; the Engineers Company assented to this proposal and the stock was sold. After deducting Federal income tax and expenses, this sale resulted in a net profit on these shares of $830,843 which was credited direct to earned surplus. A similar transaction in 1936 with a net profit of $609,460 was recorded in the same manner. The Company continues to own the beneficial interest in 51,357 common shares which represents less than 9% of the total common shares of El Paso Natural Gas Company outstanding at the end of the year.

Pages 11-12:

Puget Sound Power & Light Company

Total operating revenues increased $1,711,287 or 11.4%. Electric revenues, which constituted approximately 85% of the total, increased $1,594,689 or 12.8%, inclusive of $735,062 of non-recurring sales to another utility. Transportation revenues exceeded those of 1936 by 3.1%. Pay roll increased approximately $450,000 due principally to wage increases in accordance with labor agreements, and

Engineers' Exhibit No. 37-E (Cont'd)

the cost of fuel for steam power generation increased $441,000 of which a substantial part was to furnish power for the above mentioned sales to another utility. The default of interest accruing from March 1, 1937 on Seattle Municipal Street Railway Bonds reduced non-operating income—net by $347,333 compared with the previous year.

Plans have been announced by Mr. J. D. Ross, administrator of the Bonneville project who is on leave of absence as Superintendent of Seattle City Light Department, to construct transmission lines and sell the power output of the Bonneville plant. The initial installation of 86,400 kilowatts is expected to begin generating power in May 1938. The Federal Power Commission, in accordance with an Act of Congress, divided the total cost of this project between power production, navigation and other uses, and allocated to power production less than one quarter of the cost of the initial project. Power rates will be based on 3½% interest on this allocation and its amortization over forty years. During January 1938 a contract was let for completion of the high dam at Grand Coulee and the construction of the west bay power house structure. It is stated that the dam is to be completed in 1942 and that the ultimate project will have a total generating capacity, including that for irrigation purposes, of approximately two million kilowatts. The project contemplates eventually the irrigation of a million acres of land.

During the year several public power districts set up or enlarged their staff organizations and started levying taxes to maintain them. Plans are being made to acquire the portions of the privately owned systems located in these districts but the company has received no definite proposals from any district for the sale of any of its property. The question of establishing a public power district for King County outside Seattle and also a county-wide district for Kitsap County will be voted on at the general election in November 1938.

Engineers' Exhibit No. 37-E (Cont'd)

During the year the company entered into an agreement with Seattle City Light for the interchange of surplus and emergency power for the mutual advantage of both systems. A 30,000 kilovatt interconnection has been constructed and was put in operation under this agreement early in 1938.

The Department of Public Service has issued an order, effective July 1, 1938, requiring that the company discontinue certain metering and billing practices arising from competition with the City Light System for business in Seattle. The City of Seattle adopted an ordinance stating that the City's municipal plant would adopt as a policy the same regulations as were ordered for the company. In further reference to the default of interest payments on the $8,336,000 of municipal railway bonds held by the company, suit has been entered by the company asking for a declaratory judgment by the court as to the priority of payment of bond principal and interest over operating costs of the railway. The City has filed a motion to dismiss the company's suit. The company has also filed claims with the City Comptroller for interest due September 1, 1937 and for principal and interest due March 1, 1938. This action is in compliance with the City charter preliminary to a suit in tort to hold the City generally liable for failure to impound street railway revenues. The City is attempting to develop a new financial plan for rehabilitating the municipal street railway and retiring the bonds held by the company.

Engineers' Exhibit No. 37-E (Cont'd)

Page 14:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)
(Parent Company Only)

Comparative Income Statement

GROSS REVENUES	1937	1936	Increase
Revenue from Subsidiary Companies:			
Interest—Income Notes	$ 219,500.00	$ 225,000.00	$ 5,500.00*
Interest—Time Notes	59,811.74	63,056.82	3,245.08*
Interest—Miscellaneous	—0—	48.75	48.75*
Dividends—Preferred	76,274.28	87,672.00	11,397.72*
Dividends—Common	2,470,222.00	2,343,243.75	126,978.25
Dividends on Miscellaneous Investment	150,714.00	44,542.80	106,171.20
Total	$2,976,522.02	$2,763,564.12	$ 212,957.90
EXPENSES AND TAXES			
Expenses	$ 119,252.53	$ 105,226.64	$ 14,025.89
Taxes—Including Federal income taxes of $78,770.55 (1936—$78,119.18) (a)	114,468.55	118,853.46	4,384.91*
Total	$ 233,721.08	$ 224,080.10	$ 9,640.98
Balance	$2,742,800.94	$2,539,484.02	$ 203,316.92
Interest Paid	1,130.46	1,593.34	462.88*
Balance for Dividends and Surplus	$2,741,670.48	$2,537,890.68	$ 203,779.80
Preferred Dividend Requirements	$2,323,537.00	$2,323,537.00	$ —0—

Comparative Earned Surplus Statement

	1937	1936	Increase
Earned Surplus at Beginning of Year	$4,692,526.49	$6,192,249.48	$1,499,772.99*
Balance for Dividends and Surplus, as above	2,741,670.48	2,537,890.68	203,779.80
Direct Credits	943,727.05(b)	609,460.33(c)	334,266.72
Total	$8,377,924.02	$9,339,600.49	$ 961,676.47*
Preferred Dividends Declared	5,808,861.48	4,647,074.00	1,161,787.48
Earned Surplus at End of Year	$2,569,062.54	$4,692,526.49	$2,123,463.95*

* Decrease.

(a) Excludes Federal income tax of $165,536.30 (1936—$107,551.82) on transactions described in notes (b) and (c) below. The company is of the opinion that it has no liability for Federal surtax on undistributed profits.

(b) Represents net profit of $830,843.21 from sale of 60,000 shares of common stock of El Paso Natural Gas Company held by Trustee under Declaration of Trust and $112,883.84 net profit from liquidation of subsidiary companies, after deducting Federal income tax and expenses applicable thereto.

(c) Represents net profit arising from assignment by the company of a partial interest in an option to purchase El Paso Natural Gas Company common stock and sale of 60,000 shares of common stock of that company held by Trustee under Declaration of Trust, after deducting Federal income tax and expenses applicable thereto.

Engineers' Exhibit No. 37-E (Cont'd)

Page 15:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)
(Parent Company Only)
Comparative Balance Sheet

ASSETS	Dec. 31, 1937	Dec. 31, 1936	Increase
Investments in Subsidiary Companies (a)	$ 89,443,868.59	$ 90,504,157.28	$1,060,288.69*
Miscellaneous Investment, at Cost	427,975.00(b)	927,975.00	500,000.00*
Notes Receivable (Subsidiary Companies): (c)			
Income Notes	8,485,000.00	8,655,000.00	170,000.00*
Time Notes	2,049,000.00	2,011,000.00	38,000.00
Cash in Banks	1,476,873.57	1,944,437.28	467,563.71*
Accounts Receivable	120,111.46	425.24	119,686.22
Dividends Receivable (Subsidiary Companies)	16,988.25	21,918.00	4,929.75*
Unadjusted Debits	—0—	3,085.90	3,085.90*
	$102,019,816.87	$104,067,998.70	$2,048,181.83*
LIABILITIES			
Preferred Stock (d)	$ 41,075,633.00	$ 41,075,633.00	$ —0—
Common Stock (e)	1,909,968.00	1,909,968.00	—0—
Accounts Payable	20,244.70	4,645.34	15,599.36
Taxes Accrued	295,363.78	210,861.84	84,501.94
Sundry Liabilities	—0—	24,819.18	24,819.18*
Capital Surplus	56,149,544.85	56,149,544.85	—0—
Earned Surplus	2,569,062.54	4,692,526.49(f)	2,123,463.95*
	$102,019,816.87	$104,067,998.70	$2,048,181.83*

Contingent Liability:

Agreement, jointly and severally with Eastern Texas Electric Company (Del.), to indemnify a surety company against all losses and expenses it might incur as guarantor of the payment, on various maturity dates between 1938 and 1948, inclusive, of $329,000 principal amount of municipal bonds assumed by The Western Public Service Company, with interest thereon until paid; and to guarantee payment of the annual premiums to the surety company.

*Decrease.

(a) Investments in subsidiary companies are carried at an amount based on the stated value of securities of the Parent Company issued, and cash paid, to acquire stocks of subsidiaries and an amount of $5,263,498 arising from revaluation.

(b) Represented by 51,357 shares of common stock of El Paso Natural Gas Company held by Trustee under Declaration of Trust. The quoted market price on December 31, 1937 when applied to such shares indicates an amount of approximately $911,500.

(c) See page 24 for detail.

(d) Represented by 158,080 shares $5 (Cumulative) Dividend Convertible Preferred, 196,934 shares $5.50 Cumulative Dividend Preferred and 75,000 shares $6 Cumulative Dividend Preferred, of no par value (entitled to $110 per share upon redemption or voluntary liquidation, or $100 per share upon involuntary liquidation, plus accrued dividends, except that after June 30, 1938 the $5 Preferred is entitled to $105 per share upon redemption or voluntary liquidation). Total Preferred Stock authorized 431,000 shares.

(e) Represented by 1,909,968 shares of $1 par value. Authorized 2,349,000 shares. (See Note.)

(f) Before provision for cumulative dividends on Preferred Stock in arrears and not declared, $3,485,305.50.

NOTE: There are outstanding Common Stock Purchase Warrants, which were originally issued attached to certificates for the $5.50 Cumulative Dividend Preferred Stock, to purchase 196,934 shares of Common Stock at $68 per share on or before November 1, 1938. The 158,080 shares of $5 (Cumulative) Dividend Convertible Preferred Stock are convertible at option of holders up to June 30, 1938 into one and one-half shares of Common Stock for each share of Preferred.

See page 25 for detailed statement of capitalization.

Engineers' Exhibit No. 37-E (Cont'd)

Page 17:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Income Statement of Engineers Public Service Company Including Undistributed Earnings of Subsidiary Companies Applicable to Engineers Public Service Company

(Inter-company Items Between Subsidiary Companies Eliminated)

	1937	1936	Increase
Balance of Earnings Applicable to Engineers Public Service Company, from page 16	$4,066,617.63	$3,451,240.79	$ 615,376.84
Earnings from Subsidiary Companies, included in charges above:			
Interest	59,811.74	63,105.57	3,293.83*
Preferred Dividends, Declared	76,274.28	87,672.00	11,397.72*
Dividends on Miscellaneous Investment	150,714.00	44,542.80	106,171.20
Total	$4,353,417.65	$3,646,561.16	$ 706,856.49
Expenses, Taxes and Interest (a)	234,851.54	225,673.44	9,178.10
Balance of Earnings of Parent and Subsidiary Companies Applicable to Engineers Public Service Company Stocks, Before Allowing for Loss, as below	$4,118,566.11	$3,420,887.72	$ 697,678.39
Allowing for Loss in Investment in Common Stocks of Subsidiary Companies, Measured by Cumulative Dividends on Preferred Stocks of Such Companies Not Earned Within the Year, Less Minority Interests and Inter-company Eliminations. Such Amounts Are Not a Claim Against Engineers Public Service Company or its Other Subsidiary Companies	349,789.02	474,495.57	124,706.55*
Balance Applicable to Stocks of Engineers Public Service Company, After Allowing for Loss, as above	$3,768,777.09	$2,946,392.15	$ 822,384.94
Preferred Dividend Requirements of Engineers Public Service Company	$2,323,537.00	$2,323,537.00	$ —0—

Engineers' Exhibit No. 37-E (Cont'd)

Comparative Consolidated Earned Surplus Statement

(Minority Interests Excluded)

	1937	1936	Increase
Earned Surplus at Beginning of Year	$4,596,882.81	$5,802,096.98	$1,205,214.17
Balance, as above	3,768,777.09	2,946,392.15	822,384.94
Miscellaneous Credits	872,909.71(b)	609,460.33(c)	263,449.38
Total	$9,238,569.61	$9,357,949.46	$ 119,379.85*
Deductions:			
Special Appropriation to Retirement Reserve	$ 586,966.36	$ —0—	$ 586,966.36
Federal Income Taxes for Prior Years	166,377.50	—0—	166,377.50
Loss on Liquidation of Subsidiaries	47,458.55	—0—	47,458.55
Premium and Expenses on Bonds Reacquired	23,597.40	26,397.49	2,800.09*
Miscellaneous	40,505.22	87,595.16	47,089.94*
Preferred Dividends Declared	5,808,861.48	4,647,074.00	1,161,787.48
Total Deductions	$6,673,766.51	$4,761,066.65	$1,912,699.86
Earned Surplus at End of Year	$2,564,803.10	$4,596,882.81	$2,032,079.71*

*Decrease.

(a) Includes Federal income taxes of $78,770.55 (1936—$78,119.18) but excludes Federal income taxes of $165,536.30 (1936—$107,551.82) applicable to profits credited direct to Earned Surplus. The Company is of the opinion that it has no liability for Federal surtax on undistributed profits.

(b) Represents net profit of $830,843.21 from sale of 60,000 shares of common stock of El Paso Natural Gas Company held by Trustee under Declaration of Trust, after deducting Federal income tax and expenses applicable thereto, and $42,066.50 representing cumulative unpaid dividends on preferred stock of a subsidiary acquired by the Parent Company.

(c) Represents net profit arising from assignment by Engineers Public Service Company of a partial interest in an option to purchase El Paso Natural Gas Company common stock and sale of 60,000 shares of common stock of that company held by Trustee under Declaration of Trust, after deducting Federal income tax and expenses applicable thereto.

Engineers' Exhibit No. 37-E (Cont'd)

Page 18:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

	Dec. 31, 1937	Dec. 31, 1936	Increase
ASSETS			
Property, Plant and Equipment (a)	$329,155,273.49	$323,887,212.03	$5,268,061.46
Investments, at Cost or Written-down Amounts	9,501,241.24(b)(c)	10,092,868.56	591,657.32*
Cash in Banks and on Hand	7,587,483.45	8,670,361.87	1,082,878.42*
Notes and Warrants Receivable	636,337.56	638,537.01	2,199.45*
Accounts Receivable from Customers and Miscellaneous Sources, Including Installment Accounts	8,061,512.38(d)	7,318,637.23	742,875.15
Interest Receivable	225,209.49	166,006.07	59,203.42
Materials and Supplies, at Cost or Written-down Amounts	3,032,673.46	2,707,918.60	324,754.86
Appliances on Rental, at Cost, Less Rentals Charged	238,331.26	468,411.79	230,080.53*
Prepayments	239,861.70	267,630.09	27,768.39*
Sinking Funds, Representing Cash held by Bond Trustees	294,508.65	291,662.25	2,846.40
Special Deposits	44,506.93(e)	1,620,208.17	1,575,701.24*
Unamortized Debt Discount and Expense, Including Unamortized Discount and Expense and Call Premium on Refunded Issues	9,767,639.10	10,408,169.15	640,530.05*
Unadjusted Debits	261,898.00	182,896.78	79,001.22
	$369,046,446.71	$366,720,519.60	$2,325,927.11

Engineers' Exhibit No. 37-E (Cont'd)

LIABILITIES

Preferred Stock(f)	$ 41,075,633.00	$ 41,075,633.00	$ —0—
Common Stock(g)	1,909,968.00	1,909,968.00	—0—
Subsidiary Companies:			
Preferred Stock (Represented by 737,000 shares; entitled in involuntary liquidation to $74,054,540) (h) (Detail on page 22)	69,206,854.51	69,449,796.43	242,941.92*
Premium and Discount on Preferred Stock	78,679.10	78,679.10	—0—
Bonds (Detail on page 23)	142,734,000.00(i)	142,871,000.00	137,000.00*
Debentures (Detail on page 23)	3,644,000.00	4,000,000.00	356,000.00*
Coupon Notes (Detail on page 23)	2,919,500.00(j)	2,919,500.00	—0—
Notes Payable:			
Banks	1,717,173.52	788,032.27	929,141.25
Others	100,392.16	74,045.00	26,347.16
Accounts Payable	1,706,025.51	1,871,683.70	165,658.19*
Customers' Deposits	788,028.46	766,224.34	21,804.12
Dividends Declared	51,432.25	188,932.25	137,500.00*
Interest and Taxes Accrued	4,527,394.62	3,877,474.94	649,919.68
Sundry Liabilities	200,204.39	189,283.28	10,921.11
Retirement Reserve(k)	26,290,092.36	24,434,630.31	1,855,462.05
Operating Reserves, Including Provision for Losses on Doubtful Notes and Accounts, Injury and Damage Claims, Etc.	1,850,472.93	1,571,739.30	278,733.63
Unadjusted Credits	520,468.36	424,803.65	95,664.71
Cumulative Preferred Dividends Not Declared (Subsidiary Companies)	10,436,070.25	8,881,454.75	1,554,615.50
Minority Interests in Common Capital Stocks and Surplus of Subsidiary Companies (Including Surplus $61,483.04; 1936—$63,810.13)	575,709.34	601,211.62	25,502.28*
Capital Surplus	56,149,544.85	56,149,544.85	—0—
Earned Surplus(c)	2,564,803.10(l)	4,596,882.81(m)	2,032,079.71*
	$369,046,446.71	$366,720,519.60	$2,325,927.11

See note on combined income statement regarding adoption of new system of accounts.

* Decrease.

NOTE: See explanatory notes on page 19 opposite, which are to be read as an integral part of the above consolidated balance sheet.

SUBSIDIARY COMPANIES OF ENGINEERS PUBLIC SERVICE COMPANY

Detail of Balance for Dividends and Surplus, Preferred Dividends, and Balance for Common Stock Owned by Engineers Public Service Company

Twelve Months Ending December 31, 1937

Subsidiary Companies Which Have Earned Their Preferred Dividends

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Not Declared	Balance for Common	Minority Interest	Balance Applicable to Parent Company 1937	Balance Applicable to Parent Company 1936
Baton Rouge Electric Co.	$ 286,690.37	$ 37,254.00		$ 249,436.37		$ 249,436.37	$ 189,411.92
Eastern Texas Electric Co. & Sub. Cos.	1,470,735.01	579,624.35		891,110.66(a)	$ 8,850.18	882,260.48	576,257.87
El Paso Electric Co. & Sub. Cos.	401,471.06	229,682.00		171,789.06	8,768.96	163,020.10	92,605.23
Engineers Securities Corp.	492.55	No Pref.		492.55		492.55	89,201.06
Louisiana Steam Generating Corp.	397,465.05	No Pref.		397,465.05		397,465.05	346,509.45
Ponce Electric Co.	25,248.52	10,570.14		14,678.38	373.99	14,304.39	63,500.43
Savannah Electric and Power Co.	353,844.79	209,114.72		144,730.07	247.50	144,482.57	118,708.04
Virginia Electric and Power Co.	3,394,516.34	1,171,615.50		2,222,900.84	7,744.72	2,215,156.12	1,975,046.79
Total	$6,330,463.69	$2,237,860.71	—0—	$4,092,602.98	$25,985.35	$4,066,617.63	$3,451,240.79

Subsidiary Companies Which Have Not Earned Their Preferred Dividends

Note:—Deficiencies are indicated by *Italics*

(The Deficiencies in Balance for Common are not a claim against either Engineers Public Service Company or its other Subsidiary Companies)

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Not Declared	Deficiency for Common	Minority Interest	Deficiency Applicable to Parent Company 1937	Deficiency Applicable to Parent Company 1936
The Key West Electric Co.	$ 22,798.09	-0-	$ 24,374.00	*$ 1,575.91*		*$ 1,575.91*	*$ 6,361.73*
Puget Sound Power & Light Co. & Sub. Cos.	1,771,607.46	$550,000.00	1,583,970.00	*362,362.54*	*$2,487.43*	*359,875.11*	*468,133.84*
Total	$1,794,405.55	$550,000.00	$1,608,344.00	*$363,938.45*	*$2,487.43*	*$361,451.02*	*$474,495.57*
Balance for Dividends and Surplus (See page 16)	$8,124,869.24						

(a) Balance for Interest on Demand Income Notes of Eastern Texas Electric Company (Delaware) held by Engineers Public Service Company.

Engineers' Exhibit No. 37-F

Excerpts from Annual Report of Engineers Public Service Company for the Year 1938

Page 4:

ENGINEERS PUBLIC SERVICE COMPANY

ORGANIZED IN 1925 UNDER THE LAWS OF DELAWARE

DIRECTORS

DONALD C. BARNES
HOWARD COONLEY
HOMER L. FERGUSON
ANDREW FLETCHER
ALEXANDER C. FORBES
PHILIP A. S. FRANKLIN
CHARLES W. KELLOGG
THOMAS W. STREETER
SAMUEL B. TUELL

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
Chairman of the Board

DONALD C. BARNES
President

SAMUEL B. TUELL
Vice President and Comptroller

THOMAS J. HANLON, JR.
Vice President

ALAN W. HASTINGS
Vice President

JASON C. LEIGHTON
Treasurer

RICHARD N. BENJAMIN
Secretary

GENERAL COUNSEL

MUDGE, STERN, WILLIAMS & TUCKER
New York

AUDITORS

LYBRAND, ROSS BROS. & MONTGOMERY
New York

Engineers' Exhibit No. 37-F (Cont'd)

Pages 5-7:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware.

March 29, 1939.

To the Stockholders:

Engineers Public Service Company is a public utility holding company whose income is derived from dividends and interest on securities. Gross Revenues were $3,226,755 in 1938 as compared to $2,976,522 in 1937. After deducting all charges and annual preferred dividend requirements of $2,323,537, there remained a balance for common stock of $645,229 in 1938 as compared to $418,133 in 1937.

The combined operating revenues of subsidiary companies for 1938 as shown in the combined income statement on page 18 were $52,715,815, an increase of $258,905 over 1937, although revenues from nonrecurring sales to another utility in the amount of $735,062 were included in the previous year. The balance after operating expenses, taxes and non-operating income—net was $22,098,806 in 1938, an increase of $482,611 over the previous year. Substantial increases in wages and in certain taxes were in the aggregate more than offset by reductions in power production expenses and in income taxes due to nonrecurring tax deductions in connection with refinancing.

One subsidiary, Puget Sound Power & Light Company, failed to earn full preferred dividend requirements in 1938, and of the deficiency reported for its common shares, $602,086 was applicable to the shares owned by Engineers Public Service Company. Although this deficiency is not a claim against the Engineers Company or its other subsidiaries, it has been deducted, under the method of reporting consolidated income followed by the Company up to

Engineers' Exhibit No. 37-F (Cont'd)

December 31, 1938, to arrive at the balance applicable to the stocks of Engineers Public Service Company. The consolidated balance for common stock so produced, after deducting in each case preferred dividend requirements of Engineers of $2,323,537, was $1,549,420 or 81 cents per share of common stock in 1938 as compared with $1,445,240 or 76 cents per share of common stock in 1937. If the amount of the deficiency in earnings for the common stock of the Puget Sound subsidiary owned by the Engineers Company had not been deducted in each year, the corresponding balances would have been $2,151,506 or $1.13 per share of common stock in 1938 as compared with $1,805,115 or 95 cents per share of common stock in 1937.

The Company has made certain adjustments in its balance sheet as described more fully hereafter under "Adjustment of Balance Sheet," which included the creation of a reserve for depreciation in investments in subsidiaries, embodying a substantial allowance for the Company's investment in the common stock of Puget Sound Power & Light Company. Since this reserve has provided for a considerable period in advance for losses which may be sustained because of the accrual of unearned cumulative dividends on the preferred stocks of the Puget Sound subsidiary held by the public, it is unnecessary to deduct from current consolidated income the amount of the deficiency in earnings of this subsidiary. Accordingly, beginning with the January 1939 monthly report, the consolidated balance for the 12 months' period then ended applicable to stocks of Engineers Public Service Company is being set forth without deduction for such deficiency.

In addition to Puget Sound Power & Light Company, two other subsidiary companies, The Western Public Service Company and The Key West Electric Company, had cumulative preferred dividends in arrears at the end of the year. The total cumulative preferred dividends not declared on shares of these three subsidiaries, held by the

public, amounted to $12,584,434 at the end of the year, of which amount $12,506,810 pertains to Puget Sound Power & Light Company.

The complete combined income statement which appears on pages 18 and 19 is further supported by the tabulation on page 25 showing the contribution by each subsidiary to the consolidated balance.

Adjustment of Balance Sheet

As of May 31, 1938 the Directors of the Company authorized certain adjustments in the balance sheet, as follows:

(1) A write-down of $6,763,498 in investments in subsidiary companies by charging earned surplus to the full extent of such surplus at that time (after charging to it the quarterly dividend on the preferred stock normally declared in the month of May and paid July 1, 1938) and by charging capital surplus with the balance. The purpose of this entry was to reduce the book value of such investments to the cost to the Company of the securities held;

(2) An increase of $1,925,767 in the preferred stock capital account raising it to the amount payable on the preferred stock in the event of involuntary liquidation, namely at the rate of $100 per share, by transferring such amount from capital surplus. Prior to that date this stock had been carried on the books at the amount received therefor;

(3) The creation of a $35,000,000 reserve for depreciation in investments in subsidiaries by a transfer from capital surplus in this amount. This reserve was established to provide for losses which the Directors believed to have accrued at that date

although such losses had not yet been taken. The principal factors causing the depreciation against which this reserve was provided, were reduced net earnings brought about largely by increased taxes, existing competition and the announced intention of certain power districts and other public authorities either to purchase or condemn certain properties of subsidiaries of the Company or to compete with such subsidiaries. These factors are largely covered in subsequent sections of this letter.

Thus at May 31, 1938 the Company had no earned surplus and the earned surplus of subsidiaries at that date also became unavailable to it to rebuild this account since dividends from subsidiaries declared subsequent to May 31, 1938 may be credited to the Company's earned surplus only to the extent that such dividends were earned subsequent to that date. Neither the properties owned nor their earning power were altered by these adjustments.

Dividends

After the payment on January 3, 1938 of three-fourths of a full year's preferred dividend requirements, there remained no dividends in arrears on the preferred stock. Regular quarterly preferred dividends have been paid subsequent to that date. In view of the conditions existing after the above described adjustment of the balance sheet, it is clearly desirable to accumulate additional earned surplus before consideration is given to a dividend on the common stock of the Company.

* * * * * * *

Preferred Stock Tenders

On March 1, 1939, having obtained authorization from the Securities and Exchange Commission, the Company

addressed a letter to all of its preferred stockholders stating that sealed tenders would be received up to March 29, 1939 for the sale to it of a total of not exceeding 7,000 shares of its preferred stock of any or all series. It was further stated that if the Board of Directors accepted any tenders, they would accept the lowest offers, taking into consideration the differences in yield of the three series. On the latter date the Board of Directors accepted tenders for a total of 7,000 shares of preferred stock at a total cost of $548,536 as follows; 1,817 shares of $6 Dividend Preferred Stock at an average price of $85.22 per share; 3,138 shares of $5.50 Dividend Preferred Stock at an average price of $78.76 per share, and 2,045 shares of $5 Dividend Preferred Stock at an average price of $71.65 per share. The total reduction in annual preferred dividend requirements effected thereby is $38,386.

El Paso Natural Gas Company

The Company continues to own the beneficial interest in 51,357 shares of common stock of El Paso Natural Gas Company, which shares represent less than 9% of the total common stock of that company. Other than this, the Engineers Company has no investment outside of its own subsidiaries. A dividend of $2 per share was paid on this stock in 1938, and also in 1937. The earnings per share were $3.29 and $3.00, respectively, for these two years.

Public Utility Act of 1935

As stated in the 1937 Annual Report, the Company and its public utility holding company subsidiaries registered under this Act in February 1938. Subsequently the Securities and Exchange Commission addressed a letter to the major holding companies, including the Company, requesting them to furnish tentative plans of compliance with Section 11 of the Act, which section contains provisions for the simplification of holding company systems and limi-

Engineers' Exhibit No. 37-F (Cont'd)

tations with respect to the properties which may be included therein. The Company submitted to the Commission an answer to this request which, because of its tentative nature, has not been made public. It is impossible at this time to determine the ultimate effect of the Act on the Company and its subsidiaries or their security holders.

Engineers Public Service Company, Inc., the mutual service organization, has, since 1931, furnished certain services and facilities on a non-profit basis to the companies in the Engineers group, all as more fully described on page 10. That company recently obtained the approval of the Securities and Exchange Commission, as required in the Act, for these service arrangements, with certain modifications in the method of allocating costs.

Simplification of Corporate Structure

As recorded in the 1937 Annual Report, Eastern Texas Electric Company (Delaware), an intermediate holding company, was liquidated and dissolved in February 1938. Also the plan for consolidating the properties of Baton Rouge Electric Company and Louisiana Steam Generating Corporation with those of Gulf States Utilities Company was consummated on August 25, 1938 in substantially the form outlined in that report. The bus properties of Baton Rouge Electric Company, which could not be acquired by Gulf States Utilities Company because of charter limitations, were acquired by Baton Rouge Bus Company, Inc., a subsidiary of the Engineers Company, which had been formed for the purpose. The corporate chart on page 73 sets forth the present corporate relationship of the companies in the Engineers system.

Pages 11-12:

Puget Sound Power & Light Company

General business conditions in 1938 were less favorable than in 1937. Electric revenues, which constitute 84.5% of the total, decreased $711,929 or 5.1%, however, after elim-

Engineers' Exhibit No. 37-F (Cont'd).

inating the $735,062 of nonrecurring power sales to another utility in 1937, these revenues showed a slight increase. Transportation revenues decreased $183,660 or 10.0%, nearly half of which was due to a change in revenue classification which did not affect net income. Total operating revenues decreased $924,965 or 5.5%, and operating expenses decreased $763,537 or 10.4% principally due to less steam power generation.

With the sale of the street railway business in Bellingham in November 1938 and the discontinuance in February 1939 of the Seattle-Everett interurban, neither the company nor any subsidiary conducts any street or interurban railway operations.

The Seattle Electric Company, Seattle-Everett Traction Company Bonds in the amount of $1,218,000 were paid at maturity on March 1, 1939. In addition there are maturities of $2,919,500 on February 1, 1940 and $3,990,000 on March 1, 1940. No dividends were paid during the year because of the necessity to conserve cash to meet these maturities.

On September 1, 1937 the City of Seattle defaulted with respect to semi-annual interest due on that date on the Municipal Street Railway Bonds held by the company. The suit instituted by the company in this connection has been continued from time to time pending the outcome of the Ctiy's efforts to develop a complete refinancing and rehabilitation program for the street railway system. On January 26, 1939 the Reconstruction Finance Corporation authorized a loan to the street railway of $10,200,000 of which not more than $4,500,000 may be used to retire the present debt of the system. In view of the circumstances surrounding this situation, the company has agreed to accept a minimum of $3,250,000 for the $8,336,000 principal amount of bonds and accrued interest and 80 cents on the dollar for $125,588 of street railway warrants, owned by it.

Agitation continued throughout the year for acquisition by public utility districts of all or part of the company's

Engineers' Exhibit No. 37-F (Cont'd)

electric property. In the general election of November 8, 1938, in the territory served by the company, two counties voted in favor of establishing public utility districts and three counties, including King County outside of Seattle, voted against the formation of districts. In the 19 counties served in whole or in part by the company, public utility districts are authorized in 13 counties, however, only one district has actually progressed to the point where it is operating and rendering service. Two other districts have started condemnation proceedings to acquire the property of the company in their respective districts.

During the year, construction continued on the Grand Coulee project. The first installation of generating capacity totalling 361,500 kilowatts is estimated to be completed in 1942 if the necessary funds are provided. The entire project is estimated to cost $383,000,000. On July 9, 1938 the Federal Government's Bonneville electric plant, with a capacity of 86,400 kilowatts, was placed in operation. An additional installation of 120,000 kilowatts is under construction and $18,000,000 has been allotted for the construction of transmission lines to expected market centers.

In December 1938 the Seattle City Lighting Department's second Skagit transmission line, which cost approximately $5,000,000, was placed in operation. Construction is being continued on the Department's Ruby Dam with the aid of PWA funds.

During 1938 the company was granted new electric franchises in the cities of Olympia, Snohomish and Tenino, which expire in 1963, and a steam heat franchise in Seattle, which expires in 1952.

Page 13:

Mr. Howard Coonley, Chairman of the Board of Walworth Company, Incorporated, and Mr. Thomas W. Streeter, President of Prudence Bonds Corporation and a Director of several of the subsidiaries of Engineers Public Service Company, have been elected Directors of the Company.

Engineers' Exhibit No. 37-F (Cont'd)

Page 15:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)
(Parent Company Only)

Comparative Income Statement

	1938	1937	Increase
GROSS REVENUES			
Revenue from Subsidiary Companies:			
Dividends—Common	$2,865,606.87(a)	$2,470,222.00	$ 395,384.87
Dividends—Preferred	135,535.20	76,274.28	59,260.92
Interest—Bonds	73,562.50	—0—	73,562.50
Interest—Time Notes	48,250.78	59,811.74	11,560.96*
Interest—Income Notes	—0—	219,500.00	219,500.00*
Interest—Miscellaneous	779.98	—0—	779.98
Dividends on Miscellaneous Investment	102,714.00	150,714.00	48,000.00*
Miscellaneous Revenue	306.09	—0—	306.09
Total	$3,226,755.42	$2,976,522.02	$ 250,233.40
EXPENSES, TAXES AND INTEREST			
Expenses	$ 142,971.52	$ 119,252.53	$ 23,718.99
Taxes—including Federal income taxes of $71,051.55 (1937—$78,770.55(b))	114,866.78	114,468.55	398.23
Interest	151.48	1,130.46	978.98*
Total	$ 257,989.78	$ 234,851.54	$ 23,138.24
Balance for Dividends and Surplus	$2,968,765.64	$2,741,670.48	$ 227,095.16
Preferred Dividend Requirements	$2,323,537.00	$2,323,537.00	$ —0—

Comparative Earned Surplus Statement

	1938	1937	Increase
Earned Surplus at Beginning of Year	$2,569,062.54	$4,692,526.49	$2,123,463.95*
Balance for Dividends and Surplus, as above	2,968,765.64	2,741,670.48	227,095.16
Direct Credits	3,220,805.59(c)	943,727.05(d)	2,277,078.54
Total	$8,758,633.77	$8,377,924.02	$ 380,709.75
Deductions:			
Direct Charges	$5,263,498.16(c)	$ —0—	$5,263,498.16
Preferred Dividends Declared	2,323,555.89	5,808,861.48	3,485,305.59*
Total Deductions	$7,587,054.05	$5,808,861.48	$1,778,192.57
Earned Surplus at End of Year (1938—Since May 31, 1938)	$1,171,579.72	$2,569,062.54	$1,397,482.82*

* Decrease.

(a) Excludes dividends of $202,762.63 received subsequent to May 31, 1938 on common stock of subsidiaires paid out of earnings of such subsidiaries accumulated prior to June 1, 1938, such dividends being credited to Capital Surplus. (See note (c) below).

(b) Excludes Federal income tax of $165,536.30 on transactions described in note (d) below.

(c) As of May 31, 1938 the Company reduced the book value of its investment in common stock of a subsidiary company to actual cost to the Parent Company. This reduction in the amount of $5,263,498.16 was charged to Earned Surplus, including net earnings for the year to May 31, 1938, and an amount of $3,220,750.49 was transferred from Capital Surplus to eliminate the deficit then existing in the Earned Surplus account.

(d) Represents net profit of $830,843.21 from sale of 60,000 shares of common stock of El Paso Natural Gas Company held by Trustee under Declaration of Trust and $112,883.84 net profit from liquidation of subsidiary companies, after deducting Federal income tax and expenses applicable thereto.

Engineers' Exhibit No. 37-F (Cont'd)

Page 16:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)
(Parent Company Only)

Capital Surplus Statement

	1938
Capital Surplus at Beginning of Year	$56,149,544.85
Dividends received subsequent to May 31, 1938 on common stock of subsidiaries paid out of earnings of such subsidiaries accumulated prior to June 1, 1938	202,762.63
Total	$56,352,307.48
Deductions:	
Transfer to Earned Surplus to eliminate deficit therein at May 31, 1938 resulting from reduction in book value of investment in common stock of a subsidiary company to actual cost to the Parent Company	$ 3,220,750.49
Reduction in book value of investment in common stock of a subsidiary company representing commission charged thereto for marketing Parent Company securities in prior years	1,500,000.00
Transfer to Preferred Stock accounts to increase the stated value of preferred stocks outstanding from the aggregate consideration received therefor to the aggregate involuntary liquidating value thereof	1,925,767.00
Transfer to reserve for depreciation in value of investments in subsidiaries	35,000,000.00
Total Deductions	$41,646,517.49
Capital Surplus at End of Year	$14,705,789.99

Engineers' Exhibit No. 37-F (Cont'd)

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ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)

(Parent Company Only)

Comparative Balance Sheet

	Dec. 31, 1938	Dec. 31, 1937	Increase
ASSETS			
Investments:			
Investments in Subsidiary Companies:			
Common Stocks	$89,130,779.68	$ 88,393,154.84	$ 737,624.84
Preferred Stocks	2,531,930.75	1,050,713.75	1,481,217.00
Bonds	1,200,000.00	—0—	1,200,000.00
	$92,862,710.43(a)	$ 89,443,868.59	$ 3,418,841.84
Less Reserve for Depreciation in Investments	35,000,000.00	—0—	35,000,000.00
	$57,862,710.43(b)	$ 89,443,868.59	$31,581,158.16*
Notes Receivable:			
Income Notes	—0—	8,485,000.00(c)	8,485,000.00*
Time Notes	—0—	1,875,000.00	1,875,000.00*
Miscellaneous Investment(d)	427,975.00	427,975.00	—0—
Total Investments	$58,290,685.43	$100,231,843.59	$41,941,158.16*
Current Assets:			
Cash in Banks	$ 2,567,105.45	$ 1,476,873.57	$ 1,090,231.88
Notes Receivable (Subsidiary Companies)	—0—	174,000.00	174,000.00*
Accounts Receivable	373.94	120,111.46	119,737.52*
Interest and Dividends Receivable (Subsidiary Companies)	51,538.25	16,988.25	34,550.00
Total Current Assets	$ 2,619,017.64	$ 1,787,973.28	$ 831,044.36
	$60,909,703.07	$102,019,816.87	$41,110,113.80*
LIABILITIES			
Capital Stock:			
Preferred Stock(e)	$43,001,400.00	$ 41,075,633.00	$ 1,925,767.00
Common Stock(f)	1,909,968.00	1,909,968.00	—0—
Total Capital Stock	$44,911,368.00	$ 42,985,601.00	$ 1,925,767.00
Current Liabilities:			
Accounts Payable	$ 112.65	$ 20,244.70	$ 20,132.05*
Accrued Taxes	120,852.71	295,363.78	174,511.07*
Total Current Liabilities	$ 120,965.36	$ 315,608.48	$ 194,643.12*
Surplus:			
Capital Surplus	$14,705,789.99(b)	$ 56,149,544.85	$41,443,754.86*
Earned Surplus (1938—Since May 31, 1938)	1,171,579.72	2,569,062.54	1,397,482.82*
	$60,909,703.07	$102,019,816.87	$41,110,113.80*

* Decrease.

Engineers' Exhibit No. 37-F (Cont'd)

Contingent Liability:

Agreement to indemnify a surety company against all losses and expenses it might incur as guarantor of the payment, on various maturity dates between 1939 and 1948, inclusive, of $318,000 principal amount of municipal bonds assumed by The Western Public Service Company, with interest thereon until paid; and to guarantee payment of the annual premiums to the surety company.

(a) Investments in Subsidiary Companies are carried at an amount based on the stated value of securities of the Parent Company issued, and cash paid, to acquire securities of subsidiaries.

(b) As at May 31, 1938 Investments in Subsidiary Companies were written down by $6,763,498.16, Earned Surplus being charged to the extent thereof and the remainder to Capital Surplus; $1,925,767 was transferred from Capital Surplus to Preferred Stock; and $35,000,000 was transferred from Capital Surplus to Reserve for Depreciation in Investments.

(c) In January, 1938 these notes were surrendered for cancellation as a contribution to the capital of the subsidiary company and this amount was transferred to Investments in common stocks of subsidiary companies.

(d) Represented by 51,357 shares of common stock of El Paso Natural Gas Company held by Trustee under Declaration of Trust. The quoted market price on December 31, 1938 when applied to such shares indicates an amount of approximately $1,489,300.

(e) Represented by 158,080 shares $5 (Cumulative) Dividend Preferred, of no par value (entitled to $105 per share upon redemption or voluntary liquidation, or $100 per share upon involuntary liquidation, plus accrued dividends), 196,934 shares $5.50 Cumulative Dividend Preferred and 75,000 shares $6 Cumulative Dividend Preferred, of no par value (entitled to $110 per share upon redemption or voluntary liquidation, or $100 per share upon involuntary liquidation, plus accrued dividends). Total Preferred Stock authorized 431,000 shares. On May 31, 1938 each series of Preferred Stock was increased, from the amount paid in on such series to the amount to which it is entitled in involuntary liquidation, namely $100 per share, by transfers from Capital Surplus aggregating $1,925,767.

(f) Represented by 1,909,968 shares of $1 par value. Authorized 2,349,000 shares.

See Page 29 for detailed Statement of Capitalization.

Engineers' Exhibit No. 37-F (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Combined Income Statement of Subsidiary Companies
(Inter-company Items Between Subsidiary Companies Eliminated)

	1938	Per Cent of Operating Revenues	1937	Per Cent of Operating Revenues	Increase
OPERATING REVENUES					
Electric Department (a)	$42,648,011.08	80.9	$42,224,339.48	80.5	$423,671.60
Transportation Department (a)	7,224,597.17	13.7	7,370,721.19	14.0	146,124.02*
Gas Department (a)	1,561,340.61	3.0	1,476,967.40	2.8	84,373.21
Ice Department	398,831.36	.7	449,933.28	.9	51,101.92*
Other Departments	883,034.43	1.7	934,948.34	1.8	51,913.91*
Total	$52,715,814.65	100.0	$52,456,909.69	100.0	$258,904.96
OPERATING EXPENSES AND TAXES					
Operation	$20,257,604.56	38.4	$20,630,744.23	39.3	$373,139.67*
Maintenance	3,587,139.11	6.8	3,634,263.79	6.9	47,124.68*
Taxes (b)	6,330,970.79	12.0	6,238,168.66	11.9	92,802.13
Total	$30,175,714.46	57.2	$30,503,176.68	58.1	$327,462.22*
Net Operating Revenues	$22,540,100.19	42.8	$21,953,733.01	41.9	$586,367.18
Non-Operating Income—Net Deficit	441,293.98	.9	337,537.91	.7	103,756.07
Balance	$22,098,806.21	41.9	$21,616,195.10	41.2	$482,611.11
INTEREST AND AMORTIZATION					
Interest on Long-Term Debt	$ 7,281,704.14	13.8	$ 7,050,861.59	13.4	$230,842.55
Other Interest	169,302.56	.3	151,716.20	.3	17,586.36
Taxes Assumed on Bond Interest	53,887.60	.1	52,254.39	.1	1,633.21
Amortization of Discount and Expense	665,818.98	1.3	639,704.47	1.2	26,114.51
Total	$ 8,170,713.28	15.5	$ 7,894,536.65	15.0	$276,176.63
Balance	$13,928,092.93	26.4	$13,721,658.45	26.2	$206,434.48
Appropriations for Retirement Reserve (c)	5,717,692.47	10.8	5,596,789.21	10.7	120,903.26
Balance	$ 8,210,400.46(d)	15.6	$ 8,124,869.24	15.5	$ 85,531.22
Dividends on Preferred Stocks, Declared	2,285,835.76		2,787,860.71		502,024.95*
Balance	$ 5,924,564.70		$ 5,337,008.53		$587,556.17
Cumulative Preferred Dividends Earned But Not Declared	1,596,890.51		1,244,405.55		352,484.96
Balance	$ 4,327,674.19		$ 4,092,602.98		$235,071.21
Amount Applicable to Minority Interests	18,205.17		25,985.35		7,780.18*
Balance Applicable to Engineers Public Service Company, Before Allowing for Unearned Cumulative Preferred Dividends of Certain Subsidiary Companies	$ 4,309,469.02		$ 4,066,617.63		$242,851.39
Cumulative Preferred Dividends of Certain Subsidiary Companies, Not Earned	$ 606,247.06		$ 363,938.45		$242,308.61

(Continued on Page 19)

As of January 1, 1937, certain subsidiary companies adopted the systems of accounts prescribed by the Federal Power Commission and various state regulatory bodies. One of the requirements of these systems is that certain property studies be made for the purpose of determining the original cost of the companies' electric plant when first devoted to public service. The Federal Power Commission has granted to certain subsidiary companies an extension to July 1, 1939 for completion of these studies. The systems of accounts also require that the companies provide for depreciation on their depreciable electric plant to the extent of the loss in service value not restored by current maintenance. Pending completion of their property and depreciation requirements studies, the companies have continued to follow the retirement reserve method of providing for property retired from service. It cannot presently be foreseen what changes in the companies' accounting for property and provision for property retirements may be necessitated upon the completion of these studies, but they may be material.

*Decrease.

(a) See page 24 for detail.

(b) Includes $767,726.62 (1937—$1,028,789.95) Federal income taxes. See page 24 for detail of taxes.

(c) These amounts are substantially less than the depreciation deductions claimed or to be claimed on Federal income tax returns of the companies, which deductions are based on a straight-line method, and the resulting reserve is substantially less than a depreciation reserve would be if based on such straight-line method. In addition to the amounts shown, the companies have accrued $151,761.89 (1937—$160,998.19) for depreciation of automobiles and trucks and have assigned such depreciation to other accounts.

(d) See page 25 for detail.

Engineers' Exhibit No. 37-F (Cont'd)

Page 19:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Income Statement of Engineers Public Service Company Including Undistributed Earnings of Subsidiary Companies Applicable to Engineers Public Service Company

(Inter-company Items Between Subsidiary Companies Eliminated)

	1938	1937	Increase
Balance of Earnings Applicable to Engineers Public Service Company, from page 18	$ 4,309,469.02	$4,066,617.63	$ 242,851.39
Amortization on Bonds Owned by Parent Company, included in charges on page 18	10,091.73	—0—	10,091.73
Earnings from Subsidiary Companies, included in charges on page 18:			
Preferred Dividends, Declared	135,535.20	76,274.28	59,260.92
Interest	122,593.26	59,811.74	62,781.52
Earnings from Other Sources	103,020.09	150,714.00	47,693.91*
Total	$ 4,680,709.30	$4,353,417.65	$ 327,291.65
Expenses, Taxes and Interest(a)	257,989.78	234,851.54	23,138.24
Balance of Earnings of Parent and Subsidiary Companies Applicable to Engineers Public Service Company Stocks, Before Allowing for Loss, as below	$ 4,422,719.52	$4,118,566.11	$ 304,153.41
Allowing for Loss in Investment in Common Stocks of Subsidiary Companies, Measured by Cumulative Dividends on Preferred Stocks of Such Companies Not Earned Within the Year, Less Minority Interests and Inter-company Eliminations. Such Amounts Are Not a Claim Against Engineers Public Service Company or its Other Subsidiary Companies	549,762.20	349,789.02	199,973.18
Balance Applicable to Stocks of Engineers Public Service Company, After Allowing for Loss, as above	$ 3,872,957.32	$3,768,777.09	$ 104,180.23
Preferred Dividend Requirements of Engineers Public Service Company	$ 2,323,537.00	$2,323,537.00	$ —0—

Engineers' Exhibit No. 37-F (Cont'd)

Comparative Consolidated Earned Surplus Statement

(Minority Interests Excluded)

	1938	1937	Increase
Earned Surplus at Beginning of Year	$ 2,564,803.10	$4,596,882.81*	$2,032,079.71*
Balance, as above	3,872,957.32	3,768,777.09	104,180.23
Direct Credits	4,698,296.47(b)	872,909.71(c)	3,825,386.76
Total	$11,136,056.89	$9,238,569.61	$1,897,487.28
Deductions:			
Reduction in book value of Parent Company's investment in a subsidiary company	$ 5,263,498.16	$ —0—	$5,263,498.16
Special appropriations to Retirement Reserve	751,199.41	586,966.36	164,233.05
Write-off of certain intangibles from Property, Plant and Equipment	492,722.59	—0—	492,722.59
Federal income taxes for prior years	—0—	166,377.50	166,377.50*
Premium and expenses on bonds reacquired or refunded	142,978.65	23,597.40	119,381.25
Loss on liquidation of subsidiaries	163,824.11	47,458.55	116,365.56
Other deductions	52,708.89	40,505.22	12,203.67
Preferred dividends declared	2,323,555.89	5,808,861.48	3,485,305.59*
Total Deductions	$ 9,190,487.70	$6,673,766.51	$2,516,721.19
Earned Surplus at End of Year (1938—Since May 31, 1938)	$ 1,945,569.19	$2,564,803.10	$ 619,233.91*

* Decrease.

(a) Includes Federal income taxes of $71,051.35 (1937—$78,770.55 excluding Federal income taxes of $165,536.30 applicable to profits credited direct to Earned Surplus.)

(b) Includes $3,220,750.49 transferred from Capital Surplus to eliminate deficit in Parent Company's Earned Surplus at May 31, 1938 resulting from reduction in book value of Parent Company's investment in common stock of a subsidiary to actual cost to the Parent Company; $1,102,545.98 transferred from Capital Surplus to eliminate deficit in consolidated Earned Surplus at May 31, 1938; $375,000 representing reduction in stated value of common stock of a subsidiary company February 23, 1938 used to write off a portion of cost ($492,722.59) of intangibles previously included in Property, Plant and Equipment account, the subsidiary's surplus being absorbed by the remainder of such cost.

(c) Represents net profit of $830,843.21 from sale of 60,000 shares of common stock of El Paso Natural Gas Company held by Trustee under Declaration of Trust, after deducting Federal income tax and expenses applicable thereto, and $42,066.50 representing cumulative unpaid dividends on preferred stock of a subsidiary acquired by the Parent Company.

Engineers' Exhibit No. 37-F (Cont'd)

Page 20:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

	Dec. 31, 1938	Dec. 31, 1937	Increase
ASSETS			
Plant and Other Investments:			
Property, Plant and Equipment	$328,567,970.01(a)(b)	$328,433,108.17	$ 134,861.84
Other Physical Property, at Cost or Written-down Amounts	1,139,368.64	722,165.32	417,203.32
Notes Receivable	256,986.51	381,137.34	124,150.83*
Investment in Associated Company, at Cost	100,000.00	100,000.00	—0—
Other Investments, at Cost or Written-down Amounts	9,234,497.02(c)(d)	9,401,211.24	166,714.22*
Sinking Fund Cash	1,438.30	294,508.65	293,070.35*
Total Plant and Other Investments	$339,300,260.48	$339,332,130.72	$ 31,870.24*
Current Assets:			
Cash in Banks and on Hand	$ 12,813,925.47	$ 7,587,483.45	$5,226,442.02
United States Treasury Bills, at Cost	900,000.00	—0—	900,000.00
Special Deposits	128,295.86(e)	44,506.93	83,788.93
Notes and Warrants Receivable	381,465.19	248,611.22	132,853.97
Accounts Receivable from Customers and Miscellaneous Sources, Including Instalment Accounts, Less Reserves	6,376,231.38(f)	6,873,469.06	497,237.68*
Interest Receivable	11,198.67	16,809.49	5,610.82*
Materials and Supplies, at Cost or Written-down Amounts, Less Reserves	2,567,058.74	3,001,363.72	434,304.98*
Prepayments	243,949.26	239,861.70	4,087.56
Total Current Assets	$ 23,422,124.57	$ 18,012,105.57	$5,410,019.00
Deferred Debits:			
Unamortized Debt Discount and Expense, Including Unamortized Discount and Expense and Call Premium on Refunded Issues	$ 10,474,104.95	$ 9,767,639.10	$ 706,465.85
Other Deferred Debits	231,132.42	468,737.05	237,604.63*
Total Deferred Debits	$ 10,705,237.37	$ 10,236,376.15	$ 468,861.22
	$373,427,622.42	$367,580,612.44	$5,847,009.98

* Decrease.

Notes: See explanatory notes on page 22, which are to be read as an integral part of the consolidated balance sheet.

See note on page 18 regarding adoption of new systems of accounts.

Engineers' Exhibit No. 37-F (Cont'd)

Page 21:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

LIABILITIES	Dec. 31, 1938	Dec. 31, 1937	Increase
Capital Stock:			
Preferred Stock (g)	$ 43,001,400.00	$ 41,075,633.00	$1,925,767.00
Common Stock (h)	1,909,968.00	1,909,968.00	—0—
Subsidiary Companies:			
Preferred Stock (i)	69,443,863.53 (j)	69,206,854.51	237,009.02
Premium and Discount on Preferred Stock	78,679.10	78,679.10	—0—
Total Capital Stock	$114,433,910.63	$112,271,134.61	$2,162,776.02
Long-Term Debt:			
Subsidiary Companies:			
Bonds (Includes $1,270,000 maturing within one year)	$149,485,000.00 (k)	$142,734,000.00	$6,751,000.00
Debentures	3,286,000.00 (l)	3,644,000.00	358,000.00*
Coupon Notes	2,919,500.00	2,919,500.00	—0—
Notes Payable:			
Banks	1,990,388.80 (l) (m)	500,968.07	1,489,420.73
Others	10,100.00	20,200.00	10,100.00*
Total Long-Term Debt	$157,690,988.80	$149,818,668.07	$7,872,320.73
Current Liabilities:			
Notes Payable:			
Banks	$ 423,218.25 (l)	$ 1,216,205.45	$ 792,987.20*
Others	26,227.26	80,192.16	53,964.90*
Accounts Payable	1,743,494.72	1,706,025.51	37,469.21
Dividends Declared	51,257.25	51,432.25	175.00*
Customers' Deposits	808,611.57	788,028.46	20,583.11
Interest and Taxes Accrued	4,486,827.90	4,527,394.62	40,566.72*
Other Current Liabilities	179,497.86	200,204.39	20,706.53*
Total Current Liabilities	$ 7,719,134.81 (n)	$ 8,569,482.84	$ 850,348.03*
Deferred Credits:			
Customers' Advances for Construction	$ 1,607,891.06 (l)	$ 109,395.11	$1,498,495.95
Deferred Profit on Long-Term Merchandise Sales	406,027.06	398,385.00	7,642.06
Other Deferred Credits	13,584.36	12,688.25	896.11
Total Deferred Credits	$ 2,027,502.48	$ 520,468.36	$1,507,034.12

Engineers' Exhibit No. 37-F (Cont'd)

Reserves:			
Retirement Reserve (o)	$ 27,660,326.53	$ 26,290,092.36	$1,370,234.17
Reserve for Injury and Damage Claims	522,964.30	376,455.12	146,509.18
Other Reserves	26,944.22	8,183.54	18,760.68
Total Reserves	$ 28,210,235.05	$ 26,674,731.02	$1,535,504.03
Parent Company's Reserve for Depreciation in Value of Investments in Subsidiaries, $35,000,000, Less Provision Made (by Charges to Consolidated Earned Surplus) for Cumulative Preferred Dividends Not Declared by Such Subsidiaries as at May 31, 1938, $11,511,358.50	$ 23,488,641.50 (p)	$ —0—	$23,488,641.50
Cumulative Preferred Dividends Not Declared (Subsidiary Companies)	12,584,433.50	10,436,070.25	2,148,363.25
Minority Interests in Common Capital Stocks and Surplus of Subsidiary Companies (Including Surplus $52,302.35; 1937—$61,483.04)	415,366.58	575,709.34	160,342.76*
Capital Surplus	24,911,839.88 (p)	56,149,544.85	31,237,704.97*
Earned Surplus (1938—Since May 31, 1938)	1,945,569.19	2,564,803.10	619,233.91*
	$373,427,622.42	$367,580,612.44	$ 5,847,009.98

Contingent Liability:

A subsidiary company has been served with a proposed order of the National Labor Relations Board which would require the company, among other things, to reinstate with back pay certain striking employees who were discharged by the company. If said order is issued in the form proposed, and if approved by the courts, said order may entail an expenditure of approximately $125,000 for back wages from February 1, 1936 to December 31, 1938.

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* Decrease.

Notes: See explanatory notes on page 22, which are to be read as an integral part of the consolidated balance sheet.

See note on page 18 regarding adoption of new systems of accounts.

See page 23 for Consolidated Capital Surplus Statement.

SUBSIDIARY COMPANIES OF ENGINEERS PUBLIC SERVICE COMPANY

Detail of Balance for Dividends and Surplus, Preferred Dividends, and Balance for Common Stock Owned by Engineers Public Service Company

12 Months Ending December 31, 1938

Note:—Deficiencies are indicated by *Italics*

Subsidiary Companies Which Have Earned Their Preferred Dividends

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Not Declared	Balance for Common	Minority Interest	Balance Applicable to Parent Company 1938	Balance Applicable to Parent Company 1937	Common Dividends Paid to Parent Company(a) 1938	Common Dividends Paid to Parent Company(a) 1937
Baton Rouge Bus Co., Inc.	$ 17,292.93	$ No Pref.		$ 17,292.93		$ 17,292.93		$ 4,000.00	
Baton Rouge Electric Co.	237,428.75	24,143.50		213,285.25		213,285.25	$ 249,436.37	153,103.52	$ 160,000.00
Eastern Texas Electric Co. & Sub. Cos.							882,260.48		
Eastern Texas Electric Co.	*1,256.37*	No Pref.		*1,256.37*	$ 485.25	*1,741.62*			
El Paso Electric Co. & Sub. Cos.	433,856.73	229,682.00		204,174.73	9,385.20	194,789.53	163,020.10	27,722.50	
Engineers Securities Corp.							492.55		
Gulf States Utilities. Co.	1,535,921.92(b)	576,816.79		959,105.13		959,105.13		560,000.00	
The Key West Electric Co.	36,183.75		$ 24,374.00	11,809.75		11,809.75			
Louisiana Steam Generating Corp.	370,638.14	No Pref.		370,638.14		370,638.14	397,465.05	175,683.85	365,125.00
Ponce Electric Co.							14,304.39		
Savannah Electric and Power Co.	370,831.58	209,114.72		161,716.86	276.55	161,440.31	144,482.57		
Virginia Electric and Power Co.	3,484,296.51	1,171,420.50		2,312,876.01	8,058.17	2,304,817.84	2,215,156.12	1,945,097.00	1,945,097.00
The Western Public Service Co. & Sub. Cos.	197,483.58(b)	74,658.25	44,793.57	78,031.76		78,031.76			
Total	$6,682,677.52	$2,285,835.76	$ 69,167.57	$4,327,674.19	$18,205.17	$4,309,469.02	$4,066,617.63	$2,865,606.87	$2,470,222.00

Subsidiary Companies Which Have Not Earned Their Preferred Dividends

(The Deficiencies in Balance for Common are not a claim against either Engineers Public Service Company or its other Subsidiary Companies)

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Not Declared	Deficiency for Common	Minority Interest	Deficiency Applicable to Parent Company 1938	Deficiency Applicable to Parent Company 1937
The Key West Electric Co.							$ 1,575.91
Puget Sound Power & Light Co. & Sub. Cos.	$1,527,722.94		$2,133,970.00	$ 606,247.06	$ 4,161.54	$ 602,085.52	359,875.11
Total	$1,527,722.94	—0—	$2,133,970.00	$ 606,247.06	$ 4,161.54	$ 602,085.52	$ 361,451.02
Balance for Dividends and Surplus (See page 18)	$8,210,400.46						

(a) Excludes dividends of $202,762.63 paid subsequent to May 31, 1938 by Baton Rouge Electric Co. and Louisiana Steam Generating Corp. out of earnings accumulated prior to June 1, 1938, such dividends being credited to Capital Surplus by the Parent Company.

(b) Adjusted for inter-company items between subsidiary companies.

Engineers' Exhibit No. 37-G.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1939

Page 4:

ENGINEERS PUBLIC SERVICE COMPANY

ORGANIZED IN 1925 UNDER THE LAWS OF DELAWARE

DIRECTORS

DONALD C. BARNES
HOWARD COONLEY
HOMER L. FERGUSON
ANDREW FLETCHER
ALEXANDER C. FORBES
THOMAS J. HANLON, JR.
CHARLES W. KELLOGG
THOMAS W. STREETER
SAMUEL B. TUELL

OFFICERS

DONALD C. BARNES
President

SAMUEL B. TUELL
Vice President and Comptroller

ALAN W. HASTINGS
Vice President

THOMAS J. HANLON, JR.
Vice President

JASON C. LEIGHTON
Treasurer

RICHARD N. BENJAMIN
Secretary

GENERAL COUNSEL

MUDGE, STERN, WILLIAMS & TUCKER
New York

AUDITORS

LYBRAND, ROSS BROS. & MONTGOMERY
New York

Engineers' Exhibit No. 37-G (Cont'd)

Pages 5-6:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware.

March 28, 1940.

TO THE STOCKHOLDERS:

Engineers Public Service Company is a public utility holding company deriving its income from dividends and interest on securities. Gross revenues were $3,716,891 in 1939 as compared with $3,226,755 in 1938. After deducting all charges and preferred dividends in each year, there remained a balance for common stock of $1,162,624, or 61¢ per share, in 1939 as compared with $645,210, or 34¢ per share, in 1938.

The combined operating revenues of the subsidiary companies, as shown on page 16, were $54,244,928 for 1939, an increase of $1,529,113, or 2.9%, over those for 1938. Expenses of operation and maintenance show a decrease of $671,232, or 2.8%. However, operations for the two years are not comparable in that the contract basis of furnishing steam to a large industrial customer of one subsidiary was changed on December 1, 1938 (see page 9). If operations for 1938 were adjusted to the 1939 basis in this respect, the gain in revenues for 1939 would be $2,858,000, or 5.6%, and operating expenses in 1939 would have increased $658,000, or 2.9%. Depreciation and taxes increased 6.4% and 10.9%, respectively. The balance for interest was $17,709,454 in 1939, a gain of $1,328,340 over 1938.

Each subsidiary company covered its full preferred dividend requirements for 1939. However, the earnings of Puget Sound Power & Light Company for its common stock are eliminated from the consolidated balance applicable to Engineers Public Service Company because of the large amount of accrued and unpaid preferred dividends

on stock held by the public standing ahead of the common stock of that company. The consolidated balance for the common stock of Engineers Public Service Company after all charges and preferred dividends was $2,961,755, or $1.55 per share, in 1939 compared with $2,151,487, or $1.13 per share, in 1938 on a comparable basis after excluding the results of operation of the Puget Sound company in each year.

Although each subsidiary company covered its preferred dividend requirements in 1939, three had preferred dividends in arrears at the end of the year, aggregating $14,727,539 on shares held by the public, of which amount $14,640,780 pertained to Puget Sound Power & Light Company. The complete combined income statement, which appears on pages 16 and 17, is further supported by the tabulation on page 23 showing the contribution by each subsidiary company to the combined balance applicable to the parent company.

Dividends

Regular quarterly dividends have been paid on the preferred stocks of the Engineers Company during the year and there are no such dividends in arrears. The stockholders are reminded of the adjustment of the Company's balance sheet as of May 31, 1938, which reduced the earned surplus to zero at that date. It is clearly desirable to accumulate additional earned surplus to improve the stability of the Company before consideration is given to a dividend on the common stock.

Public Utility Holding Company Act

The Company, as a registered public utility holding company under this Act, has received from the Securities and Exchange Commission an order requiring the filing of an answer, or a joint answer with its subsidiary companies, with respect to compliance with Section 11(b)(1) of the

Engineers' Exhibit No. 37-G (Cont'd)

Act. This section provides for the restriction of integrated systems and incidental businesses which a holding company may control. The order is a formal order phrased largely in the words of the statute and is issued by the Commission in accordance with the duty imposed upon it by Section 11 and does not indicate what the attitude of the Commission may be with respect to administering the section. The order appears to have for its purpose the defining of the issues involved and contemplates that the facts shall be developed at hearings to be held by the Commission or its staff. At the conclusion of such hearings, the Commission presumably will order appropriate action to be taken.

It is impossible at this time to determine the ultimate effect of the above proceeding on the Company and its subsidiaries or their security holders.

It has been the position of the Company in respect to this matter that it would cooperate fully with the Securities and Exchange Commission to the extent it can properly do so, so long as the substantial rights of its security holders are not infringed. For a long period of time the Company's subsidiaries have enjoyed the benefits of the financial support and prestige of the holding company. The building up of an unusually competent key personnel through special training and broad experience in several locations and the consistent maintenance of sound management policies through supervision by able central office executives, have proven valuable to the subsidiaries. Substantial economies have been realized through group operation of important services furnished at cost, such as cooperative use of experts in various fields and savings in the cost of materials through grouping of purchases. The excellent results which have been achieved by this method of operation are evidenced in the generally efficient and economical service furnished to customers and in the progress which has been made in reducing rates (see page 28). A major advantage to the Company's security holders arises from the geographical diversity of the properties, which consist pri-

marily of fully integrated systems located in eleven states (see map, page 69); temporarily poor earnings in one area are frequently offset by gains in other areas, so that the combination of revenues in the holding company system fluctuates less than those of individual companies.

El Paso Natural Gas Company

The Company continues to own the beneficial interest in 51,357 shares of common stock of El Paso Natural Gas Company, which shares represent less than 9% of the total common stock of that company. A dividend of $2.00 per share was paid on this stock in 1939 and also in 1938. The earnings per share were $3.74 and $3.29, respectively, for these two years. Other than this, the Engineers Company has no investment outside of its subsidiaries.

Page 8:

Service Arrangements with Engineers Public Service Company, Inc.

The operating subsidiaries of Engineers Public Service Company obtain economies and more efficient service through group operation of certain essential services including executive, advisory, financial, purchasing, sales promotion, insurance, accounting, statistical, tax and corporate. These services are furnished on a nonprofit basis by Engineers Public Service Company, Inc. (N. Y.), a mutual service organization wholly owned by the operating subsidiary companies of Engineers Public Service Company. The cost of all services furnished to the operating subsidiaries of the Engineers Company, after assigning certain charges directly, was allocated proportionately among them on the basis of their respective operating revenues. The total amounts billed are shown on page 31. In 1939 the aggregate of these charges billed to operating subsidiaries was $300,191 (1938—$313,382), equivalent to less than six-tenths of one per cent of the combined operat-

Engineers' Exhibit No. 37-G (Cont'd)

ing revenues. The mutual service organization also furnishes at estimated cost certain services to the parent company and to an intermediate holding company. The charge for such services in 1939 amounted to $72,009 (1938—$81,062), of which Engineers Public Service Company paid $66,589 (1938—$75,482).

Page 10:

Puget Sound Power & Light Company

General business conditions were materially improved, and industrial payrolls increased more than 30% over 1938. Total operating revenues increased $568,761, or 3.6%, over the previous year; an improvement of $647,416, or 4.9%, in electric revenues, which constitute 85.5% of total revenues, being partly offset by decreases in other departments. Effective September 1, 1939, rate reductions were made which were estimated to save customers nearly $730,000 annually. Expenses of operation and maintenance were approximately the same as in 1938. The company covered its current preferred dividend requirements for the first time in several years.

During the year the City of Seattle received a loan from the Reconstruction Finance Corporation and paid the company $3,250,000 as a final settlement for the $8,336,000 principal amount of municipal railway bonds and accrued interest thereon. The company also received $100,470 for $125,588 of street railway warrants which it owned. During 1939 the funded debt of the company was reduced by $5,441,500 through payments at maturity and acquisition of bonds for sinking fund requirements. On March 1, 1940, an additional maturity of $3,195,000 was met. The company has no funded debt maturities until 1949. A dividend of $1.25 per share, payable April 15, 1940, has been declared on the prior preference stock on account of arrears.

During 1939 four more Public Utility Districts started condemnation proceedings to acquire the company's prop-

erty (excluding production and transmission property) in their respective districts, thus bringing the total of such proceedings to six. Decrees of public use and necessity have been granted to four of these Districts and one case has been assigned for trial. Public Utility Districts are now authorized in 13 of the 19 counties served in whole or in part by the company. Of these Districts, five owned and operated small electric systems at the end of 1939, but, except in minor instances, these projects are not directly competitive, and two of them purchase their power requirements from the company.

Construction continued on the Grand Coulee project during the year and the initial generating installation of 349,000 kilowatts is expected to be completed in January 1942. The Bonneville project has under way the installation of four additional generating units with an aggregate capacity of 216,000 kilowatts, two of which are scheduled for operation in January 1941. During the year, the Bonneville Administration constructed transmission lines to connect proposed load centers, and further extensive line construction is scheduled. The Administration also made contracts for power with certain private and municipal electric utilities and with several large industrial corporations.

The first step in the construction of the Seattle City Light Department's Ross Dam which will have a storage capacity equivalent to over 40 million kilowatt hours, is scheduled for completion in March 1940 at a cost of about $6,000,000. When built to its ultimate height in 1948, the dam is estimated to cost $40,000,000.

Engineers' Exhibit No. 37-G (Cont'd)

Page 14:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)
(Parent Company Only)

Comparative Income Statement

Gross revenues:	1939	1938	Increase
Revenue from subsidiary companies:			
Dividends—common†	$3,367,968.00	$2,865,606.87 (a)	$ 502,361.13
Dividends—preferred	178,713.02	135,535.20	43,177.82
Interest—bonds	63,195.00	73,562.50	10,367.50*
Interest—time notes	4,176.66	48,250.78	44,074.12*
Interest—miscellaneous	—0—	779.98	779.98*
Dividends on miscellaneous investment	102,714.00	102,714.00	—0—
Miscellaneous revenue	124.41	306.09	181.68*
Total	3,716,891.09	3,226,755.42	490,135.67
Expenses, taxes and interest:			
Expenses	122,677.51	142,971.52	20,294.01*
Taxes—including Federal income taxes of $104,028.08 (1938—$71,051.35)	136,806.52	114,866.78	21,939.74
Interest	—0—	151.48	151.48*
Total	259,484.03	257,989.78	1,494.25
Balance for dividends and surplus	3,457,407.06	2,968,765.64	488,641.42
Preferred dividends	2,294,783.00	2,323,555.89	28,772.89*
Balance for common stock and surplus	$1,162,624.06	$ 645,209.75	$ 517,414.31

Comparative Earned Surplus Statement

	1939	1938	Increase
Earned surplus at beginning of year	$1,171,579.72	$2,569,062.54	$1,397,482.82*
Balance for dividends and surplus, as above	3,457,407.06	2,968,765.64	488,641.42
Direct credits	27,495.00 (b)	3,220,805.59 (c)	3,193,310.59*
Total	4,656,481.78	8,758,633.77	4,102,151.99*
Deductions:			
Direct charges	—0—	5,263,498.16 (c)	5,263,498.16*
Preferred dividends declared	2,294,783.00	2,323,555.89	28,772.89*
Total deductions	2,294,783.00	7,587,054.05	5,292,271.05*
Earned surplus at end of year (since May 31, 1938)	$2,361,698.78	$1,171,579.72	$1,190,119.06

* Decrease.

† See page 23 for detail.

(a) Excludes dividends of $202,762.63 received subsequent to May 31, 1938 on common stock of subsidiaries paid out of earnings of such subsidiaries accumulated prior to June 1, 1938, such dividends being credited to capital surplus. (See note (c) below).

(b) Represents profit on $468,000 principal amount of bonds sold to a subsidiary company for retirement.

(c) As of May 31, 1938 the Company reduced the book amount of its investment in common stock of a subsidiary company to actual cost to the Parent Company. This reduction which amounted to $5,263,498.16 was charged to earned surplus and an amount of $3,220,750.49 was transferred from capital surplus to eliminate the deficit then existing in the earned surplus account.

Engineers' Exhibit No. 37-G (Cont'd)

Page 15:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)

(Parent Company Only)

Comparative Balance Sheet

ASSETS	Dec. 31, 1939	Dec. 31, 1938	Increase
Investments:			
Investments in subsidiary companies:			
Common stocks	$89,150,779.68	$89,130,779.68	$ 20,000.00
Preferred stocks	2,531,930.75	2,531,930.75	—0—
Bonds	825,600.00	1,200,000.00	374,400.00*
	92,508,310.43(a)	92,862,710.43	354,400.00*
Less reserve for depreciation in investments	35,000,000.00	35,000,000.00	—0—
	57,508,310.43	57,862,710.43	354,400.00*
Miscellaneous investment (b)	427,975.00	427,975.00	—0—
Total investments	57,936,285.43	58,290,685.43	354,400.00*
Current assets:			
Cash in banks	3,598,855.39	2,567,105.45	1,031,749.94
Accounts receivable	—0—	373.94	373.94*
Interest and dividends receivable (subsidiary companies)	40,813.25	51,538.25	10,725.00*
Total current assets	3,639,668.64	2,619,017.64	1,020,651.00
	$61,575,954.07	$60,909,703.07	$ 666,251.00
LIABILITIES			
Capital stock:			
Preferred stock (c)	$42,301,500.00	$43,001,400.00	$ 699,900.00*
Common stock (d)	1,909,968.00	1,909,968.00	—0—
Total capital stock	44,211,468.00	44,911,368.00	699,900.00*
Current liabilities:			
Accounts payable	29.04	112.65	83.61*
Taxes accrued	145,529.76	120,852.71	24,677.05
Total current liabilities	145,558.80	120,965.36	24,593.44
Surplus:			
Capital surplus	14,857,228.49	14,705,789.99	151,438.50(e)
Earned surplus (since May 31, 1938)	2,361,698.78	1,171,579.72	1,190,119.06
	$61,575,954.07	$60,909,703.07	$ 666,251.00

Engineers' Exhibit No. 37-G (Cont'd)

Contingent liability:

Agreement to indemnify a surety company against all losses and expenses it might incur as guarantor of the payment, on various maturity dates between 1940 and 1948, inclusive, of $307,000 principal amount of municipal bonds assumed by The Western Public Service Company, with interest thereon until paid; and to guarantee payment of the annual premiums to the surety company.

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* Decrease.

(a) Investments in subsidiary companies are carried at an amount based on the stated value of securities of the Parent Company issued, and cash paid, therefor.

(b) Represented by 51,357 shares of common stock of El Paso Natural Gas Company held by trustee under declaration of trust. The quoted market price on December 31, 1939 when applied to such shares indicates an amount of approximately $2,131,300.

(c) Represented by 156,001 shares (1938—158,080 shares) $5 (cumulative) dividend preferred, of no par value (entitled to $105 per share upon redemption or voluntary liquidation, or $100 per share upon involuntary liquidation, plus accrued dividends), 193,831 shares (1938—$196,934 shares) $5.50 cumulative dividends preferred and 73,183 shares (1938—75,000 shares) $6 cumulative dividend preferred, of no par value (entitled to $110 per share upon redemption or voluntary liquidation, or $100 per share upon involuntary liquidation, plus accrued dividends). Total preferred stock authorized 431,000 shares.

(d) Represented by 1,909,968 shares of $1 par value. Authorized 1,909,968 shares.

(e) Represents excess of book value over cost of 6,999 shares of the Company's preferred stock reacquired and cancelled.

See page 27 for detailed statement of capitalization.

There is pending before the Securities and Exchange Commission a proceeding, involving the Company and its subsidiaries, under Section 11 (b) (1) of the Public Utility Holding Company Act of 1935. This section provides for the restriction of integrated systems and incidental businesses which a holding company may control. It is impossible at this time to determine the ultimate effect of this proceeding on the Company and its subsidiaries and their security holders.

Engineers' Exhibit No. 37-G (Cont'd)

Page 17:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Income Statement of Engineers Public Service Company Including Undistributed Earnings of Subsidiary Companies Applicable to Engineers Public Service Company

(Intercompany Items Between Subsidiary Companies Eliminated)

	1939	1938	Increase
Balance of earnings as applicable to Engineers Public Service Company, from opposite page	$5,181,303.25	$ 4,309,469.02	$ 871,834.23
Undeclared dividends on preferred stock and amortization on bonds owned by Parent Company, included in charges on opposite page	17,578.50	62,415.05	44,836.55*
Earnings from subsidiary companies, included in charges on opposite page:			
Preferred dividends declared	178,713.02	135,535.20	43,177.82
Interest	67,371.66	122,593.26	55,221.60*
Earnings from other sources	102,838.41	103,020.09	181.68*
Total	5,547,804.84	4,733,032.62	814,772.22
Expenses, taxes and interest	259,484.03	257,989.78	1,494.25
Balance of earnings of Parent and subsidiary companies applicable to Engineers Public Service Company stocks (1938—before allowing for loss, as below)	5,288,320.81	4,475,042.84	813,277.97
Allowing for loss in investment in common stock of a subsidiary company, measured by cumulative dividends on preferred stocks of such company not earned within the year, less minority interest	—0—	602,085.52	602,085.52*
Earnings of such subsidiary company in excess of its preferred dividend requirements for the year, transferred to reserve for depreciation in investments in subsidiaries	31,782.94(c)	—0—	31,782.94
Balance applicable to stocks of Engineers Public Service Company	5,256,537.87	3,872,957.32	1,383,580.55
Dividends on preferred stock of Engineers Public Service Company	2,294,783.00	2,323,555.89	28,772.89*
Balance for common stock and surplus	$2,961,754.87	$ 1,549,401.43	$ 1,412,353.44
Earnings per share of common stock	$1.55	$.81	$.74
Earnings per share of common stock (1938—before deducting unearned preferred dividends of a subsidiary company, less minority interest, which are not a claim against Engineers Public Service Company or its other subsidiary companies)	$1.55	$1.13	$.42

Engineers' Exhibit No. 37-G (Cont'd)

Comparative Consolidated Earned Surplus Statement

(Minority Interests Excluded)

	1939	1938	Increase
Earned surplus at beginning of year	$1,945,569.19	$ 2,564,803.10	$ 619,233.91*
Balance applicable to stocks of Engineers Public Service Company, as above	5,256,537.87	3,872,957.32	1,383,580.55
Miscellaneous credits	—0—	4,698,296.47 (d)	4,698,296.47*
Total	7,202,107.06	11,136,056.89	3,933,949.83*
Deductions:			
Premium and expenses on bonds reacquired	64,756.53	142,978.65	78,222.12*
Reduction in book value of Parent Company's investment in a subsidiary company	—0—	5,263,498.16	5,263,498.16*
Special appropriations to depreciation reserve	—0—	751,199.41	751,199.41*
Write-off of certain intangibles from utility plant	—0—	492,722.59	492,722.59*
Loss on liquidation of subsidiaries	—0—	163,824.11	163,824.11*
Other deductions	39,358.59	52,708.89	13,350.30*
Preferred dividends declared, Parent Company	2,294,783.00	2,323,555.89	28,772.89*
Total deductions	2,398,898.12	9,190,487.70	6,791,589.58*
Earned surplus at end of year (since May 31, 1938)	$4,803,208.94	$ 1,945,569.19	$ 2,857,639.75

Consolidated Capital Surplus Statement

	1939
Capital surplus at beginning of year	$24,911,839.88
Excess of book value over cost of 6,999 shares of the Parent Company's Preferred stock reacquired and cancelled	151,438.50
	25,063,278.38
Miscellaneous deductions applicable to surplus as at May 31, 1938	33,698.96
Capital surplus at end of year	$25,029,579.42

* Decrease.

Note: See explanatory notes on page 20 which are to be read as an integral part of the combined income and consolidated earned surplus statements.

Engineers' Exhibit No. 37-G (Cont'd)

Page 18:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

ASSETS	Dec. 31, 1939	Dec. 31, 1938	Increase
Plant and other investments:			
Utility plant	$331,298,561.36(a)	$328,567,970.01	$2,730,591.35
Other physical property, at cost or written-down amounts	1,908,132.25	1,139,368.64	768,763.61
Investment in associated company, at cost	100,690.90	100,000.00	690—
Other investments, at cost or written-down amounts	1,217,358.66(b)	9,491,483.53	8,274,124.87*
Sinking fund cash	1,010.57	1,438.30	427.73*
Total plant and other investments	334,525,062.84	339,300,260.48	4,775,197.64*
Current assets:			
Cash in banks and on hand	2,913,258.95	12,813,925.47	2,900,666.52*
United States treasury securities, at cost	1,512,819.40	900,000.00	612,819.40
Special deposits	3,260,204.44(c)	128,295.86	3,131,908.58
Notes and warrants receivable	120,213.28	381,465.19	261,251.91*
Accounts receivable from customers and miscellaneous sources, including installment accounts, less reserves	5,965,368.33(d)	6,387,430.05	422,061.72*
Materials and supplies, at cost or written-down amounts, less reserves	2,721,857.74	2,567,058.74	154,799.00
Prepayments	251,175.04	243,949.26	7,225.78
Total current assets	23,744,897.18	23,422,124.57	322,772.61
Deferred debits:			
Unamortized debt discount and expense, including unamortized discount and expense and call premium on refunded issues	10,147,945.16	10,474,104.95	326,159.79*
Other deferred debits	154,171.87	231,132.42	76,960.55*
Total deferred debits	10,302,117.03	10,705,237.37	403,120.34*
	$368,572,077.05	$373,427,622.42	$4,855,545.37*

* Decrease.

Note: See explanatory notes on pages 20 and 21 which are to be read as an integral part of the consolidated balance sheet.

There is pending before the Securities and Exchange Commission a proceeding, involving the Company and its subsidiaries, under Section 11 (b) (1) of the Public Utility Holding Company Act of 1935. This section provides for the restriction of integrated systems and incidental businesses which a holding company may control. It is impossible at this time to determine the ultimate effect of this proceeding on the Company and its subsidiaries and their security holders.

Engineers' Exhibit No. 37-G (Cont'd)

Page 19:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

LIABILITIES	Dec. 31, 1939	Dec. 31, 1938	Increase
Capital stock:			
Preferred stock(e)	$ 42,301,500.00	$ 43,001,400.00	699,900.00*
Common stock(f)	1,909,968.00	1,909,968.00	—0—
Subsidiary companies:			
Preferred stock(g)(h)	69,443,863.53†	69,443,863.53	—0—
Premium and discount on preferred stock	78,679.10	78,679.10	—0—
Total capital stock	113,734,010.63	114,433,910.63	699,900.00*
Long-term debt:			
Subsidiary companies:			
Bonds	143,715,000.00(i)‡	148,215,000.00	4,500,000.00*
Debentures	—0—	3,286,000.00	3,286,000.00
Coupon notes	—0—	2,919,500.00	2,919,500.00*
Notes payable:			
Banks	6,655,350.09	1,990,388.80	4,664,961.29
Others	—0—	10,100.00	10,100.00*
Total long-term debt	150,370,350.09	156,420,988.80	6,050,638.71*
Current liabilities:			
Bonds, due within one year	3,233,000.00(j)‡	1,270,000.00	1,963,000.00
Notes payable, due within one year:			
Banks	2,010,038.94	423,218.25	1,586,820.69
Others	10,100.00	26,227.26	16,127.26*
Accounts payable	1,692,843.99	1,743,494.72	50,650.73*
Dividends declared	51,257.25	51,257.25	—0—
Customers' deposits	850,482.67	808,611.57	41,871.10
Interest and taxes accrued	4,959,996.98	4,486,827.90	473,169.08
Other current liabilities	202,462.78	179,497.86	22,964.92
Total current liabilities	13,010,182.61	8,989,134.81	4,021,047.80
Deferred credits:			
Customers' advances for construction	108,358.67	1,607,891.06	1,499,532.39*
Deferred profit on long-term merchandise sales	320,188.17	406,027.06	85,838.89*
Other deferred credits	16,055.45	13,584.36	2,471.09
Total deferred credits	444,602.29	2,027,502.48	1,582,900.19*

Engineers' Exhibit No. 37-G (Cont'd)

Comparative Consolidated Balance Sheet (Continued)

Reserves:			
Depreciation reserve (k)	30,272,193.48	27,660,326.53	2,611,866.95
Reserve for injury and damage claims	641,324.65	522,964.30	118,360.35
Other reserves	12,062.87	26,944.22	14,881.35*
Total reserves	30,925,581.00	28,210,235.05	2,715,345.95
Parent Company's reserve for depreciation in value of investments in subsidiaries, $35,000,000, less certain deductions explained in note (1)	15,220,917.99	23,488,641.50	8,267,723.51*
Cumulative preferred dividends not declared (subsidiary companies)	14,727,538.50	12,584,433.50	2,143,105.00
Minority interests in common capital stocks and surplus of subsidiary companies (surplus, less deficit, $9,017.25; 1938—$52,302.35)	306,105.58	415,366.58	109,261.00*
Capital surplus	25,029,579.42	24,911,839.88	117,739.54
Earned surplus (since May 31, 1938)	4,803,208.94	1,945,569.19	2,857,639.75
	$368,572,077.05	$373,427,622.42	$4,855,545.37*

Contingent liability:

A subsidiary company has been served with an order of the National Labor Relations Board requiring the company, among other things, to reinstate with back pay certain employees who went out on strike in February, 1936. If said order is sustained by the courts, it may entail an expenditure of approximately $155,000 for back wages from February 1, 1936 to December 31, 1939.

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*Decrease.

† See page 24 for detail.

‡ See page 25 for detail.

NOTE: See explanatory notes on pages 20 and 21 which are to be read as an integral part of the consolidated balance sheet.

SUBSIDIARY COMPANIES OF ENGINEERS PUBLIC SERVICE COMPANY

Detail of Balance for Dividends and Surplus, Preferred Dividends, and Balance for Common Stock Owned by Engineers Public Service Company

Twelve Months Ending December 31, 1939

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Not Declared	Balance for Common	Minority Interest	Balance Applicable to Parent Company 1939	Balance Applicable to Parent Company 1938	Common Dividends Paid to Parent Company 1939	Common Dividends Paid to Parent Company 1938
Baton Rouge Bus Co., Inc.	$ 32,463.34	$ No Pref.		$ 32,463.34		$ 32,463.34	$ 17,292.93	$ 25,000.00	$ 4,000.00
Baton Rouge Electric Co.							213,285.25		153,103.52
Eastern Texas Electric Co.							*1,741.62*		
El Paso Electric & Sub. Cos.	455,090.65	229,682.00		225,408.65	$ 7,760.23	217,648.42	194,789.53		27,722.50
Gulf States Utilities Co.	2,638,094.38	584,967.74		2,053,126.64		2,053,126.64	959,105.13	1,120,000.00	560,000.00
The Key West Electric Co.	40,408.50	6,093.50	$ 18,280.50	16,034.50		16,034.50	11,809.75		
Louisiana Steam Generating Corp.							370,638.14		175,683.85
Puget Sound Power & Light Co. & Sub. Cos.	2,165,972.62		2,133,970.00	32,002.62	219.68	31,782.94			
Savannah Electric and Power Co.	355,867.01	209,114.66		146,752.35	250.94	146,501.41	161,440.31		
Virginia Electric and Power Co.	3,833,617.43	1,171,596.00		2,662,021.43	9,274.61	2,652,746.82	2,304,817.84	2,222,968.00	1,945,097.00
The Western Public Service Co. & Sub. Cos.	150,451.77	119,452.59		30,999.18		30,999.18	78,031.76		
Total	$9,671,965.70(a)	$2,320,906.49	$2,152,250.50	$5,198,808.71	$17,505.46	$5,181,303.25	$4,309,469.02(b)	$3,367,968.00	$2,865,606.87(c)

(a) Balance for dividends and surplus as shown in combined income statement (see page 16).

(b) Before deducting cumulative dividends on preferred stocks of Puget Sound Power & Light Company not earned within the year, less minority interest, amounting to $602,085.52.

(c) Excludes dividends of $202,762.63 paid subsequent to May 31, 1938 by Baton Rouge Electric Company and Louisiana Steam Generating Corporation out of earnings accumulated prior to June 1, 1938, such dividends being credited to capital surplus by the Parent Company.

Engineers' Exhibit No. 37-H.

Page 4:

Excerpts from Annual Report of Engineers Public Service Company for the Year 1940

ENGINEERS PUBLIC SERVICE COMPANY

ORGANIZED IN 1925 UNDER THE LAWS OF DELAWARE

DIRECTORS

DONALD C. BARNES
HOWARD COONLEY
HOMER L. FERGUSON
ANDREW FLETCHER
ALEXANDER C. FORBES
THOMAS J. HANLON, JR.
CHARLES W. KELLOGG
THOMAS W. STREETER
SAMUEL B. TUELL

OFFICERS

DONALD C. BARNES
President

SAMUEL B. TUELL
Vice President and Comptroller

ALAN W. HASTINGS
Vice President

JASON C. HEIGHTON
Treasurer

THOMAS J HANLON, JR.
Vice President

WALTER S. ZACHARY
Vice President

RICHARD N. BENJAMIN
Secretary

GENERAL COUNSEL

MUDGE, STERN, WILLIAMS & TUCKER
New York

AUDITORS

LYBRAND, ROSS BROS. & MONTGOMERY
New York

Engineers' Exhibit No. 37-H (Cont'd)

Pages 5-7:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,
April 3, 1941.

TO THE STOCKHOLDERS:

Earnings

Gross revenues of your Company (the parent company), which consist of interest and dividends on securities owned, were $3,715,059 in 1940, substantially the same as for the year 1939. Expenses of the Company increased, due largely to the cost of preparing information for presentation before the Securities and Exchange Commission in connection with Section 11 of the Public Utility Holding Company Act. The increase in taxes resulted from the rise in the federal income tax rate. Net income of the Company available for dividends and surplus in 1940 was $3,394,169 as compared with $3,457,407 in 1939. Dividends on the preferred stocks amounted to $2,285,192, leaving a balance for common stock and surplus of $1,108,977 equivalent to 58¢ a share, compared with $1,162,624 or 61¢ a share in 1939.

Earnings on a consolidated basis are given below, but the nature of a consolidated earnings statement should be borne in mind when considering earnings available to your Company. The difference between the balance of consolidated earnings and the parent company earnings represents amounts retained in the surpluses of the subsidiary companies and not declared out in the form of dividends to the parent company. Sound and prudent management requires, especially under present conditions, the retention of substantial surplus earnings in all subsidiary companies, particularly those having large cash requirements for construction. Three subsidiary companies have

bank loans maturing serially over periods from five to seven years, which are to be paid off out of earnings, thus requiring the retention of surplus for this purpose. The maturities currently aggregate $1,310,000 annually, which represents a substantial part of the consolidated earnings for the common stock and the amount will not be received by the holding company and thus not made available for its own dividends and surplus.

The combined operating revenues of the subsidiary companies in 1940 were $57,093,653, an increase of $2,848,725 over 1939. Half of this increase was absorbed by rises in taxes and an additional substantial amount by increased costs of operation, including payroll. The final balance applicable to the parent company common stock and surplus on a consolidated basis was $3,068,967, or $1.61 per share, compared with $2,961,755, or $1.55 per share, in 1939.

In the above consolidated figures the earnings of Puget Sound Power & Light Company are eliminated from the balance applicable to Engineers Public Service Company because of the provision made in the balance sheet for estimated loss in value of this investment including provision for a considerable period in advance for loss which may be sustained because of the accrual of unearned cumulative dividends on preferred stock of that company. All other subsidiary companies earned and paid their regular preferred dividends in 1940, although two of these companies now have preferred dividends in arrears which at the end of 1940 amounted in total to $86,758 with respect to stock held by the public. The complete combined income statement which appears on pages 18 and 19 is further supported by the tabulation on page 25 showing the contribution of each individual subsidiary company to the combined balance applicable to the parent company.

Dividends

Regular quarterly dividends have been paid on the preferred stocks of the Engineers Company during the year

and there are no preferred dividends in arrears. No dividends on the common stock of the Engineers Company have been paid during the year. The stockholders are reminded of the adjustment of the Company's balance sheet as of May 31, 1938, reducing the earned surplus to zero at that date and making a substantial charge to capital surplus, in order to set up a reserve of $35,000,000 for depreciation in the value of the investments. Accordingly there have been accumulations in the earned surplus of the parent company only since May 31, 1938. Also, as at December 31, 1940, approximately $2,010,000 of consolidated earned surplus is not available for the payment of dividends on common stock of certain subsidiaries due to covenants made by such companies restricting the payment of dividends on common stock. In view of the uncertainties, past and present, the Directors of your Company believe it has been in the interest of both the preferred and common stockholders to accumulate additional earned surplus and cash and thus improve the stability of the Company.

Public Utility Holding Company Act

In February 1940 the Company and its subsidiaries were cited to file an answer as to compliance with Section 11(b)(1) of the Public Utility Holding Company Act and such an answer was filed. The Company subsequently filed a motion to dismiss the proceedings which the Securities and Exchange Commission construed as a request to give its interpretation of the Section as applied to the Engineers system. On March 11, 1941, the Commission issued its statement of its tentative conclusions which are that the requirements of the geographical standards of the Section would be met with respect to the Engineers system if it disposed of all of its subsidiaries except Virginia Electric and Power Company and Savannah Electric and Power Company or, in the alternative, except Gulf States Utilities Company and El Paso Electric Company (Delaware) and, in the case of

Engineers' Exhibit No. 37-H (Cont'd)

the choice of either of these alternatives, it would be incumbent on the Company to prove that the other requirements of the Section were met as to the Savannah or El Paso companies, as the case may be. In connection with the statement, the Commission reconvened the hearing on March 25, 1941 at which time certain broad issues were discussed. Further hearings are scheduled to begin on April 8, 1941, at which hearings the Company expects to present evidence which it believes will show that the requirements of the Section, as construed by the Company, would be met if the Company continued to control the properties of Virginia Electric and Power Company, Gulf States Utilities Company and El Paso Electric Company (Delaware). There is the further question of the constitutionality of this Section. Until these matters have been determined, it is impossible to state what the ultimate effect of this action will be on the Company and its subsidiaries. Considerable work has been done by the Company and its subsidiaries preparatory to presenting their case before the Commission.

Your Company has repeatedly pointed out that its subsidiaries enjoy certain advantages not available to comparable independent companies. The financial support and prestige of the holding company assist in obtaining the lowest cost money from the sale of senior securities. Since it was formed, the Engineers Company has contributed $30,000,000 to the equity base of its subsidiary companies and in addition $9,500,000 of surplus earnings have been retained in the surplus accounts of subsidiaries. The building up in the subsidiary companies of an unusually competent key personnel through special training and broad experience in several locations and over a long period of years and the consistent maintenance of sound management policies through supervision by central office executives so trained and developed, have proven valuable to the subsidiaries. Substantial economies have been realized by the operating companies through group operation of im-

Engineers' Exhibit No. 37-H (Cont'd)

portant services furnished at cost, such as cooperative use of experts in various fields and savings in the cost of materials and equipment through grouping of purchases. The results which have been achieved by this method of operation over a period of years are evidenced in the generally efficient conduct of the business and in the progress which has been made in reducing rates (see page 32).

El Paso Natural Gas Company

In 1936 the Company made a substantial investment in the common stock of El Paso Natural Gas Company. Because of the Public Utility Holding Company Act Engineers could not own the stock directly, since the shares proposed to be purchased constituted control as defined in the Act. Consequently the stock was purchased with funds furnished by the Company and held by an independent trustee for the beneficial interest of the Company. As previously reported, blocks of this stock have been sold, reducing the amount presently held to 51,357 shares, which constitutes less than 9% of the present total common stock of El Paso Natural Gas Company. Since ownership of such a percentage does not constitute control under the Act, the Company recently arranged to transfer the stock to direct ownership. A dividend of $2.00 per share has been paid on this stock in each of the past four years. The earnings per share were $3.75 in 1940 and $3.74 in 1939. Other than these shares the Engineers Company has no investment outside of its subsidiaries.

Pages 8-9:

Service Arrangements with Engineers Public Service Company, Inc.

The operating subsidiaries of Engineers Public Service Company (Delaware) obtain economies and more efficient service through group operation of certain essential ser-

Engineers' Exhibit No. 37-H (Cont'd)

vices including executive, advisory, financial, purchasing, sales promotion, insurance, accounting, statistical, tax and corporate. These services are furnished on a nonprofit basis by Engineers Public Service Company, Inc. (N. Y.), a mutual service organization wholly owned by the operating subsidiary companies of Engineers Public Service Company. The cost of all services furnished to the operating subsidiaries of the Engineers Company, after assigning certain charges directly, was allocated proportionately among them on the basis of their respective operating revennes. The total amounts billed are shown on page 34. In 1940 the aggregate of these charges billed to operating subsidiaries was $296,025 (1939—$300,191), equivalent to less than six-tenths of one per cent of combined operating revenues. The mutual service organization also furnishes at estimated cost certain services to the parent company and to an intermediate holding company. The charges for such services in 1940 amounted to $65,389 (1939—$72,009), of which Engineers Public Service Company paid $57,377 (1939—$66,589).

* * * * *

Financing

The major financing operation undertaken during 1940 was the refunding of the senior securities of El Paso Electric Company (Texas). On December 30, 1940, $6,500,000 principal amount of First Mortgage 3¼% Bonds due 1970 and 15,000 shares of $4.50 dividend preferred stock were publicly offered through underwriters. On January 7, 1941, the proceeds, together with the proceeds of a $1,000,000 note placed with a bank, bearing interest at 2%-2¼% and maturing serially over a 7-year period, were used to call the $8,000,000 principal amount of First Mortgage 5% Bonds due 1950 and 7,785 shares of $6 dividend preferred stock. In connection with this transaction the property and business of Mesilla Valley Electric Company

Engineers' Exhibit No. 37-H (Cont'd)

were acquired by the El Paso Electric Company (Texas) through a contribution by El Paso Electric Company (Delaware) and Mesilla Valley Electric Company was liquidated. The total saving in charges initially resulting from these transactions amounts to $110,000 annually in consolidated earnings. Following the completion of these transactions in January 1941, El Paso Electric Company (Delaware) used surplus funds amounting to $1,150,000 to buy in 10,221 shares of its 7% preferred stock under tenders, including 2,520 shares out of 3,377 shares owned by the Engineers Company which had been tendered at cost, namely, $114.10 per share. The retirement of the publicly held shares will result in a further saving of $51,700 annually in consolidated earnings.

* * * * *

The Company has made application to the Securities and Exchange Commission for permission to buy 5,000 shares of its outstanding preferred stock, largely with the proceeds of the sale of the 2,520 shares of El Paso Electric Company (Delaware) 7% preferred stock mentioned above. Hearing on this application was held on April 2, 1941 and the Commission has the matter under consideration.

Pages 11-12:

Puget Sound Power & Light Company

The improved trend in business conditions in the area served by this subsidiary was accelerated by national defense activities. Total operating revenues increased $392,338 or 2.4% over 1939. Electric revenues, which constitute approximately 85% of the total, increased by 2.3%, more than offsetting rate reductions during 1939 and 1940 which aggregated $1,630,000 on an annual basis. Expenses of operation and maintenance increased by $703,034 or 10.6%, over one half of which resulted from increased expenditures in defense of Public Utility District condemna-

tion suits mentioned hereafter. Over one-half of the increase of nearly 10% in taxes was in Federal income taxes. The reduction of $318,442 in interest and amortization charges was due to an aggregate reduction in debt of approximately $9,000,000 in 1939 and 1940. Commencing April 15, 1940, quarterly dividends have been paid on the prior preference stock.

Three more Public Utility Districts were authorized in 1940 so that such districts are now authorized in 16 of the 19 counties served by the company. Of these, only three are operating on a substantial scale and these serve an aggregate of 22,925 customers. Of the six districts which have filed condemnation suits to acquire parts of the company's property three have been granted applications for decrees of public use and necessity, two such applications are pending and in the sixth case judgment was rendered on August 24, 1940 by the Federal District Court fixing $5,000,000 as the value of the property in Whatcom County which the District proposed to acquire. The Company has appealed this decision to the United States Circuit Court of Appeals. The City of Bremerton (population 29,314) has filed suit preparatory to an attempt to acquire the company's electric property in that City.

During the year Grand Coulee and Bonneville were placed under a single power marketing organization. Construction continued on the Grand Coulee project and 349,000 kilowatts are expected to be in operation by early 1942. Two additional units aggregating 108,000 kilowatts have been placed in service in the Bonneville power station which now has a capacity of 194,400 kilowatts. The Bonneville-Grand Coulee Administration continued to build transmission lines and is reported to have contracts for the delivery of 218,300 kilowatts of prime power. Two Public Utility Districts and one city, purchasing an aggregate of 1,850 kilowatts from the company, have given notice that they expect to purchase their future power requirements from the Administration.

Engineers' Exhibit No. 37-H (Cont'd)

In October, negotiations were opened by the Bonneville Administration to acquire the entire property of the company, and upon securing deferment of condemnation suits against the company by certain of the Public Utility Districts, the company's books and records were made available to them. A series of discussions has been had in an effort to develop a workable purchase plan, but no conclusion has been reached. While these negotiations are being continued with the Bonneville Administration, a Public Utility District representative has announced that the districts would resume individual condemnation proceedings without waiting for conclusion of the negotiations with the Bonneville Administration. Bills have been introduced in Congress to create an agency which would enable the Government to finance the acquisition of private utilities in this area.

Engineers' Exhibit No. 37-H (Cont'd)

Page 16:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)

(Parent Company Only)

Comparative Income Statement

	1940	1939	Increase
Gross revenues:			
Revenue from subsidiary companies:			
Dividends—common†	$3,367,968.00	$3,367,968.00	$ —0—
—preferred	187,605.02	178,713.02	8,892.00
Interest—bonds	56,760.00	63,195.00	6,435.00*
—time notes	—0—	4,176.66	4,176.66*
Dividends on miscellaneous investment	102,714.00	102,714.00	—0—
Miscellaneous revenue	12.24	124.41	112.17*
Total	3,715,059.26	3,716,891.09	1,831.83*
Expenses and taxes:			
Expenses	157,554.72	122,677.51	34,877.21
Taxes—federal income(a)	126,785.28	104,028.08	22,757.20
—other	36,550.19	32,778.44	3,771.75
Total	320,890.19	259,484.03	61,406.16
Balance for dividends and surplus	3,394,169.07	3,457,407.06	63,237.99*
Preferred dividends	2,285,191.99	2,294,783.00	9,591.01*
Balance for common stock and surplus	$1,108,977.08	$1,162,624.06	$ 53,646.98*
Earnings per share of common stock	$.58	$.61	$.03*

Comparative Earned Surplus Statement

	1940	1939	Increase
Earned surplus at beginning of year	$2,361,698.78	$1,171,579.72	$1,190,119.06
Balance for dividends and surplus, as above	3,394,169.07	3,457,407.06	63,237.99*
Direct credits	—0—	27,495.00	27,495.00*
Total	5,755,867.85	4,656,481.78	1,099,386.07
Deduction:			
Preferred dividends declared	2,285,191.99	2,294,783.00	9,591.01*
Earned surplus at end of year (since Mar. 31 1938)	$3,470,675.86	$2,361,698.78	$1,108,977.08

* Decrease.

† See page 25 for detail.

(a) The Company does not consider that it has any liability under the Excess Profits Tax Act of 1940.

Engineers' Exhibit No. 37-H (Cont'd)

Page 17:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)
(Parent Company Only)

Comparative Balance Sheet

Assets	Dec. 31, 1940	Dec. 31, 1939	Increase
Investments:			
Investments in subsidiary companies:			
Common stocks (a)	$89,150,779.68	$89,150,779.68	$ —0—
Preferred stocks	2,531,930.75	2,531,930.75	—0—
Bonds	825,600.00	825,600.00	—0—
	92,508,310.43 (b)	92,508,310.43	—0—
Less reserve for depreciation in value of investments	35,000,000.00	35,000,000.00	—0—
	57,508,310.43	57,508,310.43	—0—
Miscellaneous investment (c)	427,975.00	427,975.00	—0—
Total investments	57,936,285.43	57,936,285.43	—0—
Current assets:			
Cash in banks	4,797,779.37	3,598,855.39	1,198,923.98
Interest and dividends receivable (subsidiary companies)	40,559.75	40,813.25	253.50
Total current assets	4,838,339.12	3,639,668.64	1,198,670.48
	$62,774,624.55	$61,575,954.07	$ 1,198,670.48
LIABILITIES			
Capital stock:			
Preferred stock (d)	$42,301,500.00	$42,301,500.00	$ —0—
Common stock (e)	1,909,968.00	1,909,968.00	—0—
Total capital stock	44,211,468.00	44,211,468.00	—0—
Current liabilities:			
Accounts payable	66,659.16	29.04	66,630.12
Taxes accrued	168,593.04	145,529.76	23,063.28
Total current liabilities	235,252.20	145,558.80	89,693.40
Surplus:			
Capital surplus	14,857,228.49	14,857,228.49	—0—
Earned surplus (since May 31, 1938)	3,470,675.86	2,361,698.78	1,108,977.08
	$62,774,624.55	$61,575,954.07	$ 1,198,670.48

Engineers' Exhibit No. 37-H (Cont'd).

Contingent liability:

Agreement to indemnify a surety company against all losses and expenses it might incur as guarantor of the payment, on various maturity dates between 1941 and 1948, inclusive, of $269,000 principal amount of municipal bonds assumed by The Western Public Service Company, with interest thereon until paid; and to guarantee payment of the annual premiums to the surety company.

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* Decrease.

(a) On February 25, 1941, the Company made a contribution of $1,000,000 in cash to Virginia Electric and Power Company, a subsidiary company, which contribution was added to the investment in common stock of that company.

(b) Investments in subsidiary companies are carried at an amount based on the stated value of securities of the Parent Company issued, and cash paid, therefor.

(c) Represented by 51,357 shares of common stock of El Paso Natural Gas Company. The quoted market price on December 31, 1940 when applied to such shares indicates an amount of approximately $1,540,700.

(d) Represented by 156,001 shares $5 (cumulative) dividend preferred of no par value (entitled to $105 per share upon redemption or voluntary liquidation or $100 per share upon involuntary liquidation, plus accrued dividends), 193,831 shares $5.50 cumulative dividend preferred and 73,183 shares $6 cumulative dividend preferred of no par value (entitled to $110 per share upon redemption or voluntary liquidation or $100 per share upon involuntary liquidation, plus accrued dividends). Total preferred stock authorized 431,000 shares.

(e) Represented by 1,909,968 shares of $1 par value. Authorized 1,909,968 shares.

See Page 29 for detailed Statement of Capitalization.

There is pending before the Securities and Exchange Commission a proceeding, involving the Company and its subsidiaries, under Section 11 (b) (1) of the Public Utility Holding Company Act of 1935. This section provides for the restriction of integrated systems and incidental businesses which a holding company may control. It is impossible at this time to determine the ultimate effect of this proceeding on the Company and its subsidiaries.

Engineers' Exhibit No. 37-H (Cont'd)

Page 19:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Income Statement of Engineers Public Service Company Including Undistributed Earnings of Subsidiary Companies Applicable to Engineers Public Service Company

	1940	1939	Increase
Balance of earnings applicable to Engineers Public Service Company, from opposite page	$ 5,320 129.97	$ 5,181,303.25	$ 138,826.72
Deductions applicable to securities of subsidiary companies owned by Parent Company, included on opposite page:			
Preferred dividends not declared	253.50	9,145.50	8,892.00*
Amortization of bond discount	7,574.28	8,433.00	858.72*
Earnings from subsidiary companies, included as deductions on opposite page:			
Preferred dividends declared	187,605.02	178,713.02	8,892.00
Interest	56,760.00	67,371.66	10,611.66*
Earnings from other sources	102,726.24	102,838.41	112.17*
Total	5,675,049.01	5,547,804.84	127,244.17
Expenses and taxes	320,890.19	259,484.03	61,406.16
Balance	5,354,158.82	5,288,320.81	65,838.01
Earnings of a subsidiary company in excess of its preferred dividend requirements for the year, transferred to reserve for depreciation in value of investments in subsidiaries	—0—	31,782.94(c)	31,782.94*
Balance applicable to stocks of Engineers Public Service Company	5,354,158.82	5,256,537.87	97,620.95
Dividends on preferred stock of Engineers Public Service Company	2,285,191.99	2,294,783.00	9,591.01*
Balance for common stock and surplus (c)	$ 3,068,966.83	$ 2,961,754.87	$ 107,211.96
Earnings per share of common stock	$1.61	$1.55	$.06

Engineers' Exhibit No. 37-H (Cont'd)

Comparative Consolidated Earned Surplus Statement

(Minority Interests Excluded)

	1940	1939	Increase
Earned surplus at beginning of year	$ 4,803,208.94	$ 1,945,569.19	$ 2,857,639.75
Balance applicable to stocks of Engineers Public Service Company, as above	5,354,158.82	5,256,537.87	97,620.95
Total	10,157,367.76	7,202,107.06	2,955,260.70
Deductions:			
Premium and expenses on bonds reacquired	322.94	64,756.53	64,433.59*
Special appropriations to depreciation reserve	133,850.95	—0—	133,850.95
Other deductions—net	97,921.69	39,358.59	58,563.10
Preferred dividends declared, Parent Company	2,285,191.99	2,294,783.00	9,591.01*
Total deductions	2,517,287.57	2,398,898.12	118,389.45
Earned surplus at end of year (since May 31, 1938) (d)	$ 7,640,080.19	$ 4,803,208.94	$ 2,836,871.25

* Decrease.

NOTE: See explanatory notes on page *22* which are to be read as an integral part of the combined income and consolidated earned surplus statements.

Engineers' Exhibit No. 37-H (Cont'd)

Page 20

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

ASSETS	Dec. 31, 1940	Dec. 31, 1939	Increase
Plant and other investments:			
Utility plant	$339,139,565.24(a)	$331,298,561.36	$7,841,003.88
Other physical property, at cost or written-down amounts	1,538,277.24	1,908,132.25	369,855.01*
Investment in associated company, at cost	100,000.00	100,000.00	—0—
Other investments, at cost or written-down amounts	1,092,886.43(b)	1,217,358.66	124,472.23*
Sinking fund cash	462.72	1,010.57	547.85*
Total plant and other investments	341,871,191.63	334,525,062.84	7,346,128.79
Current assets:			
Cash in banks and on hand	12,190,680.28	9,913,258.95	2,277,421.33
United States treasury securities, at cost	—0—	1,512,819.40	1,512,819.40*
Special deposits	110,067.19	3,260,204.44	3,150,137.25*
Notes and warrants receivable	97,177.45	120,213.28	23,035.83*
Accounts receivable from customers and miscellaneous sources including instalment accounts, less reserves	5,800,247.17(c)	5,965,368.33	165,121.16*
Materials and supplies, at cost or written-down amounts, less reserves	3,012,096.76	2,721,857.74	290,239.02
Prepayments	258,221.75	251,175.04	7,046.71
Total current assets	21,468,490.60	23,744,897.18	2,276,406.58*
Deferred debits:			
Unamortized debt discount and expense, including unamortized discount and expense and call premium on refunded issues	9,336,092.45	10,147,945.16	811,852.71*
Other deferred debits	361,268.33	154,171.87	207,096.46
Total deferred debits	9,697,360.78	10,302,117.03	604,756.25*
	$373,037,043.01	$368,572,077.05	$4,464,965.96

* Decrease.

Note: See explanatory notes on pages 22 and 23 which are to be read as an integral part of the consolidated balance sheet.

There is pending before the Securities and Exchange Commission a proceeding, involving the Company and its subsidiaires, under Section 11 (b) (1) of the Public Utility Holding Company Act of 1935. This section provides for the restriction of integrated systems and incidental businesses which a holding company may control. It is impossible at this time to determine the ultimate effect of this proceeding on the Company and its subsidiaries.

Engineers' Exhibit No. 37-H (Cont'd)

Page 21:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES.

Comparative Consolidated Balance Sheet

LIABILITIES	Dec. 31, 1940	Dec. 31, 1939	Increase
Capital stock:			
Preferred stock (d)	$ 42,301,500.00	$ 42,301,500.00	$ —0—
Common stock (e)	1,909,968.00	1,909,968.00	—0—
Subsidiary companies:			
Preferred stock (f)	69,443,744.20 (g)†	69,443,863.53	119.33*
Premium and discount on preferred stock	78,679.10	78,679.10	—0—
Total capital stock	113,733,891.30	113,734,010.63	119.33*
Long-term debt:			
Subsidiary companies:			
Bonds (h)	143,600,000.00 (i)‡	143,715,000.00	115,000.00*
Notes payable to banks (j)	5,478,334.21	6,655,350.09	1,177,015.88*
Total long-term debt	149,078,334.21	150,370,350.09	1,292,015.88*
Current liabilities:			
Bonds, due within one year	11,000.00‡	3,233,000.00	3,222,000.00*
Notes payable, due within one year:			
Banks	1,502,849.53	2,010,038.94	507,189.41*
Others	71,241.63	10,100.00	61,141.63
Accounts payable	2,171,428.39	1,692,843.99	478,584.40
Dividends declared	177,333.25	51,257.25	126,076.00
Customers' deposits	879,150.48	850,482.67	28,667.81
Interest and taxes accrued	6,330,912.28	4,959,996.98	1,370,915.30
Other current liabilities	173,149.07	202,462.78	29,313.71*
Total current liabilities	11,317,064.63	13,010,182.61	1,693,117.98*
Deferred credits:			
Customers' advances for construction	120,405.96	108,358.67	12,047.29
Deferred profit on long-term merchandise sales	228,475.57	320,188.17	91,712.60*
Other deferred credits	20,080.40	16,055.45	4,024.95
Total deferred credits	368,961 93	444,602.29	75,640.36*

Engineers' Exhibit No. 37-H (Cont'd)

Comparative Consolidated Balance Sheet (Continued)

Reserves:			
Depreciation reserve (k)	33,548,436.69	30,272,193.48	3,276,243.21
Reserve for injury and damage claims	684,806.99	641,324.65	43,482.34
Other reserves	7,369.95	12,062.87	4,692.92*
Total reserves	34,240,613.63	30,925,581.00	3,315,032.63
Parent Company's reserve for depreciation in value of investments in subsidiaries, $35,000,000, less certain deductions explained in note (1)	14,975,679.06	15,220,917.99	245,238.93*
Cumulative preferred dividends not declared (subsidiary companies)	16,322,932.50	14,727,538.50	1,595,394.00
Minority interests in common capital stocks and surplus of subsidiary companies (surplus, less deficit, $13,777.15; 1939—$9,017.25)	310,865.48	306,105.58	4,759.90
Capital surplus	25,048,620.08	25,029,579.42	19,040.66
Earned surplus (since May 31, 1938) (g) (m)	7,640,080.19	4,803,208.94	2,836,871.25
	$373,037,043.01	$368,572,077.05	$4,464,965.96

Contingent liability:

A subsidiary company has been served with an order of the National Labor Relations Board which would require the company, among other things, to reinstate with back pay certain employees who went out on strike in February, 1936. If said order is sustained by the courts, it may entail an expenditure of approximately $185,000 for back wages from February 1, 1936 to December 31, 1940.

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* Decrease.

† See page 26 for detail.

‡ See page 27 for detail.

Note: See explanatory notes on pages 22 and 23 which are to be read as an integral part of the consolidated balance sheet.

Engineers' Exhibit No. 37-I.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1941

Page 4:

ENGINEERS PUBLIC SERVICE COMPANY

ORGANIZED IN 1925 UNDER THE LAWS OF DELAWARE

DIRECTORS

DONALD C. BARNES
HOWARD COONLEY
ALEXANDER C. FORBES
CHARLES W. KELLOGG
THOMAS W. STREETER
SAMUEL B. TUELL
CHARLES G. WILSON

OFFICERS

DONALD C. BARNES
President

SAMUEL B. TUELL
Vice President and Comptroller

ALAN W. HASTINGS
Vice President

JASON C. LEIGHTON
Treasurer

THOMAS J. HANLON, JR.
Vice President

WALTER S. ZACHARY
Vice President

RICHARD N. BENJAMIN
Secretary

GENERAL COUNSEL

MUDGE, STERN, WILLIAMS & TUCKER
New York

AUDITORS

LYBRAND, ROSS BROS. & MONTGOMERY
New York

Engineers' Exhibit No. 37-I (Cont'd)

Pages 5-7:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,
March 26, 1942.

TO THE STOCKHOLDERS:

The gross revenues of the Company (the parent company), consisting of interest and dividends on securities owned, were $3,655,127 in 1941, a decline of $59,932 compared with 1940. Expenses of the Company were $313,666, approximately double those of 1940. The increase was due almost entirely to requirements of the Securities and Exchange Commission, and to costs in connection with the proceedings before that Commission under Section 11 of the Public Utility Holding Company Act. Effective May 1, 1941 the Company complied with a requirement of the Commission that none of the salaries of officers and employees of a holding company including applicable overhead expenses can be paid directly or indirectly by subsidiary operating companies regardless of the extent of the services rendered by such personnel to such companies. The result of such compliance was to relieve the operating subsidiaries of payment for substantial services furnished to them by officers and employees of the Company, although there was no reduction in the services rendered. Net income available for dividends and surplus in 1941 was $3,181,212 as compared with $3,394,169 in 1940. Dividends on preferred stocks amounted to $2,263,362, leaving a balance applicable to common stock and surplus of $917,850, equivalent to 48¢ per share compared to $1,108,977, or 58¢ per share in 1940.

The combined operating revenues of the subsidiary companies in 1941 amounted to $64,739,518, an increase of $7,645,864 over 1940. Operating expenses increased only

in proportion to the growth in revenue despite a substantial rise in wages and fuel costs. Combined taxes increased $4,295,003, or the equivalent of $2.25 per share on the common stock. This increase in taxes included $2,516,967 of Federal excess profits taxes, and an increase in Federal income taxes of $1,205,112. The decreases in interest and preferred dividend requirements reflected refunding operations. The final balance applicable to the parent company common stock and surplus on a consolidated basis was $2,429,497, or $1.27 per share, compared with $3,068,967, or $1.61 per share, in 1940. The difference between the final balance of consolidated earnings and of parent company earnings represents amounts retained in surplus by the subsidiary companies and not declared out in the form of dividends on stocks owned by the parent company.

In the above figures for consolidated balance applicable to Engineers Public Service Company the earnings of Puget Sound Power & Light Company are eliminated because of the reserve set up for depreciation in the value of investment in that company including the large dividend arrearages on its preferred stocks. All other subsidiary companies paid their regular preferred dividends in 1941. The Key West Electric Company is the only other company in the Engineers system having dividends in arrears at December 31, 1941.

The complete combined income statement which appears on pages 18 and 19 is further supported by the tabulation on page 26 showing the contribution of each individual subsidiary company to the combined balance applicable to the parent company.

Dividends

Regular quarterly dividends have been paid on the preferred stocks of the Engineers Company during the year and there are no preferred dividends in arrears; no dividends were paid on the common stock of the Company. The decline in earnings of subsidiaries due to increased

Engineers' Exhibit No. 37-I (Cont'd)

Federal taxes together with the uncertainties created by war conditions, pending tax legislation and the proceedings before the Securities and Exchange Commission, cause the Directors of your Company to believe that it is in the interest of both the preferred and the common stockholders to make no payment to the common stockholders at this time.

Public Utility Holding Company Act

The stockholders have been advised from time to time of the proceedings before the Securities and Exchange Commission relating to compliance with Section 11 of the Public Utility Holding Company Act. Hearings were held almost continuously from March 25 to November 4, 1941. One of the matters of most importance to this system was the interpretation of the geographical provisions of this Section. Counsel for Engineers and its subsidiaries contended that the proper interpretation was a "two-area" interpretation, which would have permitted the Company to retain, so far as the geographical standards were concerned, its interest in Virginia Electric and Power Company, Gulf States Utilities Company and El Paso Electric Company. This was contested by Commission Counsel and on July 23, 1941 the Commission stated that it construed this Section in accordance with the so-called "one-area" interpretation, which meant that the Company could retain at the most no more than Virginia Electric and Power Company and Savannah Electric and Power Company on the one hand, or Gulf States Utilities Company and El Paso Electric Company on the other hand. In the case of either of these alternatives the Company would have to prove that the other requirements of the Section were met. During the hearing, testimony was presented as to the methods of operation of these subsidiary companies and the economies realized by joint operation of electric, gas, transportation and other businesses and also the operating, tax and financial economies to be realized by combining in a holding company system Savannah Electric and Power

Engineers' Exhibit No. 37-I (Cont'd)

Company with Virginia Electric and Power Company, and by combining El Paso Electric Company with Gulf States Utilities Company.

Your Company has repeatedly pointed out during the past several years that its subsidiaries realize substantial economies and advantages not available to independent companies of comparable size. Such advantages include financial support from the parent company, which provides equity money and assists them in obtaining the lowest cost funds from the sale of senior securities; the development in the system of an unusually competent key personnel; consistent maintenance of sound management policies through supervision by skilled central office executives; the cooperative use of skilled experts in various specialized fields, and savings in the cost of materials and equipment through the grouping of purchases. The results which have been achieved by this method of operation over a period of years are evidenced in the generally efficient conduct of the business and in the progress which has been made in reducing rates.

That the above advantages are not limited to the Engineers holding company system alone but are characteristic of holding companies is strikingly demonstrated in studies which Dr. Merwin H. Waterman, of the University of Michigan staff, made at the Company's instance for use in its Section 11 proceeding. Dr. Waterman's studies covered the entire public utility industry and were principally based upon information taken from the publications and files of the Federal Power Commission. His general conclusions are summarized as follows:

1. Holding company subsidiaries serve the public at lower rates than independent companies. This is true in all parts of the country and for every size group of communities or of utility companies;

2. Larger companies serve at lower rates than smaller companies;

Engineers' Exhibit No. 37-I (Cont'd)

3. Holding company subsidiaries show definite economies in operation compared to independent companies, particularly as to administrative and general expenses including supervision costs; and

4. Investors in senior securities of holding company subsidiaries are at least as well off as investors in such securities of independent utility companies.

Company's counsel proffered the studies prepared by Dr. Waterman as evidence furnishing a basis for contesting the constitutionality of Section 11 of the Public Utility Holding Company Act. However, the Commission refused to admit these studies as evidence, on the ground that it had no authority to pass upon the constitutionality of the statute under which it is acting.

Since the closing of the record in these proceedings Counsel for the Commission and Counsel for the Engineers companies have both filed requests for specific findings of fact and accompanying briefs and the matter has been set down for oral argument on April 2, 1942 before the Commission. Commission Counsel, in their brief, urge the Commission to require (1) that each subsidiary which is engaged in the electric business divest itself of any interest in gas, transportation, water or ice business and (2) that the holding company be limited to owning a single subsidiary. Counsel for the Engineers companies oppose vigorously such an interpretation and application of the Act. At the present time it cannot be determined when the Commission will take further action in this matter, nor is it possible to state what the ultimate effect of this action will be on the Company and its security holders.

Divestment Orders

The Securities and Exchange Commission, during 1941, directed Engineers to divest itself of its interest in three groups of properties, namely, Puget Sound Power & Light

Engineers' Exhibit No. 37-I (Cont'd)

Company, The Key West Electric Company, and certain properties formerly owned by The Western Public Service Company (Maryland). Under the terms of the orders the Company has until July 23, 1942 to divest itself of its interest in the first two groups of properties and until January 2, 1943 to divest itself of its interest in the third group of properties. The Commission has pointed out in another case that the Act gives it discretion to permit additional time if conditions are such that compliance with the order would involve undue loss. The Company intends to comply with these orders if it can do so within these limits.

Sale of the Western Public Service Company (Maryland)

During the past several years the Company has had negotiations with public agencies in Nebraska regarding the sale to them of The Western Public Service Company. The Securities and Exchange Commission indicated that it would eventually issue an order directing the Company to divest itself of its interest in this subsidiary. In October 1941 the Western company sold its property at Las Animas, Colorado to the City. On January 2, 1942 the Engineers Company sold the common stock of the Western company to Consumers Public Power District of Nebraska, after having first acquired the Wyoming properties and ownership of the subsidiary of the Western company which owned the Missouri properties. A new subsidiary, The Western Public Service Company (Delaware), was formed to own and operate the Wyoming properties. The properties retained produced in 1941 approximately one-quarter of the total operating revenues of this group. The net proceeds to the Engineers Company were approximately $3,070,000 cash from this sale (see note (a) to the parent company balance sheet).

Purchase of Engineers Preferred Stock

In May 1941 the Company purchased under tenders 5,000 shares of its outstanding preferred stock, largely with

Engineers' Exhibit No. 37-I (Cont'd)

the proceeds of the sale of 2,520 shares of El Paso Electric Company (Delaware) 7% preferred stock which was tendered to that company at cost in January 1941. The average price paid for the shares of Engineers preferred stock was $85.02 per share and the reduction in annual dividend requirements was $29,108.

In December 1941, in connection with the sale of The Western Public Service Company (Maryland) above described, the Company applied to the Securities and Exchange Commission for authority to purchase 35,000 shares of its own preferred stock, either under tenders or on the New York Stock Exchange. The Commission heard the Company with respect to this matter on December 22, 1941 and reconvened the hearing on March 20, 1942, but has not as yet rendered a decision.

El Paso Natural Gas Company

The Company continues to hold 51,357 shares of the common stock of El Paso Natural Gas Company, which constitutes less than 9% of the outstanding common stock of that company. Dividends of $2.00 per share were received on this stock in each of the four years prior to 1941 and in that year dividends of $2.30 were received. Except for these shares the Engineers Company has no investment other than the securities of its subsidiaries.

Pages 9-10:

Service Arrangements With Engineers Public Service Company, Inc.

The operating subsidiaries of Engineers Public Service Company (Delaware) obtain economies and more efficient service through group operation of certain essential services, including executive, advisory, financing, purchasing, sales promotion, insurance, accounting, statistical, tax and corporate. These services are furnished on a non-profit basis by Engineers Public Service Company, Inc. (New York), a mutual service organization wholly owned by the

Engineers' Exhibit No. 37-I (Cont'd)

operating subsidiaries of Engineers Public Service Company. The mutual service organization billed the operating companies in the amount shown on page 34 of this report covering that portion of the cost of these services allocated to them. In 1941 the aggregate of the charges billed the operating subsidiaries was $204,654 (1940—$296,025), equivalent to .3% of the combined operating revenues. The reduction in the proportion of the total costs of these services billed to the operating companies resulted from meeting certain requirements of the Securities and Exchange Commission whereby, subsequent to April 1941, no part of the salaries of officers and certain other employees of the mutual service organization including applicable overhead expenses is charged to the operating subsidiaries. Such salaries and expenses are now billed in their entirety to the holding companies. There has been no change, however, in the services rendered to the operating companies. The charges for such services in 1941 which were allocated to the Engineers Company and to the El Paso holding company amounted to $157,716 (1940—$65,389), of which the Engineers Company paid $147,361 (1940—$57,377).

Pages 11-12:

Puget Sound Power & Light Company

General business conditions, accelerated by war activities, improved throughout the year. Total operating revenues increased $1,876,624, or 11.2%, over 1940. Electric revenues, which constituted approximately 84% of the total, increased by $1,252,432, or 8.7%, and bus transportation revenues increased $552,119, or 32%. Expenses of operation and maintenance increased $741,116, or 10.1%, of which 70% was in payroll. Taxes increased by $526,764, or 20.7%, aproximately two-thirds of which was in Federal income taxes.

Public utility districts are authorized in sixteen of the nineteen counties served by the company; six of these operate electric systems serving a total of approximately

Engineers' Exhibit No. 37-I (Cont'd)

28,000 customers. Ten districts have filed condemnation suits to acquire parts of the company's property, four of which have been set for trial during 1942. In respect to the Whatcom County District it will be recalled that a condemnation award of $5,000,000 was set by the Federal District Court in August 1940. This decision, which was appealed by the company, was affirmed by the United States Circuit Court of Appeals and upon further appeal, review was denied by the United States Supreme Court on March 2, 1942. It is understood that the Whatcom County District is taking steps necessary to acquire ownership of the company's property in that county.

During the year expansion continued at the Federal government's Grand Coulee and Bonneville projects. At Grand Coulee two main generating units aggregating 216,000 kilowatts are now installed with seven other units of 108,000 kilowatts each scheduled for installation by 1945. The Bonneville plant now has in operation five units with an aggregate capacity of 248,000 kilowatts with five additional units of 54,000 kilowatts each scheduled for installation during the next two years. The Bonneville-Grand Coulee Administration continued to build transmission lines and substations in the area, including lines into Seattle and Tacoma.

It has already been stated that the Engineers Company is under order of the Securities and Exchange Commission to divest itself of this property and in accordance therewith, discussions have been held with the Bonneville Administration as to how a sale could be effected. However, no suitable means of financing such acquisition by the Bonneville interests has been developed. A plan to establish a non-profit corporation to acquire the company's property with money to be loaned by the Reconstruction Finance Corporation was worked out but further legislative authority must be granted to that agency. Several bills are pending in Congress to create a Columbia Valley Authority with power to finance the acquisition of private utility companies in the northwest.

Engineers' Exhibit No. 37-I (Cont'd)

Page 16:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)

(Parent Company Only)

Comparative Income Statement

	1941	1940	Increase
Gross revenues:			
Revenue from subsidiary companies:			
Dividends—common†	$3,230,467.20	$3,367,968.00	$ 137,500.80*
—preferred	249,775.80 (a)	187,605.02	62,170.78
Interest—bonds of The Western Public Service Company (Maryland)	56,760.00	56,760.00	—0—
Dividends on miscellaneous investment	118,121.10	102,714.00	15,407.10
Miscellaneous revenue	3.17	12.24	9.07*
Total	3,655,127.27	3,715,059.26	59,931.99*
Expenses and taxes:			
Expenses	313,666.22	157,554.72	156,111.50
Taxes—Federal income (b)	155,498.53	126,785.28	28,713.25
—Other	4,750.76	36,550.19	31,799.43*
Total	473,915.51	320,890.19	153,025.32
Balance for dividends and surplus	3,181,211.76	3,394,169.07	212,957.31*
Preferred dividends	2,263,361.58	2,285,191.99	21,830.41*
Balance for common stock and surplus	$ 917,850.18	$1,108,977.08	$ 191,126.90*
Earnings per share of common stock	$.48	$.58	$.10*

Comparative Earned Surplus Statement

	1941	1940	Increase
Earned surplus at beginning of year	$3,470,675.86	$2,361,698.78	$1,108,977.08
Balance for dividends and surplus, as above	3,181,211.76	3,394,169.07	212,957.31*
Direct credits	1,936.85	—0—	1,936.85
Total	6,653,824.47	5,755,867.85	897,956.62
Deduction:			
Preferred dividends declared	2,263,361.58	2,285,191.99	21,830.41*
Earned surplus at end of year (since May 31, 1938)	$4,390,462.89	$3,470,675.86	$ 919,787.03

* Decrease.

† See page 26 for detail.

(a) Includes dividends of $187,270.15 on preferred stocks of The Western Public Service Company (Maryland) of which $80,258.63 represented cumulative dividends applicable to periods prior to 1941.

(b) The Company does not consider that it has any liability for Federal excess profits taxes for the years 1941 and 1940.

Engineers' Exhibit No. 37-I (Cont'd)

Page 17:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)
(Parent Company Only)

Comparative Balance Sheet

	Dec. 31, 1941	Dec. 31, 1940	Increase
ASSETS			
Investments:			
Investments in subsidiary companies (a):			
Common stocks (b)	$90,154,761.28	$89,150,779.68	$1,003,981.60
Preferred stocks	2,227,745.60	2,531,930.75	304,185.15*
Bonds	825,600.00	825,600.00	—0—
	93,208,106.88 (c)	92,508,310.43	699,796.45
Less reserve for depreciation in value of investments	35,000,000.00	35,000,000.00	—0—
	58,208,106.88	57,508,310.43	699,796.45
Miscellaneous investments (d)	427,975.00	427,975.00	—0—
Total investments	58,636,081.88	57,936,285.43	699,796.45
Current assets:			
Cash in banks	4,454,368.50	4,797,779.37	343,410.87*
United States Treasury Tax Notes, at cost	154,246.40	—0—	154,246.40
Accounts receivable	157.96	—0—	157.96
Interest and dividends receivable (subsidiary companies)	36,149.75	40,559.75	4,410.00*
Total current assets	4,644,922.61	4,838,339.12	193,416.51*
	$63,281,004.49	$62,774,624.55	$ 506,379.94
LIABILITIES			
Capital stock:			
Preferred stock (e)	$41,801,500.00	$42,301,500.00	$ 500,000.00*
Common stock (f)	1,909,968.00	1,909,968.00	—0—
Total capital stock	43,711,468.00	44,211,468.00	500,000.00*
Current liabilities:			
Accounts payable	34,165.22	66,659.16	32,493.94*
Taxes accrued	186,719.52	168,593.04	18,126.48
Other current liabilities	26,049.25	—0—	26,049.25
Total current liabilities	246,933.99	235,252.20	11,681.79
Surplus:			
Capital surplus	14,932,139.61	14,857,228.49	74,911.12
Earned surplus (since May 31, 1938)	4,390,462.89	3,470,675.86	919,787.03
	$63,281,004.49	$62,774,624.55	$ 506,379.94

Contingent liability:

Agreement to indemnify a surety company against all losses and expenses it might incur as guarantor of the payment, on various maturity dates between 1942 and 1948, inclusive, of $258,000 principal amount of municipal bonds assumed by The Western Public Service Company, with interest thereon until paid; and to guarantee payment of the annual premiums to the surety company.

* Decrease.

Note: See explanatory notes on page 22 which are to be read as an integral part of the balance sheet.

See Page 14 for Detailed Statement of Capitalization

Engineers' Exhibit No. 37-I (Cont'd)

Page 19:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Income Statement of Engineers Public Service Company Including Undistributed Earnings of Subsidiary Companies Applicable to Engineers Public Service Company

	1941	1940	Increase
Balance of earnings applicable to Engineers Public Service Company, from opposite page	$ 5,274,503.56	$ 5,320,129.97	$ 45,626.41*
Deductions applicable to securities of subsidiary companies owned by Parent Company, included on opposite page:			
Preferred dividends not declared	—0—	253.50	253.50*
Amortization of bond discount	7,574.28	7,574.28	—0—
Earnings from subsidiary companies, included as deductions on opposite page:			
Preferred dividends declared	169,263.67	187,605.02	18,341.35*
Interest	56,760.00	56,760.00	—0—
Earnings from other sources	118,124.27	102,726.24	15,398.03
Total	5,626,225.78	5,675,049.01	48,823.23*
Expenses and taxes	473,915.51	320,890.19	153,025.32
Balance	5,152,310.27	5,354,158.82	201,848.55*
Earnings of a subsidiary company in excess of its preferred dividend requirements for the year, less minority interest, credited to reserve for depreciation in value of investments in subsidiaries	459,451.54(b)	—0—	459,451.54
Balance applicable to stocks of Engineers Public Service Company	4,692,858.73	5,354,158.82	661,300.09*
Dividends on preferred stock of Engineers Public Service Company	2,263,361.58	2,285,191.99	21,830.41*
Balance for common stock and surplus (b)	$ 2,429,497.15	$ 3,068,966.83	$ 639,469.68*
Earnings per share of common stock	$1.27	$1.61	$.34*

Comparative Consolidated Earned Surplus Statement

(Minority Interests Excluded)

	1941	1940	Increase
Earned surplus at beginning of year	$ 7,640,080.19	$ 4,803,208.94	$ 2,836,871.25
Balance applicable to stocks of Engineers Public Service Company, as above	4,692,858.73	5,354,158.82	661,300.09*
Total	12,332,938.92	10,157,367.76	2,175,571.16
Deductions:			
Premium and expenses on preferred stocks retired	178,628.18	—0—	178,628.18
Special appropriations to depreciation reserve	—0—	133,850.95	133,850.95*
Other deductions—net	128,045.69	98,244.63	29,801.06
Preferred dividends declared, Parent Company	2,263,361.58	2,285,191.99	21,830.41*
Total deductions	2,570,035.45	2,517,287.57	52,747.88
Earned surplus at end of year (since May 31, 1938)	$ 9,762,903.47 (c)	$ 7,640,080.19	$ 2,122,823.28

* Decrease.

Note: See explanatory notes on page 22 which are to be read as an integral part of the combined income and consolidated earned surplus statements.

Engineers' Exhibit No. 37-I (Cont'd)

Page 20:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

ASSETS	Dec. 31, 1941	Dec. 31, 1940	Increase
Plant and other investments:			
Utility plant	$352,824,664.39(a)	$339,139,565.24	$13,685,099.15
Other physical property, at cost or written-down amounts	1,487,925.10	1,538,277.24	50,352.14*
Investment in associated company, at cost	100,000.00	100,000.00	—0—
Other investments, at cost or written-down amounts	995,423.28(b)	1,092,886.43	97,463.15*
Sinking fund cash	5,072.72	462.72	4,610.00
Total plant and other investments	355,413,085.49	341,871,191.63	13,541,893.86
Current assets:			
Cash in banks and on hand	10,640,029.95	12,190,680.28	1,550,650.33*
United States Treasury Tax Notes, at cost	1,135,814.40	—0—	1,135,814.40
Special deposits	76,608.48	110,067.19	33,458.71*
Notes and warrants receivable	65,760.00	97,177.45	31,417.45*
Accounts receivable from customers and miscellaneous sources including instalment accounts, less reserves	6,035,688.54(c)	5,800,247.17	235,441.37
Materials and supplies, at cost or written-down amounts, less reserves	4,149,845.39	3,012,096.76	1,137,748.63
Prepayments	287,228.98	258,221.75	29,007.23
Total current assets	22,390,975.74	21,468,490.60	922,485.14
Deferred debits:			
Unamortized debt discount and expense, including unamortized discount and expense and call premium on refunded issues	8,055,180.57	9,336,092.45	1,280,911.88*
Other deferred debits	374,997.44	361,268.33	13,729.11
Total deferred debits	8,430,178.01	9,697,360.78	1,267,182.77*
	$386,234,239.24	$373,037,043.01	$13,197,196.23

* Decrease.

Note: See explanatory notes on pages 23 and 24 which are to be read as an integral part of the consolidated balance sheet.

There is pending before the Securities and Exchange Commission a proceeding, involving the Company and its subsidiaries, under Section 11(b)(1) of the Public Utility Holding Company Act of 1935. This section provides for the restriction of integrated systems and incidental businesses which a holding company may control. On July 23, 1941, the Commission issued an Order directing the Company to dispose of its interest in The Key West Electric Company and Puget Sound Power & Light Company within one year, and on December 29, 1941, the Commission issued an Order directing the Company to dispose, within one year, of its interest in properties acquired from The Western Public Service Company (Maryland) prior to the sale of that company. The Commission has pointed out in another case that the Act gives it discretion to permit additional time if conditions are such that compliance with the Order would involve undue loss. The Company intends to comply with these Orders if it can do so within these limits. The proceeding is still in progress to determine what of its other properties the Company may be allowed to retain. It is impossible at this time to determine the ultimate effect of this proceeding on the Company and its subsidiaries.

Engineers' Exhibit No. 37-I (Cont'd)

Page 21:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

LIABILITIES	Dec. 31, 1941	Dec. 31, 1940	Increase
Capital stock:			
Preferred stock (d)	$ 41,801,500.00	$ 42,301,500.00	$ 500,000.00*
Common stock (e)	1,909,968.00	1,909,968.00	—0—
Subsidiary companies:			
Preferred stock (f)	69,421,627.32 (g)†	69,443,744.20	22,116.88*
Premium and discount on preferred stock	62,379.84	78,679.10	16,299.26*
Total capital stock	113,195,475.16	113,733,891.30	538,416.14*
Long-term debt:			
Subsidiary companies:			
Bonds	145,088,500.00 (h)‡	143,600,000.00	1,488,500.00
Notes payable to banks	5,375,708.82	5,478,334.21	102,625.39*
Total long-term debt	150,464,208.82	149,078,334.21	1,385,874.61
Current liabilities:			
Bonds, due within one year	11,000.00‡	11,000.00	—0—
Notes payable, due within one year:			
Banks	1,753,833.93	1,502,849.53	250,984.40
Others	—0—	71,241.63	71,241.63*
Accounts payable	2,481,194.35	2,171,428.39	309,765.96
Dividends declared	163,856.50	177,333.25	13,476.75*
Customers' deposits	938,005.92	879,150.48	58,855.44
Taxes accrued	8,793,835.81	5,108,476.38	3,685,359.43
Interest accrued	1,247,960.83	1,222,435.90	25,524.93
Other current liabilities	242,079.39	173,149.07	68,930.32
Total current liabilities	15,631,766.73	11,317,064.63	4,314,702.10
Deferred credits:			
Customers' advances for construction	111,115.67	120,405.96	9,290.29*
Deferred profit on long-term merchandise sales	103,854.42	228,475.57	124,621.15*
Other deferred credits	19,365.03	20,080.40	715.37*
Total deferred credits	234,335.12	368,961.93	134,626.81*

Engineers' Exhibit No. 37-I (Cont'd)

Reserves:			
Depreciation reserve (i)	37,436,081.32	33,548,436.69	3,887,644.63
Reserve for injury and damage claims	757,764.96	684,806.99	72,957.97
Other reserves	1,356.07	7,369.95	6,013.88*
Total reserves	38,195,202.35	34,240,613.63	3,954,588.72
Parent Company's reserve for depreciation in value of investments in subsidiaries, $35,000,000, less certain deductions explained in note (j)	15,425,022.30	14,975,679.06	449,343.24
Cumulative preferred dividends not declared (subsidiary companies)	17,886,150.00	16,322,932.50	1,563,217.50
Minority interests in common capital stocks and surplus of subsidiary companies (surplus, less deficit, $20,064.57; 1940—$13,777.15)	315,644.09	310,865.48	4,778.61
Capital surplus	25,123,531.20	25,048,620.08	74,911.12
Earned surplus (since May 31, 1938)	9,762,903.47 (k)	7,640,080.19	2,122,823.28
	$386,234,239.24	$373,037,043.01	$13,197,196.23

* Decrease.

† See page 27 for detail.

‡ See page 28 for detail.

Note: See explanatory notes on pages 23 and 24 which are to be read as an integral part of the consolidated balance sheet.

SUBSIDIARY COMPANIES OF ENGINEERS PUBLIC SERVICE COMPANY

Detail of Balance for Dividends and Surplus, Preferred Dividends, and Balance for Common Stock Owned by Engineers Public Service Company

Twelve Months Ending December 31, 1941

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Earned but Not Declared	Balance for Common	Minority Interest	Balance Applicable to Parent Company 1941	Balance Applicable to Parent Company 1940	Common Dividends Paid to Parent Company 1941	Common Dividends Paid to Parent Company 1940
Baton Rouge Bus Co., Inc.	$ 28,988.85	$ No Pref.		$ 28,988.85		$ 28,988.85	$ 34,937.78	$ 25,000.00	$ 25,000.00
El Paso Electric Co. & Sub. Cos.	669,255.51	180,526.23		488,729.28	$14,761.24	473,968.04	280,264.56	84,796.00	
Gulf States Utilities Co.	1,903,619.51	584,967.54		1,318,651.97		1,318,651.97	1,841,366.81	1,120,000.00	1,120,000.00
The Key West Electric Co.	82,350.23	24,374.00		57,976.23		57,976.23	22,056.88		
Puget Sound Power & Light Co. & Sub. Cos.	2,596,597.21	550,000.00	$1,583,970.00	462,627.21	3,175.67	459,451.54(a)	(b)		
Savannah Electric and Power Co.	419,458.85	209,114.67		210,344.18	359.69	209,984.49	130,379.48		
Virginia Electric and Power Co.	3,830,955.69	1,171,602.00		2,659,353.69	9,265.32	2,650,088.37	2,946,690.49	2,000,671.20	2,222,968.00
The Western Public Service Co. & Sub. Cos.	194,847.61	119,453.54		75,394.07		75,394.07	64,438.97		
Total	$9,726,073.46(c)	$2,840,037.98	$1,583,970.00	$5,302,065.48	$27,561.92	$5,274,503.56(a)	$5,320,129.97(b)	$3,230,467.20	$3,367,968.00

(a) Puget Sound Power & Light Company's earnings, in 1941, exceeded its annual preferred dividend requirements of $2,133,970.00 by $462,627.21 of which the Parent Company's proportion amounted to $459,451.54 which, in consolidation, was credited to the Parent Company's reserve for depreciation in value of investments in subsidiary companies instead of increasing consolidated earnings. See note (b) in combined income statement notes on page 22.

(b) Puget Sound Power & Light Company, in 1940, failed to earn its annual preferred dividend requirements of $2,133,970.00 by $209,589.63 of which the Parent Company's proportion amounted to $208,150.91 which, in consolidation, was charged to the Parent Company's reserve for depreciation in value of investments in subsidiary companies instead of reducing consolidated earnings. See note (b) in combined income statement notes on page 22.

(c) Balance for dividends and surplus as shown in combined income statement (see page 18).

Engineers' Exhibit No. 37-J.

Page 4:

Excerpts from Annual Report of Engineers Public Service Company for the Year 1942

ENGINEERS PUBLIC SERVICE COMPANY

ORGANIZED IN 1925 UNDER THE LAWS OF DELAWARE

DIRECTORS

DONALD C. BARNES
HOWARD COONLEY
THOMAS J. HANLON, JR.
CHARLES W. KELLOGG
JASON C. LEIGHTON
THOMAS W. STREETER
CHARLES G. WILSON

OFFICERS

DONALD C. BARNES
President

THOMAS J. HANLON, JR.
Vice President

WALTER S. ZACHARY
Vice President

ALAN W. HASTINGS
Vice President

JASON C. LEIGHTON
Treasurer

RICHARD N. BENJAMIN
Secretary

GENERAL COUNSEL

MUDGE, STERN, WILLIAMS & TUCKER
New York

AUDITORS

LYBRAND, ROSS BROS. & MONTGOMERY
New York

Engineers' Exhibit No. 37-J (Cont'd)

Pages 5-7:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,
April 8, 1943.

TO THE STOCKHOLDERS:

The gross revenues of the Company (the parent company), consisting of interest and dividends on securities owned, were $2,809,855 in 1942, a decline of $845,272, or 23%, under 1941. Two-thirds of this decline resulted from a reduction in common dividends received from the Virginia subsidiary. The earnings of this subsidiary were approximately the same as in 1941 but dividends were reduced because of the operation of the restrictive clause in connection with certain bank loans of that subsidiary and Federal income tax adjustments within the respective dividend declaration periods. The balance of the decline was substantially accounted for by the decrease in earnings of the Gulf States subsidiary due to higher Federal income taxes, and by the loss of earnings resulting from the sale of The Western Public Service Company (Maryland) in January 1942. Expenses of the Company were $283,440, a decline of $30,226 under 1941. Increased costs by reason of a change in the basis of allocating expenses between the parent company and subsidiaries, effective May 1, 1941, to meet requirements of the Securities and Exchange Commission were more than offset by a reduction in charges on account of proceedings under Section 11 of the Public Utility Holding Company Act. Taxes decreased slightly because of lower income. Net income available for dividends and surplus in 1942 was $2,371,925 as compared with $3,181,212 in 1941. Dividends on preferred stocks amounted to $2,256,084 leaving a balance applicable to common stock and surplus of $115,841 equivalent to 6¢ per share, compared with $917,850, or 48¢ per share, in 1941.

Engineers' Exhibit No. 37-J (Cont'd)

The trend of combined operating revenues, expenses and taxes of the subsidiary companies is discussed hereafter under "Trend of Combined Income." The total consolidated income applicable to the Company (which excludes the earnings of Puget Sound Power & Light Company) was $4,531,861, a decrease of $634,913 under 1941. The difference between this amount and the gross revenues of $2,809,855 of the parent company represents amounts retained in surplus and not declared out in the form of common dividends by subsidiary companies. The balance of consolidated earnings applicable to the parent company common stock and surplus was $1,837,847, or 96¢ per share, compared with $2,429,497, or $1.27 per share, in 1941.

The consolidated financial position of the Company has been improved during the year as evidenced by the increase of $7,732,122 in net current assets and the reduction of $1,482,709 in long-term debt which reflect the net effect of the sale of The Western Public Service Company (Maryland) and of sinking fund payments during the year and the borrowing of $4,000,000 additional by Virginia Electric and Power Company. Such improved condition, if it can be maintained, will enable the subsidiary companies to make their fullest contribution not only to the war effort, but also to the solution of the postwar problems involved in a readjustment of the national economy to a peacetime basis.

Dividends

Regular quarterly dividends have been paid on the preferred stocks of the Engineers Company during the year. No dividends were paid on the common stock of the Company. In the opinion of the Directors, the decline in earnings of subsidiaries applicable to the parent company, the possibility of further increases in Federal tax levies and expenses due to the effect of the war and the uncertainties in connection with the Section 11 proceedings before the Securities and Exchange Commission discussed below,

Engineers' Exhibit No. 37-J (Cont'd)

taken together, make the payment of common dividends in the near future inadvisable.

Public Utility Holding Company Act

Stockholders have been advised from time to time of the status of proceedings before the Securities and Exchange Commission. In March 1942, Counsel for the Company and its subsidiaries filed a brief with the Commission summarizing the evidence presented during the extensive hearings in 1941, and on April 2, 1942 oral argument was had before the Commission. On September 16, 1942 and October 6, 1942 the Commission issued orders which, in effect directed the Company to divest itself, within one year, of all of its remaining investments excepting that in Virginia Electric and Power Company and, with respect to this subsidiary, directing that it must dispose of its gas and transportation operations.

On November 14, 1942 an appeal from these orders was filed in the United States Court of Appeals for the District of Columbia. The orders were challenged on several grounds, including the constitutionality of Section 11(b)(1) of the Act, the Commission's "one area" interpretation of the geographical limitation in clause (B) of that Section and the validity of the Commission's order requiring the divestment of businesses other than electric by the subsidiary retained. Counsel for the Company filed a brief on February 23, 1943 and the case was set for argument on May 3, 1943. One of the principal points in this appeal regarding the constitutionality of Section 11(b)(1) of the Act is that the Commission excluded proffered evidence in the case which showed that the remedies provided in this Section had no relation to the abuses which the Act sought to cure. The excluded evidence showed that holding company subsidiaries serve the public at lower average rates and operate more efficiently than independent companies, that larger companies serve the public at lower average

rates than smaller companies and that investors in senior securities of holding company subsidiaries have fared at least as well as investors in such securities of independent companies. Such evidence is related to the issue of whether the breaking up of holding company systems will accomplish the avowed objectives of the Act, namely, the protection of rate-payers and investors.

Divestment Orders Issued in 1941

In connection with the order of July 23, 1941 of the Securities and Exchange Commission requiring the Company to dispose of its interest in Puget Sound Power & Light Company within one year, the Company on May 14, 1942 filed with the Commission a Recapitalization Plan of the Puget Sound Company in which that company joined as a party. Stockholders were advised of this action in a letter dated June 1, 1942. This Plan, as amended, provides, among other things, that Engineers will receive 3% of the new common stock of the Puget Sound Company to be issued in exchange for the present $6 preferred and common stock. Since the Plan could not become effective within the period specified in the order, the Company petitioned the Commission on May 28, 1942 to allow it additional time to comply with the said order. The par value of the new common stock which Engineers would receive under the Plan as amended is $654,650 and the pro forma earnings accruing to such stock upon completion of the Plan, including the refinancing, would currently be in excess of $100,000 annually. The Commission gave conditional approval to the Plan on March 16, 1943 and on April 1, 1943 in connection with approval of the financing (described on page 10) stated to the press that it would give final approval to the Plan in the near future. Before the Plan may become effective approval must be obtained from a Federal Court. The Company expects to dispose of the new common stock it will receive upon completion of the Plan.

Engineers' Exhibit No. 37-J (Cont'd)

The order of July 23, 1941 above-mentioned also required the Company to dispose of its interest in The Key West Electric Company. Although there have been negotiations regarding the sale of this property, the Company has been unable to complete any sale and on May 28, 1942 it filed a request for a year's extension of the time in which to comply.

On December 29, 1941 the Commission issued an order requiring the Company to divest itself of its interest in the Wyoming and Missouri properties formerly held by The Western Public Service Company (Maryland). The Company has also been unable to dispose of these properties on a reasonable basis within the year and on December 9, 1942 filed a request for an extension until January 2, 1944 in which to comply.

Purchase of Preferred Stock

On December 5, 1941, in connection with the sale of The Western Public Service Company (Maryland), the Company applied to the Securities and Exchange Commission for authority to utilize the proceeds to purchase 35,000 shares of its own preferred stock, either under tenders or on the New York Stock Exchange. The Commission held hearings on the application in December 1941 and in March 1942. In April 1942 briefs were filed and the case was argued before the Commission. The Company believed that the proposed action was clearly in the interest of all of its stockholders, since those preferred stockholders who chose to tender their stock to the Company would probably get a better price than they would by selling the stock on the New York Stock Exchange, and the remaining stockholders would be benefited by the retirement at a discount of the stock purchased and by the reduction in dividend requirements resulting from the use of the money which has, perforce, remained idle. On February 15, 1943 the Commission issued its opinion and order denying the Com-

Engineers' Exhibit No. 37-J (Cont'd)

pany's application on the ground that until the Company has filed a plan for compliance with the Commission's divestment orders the preferred stockholders cannot determine the value of their stock and might therefore sell it at too high or too low a price. The opinion suggests as an alternative that the money be used to retire senior securities of the subsidiaries and one member of the Commission suggested a pro rata pay down on the preferred stock.

El Paso Natural Gas Company

The Company continues to hold 51,357 shares of the common stock of El Paso Natural Gas Company, which constitute less than 9% of the outstanding common stock of that company. Dividends of $2.40 per share were received in 1942 and $2.30 per share in 1941. Except for these shares and United States Certificates of Indebtedness the Engineers Company has no investments other than the securities of its subsidiaries.

Page 9:

Service Arrangements with Engineers Public Service Company, Inc.

The operating subsidiaries of Engineers Public Service Company (Delaware) obtain economies and more efficient service through group operation of certain essential services, including executive, advisory, financing, purchasing, sales promotion, insurance, accounting, statistical, tax and corporate. These services are furnished on a non-profit basis by Engineers Public Service Company, Inc. (New York), a mutual service organization wholly owned by the operating subsidiaries of Engineers Public Service Company. The mutual service organization billed the operating companies in the amounts shown on page 34 of this report covering that portion of the cost of these services allocated to them. In 1942 the aggregate of the charges billed the operating subsidiaries was $160,582 (1941—$204,654),

Engineers' Exhibit No. 37-J (Cont'd)

equivalent to 0.22% of the combined operating revenues. The reduction in the proportion of the total costs of these services billed to the operating companies resulted from meeting certain requirements of the Securities and Exchange Commission whereby, subsequent to April 1941, no part of the salaries of officers and certain other employees of the mutual service organization, including applicable overhead expenses, is charged to the operating subsidiaries. Such salaries and expenses are now billed in their entirety to the holding companies. There has been no change, however, in the services rendered to the operating companies. The charges for such services in 1942 which were allocated to the Engineers Company and to the El Paso holding company amounted to $189,765 (1941—$157,716), of which the Engineers Company paid $177,562 (1941—$147,361).

Pages 10-11:

Puget Sound Power & Light Company

During the year the upward trend in general business and industrial activity continued. Total operating revenues increased $3,159,253 or 17%. Electric revenues, which constituted 79% of the total, increased $1,546,640 or 10%, of which increase two-thirds was derived from residential and rural customers as the result of an increase of 281 kilowatt hours or 16% in average annual use and a rise of 4% in the number of customers. Transportation revenues, which constituted 17% of the total, increased $1,425,920 or 63%.

Expenses of operation and maintenance increased $1,794,574 or 22%, of which $1,047,631 or 58% was in payroll, which increased by 22%. Purchased power and fuel for steam power production accounted for the greater part of the remainder. Balance for common stock after provision for only those preferred dividends currently accruing amounted to $1,192,019, an increase of $729,392 over 1941.

Engineers' Exhibit No. 37-J (Cont'd)

On May 14, 1942, the company joined with the Engineers Company in filing with the Securities and Exchange Commission a Recapitalization Plan which is referred to under "Divestment Orders Issued in 1941". The Plan, as amended, provided for refinancing the company's funded debt with $52,000,000 principal amount of thirty year 4¼% first mortgage bonds and $6,500,000 of 3⅛% bank loans maturing serially over a five year period. The Plan further provides that: prior preference stockholders will receive one-fourth share of additional prior preference stock, plus $2.50 in cash per share, and the balance of the unpaid and accrued dividends on that stock will be cancelled; preferred stockholders will receive 97% of the new common stock in exchange for their shares, in the ratio of one and six-tenths shares of new common for each share of old preferred stock and the unpaid and accrued preferred dividends on that stock will be cancelled; and the common stockholders (principally the Company) will receive 3% of the new common in exchange for their shares, in the ratio of one share of new common for each 100 shares of old common stock. This Plan when finally approved by the Commission must also have the approval of a Federal Court before it becomes effective. Within 100 days after the consummation of the Recapitalization Plan a special meeting of the stockholders of the company will be held to elect a Board of Directors for which Board any stockholder will be permitted to make nominations.

On March 29, 1943 an underwriting syndicate offered the company 102.05% of the principal amount for the $52,000,000 of bonds bearing a 4¼% coupon. The Commission issued the requisite authorization and on April 2, 1943 the bonds were offered to the public at 104¼. On April 8 the company received $53,066,000 for the bonds and $6,500,000 from the bank loans and called for redemption all of its outstanding First and Refunding Mortgage Bonds.

Public Utility Districts have been organized in sixteen of the nineteen counties served by the company. Ten Dis-

Engineers' Exhibit No. 37-J (Cont'd)

tricts have filed condemnation suits to acquire parts of the company's property. In four of these cases condemnation awards have been entered but the Districts have been unable to finance the purchase of the property thereunder; one District obtained an award on March 19, 1943; three more condemnation cases are pending, one of which is scheduled for trial later in the year. Two suits have been dismissed, but may be reopened.

An initiative bill was enacted by the Washington State Legislature on February 17, 1943 which, among other things, would authorize Public Utility Districts to combine and form "Joint Commissions" for the purpose of acquiring existing electric utility systems. The Supreme Court of the State of Washington determined on March 17, 1943 that the measure is subject to referendum and it is reported that preliminary steps are being taken to obtain the 30,000 signatures necessary for a referendum. If such petition is legally filed this initiative will be submitted to the electorate in November 1944 to determine whether or not it shall be adopted.

During the year expansion continued at the Federal government's Grand Coulee and Bonneville hydro-electric projects which now have a combined installed generating capacity of 701,400 kilowatts. Additional generating units scheduled for completion by the end of 1944 aggregate 615,000 kilowatts. The Bonneville-Grand Coulee Administration has constructed a transmission system in Washington and Oregon extending into the area served by the company.

Engineers' Exhibit No. 37-J (Cont'd)

Page 14:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)
(Parent Company Only)

Comparative Income Statement

	1942	1941	Increase
Gross revenues:			
Revenue from subsidiary companies:			
Dividends—common†	$2,547,498.30	$3,230,467.20	$ 682,968.90*
—preferred	74,380.00	249,775.80(a)	175,395.80*
Interest—bonds	38,257.67	56,760.00	18,502.33*
—note	25,369.33	—0—	25,369.33
—open account	110.00	—0—	110.00
Dividends on miscellaneous investment	123,256.80	118,121.10	5,135.70
Miscellaneous revenue	982.87	3.17	979.70
Total	2,809,854.97	3,655,127.27	845,272.30*
Expenses and taxes:			
Expenses	283,440.40	313,666.22	30,225.82*
Taxes—Federal income (b)	145,000.00	155,498.53	10,498.53*
—Other	9,412.50	4,750.76	4,661.74
Total	437,852.90	473,915.51	36,062.61*
Balance	2,372,002.07	3,181,211.76	809,209.69*
Interest	77.16	—0—	77.16
Balance for dividends and surplus	2,371,924.91	3,181,211.76	809,286.85*
Preferred dividends	2,256,084.33	2,263,361.58	7,277.25*
Balance for common stock and surplus	$ 115,840.58	$ 917,850.18	$ 802,009.60*
Earnings per share of common stock	$.06	$.48	$.42*

Comparative Earned Surplus Statement

	1942	1941	Increase
Earned surplus at beginning of year	$4,390,462.89	$3,470,675.86	$ 919,787.03
Balance for dividends and surplus, as above	2,371,924.91	3,181,211.76	809,286.85*
Direct credits	63.16	1,936.85	1,873.69*
Total	6,762,450.96	6,653,824.47	108,626.49
Deduction:			
Preferred dividends declared	2,256,084.33	2,263,361.58	7,277.25*
Earned surplus at end of year (since May 31, 1938)	$4,506,366.63	$4,390,462.89	$ 115,903.74

* Decrease.

† See page 24 for detail.

(a) Includes dividends of $187,270.15 on preferred stocks of The Western Public Service Company (Maryland) of which $80,258.63 represented cumulative dividends applicable to periods prior to 1941.

(b) The Company does not consider that it has any liability for Federal excess profits taxes for the years 1942 and 1941.

Engineers' Exhibit No. 37-J (Cont'd)

Page 15:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)
(Parent Company Only)

Comparative Balance Sheet

ASSETS	Dec. 31, 1942	Dec. 31, 1941	Increase
Investments:			
Investments in subsidiary companies (a) (b):			
Common stocks	$86,862,752.51	$90,154,761.28	$3,292,008.77*
Preferred stocks	756,875.76	2,227,745.60	1,470,869.84*
Bonds	635,000.00	825,600.00	190,600.00*
Note	508,800.00	—0—	508,800.00
Advances on open accounts	61,000.00	—0—	61,000.00
	88,824,428.27 (c)	93,208,106.88	4,383,678.61*
Less reserve for depreciation in value of investments	33,876,470.62	35,000,000.00	1,123,529.38*
	54,947,957.65	58,208,106.88	3,260,149.23*
Miscellaneous investment (d)	427,975.00	427,975.00	—0—
Total investments	55,375,932.65	58,636,081.88	3,260,149.23*
Special fund (e)	92,000.00	—0—	92,000.00
Current assets:			
Cash in banks and on hand	5,758,999.87	4,454,368.50	1,304,631.37
United States Treasury Tax Notes, at cost	140,000.00	154,246.40	14,246.40*
United States Certificates of Indebtedness, at cost	2,000,000.00	—0—	2,000,000.00
Accounts receivable	271.23	157.96	113.27
Interest and dividends receivable	14,138.08	36,149.75	22,011.67*
Total current assets	7,913,409.18	4,644,922.61	3,268,486.57
	$63,381,341.83	$63,281,004.49	$ 100,337.34
LIABILITIES			
Capital stock:			
Preferred stock (f)	$41,801,500.00	$41,801,500.00	$ —0—
Common stock (g)	1,909,968.00	1,909,968.00	—0—
Total capital stock	43,711,468.00	43,711,468.00	—0—
Current liabilities:			
Accounts payable	10,538.76	34,165.22	23,626.46*
Taxes accrued	173,699.51	186,719.52	13,020.01*
Other current liabilities	47,129.32	26,049.25	21,080.07
Total current liabilities	231,367.59	246,933.99	15,566.40*
Surplus:			
Capital surplus	14,932,139.61	14,932,139.61	—0—
Earned surplus (since May 31, 1938)	4,506,366.63	4,390,462.89	115,903.74
	$63,381,341.83	$63,281,004.49	$ 100,337.34

* Decrease.

Note: See explanatory notes on page 20 which are to be read as an integral part of the balance sheet.

See Page 27 for Detailed Statement of Capitalization

Engineers' Exhibit No. 37-J (Cont'd)

Page 17:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Income Statement of Engineers Public Service Company Including Undistributed Earnings of Subsidiary Companies Applicable to Engineers Public Service Company

	1942	1941	Increase
Balance of earnings applicable to Engineers Public Service Company, from opposite page	$ 4,281,654.59	$ 4,815,052.02	$ 533,397.43*
Amortization of discount applicable to bonds of a subsidiary company owned by Parent Company; included as a deduction on opposite page	40.72	7,574.28	7,533.56*
Earnings from subsidiary companies, included as deductions on opposite page:			
Preferred dividends declared	62,189.50	169,263.67	107,074.17*
Interest	63,737.00	56,760.00	6,977.00
Earnings from other sources	124,239.67	118,124.27	6,115.40
Total	4,531,861.48	5,166,774.24	634,912.76*
Expenses, taxes and interest	437,930.06	473,915.51	35,985.45*
Balance applicable to stocks of Engineers Public Service Company	4,093,931.42	4,692,858.73	598,927.31*
Dividends on preferred stock of Engineers Public Service Company	2,256,084.33	2,263,361.58	7,277.25*
Balance for common stock and surplus	$ 1,837,847.09	$ 2,429,497.15	$ 591,650.06*
Earnings per share of common stock	$.96	$1.27	$.31*

Engineers' Exhibit No. 37-J (Cont'd)

Comparative Consolidated Earned Surplus Statement

(Minority Interests Excluded)

	1942	1941	Increase
Earned surplus at beginning of year	$ 9,762,903.47	$ 7,640,080.19	$ 2,122,823.28
Balance applicable to stocks of Engineers Public Service Company, from income statement	4,093,931.42	4,692,858.73	598,927.31*
Total	13,856,834.89	12,332,938.92	1,523,895.97
Deductions:			
Portion of loss on liquidation of a subsidiary applicable to surplus subsequent to May 31, 1938	76,477.29	—0—	76,477.29
Federal and State income tax deficiencies for prior years	129,685.34	—0—	129,685.34
Premium and expenses on preferred stocks retired	—0—	178,628.18	178,628.18*
Other deductions—net	11,739.52	128,045.69	116,306.17*
Preferred dividends declared, Parent Company	2,256,084.33	2,263,361.58	7,277.25*
Total deductions	2,473,986.48	2,570,035.45	96,048.97*
Earned surplus at end of year (since May 31, 1938)	$11,382,848.41(d)	$ 9,762,903.47	$ 1,619,944.94

Comparative Consolidated Capital Surplus Statement

(Minority Interests Excluded)

	1942	1941	Increase
Capital surplus at beginning of year	$25,123,531.20	$25,048,620.08	$ 74,911.12
Excess of book amount over cost of preferred stock of Parent Company purchased and retired	—0—	74,911.12	74,911.12*
	25,123,531.20	25,123,531.20	—0—
Deduction:			
Portion of loss on liquidation of a subsidiary applicable to surplus at May 31, 1938	245,896.06	—0—	245,896.06
Capital surplus at end of year	$24,877,635.14	$25,123,531.20	$ 245,896.06*

* Decrease.

Note: See explanatory notes on page 20 which are to be read as an integral part of the consolidated earned surplus statement.

Engineers' Exhibit No. 37-J (Cont'd)

Page 18:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

ASSETS	Dec. 31, 1942	Dec. 31, 1941	Increase
Plant and other investments:			
Utility plant	$349,427,101.56(b)	$352,824,664.39	$ 3,397,562.83*
Other physical property, at cost or written-down amounts	2,311,370.94	1,487,925.10	823,445.84
Investment in associated company, at cost	100,000.00	100,000.00	—0—
Other investments, at cost or written-down amounts	883,426.14(c)	995,423.28	111,997.14*
Total plant and other investments	352,721,898.64	355,408,012.77	2,686,114.13*
Special funds:			
Sinking fund cash	40.64	5,072.72	5,032.08*
Miscellaneous special funds	93,350.00	—0—	93,350.00
Total special funds	93,390.64	5,072.72	88,317.92
Current assets:			
Cash in banks and on hand	13,077,816.44	10,640,029.95	2,437,786.49
United States treasury securities, at cost	12,203,263.84	1,135,814.40	11,067,449.44
Special deposits	984,789.75	76,608.48	908,181.27
Notes and warrants receivable	54,530.20	65,760.00	11,229.80*
Accounts receivable from customers and miscellaneous sources including instalment accounts, less reserves	5,349,032.54(d)	6,035,688.54	686,656.00*
Materials and supplies, at cost or written-down amounts, less reserves	4,016,435.15	4,149,845.39	133,410.24*
Prepayments	362,890.54	287,228.98	75,661.56
Total current assets	36,048,758.46	22,390,975.74	13,657,782.72
Deferred debits:			
Unamortized debt discount and expense, including unamortized discount and expense and call premium on refunded issues	8,716,998.16	9,828,381.15	1,111,382.99*
Post-war refund of Federal excess profits tax	550,946.00	—0—	550,946.00
Other deferred debits	372,907.29	374,997.44	2,090.15*
Total deferred debits	9,640,851.45	10,203,378.59	562,527.14*
	$398,504,899.19	$388,007,439.82	$10,497,459.37

* Decrease.

Note: See explanatory notes on pages 21 and 22 which are to be read as an integral part of the consolidated balance sheet.

Engineers' Exhibit No. 37-J (Cont'd)

Page 19:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

LIABILITIES	Dec. 31, 1942	Dec. 31, 1941	Increase
Capital stock:			
Preferred stock(e)	$ 41,801,500.00	$ 41,801,500.00	—0—
Common stock(f)	1,909,968.00	1,909,968.00	—0—
Subsidiary companies:			
Preferred stock(g)	69,231,011.32(h)†	69,421,627.32	190,616.00*
Premium and discount on preferred stock	62,379.84	62,379.84	—0—
Total capital stock	113,004,859.16	113,195,475.16	190,616.00*
Long-term debt:			
Subsidiary companies:			
Bonds	141,159,500.00(i)‡	145,088,500.00	3,929,000.00*
Notes payable to banks	7,822,000.00	5,375,708.82	2,446,291.18
Total long-term debt	148,981,500.00	150,464,208.82	1,482,708.82*
Current liabilities:			
Bonds, due within one year	11,000.00‡	11,000.00	—0—
Notes payable to banks, due within one year	1,520,708.82	1,753,833.93	233,125.11*
Accounts payable	2,407,819.95	2,481,194.35	73,374.40*
Dividends declared	163,856.50	163,856.50	—0—
Customers' deposits	964,791.06	938,005.92	26,785.14
Taxes accrued	14,985,734.18	8,793,835.81	6,191,898.37
Interest accrued	1,170,284.19	1,247,960.83	77,676.64*
Other current liabilities	333,232.73	242,079.39	91,153.34
Total current liabilities	21,557,427.43	15,631,766.73	5,925,660.70
Deferred credits:			
Unamortized premium less expense on bonds	1,708,738.14	1,773,200.58	64,462.44*
Customers' advances for construction	524,650.45	111,115.67	413,534.78
Deferred profit on long-term merchandise sales	—0—	103,854.42	103,854.42*
Other deferred credits	98,276.18	19,365.03	78,911.15
Total deferred credits	2,331,664.77	2,007,535.70	324,129.07

Engineers' Exhibit No. 37-J (Cont'd)

Reserves:			
Depreciation reserve (j)	41,404,401.36	37,436,081.32	3,968,320.04
Reserve for injury and damage claims	860,858.87	757,764.96	103,093.91
Other reserves	1,252.07	1,356.07	104.00*
Total reserves	42,266,512.30	38,195,202.35	4,071,309.95
Parent Company's reserve for depreciation in value of investments in subsidiaries, $33,876,470.62, less certain deductions explained in note (k)	14,352,830.17	15,425,022.30	1,072,192.13*
Cumulative preferred dividends not declared (subsidiary companies)	19,457,977.50	17,886,150.00	1,571,827.50
Minority interests in common capital stocks and surplus of subsidiary companies (surplus, less deficit, $22,805.13; 1941—$20,064.57)	291,644.31	315,644.09	23,999.78*
Capital surplus	24,877,635.14	25,123,531.20	245,896.06*
Earned surplus (since May 31, 1938)	11,382,848.41 (l)	9,762,903.47	1,619,944.94
	$398,504,899.19	$388,007,439.82	$10,497,459.37

* Decrease.

† See page 25 for detail.

‡ See page 26 for detail.

Note: See explanatory notes on pages 21 and 22 which are to be read as an integral part of the consolidated balance sheet.

SUBSIDIARY COMPANIES OF ENGINEERS PUBLIC SERVICE COMPANY

Detail of Balance for Dividends and Surplus, Preferred Dividends, and Balance for Common Stock Owned by Engineers Public Service Company

12 Months Ending December 31, 1942

	Balance for Dividends and Surplus	Preferred Dividends Declared	Preferred Dividends Earned but Not Declared	Balance for Common	Minority Interest	Balance Applicable to Parent Company 1942	Balance Applicable to Parent Company 1941	Common Dividends Paid to Parent Company 1942	Common Dividends Paid to Parent Company 1941
Baton Rouge Bus Co., Inc.	$ 48,483.74	$ No Pref.		$ 48,483.74		$ 48,483.74	$ 28,988.85	$ 35,000.00	$ 25,000.00
El Paso Elec. Co. and Sub. Cos.	513,870.48	178,926.47		334,944.01	$ 9,700.86	325,243.15	473,968.04	169,782.00	84,796.00
Gulf States Utilities Co.	1,703,169.86	584,967.50		1,118,202.36		1,118,202.36	1,318,651.97	840,000.00	1,120,000.00
The Key West Electric Co.	61,837.67	24,374.00		37,463.67		37,463.67	57,976.23		
Puget Sound Power & Light Co. and Sub. Cos.	3,325,989.31	550,000.00	$1,583,970.00	1,192,019.31	8,182.55	1,183,836.76	459,451.54		
Savannah Electric and Power Co.	327,367.36	209,114.63		118,252.73	202.21	118,050.52	209,984.49		
Virginia Electric and Power Co.	3,754,878.68	1,171,602.00		2,583,276.68	8,684.23	2,574,592.45	2,650,088.37	1,472,716.30	2,000,671.20
Western Public Service Co. Group	59,618.70	No Pref.		59,618.70		59,618.70	75,394.07	30,000.00	
Total	$9,795,215.80 (a)	$2,718,984.60	$1,583,970.00	$5,492,261.20	$26,769.85	5,465,491.35	5,274,503.56	$2,547,498.30	$3,230,467.20
Less Puget Sound Power & Light Co. and Subsidiary Companies (b)						1,183,836.76	459,451.54		
						$4,281,654.59	$4,815,052.02		

(a) Balance for dividends and surplus as shown in combined income statement (see page 16).

(b) Puget Sound Power & Light Company's earnings exceeded its annual preferred dividend requirements of $2,133,970.00 by $1,192,019.31 (1941—$462,627.21) of which the Parent Company's proportion amounted to $1,183,836.76 (1941—$459,451.54) which, in consolidation, was credited to the Parent Company's reserve for depreciation in value of investments in subsidiary companies instead of increasing consolidated earnings. See note (c) in combined income statement notes on page 20.

Engineers' Exhibit No. 37-K.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1943

Page 4:

ENGINEERS PUBLIC SERVICE COMPANY

ORGANIZED IN 1925 UNDER THE LAWS OF DELAWARE

DIRECTORS

DONALD C. BARNES
HOWARD COONLEY
THOMAS J. HANLON, JR.
CHARLES W. KELLOGG
JASON C. LEIGHTON
THOMAS W. STREETER
CHARLES G. WILSON

OFFICERS

DONALD C. BARNES
President

THOMAS J. HANLON, JR.
Vice President

LEON E. JORDAN
Vice President

ALAN W. HASTINGS
Vice President

JASON C. LEIGHTON
Treasurer

RICHARD N. BENJAMIN
Secretary

GENERAL COUNSEL

MUDGE, STERN, WILLIAMS & TUCKER
New York

AUDITORS

LYBRAND, ROSS BROS. & MONTGOMERY
New York

Engineers' Exhibit No. 37-K (Cont'd)

Pages 5-8:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,
April 17, 1944.

To the Stockholders:.

The gross revenues of the Company (the parent company) consisting of dividends and interest on securities owned, were $4,025,941 in 1943, an increase of $1,216,086 or 43% over 1942. Greater common dividends from the Virginia and Gulf States subsidiaries accounted for 85% of this gain. Expenses of the Company were $236,870, a decline of $46,571 under 1942; non-recurrence of 1942 expenses incidental to the plan of recapitalization of Puget Sound Power & Light Company and lower charges from the mutual service company account substantially for this reduction. The increase of $60,490 in taxes was almost wholly in Federal income taxes by reason of greater taxable income. Net income available for dividends and surplus in 1943 was $3,574,108 as compared with $2,371,925 in 1942. Dividends on preferred stocks amounted to $2,256,084 leaving a balance applicable to common stock and surplus of $1,318,024; equivalent to 69¢ per share, compared with $115,841, or 6¢ per share in 1942.

The discussion of operations of subsidiaries included hereinafter under "Subsidiary Companies" as well as the consolidated financial statements, exclude Puget Sound Power & Light Company, The Key West Electric Company and Baton Rouge Bus Company, Inc., which ceased to be subsidiaries during the year 1943.

The balance of combined earnings of subsidiary companies applicable to common stocks owned by Engineers was $5,702,373 as compared with $4,195,707 in 1942, whereas the amount paid as common dividends to the parent company was $3,681,357 in 1943 and $2,512,498 in 1942. The

difference represents amounts retained in surplus of subsidiary companies and not declared out in the form of common dividends. In the case of certain subsidiaries, agreements in connection with bank loans currently restrict the payment of such dividends. Total consolidated earnings in 1943 applicable to securities held by Engineers was $6,046,957 as compared with $4,493,105 in 1942. After expenses, taxes, interest and preferred dividends the balance of consolidated earnings applicable to the parent company common stock was $3,339,040, or $1.75 per share, compared with $1,799,090, or $0.94 per share, in 1942.

Dividends

Regular quarterly dividends have been paid on the preferred stocks of the Engineers Company during the year. No dividends were paid on the common stock, and, in the opinion of the Directors, the payment of common dividends is presently inadvisable in view of the problems facing the Company should the order of the Securities and Exchange Commission requiring disposition of all the assets of the Company except its interest in Virginia Electric and Power Company be sustained in the courts.

Because of the loss sustained by the Company upon the sale in February, 1944, of its holdings of shares of common stock of Puget Sound Power & Light Company it would appear, based upon present estimates, that no part of the dividend distributions which have been paid or which will normally be payable on the dates indicated below on shares of preferred stock of the Company, will be subject to Federal income taxes in the hands of recipient stockholders:

	Preferred Stock		
	$5 Dividend Series	$5.50 Dividend Series	$6 Dividend Series
April 1, 1944	$1.25 per share	$1.37½ per share	$1.50 per share
July 1, 1944	1.25 per share	1.37½ per share	1.50 per share
October 2, 1944	1.25 per share	1.37½ per share	1.50 per share

However, definite determination of the taxable status of the aforesaid normal dividend payments in the hands of recipient stockholders cannot be ascertained until after the

close of the calendar year 1944; stockholders will be advised when such determination is known.

Public Utility Holding Company Act

Stockholders have been advised from time to time of the status of proceedings before the Securities and Exchange Commission. As a result of the petition filed on November 14, 1942 for a review in the United States Court of Appeals for the District of Columbia, the Court on November 22, 1943 set aside the orders issued by the Securities and Exchange Commission on September 16 and October 6, 1942 which directed, among other things, that Engineers divest itself of ownership and control within one year of all its subsidiaries except Virginia Electric and Power Company, which, if retained, must dispose of its gas and transportation businesses, and remanded the case to the Commission for further proceedings in accordance with its opinion. The grounds for the reversal were, in substance, that Engineers was entitled to more time to determine whether it desired to retain Virginia Electric and Power Company or Gulf States Utilities Company as its single integrated system and that the interpretation of the Act upon which the Commission directed the divestment of the transportation and other incidental businesses was incorrect. The Court, however, decided adversely to Engineers and its subsidiaries on all other issues, including the constitutionality of the Act and the Commission's so-called one-area interpretation of Section 11(b)(1) of the Act which interpretation permits the retention of public utility systems, in addition to the single system, only if they are located in the same State as the single system or States adjacent thereto. Both the Securities and Exchange Commission and the Company have applied to the Supreme Court of the United States for writs of certiorari to bring these issues before that Court.

Divestment Orders and Disposition of Properties

Stockholders were advised of the order of the Securities and Exchange Commission, under Section 11(b)(1) of the

Engineers' Exhibit No. 37-K (Cont'd)

Public Utility Holding Company Act of 1935, issued on July 23, 1941, directing the Company to dispose of its interest in the Puget Sound Power & Light Company and The Key West Electric Company within one year.

On April 27, 1943 the Securities and Exchange Commission adopted an order approving a plan for recapitalization of Puget Sound Power & Light Company and the Commission filed an application in the Federal District Court in Boston, Massachusetts to enforce the terms and provisions of the plan. On June 10, 1943 the court entered an order which provided for enforcement of the plan effective on September 13, 1943. Engineers received for its holdings of old common stock of Puget Sound Power & Light Company 65,466 shares of the new common stock of the par value of $10 per share. Engineers in December 1943 and February 1944 disposed of the 65,466 shares for an aggregate net price of $777,475. The investment of Engineers in Puget Sound Power & Light Company was $34,097,994. The total loss was therefore $33,320,519, of which $29,297,000 was charged against the reserve created in 1938 for depreciation in the value of this investment, $75,358 was charged against earned surplus in December 1943, representing the loss on 1,200 shares sold in that month and $3,948,161 is provided for by a reserve set up in December 1943 through a charge to earned surplus to provide for the loss to be realized through the sale of the remaining investment in February 1944. Based on the rates in the Revenue Act of 1943, enacted February 25, 1944, it is estimated that the annual saving in consolidated Federal income and excess profits taxes, by reason of the divestment of Puget Sound Power & Light Company, will amount to approximately $442,000.

With respect to The Key West Electric Company, all of the securities of that company owned by Engineers were sold on August 13, 1943. The investment of Engineers in The Key West Electric Company was $325,701. The net proceeds of the sale, subject to certain minor adjustments, were $712,229 which resulted in a net gain on the books of

Engineers' Exhibit No. 37-K (Cont'd)

Engineers of $386,528 which was credited to earned surplus. The reserve of $229,000 established in 1938 for depreciation in the value of this investment was transferred to capital surplus.

In compliance with the order of December 29, 1941 of the Securities and Exchange Commission directing the Company to dispose, within one year of date of acquisition (January 2, 1942), of its interest in the properties formerly owned by The Western Public Service Company (Maryland), certain minor isolated properties in Wyoming and Kansas were sold in 1942 and 1943 and the Company is endeavoring to dispose of the remaining properties.

Although the Company, as hereinbefore stated, is opposing in the courts the order of the Securities and Exchange Commission issued September 16, 1942 under Section 11 (b)(1) of the Public Utility Holding Company Act of 1935 directing the Company, among other things, to divest itself of ownership and control of all subsidiaries except Virginia Electric and Power Company, nevertheless, certain steps in connection with the disposition of properties directed to be divested by that order have been taken.

The Company on July 2, 1943 sold its investment in Baton Rouge Bus Company, Inc. consisting of the entire capital stock of that company at a net price of $360,801. Since the investment of Engineers was $180,000, the result was a gain of $180,801, which was credited to earned surplus.

The Company negotiated with the Mayor and City Council of the City of El Paso (Texas) a contract for the sale to the City of the entire common stock of El Paso Electric Company (Delaware) for $6,947,571, plus certain adjustments, including net current assets, subject to approval by the voters. At a special election in October 1943 the voters rejected the contract.

On December 31, 1943 El Paso Electric Company (Texas) sold its transportation and bridge properties for an aggregate price of $828,086 of which $800,000 was for fixed property and business and $28,086 was for related materials and supplies at cost. On the same date El Paso

Engineers' Exhibit No. 37-K (Cont'd)

Electric Company (Delaware) sold the entire capital stock of El Paso and Juarez Traction Company for an aggregate price of $370,883, subject to audit adjustment for changes in net current assets. While the investment of El Paso Electric Company (Delaware) as between its two subsidiaries was not segregated on its books, studies disclosed that the proceeds from the sale represented substantially the cost of the Juarez investment and therefore the full amount was credited to the investment account.

The Company owned at December 31, 1943, 51,357 shares, or less than 9%, of the common stock of El Paso Natural Gas Company. Dividends of $2.40 per share were received on this stock in 1942 and 1943. The Company in September 1943 made an exchange offer to its preferred stockholders whereby two shares of El Paso Natural Gas Company common stock, plus varying amounts of cash, were offered in exchange for preferred stock of Engineers. The offer was withdrawn because, before the exchange could be effected, the market price of Engineers preferred stock had advanced to a value beyond that of the offer. On March 2, 1944 the Company sold for cash, pursuant to invitation for bids, its holdings of El Paso Natural Gas Company common stock at a price of $1,523,300. Since the investment of Engineers was $427,975, the result was a gain of $1,095,325, which was reflected in the charges to earned surplus creating the reserve set up in December 1943 to provide for the net effect of the sale of this stock and the stock of Puget Sound Power & Light Company.

Possible Plan for Further Disposition

If the outcome of the present litigation involving Section 11(b)(1) shall make it necessary or desirable to do so, it is hoped that it will be possible to develop a plan under Section 11(e) which will meet the approval of the Securities and Exchange Commission under which Engineers' interest in Gulf States Utilities Company and El Paso Electric Company (Texas) would be distributed to its security holders

Engineers' Exhibit No. 37-K (Cont'd)

through liquidating holding companies, the preferred stocks of which would be distributed to the preferred stockholders of Engineers and the common stocks of which would be distributed to the common stockholders of Engineers. The net income of such liquidating holding companies, including Engineers, would be used exclusively for payment of preferred dividends and retirement of their preferred stock. The remaining smaller properties would be disposed of by sales when such sales could be made on an advantageous basis and the proceeds from such sales would be devoted to the retirement of the preferred stock of Engineers and the liquidating holding companies. When the preferred stocks of such two liquidating holding companies had been entirely retired the common stocks of their subsidiaries would be distributed pro rata in liquidation to their common stockholders. Upon establishment of such liquidating holding companies the mutual service company, located in New York, N. Y., would be dissolved. As soon as the present tax advantage of maintaining Engineers as the parent of Virginia Electric and Power Company had disappeared and the Engineers' preferred stock had been entirely retired, Engineers would liquidate in the same manner as that proposed for the liquidating holding companies over Gulf States Utilities Company and El Paso Electric Company (Texas).

Purchase of Preferred Stock

Stockholders have previously been advised of the order of February 15, 1943 of the Securities and Exchange Commission, denying the Company's application for permission to purchase 35,000 shares of its own preferred stock. In view of the closer approach of the market prices to the liquidation price of $100 per share and accrued dividends the Company filed a new application for permission to utilize $4,000,000 to purchase, on the New York Stock Exchange or at private sale, its preferred stock at not exceeding the liquidation price of $100 per share and accrued dividends. Such application was approved by the Securities and Exchange Commission on April 14, 1944.

Engineers' Exhibit No. 37-K (Cont'd)

Page 10:

Service Arrangements with Engineers Public Service Company, Inc.

The operating subsidiaries of Engineers Public Service Company (Delaware) obtain economies and more efficient service through group operation of certain essential services, including executive, advisory, financing, purchasing, sales promotion, insurance, accounting, statistical, tax and corporate. These services are furnished on a non-profit basis by Engineers Public Service Company, Inc. (New York), a mutual service organization wholly owned by the operating subsidiaries of Engineers Public Service Company. The mutual-service organization billed the operating and holding companies the amounts shown on page 36 of this report covering that portion of the cost of these services allocated to them. In 1943 the aggregate of the charges billed the operating subsidiaries was $162,340 (1942—$160,582), equivalent to 0.21% of the combined operating revenues. The charges for such services in 1943 which were allocated to the Engineers Company and to the El Paso holding company amounted to $176,280 (1942—$189,765), of which the Engineers Company paid $162,612 (1942—$177,562).

Page 13:

Merger Plan

The following is a brief summary of the merger plan as amended: (1) Engineers Public Service Company is to acquire from General Gas and Electric Corporation (Gengas) all of the outstanding shares of common stock of VPS and a claim by Gengas to $1,165,167 of escrowed funds for an aggregate price of $2,500,000 of which $1,500,000 is to be paid in installments contingent upon earnings over a maximum period of five years after the merger date. The shares of VPS common stock so acquired are to be converted into 150,000 shares of presently unissued

common stock of Vepco and the claim to $1,165,167 of escrowed funds is to be contributed to the capital of VPS; (2) each presently outstanding share of preferred stock of VPS, including all rights to accrued and unpaid dividends thereon to the effective date of the merger, is to be converted into one share of new $5 dividend preferred stock of Vepco, and, in addition, the holder of each share of 7% preferred stock is to receive $24.50 in cash and the holder of each share of 6% preferred stock is to receive $19.00 in cash, with the further provision that the holder of each share of preferred stock of VPS is to receive additional cash in an amount equal to accrued dividends thereon from March 31, 1944 to the effective date of the merger; (3) each share of $6 dividend preferred stock of Vepco outstanding at the effective date of the merger is to be converted into one share of the Vepco new $5 dividend preferred stock; (4) Vepco is to sell $23,000,000 principal amount of new Series D 3% bonds and $9,000,000 principal amount of new 2¼%-2⅝% Serial one to ten year notes and call for redemption all of VPS presently outstanding bonds in the principal amount of $26,000,000 at 111⅛ and debentures in the principal amount of $10,500,000 at 104½ in each case with accrued interest to date of call; and (5) Engineers Public Service Company will contribute $2,500,000 in cash to the capital of Vepco.

Page 14:

Dividend Restrictions

There is a covenant in the merger agreement which provides that through October 1946, $55,000 per month of net income is not available for payment of dividends on the common stock and that an additional $75,000 per month for 120 months from the merger date will not be available for payment of dividends on the common stock. The aggregate amount of net income to be unavailable for common dividends pursuant to these covenants over a ten-year period is approximately $11,000,000.

Engineers' Exhibit No. 37-K (Cont'd)

Page 18:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)
(Parent Company Only)

Comparative Income Statement(a)

	1943	1942	Increase
Gross revenues:			
Revenue from subsidiary companies:			
Dividends—common†	$3,681,356.95	$2,512,498.30	$1,168,858.65
—preferred	49,999.00	49,999.00	—0—
Interest—bonds	45,000.00	38,257.67	6,742.33
—note	25,440.00	25,369.33	70.67
—open account	—0—	110.00	110.00*
Revenue from miscellaneous investments	194,723.40	182,637.80	12,085.60
Miscellaneous revenue	29,421.46	982.87	28,438.59
Total	4,025,940.81	2,809,854.97	1,216,085.84
Expenses and taxes:			
Expenses	236,869.72	283,440.40	46,570.68*
Taxes—Federal income(b)	200,000.00	145,000.00	55,000.00
—Other	14,902.70	9,412.50	5,490.20
Total	451,772.42	437,852.90	13,919.52
Balance	3,574,168.39	2,372,002.07	1,202,166.32
Interest	60.84	77.16	16.32*
Balance for dividends and surplus	3,574,107.55	2,371,924.91	1,202,182.64
Preferred dividends	2,256,083.89	2,256,084.33	.44*
Balance for common stock and surplus	$1,318,023.66	$ 115,840.58	$1,202,183.08
Earnings per share of common stock	$.69	$.06	$.63

Comparative Earned Surplus Statement

	1943	1942	Increase
Earned surplus at beginning of year	$4,506,366.63	$4,390,462.89	$ 115,903.74
Balance for dividends and surplus, as above	3,574,107.55	2,371,924.91	1,202,182.64
Net profit on completed sales of investments	491,971.03	—0—	491,971.03
Other credits	17,000.00	63.16	16,936.84
Total	8,589,445.21	6,762,450.96	1,826,994.25
Deductions:			
Preferred dividends declared	2,256,083.89	2,256,084.33	.44*
Provision for net loss on disposition of miscellaneous investments in 1944(e)	2,852,836.00	—0—	2,852,836.00
Total deductions	5,108,919.89	2,256,084.33	2,852,835.56
Earned surplus at end of year (since May 31, 1938)	$3,480,525.32	$4,506,366.63	$1,025,841.31*

* Decrease.

† See page 28 for detail.

Note: See explanatory notes on page 24 which are to be read as an integral part of the income and earned surplus statement.

Engineers' Exhibit No. 37-K (Cont'd)

Page 19:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)
(Parent Company Only)

Comparative Balance Sheet(a)

	Dec. 31, 1943	Dec. 31, 1942	Increase
ASSETS			
Investments:			
Investments in subsidiary companies(c):			
Common stocks	$52,509,604.99	$52,305,789.95	$ 203,815.04
Preferred stocks	710,142.85	710,142.85	—0—
Bonds	635,000.00	635,000.00	—0—
Note	508,800.00	508,800.00	—0—
Advances on open accounts	8,000.00	61,000.00	53,000.00*
	54,371,547.84(d)	54,220,732.80	150,815.04
Less reserve for depreciation in value of investments	4,350,470.62	4,350,470.62	—0—
	50,021,077.22	49,870,262.18	150,815.04
Miscellaneous investments, less reserve	2,288,065.38(e)	5,505,670.47	3,217,605.09*
Total investments	52,309,142.60	55,375,932.65	3,066,790.05*
Special fund(f)	92,000.00	92,000.00	—0—
Current assets:			
Cash in banks and on hand	8,090,566.49	5,758,999.87	2,331,566.62
United States Treasury Tax Notes, at cost	163,000.00	140,000.00	23,000.00
United States Certificates of Indebtedness, at cost	2,000,000.00	2,000,000.00	—0—
Accounts receivable	—0—	271.23	271.23*
Interest and dividends receivable	17,200.75	14,138.08	3,062.67
Total current assets	10,270,767.24	7,913,409.18	2,357,358.06
Deferred charges	25,256.55	—0—	25,256.55
	$62,697,166.39	$63,381,341.83	$ 684,175.44*
LIABILITIES			
Capital stock:			
Preferred stock(g)	$41,801,500.00	$41,801,500.00	$ —0—
Common stock(h)	1,909,968.00	1,909,968.00	—0—
Total capital stock	43,711,468.00	43,711,468.00	—0—
Current liabilities:			
Accounts payable	6,306.84	10,538.76	4,231.92*
Taxes accrued	225,611.31	173,699.51	51,911.80
Other current liabilities	109,318.09	47,129.32	62,188.77
Total current liabilities	341,236.24	231,367.59	109,868.65
Reserve for taxes on income of prior years	2,797.22	—0—	2,797.22
Surplus:			
Capital surplus	15,161,139.61	14,932,139.61	229,000.00(i)
Earned surplus (since May 31, 1938)	3,480,525.32	4,506,366.63	1,025,841.31*
	$62,697,166.39	$63,381,341.83	$ 684,175.44*

* Decrease.

Note: See explanatory notes on page 24 which are to be read as an integral part of the balance sheet.

See Page 31 for Detailed Statement of Capitalization

Engineers' Exhibit No. 37-K (Cont'd)

Page 21:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Earned Surplus Statement

(Minority Interests Excluded)

	1943	1942	Increase
Earned surplus at beginning of year (as previously reported)	$11,382,848.41	$ 9,762,903.47	$1,619,944.94
Reduction arising from exclusion from the consolidation of the companies named in note (a) to combined income statement (representing in effect a loss to the consolidation upon disposition of such companies)	91,154.72	53,167.31	37,987.41
	11,291,693.69	9,709,736.16	1,581,957.53
Balance applicable to stocks of Engineers Public Service Company, from income statement	5,595,123.39	4,055,174.51	1,539,948.88
Total	16,886,817.08	13,764,910.67	3,121,906.41
Additions:			
Net profit on completed sales of investments	491,971.03	—0—	491,971.03
Reversal of accruals for prior years' taxes on income, no longer required	642,116.44	—0—	642,116.44
Total	18,020,904.55	13,764,910.67	4,255,993.88
Deductions:			
Provision for net loss on disposition of miscellaneous investments in 1944	2,852,836.00†	—0—	2,852,836.00
Portion of write-off of utility plan adjustments applicable to surplus subsequent to May 31, 1938	166,784.83	—0—	166,784.83
Portion of loss on liquidation of a subsidiary applicable to surplus subsequent to May 31, 1938	—0—	76,477.29	76,477.29*
Federal and State income tax deficiencies for prior years	—0—	129,685.34	129,685.34*
Other deductions—net	43,353.69	10,970.02	32,383.67
Preferred dividends declared, Parent Company	2,256,083.89	2,256,084.33	.44*
Total deductions	5,319,058.41	2,473,216.98	2,845,841.43
Earned surplus at end of year (since May 31, 1938)	$12,701,846.14‡	$11,291,693.69	$1,410,152.45

Engineers' Exhibit No. 37-K (Cont'd)

Comparative Consolidated Capital Surplus Statement

(Minority Interests Excluded)

	1943	1942	Increase
Capital surplus at beginning of year (as previously reported)	$24,877,635.14	$25,123,531.20	$ 245,896.06*
Reduction arising from exclusion from the consolidation of the companies named in note (a) to combined income statement (representing, in effect, a loss to the consolidation upon disposition of such companies)	4,813,237.40	4,813,237.40	—0—
	20,064,397.74	20,310,293.80	245,896.06*
Reversal of reserve, no longer required, provided by charge to capital surplus in 1938 for investment in a subsidiary which was sold in 1943	229,000.00	—0—	229,000.00
	20,293,397.74	20,310,293.80	16,896.06*
Deductions:			
Portion of write-offs of utility plant adjustments applicable to surplus at May 31, 1938	632,251.80	—0—	632,251.80
Portion of loss on liquidation of a subsidiary applicable to surplus at May 31, 1938	—0—	245,896.06	245,896.06*
Capital surplus at end of year	$19,661,145.94	$20,064,397.74	$ 403,251.80*

* Decrease.

† See Parent Company note (e).

‡ See consolidated balance sheet note (k).

Engineers' Exhibit No. 37-K (Cont'd)

Page 22:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet (a)

	Dec. 31, 1943	Dec. 31, 1942	Increase
ASSETS:			
Plant and other investments:			
Utility plant	$210,889,926.35 (c)	$206,972,003.58	$3,917,922.77
Other physical property; at cost or written-down amounts	1,501,371.24	1,655,515.78	154,144.54*
Investment in associated company, at cost	69,150.00	69,475.00	325.00*
Other investments, at cost or written-down amounts, less reserve	2,288,065.38 (d)	5,594,837.04	3,306,771.66*
Total plant and other investments	214,748,512.97	214,291,831.40	456,681.57
Special funds	94,662.50	93,350.00	1,312.50
Current assets:			
Cash in banks and on hand	17,189,067.57	10,638,806.46	6,550,261.11
United States treasury securities, at cost	10,060,000.00	10,934,263.84	874,263.84*
Special deposits	870,683.10	71,387.32	799,295.78
Notes and warrants receivable	11,687.76	20,920.22	9,232.46*
Accounts receivable from customers and miscellaneous sources including instalment accounts, less reserves	3,443,858.86	3,597,606.14	153,747.28*
Materials and supplies, at cost or written-down amounts, less reserves	2,530,018.52	2,973,914.48	443,895.96*
Prepayments	239,813.61	254,521.50	14,707.89*
Total current assets	34,345,129.42	28,491,419.96	5,853,709.46
Deferred debits:			
Unamortized debt discount and expense, including unamortized discount and expense and call premium on refunded issues	6,538,717.42	7,166,889.34	628,171.92*
Post-war refund of Federal excess profits tax	1,174,982.76	543,181.00	631,801.76
Other deferred debits	209,101.52	207,815.44	1,286.08
Total deferred debits	7,922,801.70	7,917,885.78	4,915.92
	$257,111,106.59	$250,794,487.14	$6,316,619.45

* Decrease.

Note: See explanatory notes on pages 25 and 26 which are to be read as an integral part of the consolidated balance sheet.

Engineers' Exhibit No. 37-K. (Cont'd)

Page 23:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet (a)

LIABILITIES:	Dec. 31, 1943.	Dec. 31, 1942	Increase
Capital stock:			
Preferred stock (e)	$ 41,801,500.00	$ 41,801,500.00	$ —0—
Common stock (f)	1,909,968.00	1,909,968.00	—0—
Subsidiary companies:			
Preferred stock (g)	34,609,958.13 (h) †	34,610,063.80	105.67*
Premium and discount on preferred stock	62,379.84	62,379.84	—0—
Total capital stock	78,383,805.97	78,383,911.64	105.67*
Long-term debt:			
Subsidiary companies:			
Bonds (i)	81,855,000.00 ‡	81,866,000.00	11,000.00*
Notes payable to banks	5,900,000.00	7,810,000.00	1,910,000.00*
Total long-term debt	87,755,000.00	89,676,000.00	1,921,000.00*
Current liabilities:			
Bonds, due within one year	11,000.00 ‡	11,000.00	—0—
Notes payable to banks due within one year	1,910,000.00	1,410,000.00	500,000.00
Accounts payable	1,793,449.39	1,175,431.82	618,017.57
Dividends declared	26,356.50	26,356.50	—0—
Customers' deposits	859,776.22	866,438.26	6,662.04*
Taxes accrued	14,004,964.40	11,852,959.38	2,152,005.02
Interest accrued	847,171.37	860,310.29	13,138.92*
Other current liabilities	313,140.91	320,804.03	7,663.12*
Total current liabilities	19,765,858.79	16,523,300.28	3,242,558.51
Deferred credits:			
Unamortized premium less expense on bonds	1,644,275.70	1,708,738.14	64,462.44*
Customers' advances for construction	895,213.46	446,785.37	448,428.09
Other deferred credits	109,719.59	75,482.60	34,236.99
Total deferred credits	2,649,208.75	2,231,006.11	418,202.64
Reserves:			
Depreciation reserve (j)	30,234,267.91	27,223,300.76	3,010,967.15
Reserve for injury and damage claims	891,371.20	843,407.30	47,963.90
Reserve for taxes on income of prior years	644,043.66	—0—	644,043.66
Other reserves	1,252.07	1,252.07	—0—
Total reserves	31,770,934.84	28,067,960.13	3,702,974.71
Parent Company's reserve for depreciation in value of investments in subsidiaries	4,350,470.62	4,350,470.62	—0—
Minority interests in common capital stocks and surplus of subsidiary companies (surplus, $26,781.97; 1942—$73,635.98)	72,835.54	205,746.93	132,911.39*
Capital surplus	19,661,145.94	20,064,397.74	403,251.80*
Earned surplus (since May 31, 1938)	12,701,846.14 (k)	11,291,693.69	1,410,152.45
	$257,111,106.59	$250,794,487.14	$6,316,619.45

* Decrease.
† See page 29 for detail.
‡ See page 30 for detail.

Note: See explanatory notes on pages 25 and 26 which are to be read as an integral part of the consolidated balance sheet.

SUBSIDIARY COMPANIES OF ENGINEERS PUBLIC SERVICE COMPANY

Detail of Balance for Dividends and Surplus, Preferred Dividends, and Balance for Common Stock Owned by Engineers Public Service Company(a)

12 Months Ending December 31, 1943

	Balance for Dividends and Surplus	Preferred Dividend Requirements	Balance for Common	Minority Interest	Balance Applicable to Parent Company 1943	Balance Applicable to Parent Company 1942	Common Dividends Paid to Parent Company 1943	Common Dividends Paid to Parent Company 1942
El Paso Elec. Co. and Sub. Cos.	$ 617,710.23	$ 178,926.40	$ 438,783.83	$ 7,290.30	$ 431,493.53	$ 325,243.15	$ 287,142.50	$ 169,782.00
Gulf States Utilities Co.	2,209,100.05	584,967.60	1,624,132.45		1,624,132.45	1,118,202.36	1,120,000.00	840,000.00
Savannah Electric and Power Co.	412,505.51	209,114.64	203,390.87	315.05	203,075.82	118,050.52		
Virginia Electric and Power Co.	4,546,841.04	1,171,602.00	3,375,239.04	7,993.03	3,367,246.01	2,574,592.45	2,225,464.45	1,472,716.30
Western Public Service Co. Group	76,424.98	No Pref.	76,424.98		76,424.98	59,618.70	48,750.00	30,000.00
Total	$7,862,581.81(b)	$2,144,610.64	$5,717,971.17	$15,598.38	$5,702,372.79	$4,195,707.18	$3,681,356.95	$2,512,498.30

(a) See note (a) to combined income statement on page 24.

(b) Balance for dividends and surplus as shown in combined income statement (see page 20).

Engineers' Exhibit No. 37-K (Cont'd).

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Engineers' Exhibit No. 37-L.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1944

Page 4:

ENGINEERS PUBLIC SERVICE COMPANY

ORGANIZED IN 1925 UNDER THE LAWS OF DELAWARE

DIRECTORS

DONALD C. BARNES
HOWARD COONLEY
THOMAS J. HANLON, JR.
CHARLES W. KELLOGG
JASON C. LEIGHTON
THOMAS W. STREETER
CHARLES G. WILSON

OFFICERS

DONALD C. BARNES
President

THOMAS J. HANLON, JR.
Vice President

LEON E. JORDAN
Vice President

ALAN W. HASTINGS
Vice President

JASON C. LEIGHTON
Treasurer

RICHARD N. BENJAMIN
Secretary

GENERAL COUNSEL

MUDGE, STERN, WILLIAMS & TUCKER
New York

AUDITORS

LYBRAND, ROSS BROS. & MONTGOMERY
New York

Engineers' Exhibit 37-L (Cont'd)

Page 5:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,
April 16, 1945.

TO THE STOCKHOLDERS:

The gross revenues of the Company (the parent company) consisting of dividends and interest on securities owned were $3,979,300 in 1944, a decrease of $46,641 under 1943. Greater common dividends from subsidiaries offset most of the decline in revenues from miscellaneous investments caused by the sale of such securities. Both expenses and taxes increased slightly. These changes resulted in a decline of $73,039 in the balance for dividends and surplus. The purchase of preferred stock referred to hereinafter reduced preferred dividends by $80,195, leaving a balance applicable to common stock and surplus of $1,325,180 for the year, as compared with $1,318,024 in 1943. The latter two figures are equivalent to an earning of 69¢ per share of outstanding common stock in each of these years.

The balance of combined earnings of subsidiary companies, including the Virginia properties acquired by merger only from May 25, 1944, was $7,273,234 as compared with $5,702,373 in 1943, whereas the amount paid as common dividends to the parent company was $3,821,950 in 1944 and $3,681,357 in 1943. The difference represents the amounts retained in surplus of subsidiary companies and not declared out in the form of common dividends. Charter provisions and indenture covenants currently restrict payment of dividends of certain subsidiaries. Total consolidated earnings in 1944 applicable to securities held by Engineers were $7,430,583 as compared with $6,046,957 in 1943. After expenses, taxes, interest and preferred dividends, the balance of consolidated earnings applicable to the parent company's common stock was $4,776,464, or $2.50

per share, compared with $3,339,040, or $1.75 per share, in 1943. Approximately two-thirds of the $1,437,424 improvement during the year resulted from a reduction in Federal income taxes explained hereinafter under "Amortization of War Emergency Facilities".

Total taxes accrued in 1944 by the subsidiary companies, as shown by the income statement were $20,131,321 or 28% of combined operating revenues. Taxes contributed by this and other business enterprises owned by private security holders are a major source of revenue for the conduct of government. Under present war conditions these taxes have become so great that a large differential now exists between the cost of operation of such privately-owned business enterprises and the costs of operation of government and co-operatively-owned businesses, which are largely tax free. This differential presents, in effect a subsidy of such magnitude that the combined existence of private enterprise is threatened. Legislation should be enacted to require that all business, whether conducted by private owners, government or cooperatives, should bear equally the tax burden.

Dividends

Regular quarterly dividends have been paid on the preferred stocks of the Company during the year. No dividends were paid on the common stock, and, in the opinion of Directors, the payment of common dividends is presently inadvisable in view of the problems facing the Company, should the order of the Securities and Exchange Commission requiring disposition of all the assets of the Company except its interest in Virginia Electric and Power Company be sustained in the courts.

Pages 6-7:

Divestment Orders and Disposition of Properties

The Company and its subsidiaries have made several sales or contracts for sale of securities and properties since such divestment orders were issued:

Engineers' Exhibit 37-L (Cont'd)

In 1942 the Company's investment in The Western Public Service Company (Maryland) was sold. Prior to the sale the Company had transferred its Wyoming properties to The Western Public Service Company (Delaware), which is still owned by Engineers.

In 1942 a proceeding under Section 11(e) of the Public Utility Holding Company Act led to the recapitalization of Puget Sound Power & Light Company, which became effective September 13, 1943, and to final disposition of the Company's interest therein in February 1944.

In July 1943 the Company sold its investment in Baton Rouge Bus Company, Inc.

In August 1943 the Company sold its investment in The Key West Electric Company.

In the early fall of 1943 the Company negotiated a contract with the Mayor and City Council of the City of El Paso, Texas, subject to approval of the voters, for the sale of its investment in the El Paso property, but this contract was rejected by the voters in October 1943.

In December 1943 the transportation and bridge properties in El Paso, Texas and Juarez, Mexico, were sold.

In March 1944 the Company sold its remaining investment in the common stock of El Paso Natural Gas Company.

All of the above transactions have been previously reported to stockholders.

On December 16, 1944 El Paso Electric Company (Delaware) was liquidated and the preferred stockholders were paid the liquidation price of $100 per share and accrued dividends. This company was an intermediate holding company in the Engineers system which served no useful purpose after the sale, in December 1943, of its subsidiary

Engineers' Exhibit 37-L (Cont'd)

owning the transportation and bridge properties in Mexico. Engineers contributed to the Delaware Company $1,000,000 in cash to enable that company to pay off its preferred stock and, in connection with the final distribution, Engineers also assumed liabilities of $46,850. The remaining assets, primarily the common stock of El Paso Electric Company (Texas), were distributed to Engineers as the owner of 100% of the El Paso (Delaware) common stock.

The sales by Virginia Electric and Power Company of its transportation properties in Richmond and Norfolk and its remaining transportation properties comprising the urban transportation properties in and near Petersburg, Portsmouth and Newport News (including the capital stock of Citizens Transit Corporation, also serving the Newport News area) and the interurban transportation property between Richmond and Petersburg, were completed on December 29, 1944 and March 31, 1945, respectively, when these properties were transferred to the purchasers.

On April 25, 1945, the Company sold to Donner Estates, Inc., as the Representative of and acting for and on behalf of International Cancer Research Foundation, Union Trust Company of Pittsburgh, Trustee, and Wilmington Trust Company and Delaware Trust Co. as Trustees under certain trusts created by William H. Donner or members of his family, all the securities of Savannah Electric and Power Company owned by the Company, namely, 5,500 shares of First Preferred or Debenture Stock Series A and 133,146 shares of Common Stock, for a consideration of $3,387,500 in cash, subject to certain adjustments to the date of transfer. The cost of these securities to the Company was $3,165,965.

On March 5, 1945, the Company entered into a contract, with J. Leo Scanlon, to sell its entire interest in Missouri Service Company and Northern Kansas Power Company for a basic price of $750,000, subject to adjustment with the total consideration including adjustments not to exceed $850,000. The book cost to the Company of the

securities to be sold amounts to $1,094,119. A reserve was established in 1938 to cover the estimated loss from disposition of the Company's interest in these properties. The sale is subject to approval by the Securities and Exchange Commission.

Possible Plan for Further Disposition

If the outcome of the present litigation involving Section 11(b)(1) shall make it necessary or desirable to do so, it is hoped that it will be possible to develop a plan under Section 11(e) which will meet with the approval of the SEC under which Engineers' interest in Gulf States Utilities Company and El Paso Electric Company (Texas) would be distributed to its security holders through liquidating holding companies, the preferred stocks of which would be distributed to the preferred stockholders of Engineers and the common stocks of which would be distributed to the common stockholders of Engineers. The net income of such liquidating holding companies would be used exclusively for payment of preferred dividends and retirement of their preferred stock at $100 per share and accrued dividends. Any remaining smaller properties not sold, if the plan is allowed to become effective, would be disposed of when sales could be made on an advantageous basis and the proceeds therefrom would be devoted to the retirement of the preferred stock of the liquidating holding companies. When the preferred stocks of such holding companies had been entirely retired, the common stock of their subsidiaries would be distributed pro rata in liquidation to their common stockholders. Upon establishment of such liquidating holding companies the mutual service company, located in New York, would be dissolved. Engineers, as the parent of Virginia Electric and Power Company alone, would also proceed to liquidate in the same manner as proposed for the liquidating holding companies over Gulf States Utilities Company and El Paso Electric Company when the tax ad-

Engineers' Exhibit 37-L (Cont'd)

vantages of retaining such relationship were deemed no longer of present or prospective value.

Purchase of Preferred Stock

On April 14, 1944 the SEC approved the Company's application to utilize $4,000,000 for the purchase of shares of its preferred stock at not exceeding $100 per share. All preferred stockholders were mailed notice of this step, including a copy of the Findings and Opinion of the SEC. The Company purchased 12,050 shares of $5 Dividend Stock, 8,640 shares of $5.50 Dividend Stock and 4,870 shares of $6 Dividend Stock, at a total cost of $2,532,099, before market prices moved beyond $100. In December 1944 the Company asked the SEC to extend the order permitting such purchase for another four months and the SEC has extended the terms of the order now in effect without modification, pending further order of the Securities and Exchange Commission.

Page 9:

Amortization of War Emergency Facilities

During the period of the war emergency, subsidiary companies have been granted certificates of necessity in the estimated aggregate amount of approximately $12,300,000. These certificates permit the companies to claim the cost of such additions as deductible for Federal income tax purposes over a sixty-month period (or, in the event of an earlier termination of the emergency, in a lesser period) in lieu of normal depreciation. As a result Federal income and excess profits taxes were reduced $1,067,652 in 1944 and $104,524 in 1943. Such reduction, based upon present tax rates and with all of such facilities in service, will amount to about $1,700,000 annually during the five-year amortization period.

Engineers' Exhibit 37-L (Cont'd)

Pages 9-10:

Service Arrangements with Engineers Public Service Company, Inc.

The operating subsidiaries of Engineers Public Service Company (Delaware) obtain economies and more efficient service through group operation of certain essential services, including executive, advisory, purchasing, sales promotion, insurance, accounting, statistical, tax and corporate. These services are furnished on a non-profit basis by Engineers Public Service Company, Inc. (New York), a mutual service organization wholly owned by the operating subsidiaries of Engineers Public Service Company. The mutual service organization billed the operating and holding companies the amounts shown on page 32 of this report covering that portion of the cost of these services allocated to them. In 1944 the aggregate of the charges billed the operating subsidiaries was $162,647 (1943—$162,340), equivalent to 0.23% of the applicable operating revenues. The charges for such services in 1944 which were allocated to the Engineers Company and to the El Paso holding company amounted to $171,215 (1943—$176,280), of which the Engineers Company paid $161,384 (1943—$162,612).

Engineers' Exhibit 37-L (Cont'd)

Page 16:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)

(Parent Company Only)

Comparative Income Statement

	1944	1943	Increase
Gross revenues:			
Revenue from subsidiary companies:			
Dividends—common†	$3,821,949.60	$3,681,356.95	$ 140,592.65
—preferred	48,499.25	49,999.00	1,499.75*
Interest—bonds	44,000.00	45,000.00	1,000.00*
—note	25,440.00	25,440.00	—0—
Revenue from miscellaneous investments	19,279.80	194,723.40	175,443.60*
Miscellaneous revenue	20,130.81	29,421.46	9,290.65*
Total	3,979,299.46	4,025,940.81	46,641.35*
Expenses and taxes:			
Expenses	250,001.10	236,869.72	13,131.38
Taxes—Federal income (b)	210,000.00	200,000.00	10,000.00
—other	17,962.45	14,902.70	3,059.75
Total	477,963.55	451,772.42	26,191.13
Balance	3,501,335.91	3,574,168.39	72,832.48*
Interest	267.56	60.84	206.72
Balance for dividends and surplus	3,501,068.35	3,574,107.55	73,039.20*
Preferred dividends	2,175,888.50	2,256,083.89	80,195.39*
Balance for common stock and surplus	$1,325,179.85	$1,318,023.66	$ 7,156.19
Earnings per share of common stock	$.69	$.69	—0—

Comparative Earned Surplus Statement

	1944	1943	Increase
Earned surplus at beginning of year	$3,480,525.32	$4,506,366.63	$1,025,841.31*
Balance for dividends and surplus, as above	3,501,068.35	3,574,107.55	73,039.20*
Other credits	—0—	17,000.00	17,000.00*
Total	6,981,593.67	8,097,474.18	1,115,880.51*
Deductions:			
Preferred dividends declared	2,175,888.50	2,256,083.89	80,195.39*
Provision for net loss on disposition of investments	13,156.80	2,360,864.97	2,347,708.17*
Total deductions	2,189,045.30	4,616,948.86	2,427,903.56*
Earned surplus at end of year (since May 31, 1938)	$4,792,548.37	$3,480,525.32	$1,312,023.05

* Decrease.

† See page 26 for detail.

Note: See explanatory notes on page 22 which are to be read as an integral part of the income and earned surplus statements.

Engineers' Exhibit 37-L (Cont'd)

Page 17:

ENGINEERS PUBLIC SERVICE COMPANY (DELAWARE)

(Parent Company Only)

Comparative Balance Sheet

	Dec. 31, 1944	Dec. 31, 1943	Increase
ASSETS			
Investments:			
Investments in subsidiary companies (a) (c):			
Common stocks	$58,557,540.24	$52,509,604.99	$6,047,935.25
Preferred stocks	612,361.00	710,142.85	97,781.85*
Bonds	635,000.00	635,000.00	—0—
Note	508,800.00	508,800.00	—0—
Advances on open account	8,000.00	8,000.00	—0—
	60,321,701.24	54,371,547.84	5,950,153.40
Less reserve for depreciation in value of investments	4,394,705.20	4,350,470.62	44,234.58
	55,926,996.04	50,021,077.22	5,905,918.82
Excess profits tax refund bonds	6,079.30	—0—	6,079.30
Other investments, less reserve	—0—	2,288,065.38	2,288,065.38*
Total investment	55,933,075.34	52,309,142.60	3,623,932.74
Special fund (d)	92,000.00	92,000.00	—0—
Current assets:			
Cash in banks and on hand	3,762,239.02	8,090,566.49	4,328,327.47*
United States treasury securities, at cost	2,200,000.00	2,163,000.00	37,000.00
Interest and dividends receivable	12,658.34	17,200.75	4,542.41*
Total current assets	5,974,897.36	10,270,767.24	4,295,869.88*
Deferred charges	19,356.09	25,256.55	5,900.46*
	$62,019,328.79	$62,697,166.39	$ 677,837.60*
LIABILITIES			
Capital stock:			
Preferred stock (e)	$39,245,500.00	$41,801,500.00	$2,556,000.00*
Common stock (f)	1,909,968.00	1,909,968.00	—0—
Total capital stock	41,155,468.00	43,711,468.00	2,556,000.00*
Long-term contract payments	645,773.54	—0—	645,773.54
Current liabilities:			
Accounts payable	1,740.51	6,306.84	4,566.33*
Taxes accrued	220,298.53	225,611.31	5,312.78*
Other current liabilities	4,500.73	109,318.09	104,817.36*
Total current liabilities	226,539.77	341,236.24	114,696.47*
Reserve for taxes on income of prior years	13,958.25	2,797.22	11,161.03
Surplus:			
Capital surplus	15,185,040.86	15,161,139.61	23,901.25(g)
Earned surplus (since May 31, 1938)	4,792,548.37	3,480,525.32	1,312,023.05
	$62,019,328.79	$62,697,166.39	$ 677,837.60*

* Decrease.

Note: See explanatory notes on page 22 which are to be read as an integral part of the balance sheet.

See page 28 for detailed statement of capitalization.

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Combined Income Statement of Subsidiary Companies(b)

(Intercompany Items Between Subsidiary Companies Eliminated)

	1944	Per Cent of Operating Revenues	1943	Per Cent of Operating Revenues	Increase
Operating revenues:					
Electric department†	$54,732,122.27	76.0	$42,510,161.30	71.4	$12,221,960.97
Transportation department†	13,603,606.59	18.9	13,809,606.94	23.2	206,000.35*
Gas department†	3,071,739.87	4.3	2,440,833.59	4.1	630,906.28
Ice department	153,375.63	.2	208,402.23	.3	55,026.60*
Other departments	470,578.47	.6	601,889.23	1.0	131,310.76*
Total	72,031,422.83	100.0	59,570,893.29	100.0	12,460,529.54
Operating expenses and taxes:					
Operation	27,729,952.20	38.5	21,779,279.01	36.6	5,950,673.19
Maintenance	5,009,994.31	7.0	3,788,586.31	6.4	1,221,408.00
Depreciation(c)	5,595,576.54	7.8	5,211,048.06	8.7	384,528.48
Amortization of plant acquisition adjustments(d)	750,378.49	1.0	193,809.84	.3	556,568.65
Taxes—Federal income and excess profits (excluding reductions (1) as shown separately below, and (2) of $4,148,050 in 1944 related to and applied against items charged directly to surplus) (e)†	5,643,482.80	7.8	4,723,900.15	7.9	919,582.65
Taxes—Other†	14,487,837.77	20.1	12,386,635.84	20.8	2,101,201.93
Total	59,217,222.11	82.2	48,083,259.21	80.7	11,133,962.90
Net operating revenues	12,814,200.72	17.8	11,487,634.08	19.3	1,326,566.64
Other income—net	40,300.42		141,627.02	.2	101,326.60*
Balance	12,854,501.14	17.8	11,629,261.10	19.5	1,225,240.04
Interest and amortization:					
Interest on long-term debt	3,760,124.65	5.2	3,208,144.94	5.4	551,979.71
Other interest	77,896.37	.1	98,840.52	.2	20,944.15*
Taxes assumed on bond interest	2,541.28		508.35		2,032.93
Amortization of discount and expense	520,834.77	.7	563,709.48	.9	42,874.71*
Total	4,361,397.07	6.0	3,871,203.29	6.5	490,193.78
Net income before reduction in taxes shown below	8,493,104.07	11.8	7,758,057.81	13.0	735,046.26
Reduction in Federal income and excess profits taxes resulting from the amortization of facilities allowable as emergency facilities under the Internal Revenue Code, which facilities are expected to be employed throughout their normal life and not to replace existing facilities	1,067,652.00		104,524.00		963,128.00
Balance	9,560,756.07‡		7,862,581.81		1,698,174.26
Preferred dividend requirements	2,277,447.15		2,144,610.64		132,836.51
Balance	7,283,308.92		5,717,971.17		1,565,337.75
Amount applicable to minority interest	10,075.30		15,598.38		5,523.08*
Balance applicable to Engineers Public Service Company	$ 7,273,233.62		$ 5,702,372.79		$ 1,570,860.83

Engineers' Exhibit 37-L (Cont'd)

1631a

Comparative Income Statement of Engineers Public Service Company Including Undistributed Earnings of Subsidiary Companies Applicable to Engineers Public Service Company (b)

	1944	1943	Increase
Balance of earnings applicable to Engineers Public Service Company, as above	$7,273,233.62	$5,702,372.79	$1,570,860.83
Earnings from subsidiary companies, included as deductions above:			
Preferred dividends declared	48,499.25	49,999.00	1,499.75*
Interest	69,440.00	70,440.00	1,000.00*
Earnings from other sources	39,410.61	224,144.86	184,734.25*
Total	7,430,583.48	6,046,956.65	1,383,626.83
Expenses, taxes and interest	478,231.11	451,833.26	26,397.85
Balance applicable to stocks of Engineers Public Service Company	6,952,352.37	5,595,123.39	1,357,228.98
Dividends on preferred stock of Engineers Public Service Company	2,175,888.50	2,256,083.89	80,195.39*
Balance for common stock and surplus	$4,776,463.87	$3,339,039.50	$1,437,424.37
Earnings per share of common stock	$2.50	$1.75	$.75

* Decrease.

† See page 25 for detail.

‡ See page 26 for detail.

Note: See explanatory notes on pages 22, 23 and 24 which are to be read as an integral part of the combined income statement.

Engineers' Exhibit 37-L (Cont'd)

Page 19:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Earned Surplus Statement

(Minority Interests Excluded)

	1944	1943	Increase
Earned surplus at beginning of year	$12,701,846.14	$11,291,693.69	$1,410,152.45
Additions:			
Balance applicable to stocks of Engineers Public Service Company, from income statement	6,952,352.37	5,595,123.39	1,357,228.98
Reversal of accruals for prior years' taxes on income, no longer required	249,859.00	642,116.44	392,257.44*
Total additions	7,202,211.37	6,237,239.83	964,971.54
Deductions:			
Write-off of unamortized debt discount and expense and unamortized premium on securities of a subsidiary company refunded in prior years	2,182,766.60	—0—	2,182,766.60
Loss on sale of transportation property less resulting reduction in Federal income taxes	1,358,829.67	—0—	1,358,829.67
Premium on redemption of preferred stocks by subsidiary	526,810.00	—0—	526,810.00
Premium and expenses in connection with refunding of bonds by subsidiary, less resulting reduction in Federal income taxes	291,266.96	—0—	291,266.96
Portion of loss on liquidation of a subsidiary applicable to surplus subsequent to May 31, 1938	359,639.16	—0—	359,639.16
Transferred to stated value for preferred stock of a subsidiary company	312,103.48	—0—	312,103.48
Portion of appropriation to depreciation reserve applicable to surplus subsequent to May 31, 1938	110,234.38	—0—	110,234.38
Provision for net loss on disposition of investments	13,156.80	2,360,864.97	2,347,708.17*
Portion of write-off of utility plant applicable to surplus subsequent to May 31, 1938	1,368,330.13	166,784.83	1,201,545.30
Other deductions—net	47,340.74	43,353.69	3,987.05
Preferred dividends declared, Parent Company	2,175,888.50	2,256,083.89	80,195.39*
Total deductions	8,746,366.42	4,827,087.38	3,919,279.04
Earned surplus at end of year, (since May 31, 1938)	$11,157,691.09 (f)	$12,701,846.14	$1,544,155.05*

Engineers' Exhibit 37-L (Cont'd)

Comparative Consolidated Capital Surplus Statement

(Minority Interests Excluded)

	1944	1943	Increase
Capital surplus at beginning of year	$19,661,145.94	$20,064,397.74	$ 403,251.80*
Additions:			
Premium on preferred stock of subsidiary utilized, pursuant to order of Federal Power Commission, for absorption of an equivalent amount of write-off of utility plant shown below	1,318,856.00	—0—	1,318,856.00
Excess of book value over cost of reacquiring preferred stock, Parent Company	23,901.25	—0—	23,901.25
Reversal of reserve, no longer required, provided by charge to capital surplus in 1938 for investment in a subsidiary which was sold in 1943	—0—	229,000.00	229,000.00*
Other credits—net	25,306.31	—0—	25,306.31
Total additions	1,368,063.56	229,000.00	1,139,063.56
Deductions:			
Write-down of utility plant applied against premium on preferred stock of subsidiary, see above	1,318,856.00	—0—	1,318,856.00
Portion of loss on liquidation of a subsidiary applicable to surplus at May 31, 1938	115,586.38	—0—	115,586.38
Portion of appropriation to depreciation reserve applicable to surplus at May 31, 1938	750,788.32	—0—	750,788.32
Portion of write-off of utility plant applicable to surplus at May 31, 1938	—0—	632,251.80	632,251.80*
Total deductions	2,185,230.70	632,251.80	1,552,978.90
Capital surplus at end of year	$18,843,978.80	$19,661,145.94	$ 817,167.14*

* Decrease.

Note: See explanatory notes on pages 22, 23 and 24 which are to be read as an integral part of the consolidated earned surplus statement.

Engineers' Exhibit 37-L (Cont'd.)

Page 20:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

	Dec. 31, 1944	Dec. 31, 1943	Increase
ASSETS			
Plant and other investments:			
Utility plant	$263,273,652.89(d)	$210,889,926.35	$52,383,726.54
Other physical property, at cost or written-down amounts, less reserve	1,923,221.23	1,501,371.24	421,849.99
Investment in associated company, at cost	69,150.00	69,150.00	—0—
Excess profits tax refund bonds	472,557.42	—0—	472,557.42
Other investments, at cost or written-down amounts, less reserve	—0—	2,288,065.38	2,288,065.38*
Total plant and other investments	265,738,581.54	214,748,512.97	50,990,068.57
Special funds	894,268.75	94,662.50	799,606.25
Current assets:			
Cash in banks and on hand	15,242,529.33	17,189,067.57	1,946,538.24*
United States treasury securities, at cost	10,285,700.00	10,060,000.00	225,700.00
Special deposits	3,073,721.34	870,683.10	2,203,038.24
Notes and warrants receivable	9,346.78	11,687.76	2,340.98*
Accounts receivable from customers and miscellaneous sources, less reserves	4,568,151.61	3,443,858.86	1,124,292.75
Materials and supplies, at cost or written-down amounts, less reserves	2,650,177.57	2,530,018.52	120,159.05
Prepayments	213,274.88	239,813.61	26,538.73*
Total current assets	36,042,961.51	34,345,129.42	1,697,772.09
Deferred debits:			
Unamortized debt discount and expense, including unamortized discount and expense and call premium on refunded issues	3,783,413.36	6,538,717.42	2,755,304.06*
Post-war refund of Federal excess profits tax	1,299,027.11	1,174,982.76	124,044.35
Capital stock expense	563,586.36	—0—	563,586.36
Other deferred debits	147,873.09	209,101.52	61,228.43*
Total deferred debits	5,793,899.92	7,922,801.70	2,128,901.78*
	$308,469,651.72	$257,111,106.59	$51,358,545.13

* Decrease.

Note: See explanatory notes on pages 22, 23 and 24 which are to be read as an integral part of the consolidated balance sheet.

Engineers' Exhibit 37-L (Cont'd)

Page 21:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

LIABILITIES:	Dec. 31, 1944	Dec. 31, 1943	Increase
Capital stock:			
Preferred stock (g)	$ 39,245,500.00	$ 41,801,500.00	$ 2,556,000.00*
Common stock (h)	1,909,968.00	1,909,968.00	—0—
Subsidiary companies:			
Preferred stock	44,833,400.00†	34,609,958.13	10,223,441.87
Premium and discount on preferred stock	341,663.00	62,379.84	279,283.16
Total capital stock	86,330,531.00	78,383,805.97	7,946,725.03
Long-term debt:			
Contract payments	645,773.54	—0—	645,773.54
Subsidiary companies:			
Bonds (i)	104,686,000.00†	81,855,000.00	22,831,000.00
Notes payable	11,892,697.65	5,900,000.00	5,992,697.65
Total long-term debt	117,224,471.19	87,755,000.00	29,469,471.19
Current liabilities:			
Bonds, due within one year	169,000.00†	11,000.00	158,000.00
Notes payable, due within one year	2,437,386.04	1,910,000.00	527,386.04
Accounts payable	2,226,323.85	1,793,449.39	432,874.46
Dividends declared	—0—	26,356.50	26,356.50*
Customers' deposits	1,374,833.23	859,776.22	515,057.01
Taxes accrued	11,222,780.71	14,004,964.40	2,782,183.69*
Interest accrued	1,274,173.76	847,171.37	427,002.39
Other current liabilities	191,785.30	313,140.91	121,355.61*
Total current liabilities	18,896,282.89	19,765,858.79	869,575.90*
Deferred credits:			
Unamortized premium less expense on bonds	1,785,945.69	1,644,275.70	141,669.99
Customers' advances for construction	891,207.82	895,213.46	4,005.64*
Other deferred credits	282,449.55	109,719.59	172,729.96
Total deferred credits	2,959,603.06	2,649,208.75	310,394.31

Engineers' Exhibit 37-L (Cont'd)

Reserves:			
Depreciation (c)	34,993,705.77	29,717,429.77	5,276,276.00
Amounts in excess of original cost of utility plant (d)	7,947,076.04	—0—	7,947,076.04
Amortization of plant acquisition adjustments (d)	2,585,328.98	516,838.14	2,068,490.84
Injury and damage claims	760,259.27	891,371.20	131,111.93*
Taxes on income of prior years	1,683,641.86	644,043.66	1,039,598.20
Other	641,459.33	1,252.07	640,207.26
Total reserves	48,611,471.25	31,770,934.84	16,840,536.41
Parent Company's reserve for depreciation in value of investments in subsidiaries	4,394,705.20	4,350,470.62	44,234.58
Minority interests in common capital stocks and surplus of subsidiary companies (surplus $16,488.32; 1943—$26,781.97)	50,917.24	72,835.54	21,918.30*
Capital surplus	18,843,978.80	19,661,145.94	817,167.14*
Earned surplus (since May 31, 1938)	11,157,691.09 (f)	12,701,846.14	1,544,155.05*
	$308,469,651.72	$257,111,106.59	$51,358,545.13

* Decrease.

† See page 27 for detail.

Note: See explanatory notes on pages 22, 23 and 24 which are to be read as an integral part of the consolidated balance sheet.

Engineers' Exhibit 37-L (Cont'd)

Page 25:

Record of Earnings Since Formation of Engineers Public Service Company

(Intercompany Items Eliminated)

	Combined Earnings of Subsidiary Companies From Dates of Acquisition		Consolidated Balance Applicable to Stocks of Engineers Public Service Co.
	Operating Revenues(a)	Balance for Interest	
1925 (6 mos.)	$ 6,376,136	$ 1,832,359	$ 635,815
1926	26,600,644	7,128,789	2,316,786
1927	29,470,849	8,069,543	2,808,524
1928	32,810,878	10,440,216	3,985,708
1929	50,769,297	17,665,001	6,270,348
1930	52,935,067	19,230,090	6,972,811
1931	50,980,112	19,276,271	6,440,955
1932	44,618,829	17,164,507	4,190,052
1933	41,735,220	14,521,565	1,376,627
1934	43,687,697	13,964,347	1,111,859
1935	45,085,533	14,437,701	1,605,868
1936	48,721,361	15,434,255	2,946,392
1937	52,456,910	16,019,406	3,768,777
1938	52,715,815	16,381,114	3,872,957
1939	54,244,928	17,709,454	5,256,538
1940	57,093,653	17,184,303	5,354,159
1941	64,739,518	17,128,438	4,692,859
1942	73,836,543	16,942,850	4,093,931
1943(b)	59,570,893	11,733,785	5,595,123
1944	72,031,423	13,922,153	6,952,352

SUBSIDIARY COMPANIES OF ENGINEERS PUBLIC SERVICE COMPANY

Detail of Balance for Dividends and Surplus, Preferred Dividends, and Balance for Common Stock Owned by Engineers Public Service Company

Twelve Months Ending December 31, 1944

	Balance for Dividends and Surplus	Preferred Dividend Requirements	Balance for Common	Minority Interest	Balance Applicable to Parent Company 1944	Balance Applicable to Parent Company 1943	Common Dividends Paid to Parent Company 1944	Common Dividends Paid to Parent Company 1943
El Paso Elec. Co. and Sub. Cos.	$ 653,564.52	$ 151,070.08	$ 502,494.44		$ 502,494.44	$ 431,493.53		$ 287,142.50
Gulf States Utilities Co.	2,757,862.67	589,400.38	2,168,462.29		2,168,462.29	1,624,132.45	$1,190,000.00	1,120,000.00
Savannah Electric and Power Co.	391,434.04	209,114.66	182,319.38	$ 257.07	182,062.31	203,075.82		
Virginia Electric and Power Co. and Sub. Co.	5,675,255.57	1,327,862.03	4,347,393.54	9,818.23	4,337,575.31	3,367,246.01	2,583,199.60	2,225,464.45
Western Public Service Co. Group	82,639.27	No Pref.	82,639.27		82,639.27	76,424.98	48,750.00	48,750.00
Total	$9,560,756.07	$2,277,447.15	$7,283,308.92	$10,075.30	$7,273,233.62	$5,702,372.79	$3,821,949.60	$3,681,356.95

(a) Includes 188 shares reserved for exchange for common stock of a predecessor company.

(b) Includes 20 shares reserved for exchange of scrip of prior issue not yet surrendered for exchange.

Note: Preferred stocks of subsidiary companies outstanding which are nonvoting are not included in the above statement of stock ownership.

Engineers' Exhibit 37-L (Cont'd)

Page 29:

SUBSIDIARY COMPANIES OF ENGINEERS PUBLIC SERVICE COMPANY

Ten-Year Summary of Operations
Operating Revenues

Year Ended Dec. 31	El Paso Electric Co. and Sub. Cos. (a)	Gulf States Utilities Co. (b)	Savannah Electric and Power Co.	Virginia Electric and Power Co. and Sub. Co. (c)	Western Public Service Co. Group (d)	Total
1935	$2,772,801	$ 8,447,675	$1,805,247	$15,229,701	$1,985,032	$30,240,456
1936	2,934,214	9,057,999	1,959,520	16,353,789	2,154,644	32,469,166
1937	3,132,946	10,026,186	2,170,943	17,777,381	2,185,781	35,293,237
1938	3,196,172	10,667,899	2,232,355	18,177,597	2,216,351	36,490,374
1939	3,230,433	10,369,097	2,337,438	19,354,026	2,129,988	37,420,982
1940	3,457,535	10,733,468	2,471,999	20,992,213	2,177,592	39,832,807
1941	4,123,383	11,836,157	2,939,841	24,354,029	2,216,086	45,469,496
1942	4,641,811	12,571,804	3,648,729	29,712,116	607,636	51,182,096
1943	5,437,982	15,398,189	4,694,118	33,441,089	601,250	59,572,628
1944	3,849,729	17,484,303	5,002,272	45,119,425	575,694	72,031,423
Balance for Interest(e)						
1935	$ 755,002	$ 2,490,214	$ 664,464	$ 4,895,098	$ 478,884	$ 9,283,662
1936	764,333	2,807,491	706,455	4,934,880	528,887	9,742,046
1937	838,312	3,043,817	732,965	5,138,004	499,792	10,252,890
1938	871,372	3,414,687	748,891	5,341,152	545,387	10,921,489
1939	892,716	4,071,757	731,087	5,571,594	476,631	11,743,785
1940	956,477	3,706,229	714,510	5,890,257	502,281	11,769,754
1941	968,412	3,148,146	794,560	5,622,937	510,286	11,044,341
1942	776,954	2,933,406	703,358	5,582,298	138,565	10,134,581
1943	878,131	3,434,285	814,490	6,446,669	160,210	11,733,785
1944	911,398	3,910,568	767,365	8,167,926	164,896	13,922,153
Balance for Dividends and Surplus						
1935	$ 318,240	$ 1,026,351	$ 250,451	$ 2,893,746	$ 126,316	$ 4,615,104
1936	327,269	1,428,875	328,026	3,153,506	178,371	5,416,047
1937	401,471	1,842,669	353,845	3,394,516	150,212	6,142,713
1938	433,857	2,120,944	370,831	3,484,296	196,566	6,606,494
1939	455,090	2,638,095	355,867	3,833,618	150,451	7,433,121
1940	518,817	2,426,334	339,718	4,128,593	183,887	7,597,349
1941	669,256	1,903,620	419,459	3,830,956	194,848	7,018,139
1942	513,870	1,703,170	327,367	3,754,879	59,619	6,358,905
1943	617,710	2,209,100	412,506	4,546,841	76,425	7,862,582
1944	653,565	2,757,863	391,434	5,675,256	82,638	9,560,756

(a) Transportation and bridge properties were sold in December 1943.

(b) Includes operations of the properties of Baton Rouge Electric Company (excluding bus) and Louisiana Steam Generating Corporation prior to August 25, 1938, when such properties were acquired by Gulf States Utilities Company.

(c) Includes operations since May 25, 1944 of Citizens Rapid Transit Corporation and of the properties of Virginia Public Service Company which were acquired by Virginia Electric and Power Company under a Merger Plan.

(d) Includes earnings through January 2, 1942 resulting from operations of the Nebraska and South Dakota properties of The Western Public Service Company (Maryland) which company was sold on that date.

(e) Giving effect to reductions in Federal income and excess profits taxes resulting from amortization of emergency facilities commencing with 1943.

Engineers' Exhibit No. 37-M.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1925

Page 3:

ENGINEERS PUBLIC SERVICE COMPANY

DIRECTORS

CHARLES A. STONE, CHAIRMAN
Chairman of the Board, Stone & Webster, Inc., New York

MURRAY W. DODGE
Vice President, Chase Securities Corporation, New York

HOMER L. FERGUSON
President, Newport News Shipbuilding and Dry Dock Company, Newport News, Virginia

P. A. S. FRANKLIN
President, International Mercantile Marine Company, New York

EPPA HUNTON, JR.
President, Richmond, Fredericksburg & Potomac Railroad Co., Richmond, Virginia

C. W. KELLOGG
President

GEORGE N. LINDSAY
Vice President, Blair & Co., Inc., New York

RAY MORRIS
of Brown Brothers and Company, New York

G. O. MUHLFELD
Vice President, Stone & Webster, Inc., New York

ARTHUR W. PAGE
Vice President, Doubleday, Page and Company, Garden City, New York

BAYARD F. POPE
of Blodget & Co., New York

EXECUTIVE OFFICERS

C. W. KELLOGG
President

HOWARD F. NEILL
Treasurer

F. T. PRATT
Secretary

Engineers' Exhibit 87-M (Cont'd)

Page 14:

Reserves

It is the policy of your Company to have its subsidiaries maintain adequate reserves for retirements and replacements and for other purposes. The combined reserves and surplus of the subsidiaries of your Company as of February 28, 1926, amounted to 80% of the annual gross earnings and 16% of the book value of the properties. In view of the excellent physical condition in which the properties have been maintained it is believed that these reserves are ample.

Engineers' Exhibit 37-M (Cont'd)

Page 18:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Consolidated Income Statement Six Months Ending December 31, 1925

Includes only Engineers Public Service Company and Virginia Electric and Power Company

GROSS EARNINGS		$6,352,996.55
EXPENSES		
Operation	$2,494,277.64	
Maintenance	670,901.30	
Taxes	513,728.77	
Total Operating Expenses and Taxes		$3,678,907.71
NET EARNINGS		$2,674,088.84
Interest, Amortization and Lease Rentals		797,582.10
Balance		$1,876,506.74
Dividends on Preferred Stock Subsidiary Companies		339,677.00
Balance for Reserves and Common Stock		$1,536,829.74
SUBSIDIARY COMPANIES		
Deduct Proportion of Balance Applicable to Common Stock of Subsidiaries in Hands of Public		50,892.54
BALANCE APPLICABLE TO RESERVES AND TO ENGINEERS PUBLIC SERVICE COMPANY		$1,485,937.20
Dividends on Preferred Stock of Engineers Public Service Company		398,239.35
BALANCE AVAILABLE FOR RESERVES AND FOR 505,000 COMMON SHARES OF ENGINEERS PUBLIC SERVICE COMPANY		$1,087,697.85

Engineers' Exhibit 37-M (Cont'd)

Page 19:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Consolidated Statement of Financial Condition December 31, 1925

Includes only Engineers Public Service Company, Virginia Electric and Power Company and The Key West Electric Company

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ASSETS

Property, Plant, etc.	$63,715,109.82
Agreement to underwrite Allotment Certificates for Preferred and Common Stock	7,689,700.00
Cash	2,993,823.41
Notes Receivable	30,961.04
Accounts Receivable	845,774.33
Materials and Supplies	652,386.93
Prepayments	37,126.24
Miscellaneous Investments	496,568.20
Sinking Funds*	2,795,278.72
Special Deposits	12,855.86
Unamortized Debt Discount and Expense	1,043,872.49
Unadjusted Debits	372,784.44
Total Assets	$80,686,241.48

LIABILITIES

Preferred Stocks of Subsidiaries	$11,239,400.00
Premium on Preferred Stock	23,604.00
Bonds of Subsidiaries	26,858,000.00
Unpaid but underwritten balance on allotment price of Allotment Certificates	7,689,700.00
Notes Payable	2,824,484.45
Accounts Payable	691,619.94
Accounts Not Yet Due	773,034.36
Retirement Reserve	6,670,818.37
Operating Reserves	105,651.07
Unadjusted Credits	528,724.07
Balance of Assets for Common Stock of subsidiaries in hands of public	529,048.80
Balance of Assets showing book value for 124,770 Preferred shares, and 505,000 Common shares, both without par value	22,752,156.42
Total Liabilities	$80,686,241.48

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* Includes $2,121,000 Bonds of Virginia Railway and Power Company and $619,000 Bonds of Norfolk and Portsmouth Traction Company, held in Sinking Funds, uncancelled.

Engineers' Exhibit 37-M (Cont'd)

Page 20:

ENGINEERS PUBLIC SERVICE COMPANY

Capitalization December 31, 1925

FUNDED DEBT:

None.

STOCK:

(Shares: no par value)

	Shares
Preferred:	
Outstanding in hands of public	1,667
Reserved for delivery under allotment certificates*	200,000
Unissued	198,333
Authorized	400,000
Common:	
Outstanding in hands of public	405,000
Reserved for delivery under allotment certificates*	100,000
Reserved for issue under option warrants†	200,000
Unissued	295,000
Authorized	1,000,000

DIVIDENDS:

Preferred Stock $7 Cumulative, payable January 1, April 1, July 1 and October 1.

*200,000 Allotment Certificates carrying one share of preferred and one-half share of common were sold as a part of the original financing of the Company and as issued were 50% paid. A call for payment of 10% additional was made, payable on January 2 and a second call for 10% was made, payable on April 5. Subsequent calls may be made at intervals of not less than ninety days and for not more than 10% on any one call. Allotment certificates may be paid in full at any time and after April 1, 1926, holders of full paid allotment certificates have the option to exchange their certificates for preferred and common stocks covered thereby.

†There are outstanding option warrants for the purchase of 200,000 shares of common stock on or before January 2, 1928, at $25 per share, thereafter on or before July 1, 1930, at $27.50 per share and thereafter on or before January 2, 1933, at $30 per share.

Engineers' Exhibit 37-M (Cont'd)

Page 21:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Consolidated Income Statement Twelve Months Ending February 28, 1926

Including:

Virginia Electric and Power Company and Subsidiaries
The Key West Electric Company
Eastern Texas Electric Company and Subsidiaries
El Paso Electric Company and Subsidiaries
Savannah Electric and Power Company

This statement includes the above subsidiaries of the Engineers Public Service Company as now constituted for the full twelve months ending February 28, 1926, combined with the Engineers Public Service Company on the basis of its ownership or control of common stock of subsidiaries as of April 12, 1926. It includes a full year's dividend on the preferred stock of Engineers Public Service Company used in the acquisition of these subsidiary stocks and also estimated operating expenses of the Engineers Public Service Company for a full twelve months.

GROSS EARNINGS		$23,108,937
EXPENSES		
Operation	$10,377,083	
Maintenance	2,186,596	
Taxes	1,734,455	
Total Operating Expenses and Taxes		$14,298,134
NET EARNINGS		$ 8,810,803
Interest, Amortization and Lease Rentals		2,944,324
Balance		$ 5,866,479
Dividends on Preferred Stock Subsidiary Companies		1,293,254
Balance for Reserves and Common Stock		$ 4,573,225
Deduct Proportion of Balance Applicable to Common Stock of Subsidiaries in Hands of Public		188,057
BALANCE APPLICABLE TO RESERVES AND TO ENGINEERS PUBLIC SERVICE COMPANY		$ 4,385,168
Dividends on Preferred Stock of Engineers Public Service Company		1,856,197
BALANCE AVAILABLE FOR RESERVES AND FOR 777,979 COMMON SHARES OF ENGINEERS PUBLIC SERVICE COMPANY		$ 2,528,971

Engineers' Exhibit No. 37-N.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1926

Page 5:

ENGINEERS PUBLIC SERVICE COMPANY

DIRECTORS

CHARLES A. STONE, CHAIRMAN
Chairman of the Board, Stone & Webster, Inc., New York

MURRAY W. DODGE
Vice President, Chase Securities Corporation, New York

HOMER L. FERGUSON
President, Newport News Shipbuilding and Dry Dock Company, Newport News, Va.

ANDREW FLETCHER, JR.
W. & A. Fletcher Company, Hoboken, N. J.

PHILIP A. S. FRANKLIN
President, International Mercantile Marine Company, New York

JOSEPH P. GRACE
President, W. R. Grace & Company, New York

ARTHUR T. HADLEY
President Emeritus, Yale University, New Haven, Conn.

EPPA HUNTON, JR.
President, Richmond, Fredericksburg & Potomac Railroad Co., Richmond, Va.

CHARLES W. KELLOGG
President, Engineers Public Service Company, New York

GEORGE N. LINDSAY
Vice President, Blair & Co., Inc., New York

RAY MORRIS
of Brown Brothers and Co., New York

GEORGE O. MUHLFELD
Vice President, Stone & Webster, Inc., New York

ARTHUR W. PAGE
Vice President, American Telephone and Telegraph Company, New York

BAYARD F. POPE
President, Stone & Webster and Blodget, Inc., New York

HENRY S. PRITCHETT
President, The Carnegie Foundation, New York

BEEKMAN WINTHROP
of Robert Winthrop & Co., New York

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
President

SAMUEL B. TUELL
Vice President

HOWARD F. NEILL
Treasurer

FREDERICK T. PRATT
Secretary

Engineers' Exhibit 37-N (Cont'd)

Page 7:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,

February 25, 1927.

TO THE STOCKHOLDERS:

Your Company is a public utility holding company. Its purposes are twofold: first, as to the public served, to improve and develop the service in the territories occupied by its subsidiaries; and second, as to the investing public, to offer the opportunity, through purchase of its securities, to participate in an investment which, through diversification, has greater stability than the same investment in a single property. Common control through a holding company makes possible the raising of new capital in adequate amounts when needed for the development of the public service, and, through breadth of view and experience, makes for sound engineering and economical operation and the bringing of good service to many communities which without the holding company's backing would have inferior service. The earnings of Engineers Public Service Company proper are derived solely from dividends on stocks owned and from incidental interest on its surplus funds.

Page 8:

Since the formation of your Company eight companies underlying its present subsidiaries have been eliminated and arrangements were inaugurated in 1926 looking toward the elimination of three more of the companies shown in the Chart. It is expected that this simplification of the corporate arrangement will be completed in 1927.

Page 9:

The dividend and interest earnings of Engineers Public Service Company proper were approximately the same as

Engineers' Exhibit 37-N (Cont'd)

its own requirements for preferred dividends, operating expenses and taxes. All further earnings were left for investment in the property of subsidiaries.

Page 11:

Capitalization

The details of the capitalization of the Engineers Public Service Company and its subsidiaries are set forth in Financial and Statistical Data Pages 17 and following. Summarized, these are as follows, market values where used being closing prices December 31, 1926:

	Net Amount Outstanding	Per Dollar of Gross
Bonds and Coupon Notes of subsidiaries at face value	$ 59,939,000	$2.25
Preferred Stocks of subsidiaries at par	22,123,200	.83
Common Stocks of subsidiaries in public hands at book value	1,250,126	.05
Engineers Public Service Company Preferred at liquidation value	30,501,800	1.14
Engineers Public Service Company Common at market	17,234,003	.65
	$131,048,129	$4.92

Reserves and Surplus

It is the policy of your Company and its subsidiaries to maintain adequate reserves for replacements and retirements and surplus. These reserves and surplus are reinvested in the property. During the year 1926 $3,391,455 from earnings was reinvested in the properties of the subsidiary companies. The combined reserves and surplus of your Company and its subsidiaries as of December 31, 1926, amounted to 72% of the annual gross earnings or 14.5% of the book values of the properties. In addition the properties have been maintained in excellent physical condition, 9.0% of the gross earnings having been expended

Engineers' Exhibit 37-N (Cont'd)

in 1926 for maintenance, analysis of which is shown on Page 22.

Page 15:

Management

The operating subsidiaries of your Company are under the executive management of Stone & Webster, Inc.

Engineers' Exhibit 37-N (Cont'd)

Page 18:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Consolidated Income Statement

Twelve Months Ending December 31, 1926

Including:

Virginia Electric and Power Company and Subsidiaries
The Key West Electric Company
Eastern Texas Electric Company and Subsidiaries
El Paso Electric Company and Subsidiaries
Savannah Electric and Power Company
Baton Rouge Electric Company

This statement includes the above subsidiaries of the Engineers Public Service Company as now constituted for the full twelve months ending December 31, 1926, combined with the Engineers Public Service Company on the basis of its ownership of common stock of subsidiaries as of December 31, 1926. It includes a full year's dividend requirement on the Preferred Stock of Engineers Public Service Company outstanding December 31, 1926.

			Per Cent. of Gross Earnings
GROSS EARNINGS		$26,627,687.26	100.00
EXPENSES			
Operation	$12,223,703.47		45.9
Maintenance	2,400,506.48		9.0
Taxes	1,891,157.45		7.1
Total Operating Expenses and Taxes		16,515,367.40	62.0
NET EARNINGS		10,112,319.86	38.0
Interest, Amortization and Rentals		3,186,447.59	12.0
Balance		$6,925,872.27	26.0
Dividends on Preferred Stock Subsidiary Companies		1,391,117.60	5.2
Balance		$5,534,754.67	20.8
Proportion of Above Balance Applicable to Common Stock of Subsidiaries in Hands of Public		215,749.82	.8
BALANCE APPLICABLE TO RESERVES AND TO ENGINEERS PUBLIC SERVICE COMPANY		$5,319,004.85	20.0
Dividend Requirements on Preferred Stock of Engineers Public Service Company		2,135,126.00	8.0
BALANCE AVAILABLE FOR RESERVES AND FOR 778,938 COMMON SHARES OF ENGINEERS PUBLIC SERVICE COMPANY		$3,183,878.85	12.0

Engineers' Exhibit 37-N (Cont'd)

Page 20:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Consolidated Statement of Financial Condition December 31, 1926.

ASSETS

Property, Plant, etc.	$132,708,757.07
Agreement to underwrite Allotment Certificates for Preferred and Common Stock	262,250.00
Cash	6,145,022.19
Notes Receivable	61,616.95
Accounts Receivable	2,492,074.00
Materials and Supplies	1,788,554.52
Prepayments	834,360.46
Subscribers to Stock	293,271.10
Miscellaneous Investments	126,612.17
Sinking Funds*	3,254,165.74
Special Deposits	2,848,870.77
Unamortized Debt Discount and Expense	3,279,102.00
Unadjusted Debits	579,317.57
Total Assets	$154,673,974.54

LIABILITIES

Preferred Stock (Subsidiaries)	$22,121,200.00
Stock Subscribed For (Subsidiaries)	344,585.50
Bonds (Subsidiaries)*	57,166,500.00
Coupon Notes (Subsidiaries)	5,953,000.00
Unpaid but underwritten balance on allotment price of Allotment Certificates	262,250.00
Notes Payable (Subsidiaries)	2,165,566.00
Accounts Payable	848,841.87
Accounts Not Yet Due	1,999,093.61
Dividends Declared	46,789.25
Retirement Reserve	11,184,413.17
Operating Reserves	270,416.11
Unadjusted Credits	1,050,500.32
Balance of Assets for Common Stock of Subsidiaries in hands of public	1,250,125.70
Balance of Assets showing book value for 305,018 Preferred shares and 778,938 Common shares, both without par value	50,010,693.01
Total Liabilities	$154,673,974.54

* Includes $3,180,500 bonds of subsidiaries held in Sinking Funds, uncancelled.

Engineers' Exhibit No. 37-O.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1927

Page 5:

ENGINEERS PUBLIC SERVICE COMPANY

DIRECTORS

CHARLES A. STONE, CHAIRMAN
Chairman of the Board, Stone & Webster, Inc., New York

FRANK L. BABBOTT
President, Brooklyn Institute of Arts and Sciences, Brooklyn, N. Y.

MURRAY W. DODGE
Vice President, Chase Securities Corporation, New York

HOMER L. FERGUSON
President, Newport News Shipbuilding and Dry Dock Company, Newport News, Va.

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W. & A. Fletcher Company, Hoboken, N. J.

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President, International Mercantile Marine Company, New York

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President, W. R. Grace & Company, New York

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President Emeritus, Yale University, New Haven, Conn.

EPPA HUNTON, JR.
President, Richmond, Fredericksburg & Potomac Railroad Company, Richmond, Va.

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President, Engineers Public Service Company, New York

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Vice President, Blair & Co., Inc., New York

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ARTHUR W. PAGE
Vice President, American Telephone & Telegraph Co., New York

BAYARD F. POPE
President, Stone & Webster and Blodget, Inc., New York

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President, The Carnegie Foundation, New York

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Vice President, Engineers Public Service Company, New York

EDWIN S. WEBSTER
President, Stone & Webster, Inc., Boston

BEEKMAN WINTHROP
of Robert Winthrop & Co., New York

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
President

SAMUEL B. TUELL
Vice President

HOWARD F. NEILL
Treasurer

FREDERICK T. PRATT
Secretary

Engineers' Exhibit 37-O (Cont'd)

Page 7:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,
February 16, 1928.

TO THE STOCKHOLDERS:

Your Company is a public utility holding company. Its purposes are twofold: first, as to the public served, to improve and develop the service in the territories occupied pied by its subsidiaries; and second, as to the investing public, to offer the opportunity, through purchase of its securities, to participate in an investment which, through diversification, has greater stability than the same investment in a single property. Common control through a holding company makes possible the raising of new capital in adequate amounts when needed for the development of the public service, and, through breadth of view and experience, makes for sound engineering and economical operation and the bringing of good service to many communities which without the holding company's backing would have inferior service. The earnings of Engineers Public Service Company proper are derived solely from interest and dividends on securities of subsidiaries owned and from incidental interest on its surplus funds.

Page 11:

Reserves and Surplus

It is the policy of your Company and its subsidiaries to maintain adequate reserves for replacements and retirements and surplus. These reserves and surplus are reinvested in the property. During the year 1927 $3,518,403

Engineers' Exhibit 37-O (Cont'd)

from earnings was reinvested in the properties of the subsidiary companies. The combined reserves and surplus of your Company and its subsidiaries as of December 31, 1927, amounted to 72% of the annual gross earnings, or 14.1% of the book values of the properties. In addition the properties have been maintained in excellent physical condition, 8.1% of the gross earnings having been expended in 1927 for maintenance, analysis of which is shown on page 28.

Page 21:

Management

The operation of the subsidiaries of your Company is under the supervision of Stone & Webster, Inc.

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Income Statement

Including:
Virginia Electric and Power Company and Subsidiaries
The Key West Electric Company
Eastern Texas Electric Company and Subsidiaries
El Paso Electric Company and Subsidiaries
Savannah Electric and Power Company
Baton Rouge Electric Company
Ponce Electric Company†

	1927	Per Cent of Earnings	1926	Per Cent of Earnings	Increase
EARNINGS					
Light and Power	$17,811,261.86	60.4	$15,129,413.85	56.8	$2,681,848.01
Transportation	8,681,805.38	29.4	8,358,544.87	31.4	323,260.51
Gas	1,319,012.76	4.5	1,299,450.69	4.9	19,562.07
Other	1,674,051.42	5.7	1,840,277.85	6.9	166,226.43*
Total Earnings	$29,486,131.42	100.0	$26,627,687.26	100.0	$2,858,444.16
EXPENSES					
Operation	$13,332,429.71	45.2	$12,223,703.47	45.9	$1,108,726.24
Maintenance	2,399,640.35	8.1	2,400,506.48	9.0	866.13*
Taxes	2,375,189.27	8.1	1,891,157.45	7.1	484,031.82
Total Oper. Exp. and Taxes	$18,107,259.33	61.4	$16,515,367.40	62.0	$1,591,891.93
NET EARNINGS	$11,378,872.09	38.6	$10,112,319.86	38.0	$1,266,552.23
Interest, Amortization and Rentals	3,457,049.47	11.7	3,186,447.59	12.0	270,601.88
Balance	$ 7,921,822.62	26.9	$ 6,925,872.27	26.0	$ 995,950.35
Dividends on Preferred Stock Subsidiary Companies	1,609,547.93	5.5	1,391,117.60	5.2	218,430.33
Balance	$ 6,312,274.69	21.4	$ 5,534,754.67	20.8	$ 777,520.02
Proportion of Above Balance Applicable to Common Stock of Subsidiaries in Hands of Public	104,296.08	.4	215,749.82	.8	111,453.74*
Balance Applicable to Reserves and to Engineers Public Service Company	$ 6,207,978.61	21.0	$ 5,319,004.85	20.0	$ 888,973.76
Dividend Requirements on Preferred Stock of Engineers Public Service Company	2,173,276.00	7.3	2,135,126.00	8.0	38,150.00
Balance Applicable to Reserves and Common Stock of Engineers Public Service Company	$ 4,034,702.61	13.7	$ 3,183,878.85	12.0	$ 850,823.76

* Decrease.

† Ponce Electric Company acquired in March, 1927; the results of operations of this company are included in the 1927 statement for 9 months only.

Engineers' Exhibit 37-O (Cont'd)

Page 26:

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

	December 31, 1927	December 31, 1926	Increase
ASSETS			
Property, Plant, etc.	$151,020,196.94	$132,708,757.07	$18,311,439.87
Agreement for Allotment Certificates		262,250.00	262,250.00*
Cash	2,782,254.46	6,145,022.19	3,362,767.73*
Notes Receivable	160,128.67	61,616.95	98,511.72
Accounts Receivable	3,027,666.86	2,492,074.00	535,592.86
Materials and Supplies	2,190,366.03	1,788,554.52	401,811.51
Prepayments	700,837.12	834,360.46	133,523.34*
Subscribers to Stock	114,562.70	293,271.10	178,708.40*
Miscellaneous Investments	60,524.38	126,612.17	66,087.79*
Sinking Funds	4,937,805.62†	3,254,165.74	1,683,639.88
Special Deposits	526,526.85‡	2,848,870.77	2,322,343.92*
Unamortized Debt Discount and Expense	3,243,907.97	3,279,102.00	35,194.03*
Unadjusted Debits	516,329.09	579,317.57	62,988.48*
	$169,281,106.69	$154,673,974.54	$14,607,132.15
LIABILITIES			
Preferred Stock (Subsidiaries)	$ 25,053,338.00	$ 22,121,200.00	$ 2,932,138.00
Stock Subscribed For (Subsidiaries)	330,837.50	344,585.50	13,748.00*
Bonds (Subsidiaries)	66,009,500.00	57,166,500.00	8,843,000.00
Coupon Notes (Subsidiaries)	5,936,400.00	5,953,000.00	16,600.00*
Notes Payable (Subsidiaries)	3,248,671.91	2,165,566.00	1,083,105.91
Unpaid Balance on Allotment Certificates		262,250.00	262,250.00*
Accounts Payable	806,266.59	848,841.87	42,575.28*
Accounts Not Yet Due	2,262,031.13	1,999,093.61	262,937.52
Dividends Declared	48,662.00	46,789.25	1,872.75
Retirement Reserve	12,930,283.99	11,184,413.17	1,745,870.82
Operating Reserves	258,315.35	270,416.11	12,100.76*
Unadjusted Credits	646,499.80	1,050,500.32	404,000.52*
Book Value of Assets for Common Stock of Subsidiaries in hands of public (including Earned Surplus of $134,495.95) (1926 Earned Surplus $384,220.28)	560,051.78	1,250,125.70	690,073.92*
Book Value of Assets for 310,468 Preferred Shares (1926—305,018) and 797,240 Common Shares (1926—778,938) Both Without Par Value (including Earned Surplus of $7,917,629.97) (1926 Earned Surplus $7,441,564.68)	51,190,248.64	50,010,693.01	1,179,555.63
	$169,281,106.69	$154,673,974.54	$14,607,132.15

* Decrease.

† Includes $4,754,500 bonds of Subsidiaries held in Sinking Funds, uncancelled.

‡ Includes $98,000 bonds of Subsidiaries held in Escrow.

Engineers' Exhibit 37-O (Cont'd)

Page 29:

ENGINEERS PUBLIC SERVICE COMPANY
(Holding Company)

Comparative Income Statement

	1927	1926	Increase
EARNINGS			
Dividend Revenue	$2,674,827.92	$1,930,564.72	$744,263.20
Interest Revenue	200,616.96	196,356.55	4,260.41
Miscellaneous Revenue	329.50	152.06	177.44
Total Earnings	$2,875,774.38	$2,127,073.33	$748,701.05
EXPENSES			
Operating Expenses	$ 147,107.21	$ 141,541.68	$ 5,565.53
Taxes	9,846.46	1,831.04	8,015.42
Total Oper. Exp. and Taxes	$ 153,953.67	$ 143,372.72	$ 13,580.95
NET EARNINGS	$2,718,820.71	$1,983,700.61	$735,120.10
Interest		36,479.18	36,479.18*
NET INCOME	$2,718,820.71	$1,947,221.43	$771,599.28
Dividends on Preferred Stock	2,157,244.25	1,917,463.24	239,781.01
BALANCE	$ 561,576.46	$ 29,758.19	$531,818.27

* Decrease.

Engineers' Exhibit No. 37-P.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1928

Page 3:

ENGINEERS PUBLIC SERVICE COMPANY

DIRECTORS

CHARLES A. STONE, CHAIRMAN
Chairman of the Board, Stone & Webster, Inc., New York

FRANK L. BABBOTT
President, Brooklyn Institute of Arts and Sciences, Brooklyn, N. Y.

MURRAY W. DODGE
Vice President, Chase Securities Corporation, New York

HOMER L. FERGUSON
President, Newport News Shipbuilding and Dry Dock Company, Newport News, Va.

ANDREW FLETCHER
W. & A. Fletcher Company, Hoboken, N. J.

W. CAMERON FORBES
of J. M. Forbes & Co., Boston

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President, International Mercantile Marine Company, New York

JOSEPH P. GRACE
President, W. R. Grace & Company, New York

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President Emeritus, Yale University, New Haven, Conn.

EPPA HUNTON, JR.
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RAY MORRIS
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ARTHUR W. PAGE
Vice President, American Telephone & Telegraph Co., New York

THOMAS N. PERKINS
of Ropes, Gray, Boyden & Perkins, Boston

BAYARD F. POPE
President, Stone & Webster and Blodget, Inc., New York

HENRY S. PRITCHETT
President, The Carnegie Foundation, New York

SAMUEL B. TUELL
Vice President, Engineers Public Service Company, New York

EDWIN S. WEBSTER
President, Stone & Webster, Inc., Boston

BEEKMAN WINTHROP
of Robert Winthrop & Co., New York

EXECUTIVE COMMITTEE

ANDREW FLETCHER
W. CAMERON FORBES
PHILIP A. S. FRANKLIN
JOSEPH P. GRACE
CHARLES W. KELLOGG
ARTHUR W. PAGE
CHARLES A. STONE
BEEKMAN WINTHROP

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
President

SAMUEL B. TUELL
Vice President

WILLIAM E. WOOD
Vice President

HOWARD F. NEILL
Treasurer

FREDERICK T. PRATT
Secretary

Engineers' Exhibit 37-P (Cont'd)

Page 5:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,
February 21, 1929.

TO THE STOCKHOLDERS:

Your Company is a public utility holding company. Its purposes are twofold: first, as to the public served, to improve and develop the service in the territories covered by its subsidiaries; and, second as to the investing public, to offer the opportunity, through purchase of its securities, to participate in an investment which, through diversification, has greater stability than the same investment in a single property. Common control through a holding company makes possible the raising of new capital in adequate amounts when needed for the development of the public service, and, through breadth of view and experience, makes for sound engineering and economical operation and the bringing of good service to many communities which without the holding company's backing would have inferior service. The earnings of Engineers Public Service Company proper are derived solely from interest and dividends on securities of subsidiaries owned and from incidental interest on its surplus funds.

Your Company made notable progress during 1928, showing a good increase in gross earnings and a marked decrease in operating ratio, due mainly to economies realized in the operation of new power stations. The three outstanding events of the year were the replacement of the $7 Dividend Preferred Stock of your Company with $5 Dividend Convertible Preferred Stock, the commencement of dividends on its Common Stock and the acquisition of control of Puget Sound Power & Light Company, which serves the greater part of western Washington with electric light

Engineers' Exhibit 37-P (Cont'd).

and power. These items are discussed more fully later on in the report.

Pages 6-7:

Dividends on Common Stock

With the increase in earnings and surplus of your Company the Directors announced last fall a dividend policy for the Common Stock. In accordance with this policy, an initial quarterly cash dividend of $.25 per share was paid on January 2, 1929, and the second quarterly dividend of $.25 per share and the initial semi-annual stock dividend of 2/100ths of a share of Common Stock per share have been declared payable April 1, 1929.

Facilities have been provided so that Stockholders who receive their stock dividends wholly or partly in scrip can either buy or sell scrip to place their holdings on a full share basis. This is to the advantage of the Stockholders, since no dividends are paid on scrip certificates. Full information may be obtained from Stone & Webster, Inc., Transfer Agent, 49 Federal Street, Boston, Massachusetts, which handles the purchase and sale of scrip certificates of your Company.

Financing

The improvement in earnings and credit position of your Company made it possible in March to take advantage of the excellent market for investment securities then existing (the preferred stock index was then at the highest point on record) to replace the $7 Dividend Preferred Stock with a new issue. There was sold for this purpose 320,000 shares of $5 Dividend Convertible Preferred Stock carrying the right of conversion into 532,000 shares of Common Stock at various rates (set forth in detail on page 26). At the same time 100,000 shares of Common Stock were sold to raise the balance of funds required for this refinancing. These capital changes resulted in an immediate reduction in preferred dividend requirements of over $580,000 a year and the conversions of the $5 Dividend Convertible Pre-

Engineers' Exhibit 37-P (Cont'd)

ferred Stock completed through January, 1929, effected further reductions in preferred dividend requirements amounting to $600,000 a year. These changes have also benefited the Company by increasing its equity base, so that in the future, senior financing, when needed, may be undertaken more advantageously.

In October your Company sold a new issue of $5.50 Cumulative Dividend Preferred Stock with Common Stock Purchase Warrants attached (as more fully described on page 27), primarily to finance the purchase of 300,000 shares of Junior Preferred Stock of Puget Sound Power & Light Company, in connection with the acquisition of control of that company. Preferred Stock of this same series (with similar warrants attached), and Common Stock, was issued in exchange for Common Stock of the Puget Sound Company. Through this sale and exchange, a total of 197,993 shares of $5.50 Cumulative Dividend Preferred Stock were outstanding as of December 31, 1928.

The issue of Common Stock during the year is shown in the following table:

Common Shares outstanding December 31, 1927		797,239 9/12
Issued in exchange for subsidiary common stocks, including Scrip	234,808 3/12	
Sold for cash March 29, 1928	100,000	
Issued upon conversion of $5 Dividend Convertible Preferred Stock	131,842	
Issued upon exercise of Option Warrants	6,957	473,607 3/12
		1,270,847
Scrip outstanding (in whole shares)		226
Common Shares outstanding December 31, 1928		1,270,621

Capitalization

The details of the capitalization of Engineers Public Service Company and its subsidiaries are set forth in the Financial and Statistical Data, pages 20 and following.

Engineers' Exhibit 37-P (Cont'd).

Summarized, they are as follows:

	Net Amount Outstanding	% of Total
Bonds and Coupon Notes of Subsidiaries at face value	$115,532,500	38.6
Notes Payable	9,395,370	3.1
Preferred Stocks of subsidiaries at par or book value	64,375,752	21.5
Common Stocks of subsidiaries in public hands at book value	1,470,858	.5
Engineers Public Service Company Preferred at liquidation value	45,281,300	15.1
Engineers Public Service Company Common at market December 31, 1928	63,531,050	21.2
	$299,586,830	100.0

Reserves and Surplus

It is the policy of your Company and its subsidiaries to maintain adequate reserves for replacements and retirements and surplus. These reserves and surplus are reinvested in the property. During the year 1928, $6,089,465 from earnings was reinvested in the properties of the subsidiary companies. The combined reserves and surplus of your Company and its subsidiaries as of December 31, 1928, amounted to 70.4% of the annual gross earnings or 12.4% of the book values of the properties. During 1928, 17.8% of the gross earnings was expended for maintenance or set aside for retirements and the properties have been maintained in excellent physical condition. All of the above figures include Puget Sound Power & Light Company, as of December 31, 1928, or for the full year 1928.

Pages 15-17:

Puget Sound Power & Light Company

Control of this company was acquired in December 1928 through the acceptance by a large majority of its common stockholders of the offer to exchange each of their shares

Engineers' Exhibit 37-P (Cont'd)

for ½ share of $5.50 Cumulative Dividend Preferred Stock with Common Stock Purchase Warrant attached and 1¼ shares of Common Stock of your Company, and through the purchase by Engineers at $25 per share of 300,000 shares of Junior Preferred Stock of Puget Sound Power & Light Company.

This company does the greater part of the commercial electric light and power business in western Washington, including the cities of Seattle, Tacoma, Bellingham, Everett, Bremerton, Wenatchee and Olympia. This rapidly growing territory is rich in timber and in agricultural resources, embracing widely diversified industries. The company (through subsidiaries or directly) also furnishes transportation, gas, water and other miscellaneous services at various locations in its territory.

Over 80% of the company's generating capacity is hydro-electric and power sites are owned which are capable of considerable further development to meet the growing demand for power in this district.

The growth of earnings of the electric department of the Company has been impressive; they have increased on the average more than 13% compounded annually for the last ten years. This excellent growth is in considerable measure due to the active and progressive work the company has been doing in the development of its business. This was one of the important features recognized in the award, in 1928, of the Charles A. Coffin gold medal, mentioned previously in the report. The Puget Sound Company has made the greatest proportionate development in rural electrification of any similar company in the United States in having electrified 63% of the farms in the territory served by its lines.

A comparison of the consolidated gross earnings in 1928 with those of 1927 shows that light and power earnings, which constitute 76.4% of the total, increased 13%. Transportation earnings, which represent but 14.4% of the consolidated gross, show a decrease of 35%; this, however, was

due largely to the elimination from the system at the end of 1927 of a substantial part of the transportation properties. The combined balance available for reserves, retirements and common dividends increased 28.7%.

Reductions in rates have been announced as follows: effective January 1, 1929, an optional residential rate of the promotional type to develop a greater use of domestic power, cooking and lighting service; and, effective February 1, 1929, a reduction of from ½¢ to 1¢ per Kwh. in the primary rate for residential and commercial customers in all territory served by the company outside the city limits of Seattle.

The net increase in plant of this company amounted to $4,351,000, the major part of which was for extensions of lines to serve new customers.

During 1928, $10,000,000 7% Prior Preference Stock was called for redemption or exchanged through the issue of 110,000 shares of $5 dividend Prior Preference Stock. 22,000 shares of $6 dividend Preferred Stock were issued for sale locally. At the end of 1928 there were 10,033 stockholders in the Puget Sound district holding 137,231 shares.

The company's construction program for 1929 will require an expenditure of approximately $9,000,000. Of this amount about $5,000,000 is required for completion of a new 35,000 Kw. steam power plant which was started in the fall of 1928 to care for the company's rapidly increasing load. Of the remainder, $3,300,000 will be required for extensions to the transmission and distribution system to serve new customers and to make necessary improvements and additions to existing facilities to care for increasing load from present customers.

Management

The operation of the subsidiaries of your Company is under the supervision of Stone & Webster, Inc.

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Including:

Virginia Electric and Power Co. and Subsidiaries
Eastern Texas Electric Co. and Subsidiaries
Savannah Electric and Power Company
The Key West Electric Company
Puget Sound Power & Light Co. and Subsidiaries†
El Paso Electric Co. and Subsidiaries
Baton Rouge Electric Company
Ponce Electric Company‡

Comparative Consolidated Income Statement

	1928	Per Cent of Earnings	1927	Per Cent of Earnings	Increase
EARNINGS					
Light and Power	$20,892,350.34	63.6	$17,811,261.86	60.4	$3,081,088.48
Transportation	8,815,831.04	26.8	8,681,805.38	29.5	134,025.66
Gas	1,397,345.02	4.2	1,319,012.76	4.5	78,332.26
Other	1,759,132.03	5.4	1,641,515.23	5.6	117,616.80
Total	$32,864,658.43	100.0	$29,453,595.23	100.0	$3,411,063.20
EXPENSES					
Operation	$14,013,452.32	42.6	$13,332,429.71	45.3	$ 681,022.61
Maintenance	2,469,510.15	7.5	2,399,640.35	8.1	69,869.80
Depreciation of Equipment	14,500.39	.1			14,500.39
Taxes	2,505,995.44	7.6	2,375,189.27	8.1	130,806.17
Total Oper. Exp. and Taxes	$19,003,458.30	57.8	$18,107,259.33	61.5	$ 896,198.97
NET OPER. REVENUE	$13,861,200.13	42.2	$11,346,335.90	38.5	$2,514,864.23
Income from Other Sources	175,683.05	.5	32,536.19	.1	143,146.86
Balance	$14,036,883.18	42.7	$11,378,872.09	38.6	$2,658,011.09
Interest and Amortization	4,119,515.81	12.5	3,457,049.47	11.7	662,466.34
Balance	$ 9,917,367.37	30.2	$ 7,921,822.62	26.9	$1,995,544.75
Dividends on Preferred Stock of Subsidiary Companies (Accrued)	2,153,631.94	6.6	1,609,547.93	5.5	544,084.01
Balance	$ 7,763,735.43	23.6	$ 6,312,274.69	21.4	$1,451,460.74
Amount Applicable to Common Stock of Subsidiaries in Hands of Public	68,694.20	.2	52,750.88	.2	15,943.32
Balance Applicable to Reserves and to Engineers Public Service Company	$ 7,695,041.23	23.4	$ 6,259,523.81	21.2	$1,435,517.42

† Puget Sound Power & Light Company acquired December 1, 1928; the results of operation of this Company are included in the 1928 statement for 1 month only.

‡ Ponce Electric Company acquired in March, 1927; the results of operations of this Company are included in the 1927 statement for 9 months only.

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Engineers' Exhibit 37-P Cont'd).

Engineers' Exhibit 37-P (Cont'd)

Consolidated Surplus Statement

Prior Earned Surplus		$12,207,717.20
Puget Sound Power & Light Company charges applicable to 1928 prior to acquisition		933,166.67
		$11,274,550.53
Balance after Interest and Amortization Charges		9,917,367.37
		$21,191,917.90
Retirement Reserve*		3,709,333.33
Balance		$17,482,584.57
Net Direct Charges		645,711.15
Balance		$16,836,873.42
Dividends Paid or Declared:		
Subsidiaries –Preferred		2,532,609.61
Subsidiaries—Common		55,074.50
Engineers Public Service Company:		
Preferred		1,958,903.19
Common		251,887.00
Earned Surplus, December 31, 1928		$12,038,399.12

* Amount set aside by the Directors of Subsidiary Companies during the twelve months' period.

Engineers' Exhibit 37-P (Cont'd)

Page 21.

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet

	December 31, 1928	December 31, 1927	Increase
ASSETS			
Property, Plant, etc.	$254,783,050.27	$144,885,921.92	$109,897,128.35*
Excess of Book Value of securities of Subsidiary Companies as of date of acquisition over par or stated value thereof	9,277,931.16	6,134,275.02	3,143,656.14
Investments	15,888,440.84	60,524.38	15,827,916.46
Cash	10,362,413.29	2,782,254.46	7,580,158.83
Notes Receivable	249,472.33	160,128.67	89,343.66
Accounts Receivable	6,578,606.33	3,027,666.86	3,550,939.47
Materials and Supplies	3,043,681.06	2,190,366.03	853,315.03
Prepayments	1,062,013.79	700,837.12	361,176.67
Subscribers to Stock	5,528.05	114,562.70	109,034.65*
Sinking Funds	11,042,416.83**	4,937,805.62	6,104,611.21
Special Deposits	903,304.38**	526,526.85	376,777.53
Unamortized Debt Discount and Expense	4,797,030.47	3,243,907.97	1,553,122.50
Unadjusted Debits	930,866.21	516,329.09	414,537.12
	$318,924,755.01	$169,281,106.69	$149,643,648.32
LIABILITIES			
Preferred Stock†	$ 43,208,803.50	$ 28,278,187.00	$ 14,930,616.50
Preferred Stock Scrip	12,188.75		12,188.75
Common Stock‡	34,712,098.50	14,836,242.50	19,875,856.00
Common Stock Scrip	9,990.25		9,990.25
Preferred Stock, 675,849 shares; 1927—250,589 shares (Subsidiaries)	64,375,752.08	25,053,338.00	39,322,414.08
Premium on Stock (Subsidiaries)	134,918.71	134,532.91	385.80
Stock Subscribed For (Subsidiaries)	12,113.50	330,837.50	318,724.00*
Bonds (Subsidiaries)	120,349,500.00	66,009,500.00	54,340,000.00
Coupon Notes (Subsidiaries)	6,059,500.00	5,936,400.00	123,100.00
Notes Payable	9,395,369.89	3,248,671.91	6,146,697.98
Accounts Payable	1,458,357.73	806,266.59	652,091.14
Accounts Not Yet Due	3,858,145.90	2,262,031.13	1,596,114.77
Dividends Declared	600,253.50	48,662.00	551,591.50
Retirement Reserve	20,353,900.75	12,930,283.99	7,423,616.76
Operating Reserves	394,486.99	258,315.35	136,171.64
Unadjusted Credits	696,532.06	646,499.80	50,032.26
Minority Interests in Capital and Surplus of Subsidiaries (Earned Surplus $216,414.38; 1927—$134,495.95)	1,470,858.16	583,708.04	887,150.12
Earned Surplus	11,821,984.74§	7,917,629.97	3,904,354.77
	$318,924,755.01	$169,281,106.69	$149,643,648.32

* Decrease.

** Includes $10,778,500 bonds of Subsidiaries held in Sinking Funds, uncancelled and $98,000 bonds of Subsidiaries held in escrow.

† Represented by 254,820 shares $5 Dividend Convertible Preferred and 197,993 shares $5.50 Cumulative Dividend Preferred of no par value (1927—310,468 shares $7 Dividend Preferred Stock).

‡ Represented by 1,270,621 shares of no par value; average number of Common shares outstanding in 1928 was 930,828 (1927—797,240 Common shares; average 780,965).

§ Surplus of Subsidiary Companies at date of acquisition by Engineers Public Service Company, was $9,277,931.16 (1927—$6,134,275.02).

Engineers' Exhibit 37-P (Cont'd)

Page 24:

ENGINEERS PUBLIC SERVICE COMPANY
(Holding Company)

Comparative Income Statement

	1928	1927	Increase
EARNINGS			
Dividend Revenue	$3,202,647.91	$2,674,827.92	$527,819.99
Interest Revenue	364,282.96	200,616.96	163,666.00
Miscellaneous Revenue		329.50	329.50*
Total Earnings	$3,566,930.87	$2,875,774.38	$691,156.49
EXPENSES			
Operating Expenses	$ 158,848.45	$ 147,107.21	$ 11,741.24
Taxes	7,597.92	9,846.46	2,248.54*
Total Oper. Exp. and Taxes	$ 166,446.37	$ 156,953.67	$ 9,492.70
NET EARNINGS	$3,400,484.50	$2,718,820.71	$681,663.79
Interest	125,100.00		125,100.00
NET INCOME	$3,275,384.50	$2,718,820.71	$556,563.79

* Decrease.

Condensed Surplus Statement

Earned Surplus, January 1, 1928	$ 840,950.19
Net Income as above	3,275,384.50
	$4,116,334.69
Net Direct Charges	28,567.12
	$4,087,767.57
Dividends Paid or Declared:	
Preferred	$1,958,903.19
Common	251,887.00
Earned Surplus, December 31, 1928	$1,876,977.38

Engineers' Exhibit 37-P (Cont'd)

Page 25:

ENGINEERS PUBLIC SERVICE COMPANY

(Holding Company)

Condensed Balance Sheet December 31, 1928

ASSETS	
Investments in Subsidiary Companies	$77,308,857.87
Cash	337,124.10
Notes Receivable	7,900,000.00
Dividends Receivable	468,951.00
Interest and Accounts Receivable	60,272.91
Unadjusted Debits	1.00
	$86,075,206.88
LIABILITIES	
Preferred Stock	$43,208,803.50‡
Preferred Stock Scrip	12,188.75
Common Stock	34,712,098.50†
Common Stock Scrip	9,990.25
Notes Payable	6,200,000.00
Accounts Payable	15,202.24
Accounts Not Yet Due	
Tax Liability	7,597.92
Interest Accrued	25,733.34
Unadjusted Credits	6,615.00
Earned Surplus	1,876,977.38
	$86,075,206.88

‡ Represented by 254,820 shares $5 Dividend Convertible Preferred and 197,993 shares $5.50 Cumulative Dividend Preferred no par value.

† Represented by 1,270,621 shares of no par value; average number of Common shares outstanding in 1928 was 930,828.

Engineers' Exhibit No. 37-Q.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1929

Page 3:

ENGINEERS PUBLIC SERVICE COMPANY

DIRECTORS

FRANK L. BABBOTT
President, Brooklyn Institute of Arts and Sciences, Brooklyn, N. Y.

MURRAY W. DODGE
Vice President, Chase Securities Corporation, New York

HOMER L FERGUSON
President, Newport News Shipbuilding and Dry Dock Company, Newport News, Va.

ANDREW FLETCHER
Vice President, St. Joseph Lead Company, New York

PHILIP A. S. FRANKLIN
President, International Mercantile Marine Company, New York

ARTHUR T. HADLEY
President Emeritus, Yale University, New Haven, Conn.

EPPA HUNTON, JR.
President, Richmond, Fredericksburg & Potomac Railroad Company, Richmond, Va.

CHARLES W. KELLOGG
President, Engineers Public Service Company, New York

GEORGE N. LINDSAY
Vice President, Bancamerica-Blair Corporation, New York

RAY MORRIS
of Brown Brothers & Co., New York

ARTHUR W. PAGE
Vice President, American Telephone and Telegraph Company, New York

BAYARD F. POPE
President, Stone & Webster and Blodget, Inc., New York

HENRY S. PRITCHETT
President, The Carnegie Foundation, New York

CHARLES A. STONE
Chairman of the Board, Stone & Webster, Inc. New York

EDWIN S. WEBSTER
President, Stone & Webster, Inc., Boston

BEEKMAN WINTHROP
of Robert Winthrop & Co., New York

WILLIAM E. WOOD
Vice President, Engineers Public Service Company, New York

EXECUTIVE COMMITTEE

ANDREW FLETCHER
PHILIP A. S. FRANKLIN
CHARLES W. KELLOGG
ARTHUR W. PAGE
CHARLES A. STONE
BEEKMAN WINTHROP

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
President

WILLIAM E. WOOD
Vice President

HOWARD F. NEILL
Treasurer

FREDERICK T. PRATT
Secretary

Engineers' Exhibit No. 37-Q (Cont'd)

Page 5:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,
February 20, 1930.

TO THE STOCKHOLDERS:

Your Company is a public utility holding company. Its purposes are two-fold: first, as to the public served, to improve and develop the service in the territories covered by its constituent companies; and second, as to the investing public, to offer the opportunity, through purchase of its securities, to participate in an investment which, through diversification, has greater stability than the same investment in a single property. Common control through a holding company makes possible the raising of new capital in adequate amounts when needed for the development of the public service, and, through breadth of view and experience, makes for sound engineering and economical operation and the bringing of good service to many communities which without the holding company's backing would have inferior service. The earnings of Engineers Public Service Company proper are derived solely from interest and dividends on securities of constituent companies owned and from incidental interest on its surplus funds.

Your Company directly controls nine companies through the ownership of nearly 99% of their total common shares and, in some cases, varying amounts of their preferred stocks. These security holdings are tabulated on page 25. The corporate relationship of Engineers Public Service Company and constituent companies is shown on page 30.

Pages 6-8:

Value of Diversity

The experience of the year has demonstrated in a striking way the value of diversity in stabilizing an equity

investment. As indicated in the discussion under that company, the net earnings of the Puget Sound Power & Light Company, which represents about one-third of the Engineers group, not only did not gain during the year but actually decreased about $200,000 below those of the preceding year, due to the effect of an unprecedented drought in the Pacific Coast territory. On the other hand, the remaining constituent companies of the Engineers group showed a gain in net earnings of $1,820,000 over the previous year, so that in spite of the relatively unfavorable results shown by Puget Sound, Engineers as a whole showed for the year a gain of about 19% in the earnings per share for its common stock. The point is stressed in this year's report to indicate that the value of diversity to our common stockholders is not merely theoretical, but very practical.

Dividends on Common Stock

Earnings of your Company have fully justified the continuance of the common dividend payments (inaugurated January 2, 1929) at the annual rate of $1.00 per share, plus 4% in stock (4/100ths of a share per share). This stock dividend is charged against earned surplus at $10 per share, which is approximately one-third of the present combined capital per share, leaving in earned surplus an amount which may be used for future dividends without further earnings.

Facilities have been provided so that Stockholders who receive their stock dividends wholly or partly in scrip can either buy or sell scrip to place their holdings on a full share basis. This is to the advantage of the Stockholders, since no dividends are paid on scrip certificates and since the scrip certificates now outstanding become void after April 1, 1935. Full information may be obtained from Stone & Webster, Inc., Transfer Agent, 49 Federal Street, Boston, Massachusetts, which handles the purchase and sale of scrip certificates of your Company.

Engineers' Exhibit No. 37-Q (Cont'd)

Sale of Stock to Employees

In August your Company instituted a plan for the sale of its common stock at $50 per share on a time payment basis to the employees of the constituent companies of Engineers Public Service Company. This price was about $22 below the then market price for the stock. The amount to which any employee could subscribe was limited to one share for each $300 of annual salary. Under this plan over 4,000 employees, or about 44% of the total, subscribed to more than 18,000 shares.

Subsequent to the inauguration of this plan, the stock market broke seriously, so that this stock could be bought in the open market at a lower price than the subscription price of $50 per share provided therein. In order to protect the employees in this matter, the Company purchased in the open market sufficient stock to cover their subscriptions at a price of approximately $40 a share.

Sale of Stock to Stockholders

Early in the year your Directors felt it desirable to increase the equity base of the financial structure of your Company by the sale of common stock under rights to Stockholders at a price below the prevailing market price. Accordingly, new common stock was offered to all Stockholders at $42.50 per share in the ratio of 1 new share for each 10 shares held of common stock and $5.50 Cumulative Dividend Preferred, 1½ new shares for each 10 shares held of $5 Dividend Convertible Preferred and ½ new share for each 10 Option Warrants held, all to holders of record February 14 for subscription on or before March 15. No other financing was undertaken by your Company during the year. Option Warrants representing 117,416 shares were exercised, bringing in over $3,000,000. Financing of constituent companies is discussed later in this report.

The issue of Common Stock during the year is shown in the following table:

Engineers' Exhibit No. 37-Q (Cont'd)

Common Shares outstanding December 31, 1928 (Including 226 shares in Scrip)		1,270,847
Issued in exchange for constituent companies' common stocks, including Scrip	3,631	
Sold in connection with offering to Stockholders, March, 1929	197,911	
Issued upon conversion of $5 Dividend Convertible Preferred Stock	162,738	
Issued upon exercise of Option Warrants	117,416	
Issued in payment of Stock Dividends, including Scrip	63,969.72	
	545,665.72	
Less Scrip purchased and cancelled	1.47	545,664.25
Common Shares outstanding December 31, 1929 (Including 2,440.25 shares in Scrip)		1,816,511.25

Capitalization

The details of the capitalization of Engineers Public Service Company and its constituent companies are set forth in the Financial and Statistical Data, pages 22 and following.

Summarized, they are as follows:

	Net Amount Outstanding	% of Total
Constituent Companies		
Bonds and Coupon Notes at face value	$125,251,000	41.3
Notes Payable	4,690,275	1.5
Preferred Stocks at par or paid in value	63,374,200	20.9
Common Stocks in public hands at book value	891,313	.3
Total Constituent Companies	$194,206,788	64.0
Engineers Public Service Company		
Preferred at $100 per share	$ 35,519,000	11.7
Common at market December 31, 1929	73,923,393	24.3
Total Engineers Public Service Company	$109,442,393	36.0

Engineers' Exhibit No. 37-Q (Cont'd)

Reserves and Surplus

It is the policy of your Company to maintain adequate reserves for replacements and retirements and surplus. These reserves and surplus are reinvested in the property. During the year 1929, $5,666,659 from earnings was reinvested in the properties of the constituent companies. The combined reserves and surplus of your Company and constituent companies as of December 31, 1929, amounted to 71.1% of the annual gross earnings or 12.5% of the book values of the properties. During 1929, 16.9% of the gross earnings was expended for maintenance or set aside for retirements; and the properties have been maintained in excellent physical condition.

Carrying the record back as far as figures are available on each of the companies of the Engineers group, a period averaging 24.6 years, a total of 10.18% of the entire gross earnings over this period has been expended for maintenance and, in addition, during the same period, a total of 10.27% of these gross earnings has been set aside for reserves or retained as surplus.

Pages 17-18:

Puget Sound Power & Light Company

The progress made by this company during the past year reflects the general condition of prosperity and growth of the territory served. Washington crops for 1929 show an increase of over 10% in value as compared with 1928, and bank clearings in the leading cities of the Pacific Northwest for 1929 established new high records. Gross earnings of the company showed an increase of 8.1% over the previous year. Increased expenses due to an abnormal water shortage decreased net earnings 3.1%. The period from August 1928 to the middle of December 1929 was the driest on record since the establishment of the local Weather Bureau Station. The drought was particularly acute in the fall of 1929, just before it was broken. The new

Engineers' Exhibit No. 37-Q (Cont'd)

Shuffleton power plant of 40,000 kilowatts capacity, which was put in service in September, enabled the company to meet the entire power requirements of its customers at all times during the drought, and this dependability has occasioned much favorable comment. With the return of normal water conditions the showing of this company should be materially improved.

A reduction of one-half cent per kilowatt hour in the rate for industrial power became effective in September, and a general reduction of one-half cent per kilowatt hour in primary rates to all its residential and commercial lighting customers outside the City of Seattle was announced on December 19, 1929, to take effect March 1, 1930. These reductions were made possible by the increased use of electric service and will, in turn, stimulate even greater consumption. Over one-quarter of the residential customers of this company have electric ranges and the use of electric service per home customer, amounting to an average of 954 kilowatt hours annually, is more than twice the average for the United States and ranks among the highest of the utilities of the country.

The total increase during 1929 in the plant account of the combined properties amounted to $11,447,000 the largest item of which was for the new Shuffleton steam power plant and for extensions of lines to serve new customers. Retirements amounted to $1,149,000, leaving a net increase in plant account of $10,298,000.

The Seattle Electric Company Consolidated and Refunding 22 Year 5% Gold Bonds due August 1, 1929 in the amount of $4,824,000 were retired at maturity. In October there were issued an additional $8,000,000 face value of First and Refunding 5½% Bonds. An additional 1,000 shares of $6 Dividend Preferred Stock also were issued for sale locally. At the end of 1929 there were 11,483 stockholders in the Puget Sound district holding 151,016 shares. In addition $4,306,900 of Coupon Notes were held locally.

Engineers' Exhibit No. 37-Q (Cont'd)

The company's construction program for 1930 calls for an expenditure of over $12,000,000. Of this amount $1,700,000 is required for completion of the second 35,000 kw. unit of the Shuffleton steam power plant and $6,700,000 for initial expenditures on the Rock Island hydroelectric project on the Columbia River near Wenatchee, with an installation of 80,000 h.p. to be available in 1932 and a proposed maximum capacity of 200,000 h.p. Of the remainder, $3,100,000 will be required for extensions to the transmission and distribution system to serve new customers and to make necessary improvements and additions to existing facilities to care for the increasing load from present customers.

Page 19:

Management

The operation of the constituent companies of the Engineers group is under the supervision of Stone & Webster Service Corporation.

Engineers' Exhibit No. 37-Q (Cont'd)

Page 22:

ENGINEERS PUBLIC SERVICE COMPANY AND CONSTITUENT COMPANIES

Comparative Consolidated Income Statement

	1929	Per Cent of Earnings	1928	Per Cent of Earnings	Increase
EARNINGS					
Light and Power	$34,931,284.63	68.8	$20,892,350.34	63.6	$14,038,934.29
Transportation	11,248,246.29	22.1	8,815,831.04	26.8	2,432,415.25
Gas	1,640,131.02	3.2	1,397,345.02	4.2	242,786.00
Other	2,990,927.28	5.9	1,759,132.03	5.4	1,231,795.25
Total	$50,810,589.22	100.0	$32,864,658.43	100.0	$17,945,930.79
EXPENSES					
Operation	$22,236,492.11	43.8	$14,013,452.32	42.6	$ 8,223,039.79
Maintenance	3,723,136.34	7.3	2,469,510.15	7.5	1,253,626.19
Depreciation of Equipment	181,098.14	.4	14,500.39	.1	166,597.75
Taxes	3,417,619.02	6.7	2,505,995.44	7.6	911,623.58
Total Oper. Exp. and Taxes	$29,558,345.61	58.2	$19,003,458.30	57.8	$10,554,887.31
NET OPER. REVENUE	$21,252,243.61	41.8	$13,861,200.13	42.2	$ 7,391,043.48
Income from Other Sources	813,156.36	1.6	175,683.05	.5	637,473.31
Balance	$22,065,399.97	43.4	$14,036,883.18	42.7	$ 8,028,516.79
Interest and Amortization	6,916,765.55	13.6	4,119,515.81	12.5	2,797,249.74
Balance	$15,148,634.42	29.8	$ 9,917,367.37	30.2	$ 5,231,267.05
Dividends on Preferred Stock of Constituent Companies (Accrued)	4,083,962.70	8.0	2,153,631.94	6.6	1,930,330.76
Balance	$11,064,671.72	21.8	$ 7,763,735.43	23.6	$ 3,300,936.29
Amount Applicable to Common Stock of Constituent Companies in Hands of Public	94,834.42	.2	68,694.20	.2	26,140.22
Balance Applicable to Reserves and to Engineers Public Service Company	$10,969,837.30	21.6	$ 7,695,041.23	23.4	$ 3,274,796.07

Comparative Consolidated Surplus Statement

	1929	1928	Increase
Prior Earned Surplus	$12,038,399.12	$12,207,717.20	$ 169,318.08
Puget Sound Power & Light Company charges applicable to 1928 prior to acquisition		933,166.67	933,166.67*
	$12,038,399.12	$11,274,550.53	$ 763,848.59
Balance after Interest and Amortization	15,148,634.42	9,917,367.37	5,231,267.05
	$27,187,033.54	$21,191,917.90	$5,995,115.64
Retirement Reserve†	4,699,489.64	3,709,333.33	990,156.31
Balance	$22,487,543.90	$17,482,584.57	$5,004,959.33
Net Direct Charges	263,460.34	645,711.15	382,250.81*
Balance	$22,224,083.56	$16,836,873.42	$5,387,210.14
Dividends Paid or Declared:			
Constituent Companies—Preferred	4,083,321.32	2,532,609.61	1,550,711.71
Constituent Companies—Common	75,564.27	55,074.50	20,489.77
Engineers Public Service Company:			
Preferred	1,948,482.62	1,958,903.19	10,420.57*
Common Cash	1,663,204.00	251,887.00	1,411,317.00
Common Stock	639,697.20		639,697.20
Earned Surplus	$13,813,814.15	$12,038,399.12	$1,775,415.03

* Decrease.

† Amount set aside by the Directors of Operating Companies during the twelve months period.

NOTE: Puget Sound Power & Light Company acquired December 1, 1928; the results of operation of this company are included in the 1928 statement for 1 month only.

Engineers' Exhibit No. 37-Q (Cont'd)

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ENGINEERS PUBLIC SERVICE COMPANY AND CONSTITUENT COMPANIES

Comparative Consolidated Balance Sheet

ASSETS	December 31, 1929	December 31, 1928	Increase
Property, Plant, etc.	$279,284,212.76	$255,199,486.98	$24,084,725.78
Excess of Book Value of Securities of directly controlled companies as of date of acquisition over par or stated value thereof	8,949,877.09	8,861,494.45	88,382.64
Investments	14,264,270.84	15,888,440.84	1,624,170.66*
Cash	5,027,458.38	10,362,413.29	5,334,954.91*
Notes Receivable	311,230.36	249,472.33	61,758.03
Accounts Receivable	7,118,208.04	6,584,134.38	534,073.66
Materials and Supplies	3,273,472.88	3,043,681.06	229,791.82
Prepayments	1,282,775.99	1,062,013.79	220,762.20
Subscribers to Stock (By Employees)	575,792.98		575,792.98
Sinking Funds	9,857,521.24**	11,043,416.83	1,184,895.59*
Special Deposits	574,399.05**	903,304.38	328,905.33*
Unamortized Debt Discount and Expense	5,909,797.19	4,797,030.47	1,112,766.72
Unadjusted Debits	740,054.29	930,866.21	190,811.92*
Treasury Stock: Engineers Public Service Company Common Stock	668,150.00		668,150.00
	$337,837,221.09	$318,924,755.01	$18,912,466.08

Engineers' Exhibit No. 37-Q (Cont'd)

LIABILITIES			
Preferred Stock†	$ 33,929,745.00	$ 43,208,803.50	$ 9,279,058.50*
Preferred Stock Scrip	2,885.30	12,188.75	9,303.25*
Common Stock‡	50,083,239.85	34,712,098.50	21,371,141.35
Common Stock Scrip	25,764.25	9,990.25	15,774.00
Stock Subscribed For (By Employees)	714,980.00		714,980.00
Preferred Stock, 669,075 shares; 1928—675,849 shares (Constituent Companies)	63,374,199.64	64,375,752.08	1,001,552.44*
Premium on Stock (Coinstituent Companies)	134,816.57	134,918.71	102.14*
Bonds (Constituent Companies)	130,688,500.00	120,349,500.00	10,339,000.00
Coupon Notes (Constituent Companies)	4,348,000.00	6,059,500.00	1,711,500.00*
Notes Payable (Constituent Companies)	4,690,274.68	9,395,369.89	4,705,095.21*
Accounts Payable	1,956,279.70	1,470,471.23	485,808.47
Accounts Not Yet Due	3,793,684.25	3,858,145.90	64,461.65*
Dividends Declared	568,536.25	600,253.50	31,717.25*
Retirement Reserve	21,931,927.36	20,353,900.75	1,578,026.61
Operating Reserves	392,055.72	394,486.99	2,431.27*
Unadjusted Credits	652,976.08	696,532.06	43,555.98*
Minority Interest in Capital and Surplus of directly controlled companies (Earned Surplus $155,771.14; 1928—$216,414.38)	891,313.23	1,470,858.16	579,544.93*
Earned Surplus	13,658,043.01§	11,821,984.74§	1,836,058.27
	$337,837,221.09	$318,924,755.01	$18,912,466.08

* Decrease.

** Includes $9,785,500 bonds of Constituent Companies held in Sinking Funds and in Escrow, uncancelled.

† Represented by: 158,280 shares $5 Dividend Convertible Preferred (1928—254,820 shares) and 196,910 shares $5.50 Cumulative Dividend Preferred (1928—197,993 shares); all of no par value.

‡ Represented by: 1,814,071 shares (1928—1,270,621 shares) of no par value; average number of Common Shares outstanding in 1929 was 1,670,137 (1928—930,828).

§ Surplus of directly controlled companies at date of acquisition by Engineers Public Service Company was $8,949,877.09 (1928—$8,861,494.45).

Engineers' Exhibit No. 37-Q (Cont'd)

Page 26:

ENGINEERS PUBLIC SERVICE COMPANY

Comparative Income Statement

	1929	1928	Increase
EARNINGS			
Dividend Revenue	$5,150,183.85	$3,202,647.91	$1,947,535.94
Interest Revenue	601,530.34	364,282.96	237,247.38
Total Earnings	$5,751,714.19	$3,566,930.87	$2,184,783.32
EXPENSES			
Operating Expenses	$ 300,329.43	$ 158,848.45	$ 141,480.98
Taxes	40,054.13	7,597.92	32,456.21
Total Oper. Exp. and Taxes	$ 340,383.56	$ 166,446.37	$ 173,937.19
NET EARNINGS	$5,411,330.63	$3,400,484.50	$2,010,846.13
Interest	88,881.89	125,100.00	36,218.11*
NET INCOME	$5,322,448.74	$3,275,384.50	$2,047,064.24

Comparative Surplus Statement

Prior Earned Surplus	$1,876,977.38	$ 840,950.19	$1,036,027.19
Net Income, as above	5,322,448.74	3,275,384.50	2,047,064.24
	$7,199,426.12	$4,116,334.69	$3,083,091.43
Net Direct Charges	28,285.62	28,567.12	281.50*
Balance	$7,171,140.50	$4,087,767.57	$3,083,372.93
Dividends:			
Preferred	$1,948,482.62	$1,958,903.19	$ 10,420.57*
Common Cash	1,663,204.00	251,887.00	1,411,317.00
Common Stock	639,697.20		639,697.20
Earned Surplus	$2,919,756.68	$1,876,977.38	$1,042,779.30

* Decrease.

Engineers' Exhibit No. 37-Q (Cont'd)

Page 27:

ENGINEERS PUBLIC SERVICE COMPANY

Comparative Balance Sheet

	December 31, 1929	December 31, 1928	Increase
ASSETS			
Investments in Constituent Companies	$82,037,680.19	$77,308,857.87	$4,728,822.32
Cash	230,429.35	337,124.10	106,694.75*
Notes Receivable	9,490,000.00	7,900,000.00	1,590,000.00
Dividends Receivable	664,427.62	468,951.00	195,476.62
Interest and Accounts Receivable	66,134.17	60,272.91	5,861.26
Subscribers to Stock (By Employees)	575,792.98		575,792.98
Unadjusted Debits	1.00	1.00	
Treasury Stock:			
Common	668,150.00		668,150.00
	$93,732,615.31	$86,075,206.88	$7,657,408.43
LIABILITIES			
Preferred Stock†	$33,929,745.00	$43,208,803.50	$9,279,058.50*
Preferred Stock Scrip	2,885.50	12,188.75	9,303.25*
Common Stock‡	56,083,239.85	34,712,098.50	21,371,141.35
Common Stock Scrip	25,764.25	9,990.25	15,774.00
Stock Subscribed For (By Employees)	714,980.00		714,980.00
Notes Payable		6,200,000.00	6,200,000.00*
Accounts Payable	14,134.90	15,202.24	1,067.34*
Accounts Not Yet Due			
Tax Liability	40,054.13	7,597.92	32,456.21
Interest Accrued		25,733.34	25,733.34*
Unadjusted Credits	2,055.00	6,615.00	4,560.00*
Earned Surplus	2,919,756.68	1,876,977.38	1,042,779.30
	$93,732,615.31	$86,075,206.88	$7,657,408.43

* Decrease.

† Represented by: 158,280 shares $5 Dividend Convertible Preferred (1928—254,820 shares) and 196,910 shares $5.50 Cumulative Dividend Preferred (1928—197,993 shares); all of no par value.

‡ Represented by: 1,814,071 shares (1928—1,270,621 shares) of no par value; average number of Common shares outstanding in 1929 was 1,670,137 (1928—930,828).

AUDITORS' CERTIFICATE

We have audited the accounts of the Engineers Public Service Company for the year ended December 31, 1939, and we have reviewed the reports for that year submitted to the Company by the directly controlled companies.

We certify that the balance sheet and income statement of the holding company as published herewith are in accordance with the books and, in our opinion, set forth correctly the financial position of the Engineers Public Service Company as at December 31, 1929, and the results of its operations for the year 1929, and that the consolidated balance sheet and consolidated income account of the Engineers Public Service Company and constituent companies as published herewith have been correctly prepared from the records of the Company and the reports submitted to it by the directly controlled companies.

(Signed) LYBRAND, ROSS BROS. & MONTGOMERY,
Accountants and Auditors.

New York, February 11, 1930.

Engineers' Exhibit No. 37-R.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1930

Page 3:

ENGINEERS PUBLIC SERVICE COMPANY

DIRECTORS

FRANK L. BABBOTT
President, Brooklyn Institute of Arts and Sciences, Brooklyn, N. Y.

MATTHEW C. BRUSH
President, American International Corporation, New York

MURRAY W. DODGE
Vice President, Chase Securities Corporation, New York

HOMER L FERGUSON
President, Newport News Shipbuilding and Dry Dock Company, Newport News, Va.

ANDREW FLETCHER
Vice President, St. Joseph Lead Company, New York

PHILIP A. S. FRANKLIN
President, International Mercantile Marine Company, New York

EPPA HUNTON, JR.
President, Richmond, Fredericksburg & Potomac Railroad Company, Richmond, Va.

CHARLES W. KELLOGG
President, Engineers Public Service Company, New York

GEORGE N. LINDSAY
Vice President, Bancamerica-Blair Corporation, New York

RAY MORRIS
of Brown Brothers Harriman & Co., New York

ARTHUR W. PAGE
Vice President, American Telephone and Telegraph Company, New York

BAYARD F. POPE
President, Stone & Webster and Blodget, Inc., New York

HENRY S. PRITCHETT
President Emeritus, The Carnegie Foundation, New York

CHARLES A. STONE
Chairman of the Board, Stone & Webster, Inc., New York

EDWIN S. WEBSTER
Vice Chairman of the Board, Stone & Webster, Inc., Boston

BEEKMAN WINTHROP
of Robert Winthrop & Co., New York

WILLIAM E. WOOD
Vice President, Engineers Public Service Company, New York

EXECUTIVE COMMITTEE

ANDREW FLETCHER
PHILIP A. S. FRANKLIN
CHARLES W. KELLOGG
ARTHUR W. PAGE
CHARLES A. STONE
BEEKMAN WINTHROP

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
President

WILLIAM E. WOOD
Vice President

HOWARD F. NEILL
Treasurer

WILLIAM T. CRAWFORD
Secretary

Engineers' Exhibit No. 37-R (Cont'd)

Page 5:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware.

February 19, 1931.

TO THE STOCKHOLDERS:

Your Company is a public utility holding company. Its purposes are two-fold: first, as to the public served, to improve and develop the service in the territories covered by its constituent companies; and second, as to the investing public, to offer the opportunity, through purchase of its securities, to participate in an investment which, through diversification, has greater stability than the same investment in a single property. Common control through a holding company makes possible the raising of new capital in adequate amounts when needed for the development of the public service, and, through breadth of view and experience, makes for sound engineering and economical operation and the bringing of good service to many communities which without the holding company's backing would have inferior service. The earnings of Engineers Public Service Company proper are derived solely from interest and dividends on securities of constituent companies owned and from incidental interest on its surplus funds.

Your Company directly controls nine companies through the ownership of over 99% of their total common shares and, in some cases, varying amounts of their preferred stocks. These security holdings are tabulated on page 25. The corporate relationship of Engineers Public Service Company and constituent companies is shown on page 31.

Engineers' Exhibit No. 37-R (Cont'd)

Pages 6-7:

Dividends on Common Stock

Beginning with the quarterly dividend which was paid July 1, 1930, the rate of dividends was changed from the old basis of $1.00 in cash plus 4% in stock to $2.40 in cash annually.

Acquisition by Stone & Webster, Incorporated

On February 11, 1930, an offer was made by Stone & Webster, Incorporated, to acquire the common stock of your Company on the basis of 6 shares of Stone & Webster capital stock for each 10 shares of Engineers common stock. Through this offer and through purchases in the open market, Stone & Webster, Incorporated, obtained and controls over 90% of the common stock of your Company.

Capitalization

The details of the capitalization of Engineers Public Service Company and its constituent companies are set forth in the appendix to this report.

Summarized, they are as follows:

	Amount Outstanding	% of Total
Constituent Companies:		
Bonds and Coupon Notes at face value	$133,954,500	39.4
Notes Payable	6,498,075	1.9
Preferred Stocks at par or paid in value	72,462,109	21.3
Common Stocks in public hands at book value	773,233	.3
Total Constituent Companies	$213,687,917	62.9
Engineers Public Service Company:		
Preferred at $100 per share	$ 43,000,200	12.7
Common at market December 31, 1930	83,068,514	24.4
Total Engineers Public Service Company	$126,068,714	37.1

Engineers' Exhibit No. 37-R (Cont'd)

The issue of Common Stock during the year is shown in the following table:

Common Shares outstanding December 31, 1929 (Including 2,440.25 shares in Scrip)		1,816,511.25
Issued upon conversion of $5 Dividend Convertible Preferred Stock	300	
Issued upon exercise of Option Warrants	57,076	
Issued in payment of Stock Dividend, including Scrip	36,430.58	93,806.58
		1,910,317.83
Less Scrip purchased and cancelled		.83
Common Shares outstanding December 31, 1930 (Including 696 shares in Scrip)		1,910,317

Financing

In order to finance the proposed purchase of additional common stock of Puget Sound Power & Light Company and for other corporate purposes, your Company sold in October 75,000 shares of preferred stock bearing a $6 dividend rate. This sale of stock, together with money received on the exercise of option warrants at various times, was the only permanent financing done by your Company in 1930. Financing of constituent companies is discussed under the individual companies in succeeding paragraphs.

Reserves and Surplus

It is the policy of your Company to maintain adequate reserves for replacements and retirements and surplus. These reserves and surplus are reinvested in the property. During the year 1930, $4,833,818 from earnings was reinvested in the properties of the constituent companies. The combined reserves and surplus of your Company and constituent companies as of December 31, 1930, amounted to 70.9% of the annual gross earnings or 12.4% of the book values of the properties. During 1930, 15.7% of the gross

Engineers' Exhibit No. 37-R (Cont'd)

earnings was expended for maintenance and set aside for retirements; and the properties have been maintained in excellent physical condition.

Carrying the record back as far as figures are available on each of the companies of the Engineers group, a period averaging about 26 years, a total of 9.9% of the entire gross earnings over this period has been expended for maintenance and, in addition, during the same period, a total of 10.3% of these gross earnings has been set aside for reserves or retained as surplus.

Pages 15-19:

Puget Sound Power & Light Company

This company made substantial progress during the year in spite of unfavorable business conditions in the territory served which were particularly depressed during the last quarter. Lumber production decreased 25% for the year and the value of crops 29%. Gross earnings of the company increased 4%, largely due to the development of farm and residential business. Residential revenue increased more than 12% whereas industrial power revenue declined nearly 6%. Transportation earnings showed a slight increase over the previous year. Net earnings of the company increased over 15% in spite of the fact that this territory suffered another dry year. Precipitation at Seattle was 21.8 inches compared with 20.0 inches in 1929 and an average for a fifty year period of 34.5 inches. While the 1930 rainfall was only slightly greater than 1929, the flexibility of operation made possible with the large steam capacity in the new Shuffleton plant enabled the company to generate 77% of the total energy requirements in hydro-electric plants as compared with 67% in 1929. In this territory as in others served by the Engineers system, excellent progress was made in the development of residential business. The average use per residential customer was increased 17% over 1929, and the average rate paid by such customers decreased approximately 10%. A reduction of ½¢ to 1¢ per kilowatt hour in the primary rate for

Engineers' Exhibit No. 37-R (Cont'd)

residential and commercial service was made March 1, 1930 throughout the territory served by the company with the exception of the City of Seattle. 33% of the residential customers of the company own electric ranges and there is also large general use of electricity for refrigeration, water heaters and other heavy duty appliances.

For the year 1930, 80% of the earnings of the transportation department were derived from bus operation. The total transportation business constituted about 15% of the combined gross earnings of the company.

Total expenditures for construction during 1930 amounted to $14,122,000, the largest item of which was over $7,000,000 for carrying on work on the Rock Island Project on the Columbia River. Other large expenditures provided for completion of the second unit of the Shuffleton steam plant, improvements to substations and lines to provide increased capacity and for line extensions to serve new customers. Retirements amounted to $1,053,000, leaving a net increase in plant account for the year of $13,069,000.

In addition to its construction program, the Puget Sound company also had to finance maturities of funded debt amounting in total to over $6,000,000. To take care of these cash requirements the following securities were sold:

$3,000,000 10 year 5½% Gold Notes (Sold in the territory served)
$9,000,000 First & Refunding Series C 5% Bonds due 1950
19,000 shares Preferred Stock (Sold in the territory served)

This company has been very successful in the sale of securities to its customers, and at the end of 1930 there were over 14,000 customer security holders owning over 180,000 shares of preferred stock and $3,000,000 of notes.

Engineers' Exhibit No. 37-R (Cont'd)

For the purpose of simplifying the capital structure of this company, the Directors of Engineers offered, in effect, to exchange 300,000 shares of Junior Preferred owned by it for common stock. In order to make this exchange on a parity as to dividends, share for share, it was necessary to change the 202,829 common shares then outstanding into 811,316 common shares, which was authorized by the stockholders in December. It appeared desirable also to strengthen the equity portion of the Puget Sound company's capital structure. Accordingly, the Puget Sound directors offered 507,072 shares of common stock to common stockholders at $25 a share under rights calling for payment January 2, 1931, with the proviso that the Engineers Company should apply the entire issue of Junior Preferred at $25 per share toward its subscription for new common stock under rights accruing to it as owner of nearly 99% of the common stock. More than $5,100,000 of new money was thus invested in the property junior to all other securities, thereby greatly strengthening the position of the Preferred Stock and other senior securities.

In November the "District Power Bill" was passed by the voters of the State of Washington. This law provides that any political subdivision or part thereof may set up a "power district" and go into the power business, issuing bonds to cover the cost of the project. Previous to this time only cities and towns were enabled to do this. The two reasons which might interest a group of farmers to set up such a power district would be either inability to get electric service or unreasonable rates. Inasmuch as two-thirds of the farms in the area served by the Puget Sound company are already connected to its lines (compared with about 10% for the United States as a whole) and the further fact that the rural rates for this service are among the lowest in the country and lower than the corresponding rates of the much discussed Ontario Hydro-Electric System, it would seem that the Puget Sound company should have little to fear from this legislation.

Engineers' Exhibit No. 37-R (Cont'd)

Page 19:

El Paso Natural Gas Company

Your Company has negotiated contracts looking toward the possible purchase of the controlling interest in El Paso Natural Gas Company. This company now operates a 200 mile natural gas line from the Jal gas fields in the southeast corner of New Mexico westward to El Paso where its output is sold to wholesale consumers including the Rio Grande Power Station of El Paso Electric Company, the Nichols Copper refinery, the local gas distribution company and various industrial plants.

ENGINEERS PUBLIC SERVICE COMPANY AND CONSTITUENT COMPANIES

Comparative Consolidated Income Statement

	1930	Per Cent of Earnings	1929	Per Cent of Earnings	Increase
EARNINGS					
Light and Power	$37,128,916.32	70.0	$34,931,284.63	68.8	$2,197,631.69
Transportation	10,519,848.48	19.8	11,248,246.29	22.1	728,397.81*
Gas	1,684,227.95	3.2	1,640,131.02	3.2	44,096.93
Steam	1,334,789.72	2.5	695,817.03	1.4	638,972.69
Ice	1,226,880.27	2.3	1,238,705.66	2.4	11,825.39*
Other	1,146,977.36	2.2	1,056,404.59	2.1	90,572.77
Total Earnings	$53,041,640.10	100.0	$50,810,589.22	100.0	$2,231,050.88
EXPENSES					
Operation	$22,892,548.48	43.1	$22,236,492.11	43.8	$ 656,056.37
Maintenance	3,445,783.99	6.5	3,723,136.34	7.3	277,352.35*
Depreciation of Equipment†	205,189.54	.4	181,098.14	.4	24,091.40
Taxes	3,765,795.40	7.1	3,417,619.02	6.7	348,176.38
Total Oper. Exp. and Taxes	$30,309,317.41	57.1	$29,558,345.61	58.2	$ 750,971.80
NET OPER. REVENUE	$22,732,322.69	42.9	$21,252,243.61	41.8	$1,480,079.08
Income from Other Sources	957,618.42	1.8	813,156.36	1.6	144,462.06
Balance	$23,689,941.11	44.7	$22,065,399.97	43.4	$1,624,541.14
Interest and Amortization	7,568,651.11	14.3	6,916,765.55	13.6	651,885.56
Balance	$16,121,290.00	30.4	$15,148,634.42	29.8	$ 972,655.58
Dividends on Preferred Stock of Constituent Companies (Accrued)	4,359,495.73	8.2	4,083,962.70	8.0	275,533.03
Balance	$11,761,794.27	22.2	$11,064,671.72	21.8	$ 697,122.55
Amount Applicable to Common Stock of Constituent Companies in Hands of Public	89,493.78	.2	94,834.42	.2	5,340.64*
Balance Applicable to Reserves and to Engineers Public Service Company	$11,672,300.49	22.0	$10,969,837.30	21.6	$ 702,463.19

Engineers' Exhibit No. 37-R (Cont'd) 1692a

Comparative Consolidated Surplus Statement

	1930	1929	Increase
Prior Earned Surplus excluding Surplus of Constituent Companies accumulated prior to date of acquisition	$ 4,855,279.69§	$ 3,088,522.03	$1,766,757.66
Balance after Interest and Amortization	16,121,290.00	15,148,634.42	972,655.58
Total	$20,976,569.69	$18,237,156.45	$2,739,413.24
Retirement Reserve‡	4,699,489.64	4,699,489.64	
Balance	$16,277,080.05	$13,537,666.81	$2,739,413.24
Net Direct Charges	465,439.87	263,460.34	201,979.53
Balance	$15,811,640.18	$13,274,206.47	$2,537,433.71
Dividends Paid or Declared:			
Constituent Companies—Preferred	4,352,866.35	4,083,321.32	269,545.03
Constituent Companies—Common	89,033.89	75,564.27	13,469.62
Engineers Public Service Company:			
Preferred	1,968,665.16	1,948,482.62	20,182.54
Common Cash	3,891,892.45	1,663,204.00	2,228,688.45
Common Stock	364,305.80	639,697.20	275,391.40*
Earned Surplus	$. 5,144,876.53	$ 4,863,937.06	$ 280,930.47

* Decrease.

† See also Surplus account for $4,699,489.64 credited to Retirement Reserve.

‡ Amount set aside by the Directors of Constituent Companies during the twelve months period.

§ After deducting $8,657.37 for pre-acquisition surplus applicable to shares of Constituent Companies acquired during 1930.

NOTE: Of the above Surplus $143,238.35 (1929—$155,771.14) is applicable to minority interest in Constituent Companies.

Engineers' Exhibit No. 37-R (Cont'd)

Page 23:

ENGINEERS PUBLIC SERVICE COMPANY AND CONSTITUENT COMPANIES

Comparative Consolidated Balance Sheet

ASSETS	December 31, 1930	December 31, 1929	Increase
Property, Plant, etc.	$312,362,770.07	$284,185,009.48	$28,177,760.59
Investments	10,407,488.33§	9,297,803.34	1,109,684.99
Cash	5,859,370.80	5,027,458.38	831,912.42
Notes Receivable	350,535.51	311,230.36	39,305.15
Accounts Receivable	7,447,829.77	7,118,208.04	329,621.73
Materials and Supplies	3,358,500.09	3,273,472.88	85,027.21
Prepayments	761,870.71	1,282,775.99	520,905.28*
Subscribers to Stock	75,863.78	575,792.98	499,929.20*
Sinking Funds	7,409,793.63**	9,857,521.24	2,447,727.61*
Special Deposits	692,338.18**	574,399.05	117,939.13
Unamortized Debt Discount and Expense	6,986,086.57	5,909,797.19	1,076,289.38
Unadjusted Debits	585,803.47	740,054.29	154,250.82*
Treasury Stock:			
Engineers Public Service Company Common Stock	278.19	668,150.00	667,871.81*
	$356,298,529.10	$328,821,673.22	$27,476,855.88
LIABILITIES			
Prefererd Stock†	$ 41,074,439.00	$ 33,929,745.00	$ 7,144,694.00
Preferred Stock Scrip	1,691.50	2,885.50	1,194.00*
Common Stock†	58,056,042.85	56,083,239.85	1,972,803.00
Common Stock Scrip	7,152.50	25,764.25	18,611.75*
Preferred Stock, 767,093 shares; 1929—669,075 shares (Constituent Companies)	72,462,109.08	63,374,199.64	9,087,909.44
Premium on Stock (Constituent Companies)	108,868.99	134,816.57	25,947.58*
Stock Subscribed For	260,333.00	714,980.00	454,647.00*
Bonds (Constituent Companies)	138,405,000.00	130,688,500.00	7,716,500.00
Coupon Notes (Constituent Companies)	3,000,000.00	4,348,000.00	1,348,000.00*
Notes Payable (Constituent Companies)	6,498,075.33	4,690,274.68	1,807,800.65
Accounts Payable	1,916,842.39	1,956,279.70	39,437.31*
Accounts Not Yet Due	3,911,915.74	3,793,684.25	118,231.49
Dividends Declared	631,911.50	568,536.25	63,375.25
Retirement Reserve	23,140,351.81	21,931,927.36	1,208,424.45
Operating Reserves	357,760.19	392,055.72	34,295.53*
Unadjusted Credits	691,164.32	652,976.08	38,188.24
Minority Interest in Capital and Surplus of directly controlled companies (Earned Surplus $143,238.35; 1929—$155,771.14)	773,232.72	825,642.45	52,409.73*
Earned Surplus	5,001,638.18	4,708,165.92	293,472.26
	$356,298,529.10	$328,821,673.22	$27,476,855.88

Engineers' Exhibit No. 37-R (Cont'd)

* Decrease.

§ Includes:	City of Seattle Street Railway 5% Bonds	$8,336,000.00
	Preferred Stock of Puget Sound Power & Light Company (since resold)	914,072.62
	Coupon Notes, 5½%, due 1940, of Puget Sound Power & Light Company	54,245.95
	7,105 shares Stone & Webster, Incorporated, Capital Stock originally acquired for sale to employees (market value $294,857.50)	451,423.08
	Miscellaneous stocks, bonds and notes (no quoted value)	651,746.68

** Includes $7,450,500 bonds of Constituent Companies held in Sinking Fund and in Escrow, uncancelled.

† Represented by: 158,080 shares $5 Dividend Convertible Preferred (1929—158,280 shares); 196,922 shares $5.50 Cumulative Dividend Preferred (1929—196,910 shares) and 75,000 shares $6 Cumulative Dividend Preferred (1929—none), all of no par value.

‡ Represented by: 1,909,621 shares (1929—1,814,071 shares) of no par value; average number of Common shares outstanding in 1930 was 1,890,079 (1929—1,670,137).

NOTE: The above consolidated surplus does not include surplus of Constituent Companies accumulated prior to acquisition in an aggregate amount of $8,958,534.76 (1929—$8,949,877.09).

Engineers' Exhibit No. 37-R (Cont'd)

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ENGINEERS PUBLIC SERVICE COMPANY

Comparative Income Statement

	1930	1929	Increase
EARNINGS			
Dividend Revenue	$6,416,613.77	$5,150,183.85	$1,266,429.92
Interest Revenue	809,531.21	691,530.34	208,000.87
Miscellaneous Revenue	3,749.56		3,749.56
Total Earnings	$7,229,894.54	$5,751,714.19	$1,478,180.35
EXPENSES			
Operating Expenses	$ 285,438.52	$ 300,329.43	$ 14,890.91*
Taxes	60,773.42	40,054.13	20,719.29
Total Oper. Exp. and Taxes	$ 346,211.94	$ 340,383.56	$ 5,828.38
NET EARNINGS	$6,883,682.60	$5,411,330.63	$1,472,351.97
Interest	20,111.30	88,881.89	68,770.59*
NET INCOME	$6,863,571.30	$5,322,448.74	$1,541,122.56

Comparative Surplus Statement

	1930	1929	Increase
Prior Earned Surplus	$2,919,756.68	$1,876,977.38	$1,042,779.30
Net Income, as above	6,863,571.30	5,322,448.74	1,541,122.56
	$9,783,327.98	$7,199,426.12	$2,583,901.86
Net Direct Charges	15,249.10†	28,285.62	43,534.72*
Balance	$9,798,577.08	$7,171,140.50	$2,627,436.58
Dividends:			
Preferred	1,968,665.16	1,948,482.62	20,182.54
Common Cash	3,891,892.45	1,663,204.00	2,228,688.45
Common Stock	364,305.80	639,697.20	275,391.40*
Earned Surplus	$3,573,713.67	$2,919,756.68	$ 653,956.99

* Decrease.
† Credit.

Engineers' Exhibit No. 37-R (Cont'd)

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ENGINEERS PUBLIC SERVICE COMPANY

Capitalization

December 31, 1930

	Authorized	Outstanding in hands of public
FUNDED DEBT:	None	None
STOCK:		
Preferred Stock (No Par)	1,000,000 shares	
$5 Dividend Convertible Series		158,080 shares
$5.50 Cumulative Dividend Series		196,922 shares*
$6 Cumulative Dividend Series		75,000 shares
Common Stock (No Par)	4,000,000 shares	1,909,621 shares†

Preferred Stock Provisions

This class of stock is preferred as to cumulative dividends and assets over the Common Stock of the Company. It is issuable in series and is non-voting except in statutory proceedings as to which the vote thereof is at the time required by law and except in the event of certain dividend defaults. The following three series are outstanding at present, ranking equally as to earnings and assets:

$5 Dividend Convertible Preferred Stock

This series of Preferred Stock is entitled to cumulative dividends at the rate of $5 per share per year, payable

---

* In addition there are 17 shares reserved for exchange of Scrip.

† In addition there are 237,120 shares reserved for conversion of $5 Dividend Convertible Preferred Stock; 196,939 shares for the exercise of Common Stock Purchase Warrants; 18,551 shares for the exercise of Option Warrants; and 696 shares for the exchange of Scrip.

Engineers' Exhibit No. 37-R (Cont'd)

quarterly on the first day of January, April, July and October. It is entitled in liquidation to $100 per share and accrued dividends, plus, if such liquidation be voluntary, $10 per share if such liquidation takes place on or before June 30, 1938, or $5 per share thereafter. It is redeemable in whole or in part on 30 days' notice at $110 per share and accrued dividends if redeemed on or before June 30, 1938, or $105 per share and accrued dividends if redeemed thereafter. Shares of this series now outstanding are convertible up to and including June 30, 1938, or at any time up to within ten days of any specified date of redemption, whichever is earlier (but only in blocks of 10 shares or multiples of 10 shares), on the basis of 15 shares of Common Stock for each 10 shares of Preferred.

Engineers' Exhibit No. 37-S.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1931.

ENGINEERS PUBLIC SERVICE COMPANY

DIRECTORS

FRANK L. BABBOTT
Honorary President, Brooklyn Institute of Arts and Sciences, Brooklyn, N. Y.

MATTHEW C. BRUSH
President, American International Corporation, New York.

MURRAY W. DODGE
Executive Vice President, Chase Harris Forbes Corporation, New York

HOMER L. FERGUSON
President, Newport News Shipbuilding and Dry Dock Company, Newport News, Va.

ANDREW FLETCHER
Vice President, St. Joseph Lead Company, New York

PHILIP A. S. FRANKLIN
President, International Mercantile Marine Company, New York

EPPA HUNTON, JR.
President, Richmond, Fredericksburg & Potomac Railroad Company, Richmond, Va.

CHARLES W. KELLOGG
President, Engineers Public Service Company, New York

GEORGE N. LINDSAY
Vice President, Bancamerica-Blair Corporation, New York

RAY MORRIS
of Brown Brothers, Harriman & Co., New York

GEORGE O. MUHLFELD
President, Stone & Webster, Inc., New York

ARTHUR W. PAGE
Vice President, American Telephone and Telegraph Company, New York

BAYARD F. POPE
President, Stone & Webster and Blodget, Inc., New York

HENRY S. PRITCHETT
President Emeritus, The Carnegie Foundation, New York

CHARLES A. STONE
Chairman of the Board, Stone & Webster, Inc. New York

SAMUEL B. TUELL
President, General Public Service Corporation, New York

EDWIN S. WEBSTER
Vice Chairman of the Board, Stone & Webster, Inc., Boston

BEEKMAN WINTHROP
of Robert Winthrop & Co., New York

WILLIAM E. WOOD
Executive Vice President, Engineers Public Service Company, New York

EXECUTIVE COMMITTEE

ANDREW FLETCHER
PHILIP A. S. FRANKLIN
CHARLES W. KELLOGG
GEORGE O. MUHLFELD
ARTHUR W. PAGE
CHARLES A. STONE
BEEKMAN WINTHROP
EDWIN S. WEBSTER
WILLIAM E. WOOD

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
President

DONALD C. BARNES
Vice President

FRED H. FARNHAM
Treasurer

WILLIAM E. WOOD
Executive Vice President

THOMAS J. HANLON, JR.
Vice President

WILLIAM T. CRAWFORD
Secretary

Engineers' Exhibit No. 37-S (Cont'd)

Page 5:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,

February 18, 1932.

TO THE STOCKHOLDERS:

Your Company is a public utility holding company. Its purposes are two-fold: first, as to the public served, to improve and develop the service in the territories covered by its constituent companies; and second, as to the investing public, to offer the opportunity, through purchase of its securities, to participate in an investment which, through diversification, has greater stability than the same investment in a single property. Common control through a holding company assists in the raising of new capital when needed for the development of the public service, and, through breadth of view and experience, makes for sound engineering and economical operation and the bringing of good service to many communities which, without the holding company's backing, would have inferior service. In the operation of your Company's properties the attempt is made to reap the maximum advantages outlined above and at the same time to preserve the benefits of close contact with the public served, by giving the local officers and employees the greatest possible freedom and autonomy in the administration of local affairs.

The earnings of Engineers Public Service Company proper are derived solely from interest and dividends on securities of constituent companies owned and from incidental interest on its surplus funds and investments.

Your Company directly controls ten companies through the ownership of over 99% of their total common shares and, in some cases, varying amounts of their preferred stocks. These security holdings are tabulated on page 17. The cor-

Engineers' Exhibit No. 37-S (Cont'd)

porate relationship of Engineers Public Service Company and its constituent companies is shown on page 23.

Page 6:

Reserves and Surplus

It is the policy of your Company to maintain adequate reserves for replacements and retirements, and surplus These reserves and surplus are reinvested in the property. During the year 1931, $5,797,593 from earnings was reinvested in the properties of the constituent companies. The combined reserves and surplus of your Company and constituent companies as of December 31, 1931, amounted to 74.5% of the annual gross earnings or 12.1% of the book values of the properties. During 1931, 14.9% of the gross earnings was expended for maintenance or set aside for retirements; and the properties have been maintained in excellent physical condition.

Carrying the record back as far as figures are available on each of the companies of the Engineers group, for a period averaging about 27 years, a total of 9.6% of the entire gross earnings has been expended for maintenance and, in addition, during the same period, a total of 10.2% of these gross earnings has been set aside for reserves or retained as surplus.

Page 7:

Supervision

On May 1 the supervision of the constituent companies of Engineers Public Service Company formerly provided by Stone & Webster Service Corporation, was taken over by Engineers Public Service Company, Inc., a supervisory company entirely owned by the constituent companies. The primary effect of the new arrangement was to place the supervision of Engineers' properties on a non-profit basis.

Engineers' Exhibit No. 37-S (Cont'd)

Pages 11-12:

Puget Sound Power & Light Company

Business conditions in the territory were increasingly unfavorable during the year. The lumber industry, which normally provides 65% of the State's industrial payroll, produced 30% less lumber than in 1930. Due to a continuing decline in lumber prices the value of 1931 gross sales of lumber amounted to less than one-third of that for 1929. The value of all Washington crops decreased 25% from that of 1930 and 47% from that of 1929.

Combined gross earnings of the company decreased 8%. Electric department earnings decreased 4.6%, the 14% decrease in industrial and 2.7% decrease in commercial earnings being largely offset by the increase of 3.5% in farm and residential earnings. Transportation earnings, which decreased 17%, reflecting the depressed business conditions, amounted to only 13% of combined gross earnings and of these approximately 83% were derived from motor coach operation. Net earnings decreased only 6% from 1930. This excellent showing was the result of rigid economies practiced in all departments. Adequate rainfall made it possible to generate 89% of the company's energy requirements in its hydro electric power plants. The major contract for purchase of firm power was terminated during the year as the Rock Island Project will greatly augment the company's power supply. The interconnection is still maintained for the purchase and sale of surplus power when desirable.

Continued progress was made in the development of residential business and with one-third of the residential customers using electric cooking together with extensive use of electric refrigeration and water heating, the average use per residential customer has increased to 1,121 kwh. per year or nearly twice the national average. Reductions averaging 8% in the primary rates for residential and commercial service were made on March 1, effective throughout

the territory served by the company with the exception of the City of Seattle which was already enjoying the lower rates. A lesser reduction was made in the general power rate on November 1 in order to effect uniformity throughout the portion of the territory west of the Cascade Mountains.

Total expenditures for construction during 1931 amounted to $10,056,000, of which over $7,300,000, was expended on the Rock Island Hydro Electric Project on the Columbia River. The initial development of 80,000 horse power will be completed about the end of 1932. Expenditures amounting to $2,156,000 were made for improvement to sub-stations and lines to provide increased capacity and to serve new customers. Retirements amounted to $1,006,000 leaving net plant additions of $9,050,000 for the year.

On January 2 the capital structure of this company was simplified and strengthened by the extinguishment of the entire outstanding issue of 300,000 shares of Junior Preferred Stock owned by Engineers Public Service Company and by the sale of 507,072 additional shares of common stock. More than $5,100,000 of new junior money was thus invested in the property, thereby greatly strengthening the position of the Preferred Stock and other senior securities.

In addition to its construction program the Puget Sound company had to finance the maturity of $4,425,500 of Series B First and Refunding Mortgage 5% Gold Bonds which came due February 1. To meet this maturity and the requirements for construction, $9,000,000 of one year 4½% Secured Gold Notes, due Feb. 1, 1932, callable at 100 on or after August 1, were sold in January, when the market for long term securities was poor. In June $16,000,000 face value of First and Refunding Mortgage 4½% Gold Bonds Series D due 1950 were sold and part of the proceeds was used to retire the 4½% Secured Gold Notes which were redeemed August 1.

ENGINEERS PUBLIC SERVICE COMPANY AND CONSTITUENT COMPANIES

Comparative Consolidated Income Statement

	1931	Per Cent of Earnings	1930	Per Cent of Earnings	Increase
EARNINGS					
Light and Power	$36,335,680.95	71.0	$37,128,916.32	70.0	$ 793,235.37*
Transportation	9,067,502.11	17.7	10,519,848.48	19.8	1,452,346.37*
Gas	1,661,862.00	3.2	1,684,227.95	3.2	22,365.95*
Steam	2,025,651.52	4.0	1,334,789.72	2.5	690,861.80
Ice	1,031,339.04	2.0	1,226,880.27	2.3	195,541.23*
Other	1,079,504.66	2.1	1,146,977.36	2.2	67,472.70*
Total Earnings	$51,201,540.28	100.0	$53,041,640.10	100.0	$1,840,099.82*
EXPENSES					
Operation	$21,457,994.00	41.9	$22,892,548.48	43.1	$1,434,554.48*
Maintenance	2,981,630.80	5.8	3,445,783.99	6.5	464,153.19*
Taxes	4,048,071.49	7.9	3,765,795.40	7.1	282,276.09
Total Oper. Exp. and Taxes	$28,487,696.29	55.6	$30,104,127.87	56.7	$1,616,431.58*
	$22,713,843.99	44.4	$22,937,512.23	43.3	$ 223,668.24*
NET EARNINGS					
Income from Other Sources‡	1,192,358.08	2.3	957,618.42	1.8	234,739.66
Balance	$23,906,202.07	46.7	$23,895,130.65	45.1	$ 11,071.42
Interest and Amortization	8,403,051.50	16.4	7,568,651.11	14.3	834,400.39
Balance	$15,503,150.57	30.3	$16,326,479.54	30.8	$ 823,328.97*
Reserve for Retirements§§	4,655,160.21	9.1	4,904,679.18	9.2	249,518.97*
Balance	$10,847,990.36	21.2	$11,421,800.36	21.6	$ 573,810.00*
Dividends on Preferred Stock of Constituent Companies	4,345,762.43	8.5	4,359,495.73	8.2	13,733.30*
Balance	$ 6,502,227.93	12.7	$ 7,062,304.63	13.4	$ 560,076.70*
Amount Applicable to Common Stock of Constituent Companies in Hands of Public	61,272.99	.1	89,493.78	.2	28,220.79*
Balance for Dividends and Surplus	$ 6,440,954.94	12.6	$ 6,972,810.85	13.2	$ 531,855.91*
Dividends on Preferred Stock of Engineers Public Service Company	2,323,542.81	4.5	1,968,665.16	3.7	354,877.65
Balance for Common Stock Dividends and Surplus	$ 4,117,412.13**	8.1	$ 5,004,145.69	9.5	$ 886,733.56*

Comparative Consolidated Surplus Statement

	1931	1930	Increase
Prior Earned Surplus excluding Surplus of Constituent Companies accumulated prior to date of acquisition	$5,126,638.90§	$4,855,279.69	$271,359.21
Balance as above	4,117,412.13	5,004,145.69	886,733.56*
Total	$9,244,051.03	$9,859,425.38	$615,374.35*
Net Direct Charges	198,202.27	458,810.49	266,608.22*
Difference between Amount Applicable to Common Stock of Constituent Companies in Hands of Public, deducted above, and Common Dividends Actually Paid Thereon	2,974.69†	459.89†	2,514.80
Balance	$9,048,823.45	$9,401,074.78	$352,251.33*
Dividends Paid or Declared:			
Engineers Public Service Company:			
Common Cash	3,628,443.20	3,891,892.45	263,449.25*
Common Stock		364,305.80	364,305.80*
Earned Surplus	$5,420,380.25	$5,144,876.53	$275,503.72

* Decrease. † Credit. ‡ Interest on funds for construction purposes and income from miscellaneous investments.

§§ For 1931 no appropriations for retirement reserve were made in the case of two operating companies which had made such appropriations aggregating $280,000 for 1930 and the appropriation for one other company was $102,000 less than for 1930, these companies having accumulated reserves which in the opinion of their respective boards of directors were already adequate for retirement purposes.

** Subject to deduction of $41,536.23 for December, 1931 expenses of supervisory company.

§ After deducting $18,237.63 for pre-acquisition surplus applicable to shares of Constituent Companies acquired during 1931.

NOTE: Of the above Surplus, $128,289.09 (1930—$143,238.35) is applicable to minority interest in Constituent Companies.

Engineers' Exhibit No. 37-S (Cont'd)

Page 15:

ENGINEERS PUBLIC SERVICE COMPANY AND CONSTITUENT COMPANIES

Comparative Consolidated Balance Sheet

	December 31, 1931	December 31, 1930	Increase
ASSETS			
Plant and Property	$325,797,947.73	$312,362,770.07	$13,435,177.66
Investments	14,993,405.86§	10,407,488.33	4,585,917.53
Cash	4,532,243.16	5,859,370.80	1,327,127.64*
Notes Receivable	411,468.40	350,535.51	60,932.89
Accounts Receivable	7,216,290.75	7,447,829.77	231,539.02*
Materials and Supplies	3,009,037.46	3,358,500.09	349,462.63*
Prepayments	510,079.41	761,870.71	251,791.30*
Subscribers to Stock	19,940.94	75,863.78	55,922.84*
Sinking Funds**	8,021,702.81	7,409,793.63	611,909.18
Special Deposits**	442,245.45	692,338.18	250,092.73*
Unamortized Debt Discount and Expense	8,246,411.82	6,986,086.57	1,260,325.25
Unadjusted Debits	716,807.90	585,803.47	131,004.43
Treasury Stock:			
Engineers Public Service Co. Common Stock		278.19	278.19*
	$373,918,081.69	$356,298,529.10	$17,619,552.59
LIABILITIES			
Preferred Stock†	$ 41,075,434.00	$ 41,074,439.00	$ 995.00
Preferred Stock Scrip	696.50	1,691.50	995.00*
Common Stock‡	58,057,172.85	58,056,042.85	1,130.00
Common Stock Scrip	6,022.50	7,152.50	1,130.00*
Constituent Companies:			
Preferred Stock (1931—758,820 shares; 1930—767,093 shares)	71,332,922.14	72,462,109.08	1,129,186.94*
Premium on Stock	103,703.98	108,868.99	5,165.01*
Stock Subscribed For	37,791.00	260,333.00	222,542.00*
Bonds	152,551,800.00	138,405,000.00	14,146,800.00
Coupon Notes	3,000,000.00	3,000,000.00	
Notes Payable	11,736,846.00‡‡	6,498,075.33	5,238,770.67
Accounts Payable	1,312,829.18	1,916,842.39	604,013.21*
Accounts Not Yet Due	3,578,749.74	3,911,915.74	333,166.00*
Dividends Declared	587,870.75	631,911.50	44,040.75*
Retirement Reserve	23,434,893.74	23,140,351.81	294,541.93
Contributions for Extensions	370,782.62	314,249.33	56,533.29
Operating Reserves	292,999.90	357,760.19	64,760.29*
Unadjusted Credits	413,857.21	376,914.99	36,942.22
Minority Interest in Capital and Surplus of directly controlled companies (Earned Surplus $128,289.09; 1930—$143,238.35)	731,618.42	773,232.72	41,614.30*
Earned Surplus§§	5,292,091.16	5,001,638.18	290,452.98
	$373,918,081.69	$356,298,529.10	$17,619,552.59

Engineers' Exhibit No. 37-S (Cont'd)

* Decrease.

§ Includes:	City of Seattle Municipal Street Railway 5% Bonds of 1919	$8,336,000.00
	Preferred Stock of Puget Sound Power & Light Company	1,787,046.67
	Coupon Notes, 5½%, due 1940, of Puget Sound Power & Light Company	78,980.16
	Preferred Stock of The Western Public Service Company	13,593.00
	6,864 shares Stone & Webster, Incorporated, Capital Stock originally acquired for sale to employees (market value $70,356.00)	436,110.92
	Western Gas Company, 1st Mortgage 6% Gold Bond, due January 1, 1934	3,500,000.00
	Miscellaneous stocks, bonds and notes (no quoted value)	841,675.11

** Includes $8,097,000 (1930—$7,450,500) bonds of Constituent Companies held in Sinking Funds and in Escrow, uncancelled.

† Represented by: 158,080 shares $5 (Cumulative) Dividend Convertible Preferred (1930—158,080 shares); 196,932 shares $5.50 Cumulative Dividend Preferred (1930—196,922 shares) and 75,000 shares $6 Cumulative Dividend Preferred (1930—75,000 shares), all of no par value.

‡ Represented by: 1,909,734 shares (1930—1,909,621 shares), of no par value.

§§ Excludes surplus of Constituent Companies accumulated prior to acquisition in an aggregate amount of $8,976,772.09 (1930—$8,958,534.46).

‡‡ Includes note for $3,300,000 of Engineers Public Service Company secured by pledge of stocks of Constituent Companies.

Engineers' Exhibit No. 37-S (Cont'd)

Page 18:

ENGINEERS PUBLIC SERVICE COMPANY

Comparative Income Statement

	1931	1930	Increase
EARNINGS			
Dividend Revenue	$4,674,888.95	$6,416,613.77	$1,741,724.82*
Interest Revenue	1,013,533.26	809,531.21	204,002.05
Miscellaneous Revenue	795.47	3,749.56	2,954.09*
Total Earnings	$5,689,217.68	$7,229,894.54	$1,540,676.86*
EXPENSES			
Operating Expenses	$ 148,506.53	$ 285,438.52	$ 136,931.99*
Taxes	98,150.52	60,773.42	37,377.10
Total Oper. Exp. and Taxes	$ 246,657.05	$ 346,211.94	$ 99,554.89*
NET EARNINGS	$5,442,560.63	$6,883,682.60	$1,441,121.97*
Interest	141,315.62	20,111.30	121,204.32
Balance	$5,301,245.01	$6,863,571.30	$1,562,326.29*
Dividends on Preferred Stock	2,323,542.81	1,968,665.16	354,877.65
Balance for Common Stock Dividends and Surplus	$2,977,702.20	$4,894,906.14	$1,917,203.94*

Comparative Surplus Statement

	1931	1930	Increase
Prior Earned Surplus	$3,573,713.67	$2,919,756.68	$ 653,956.99
Balance as above	2,977,702.20	4,894,906.14	1,917,203.94*
	$6,551,415.87	$7,814,662.82	$1,263,246.95*
Net Direct Credits	715.38	15,249.10	14,533.72*
Balance	$6,552,131.25	$7,829,911.92	$1,277,780.67*
Common Cash Dividends	3,628,443.20	3,891,892.45	263,449.25*
Common Stock Dividends		364,305.80	364,305.80*
Earned Surplus	$2,923,688.05	$3,573,713.67	$ 650,025.62*

* Decrease.

Engineers' Exhibit No. 37-S (Cont'd)

Page 19:

ENGINEERS PUBLIC SERVICE COMPANY

Comparative Balance Sheet

	December 31, 1931	December 31, 1930	Increase
ASSETS			
Investments:			
Constituent Companies	$ 91,018,219.67	$ 82,692,199.99	$8,326,019.68
Miscellaneous		451,423.08	451,423.08*
Cash	199,365.02	810,769.39	611,404.37*
Notes Receivable (Constituent Companies)	14,090,000.00	18,760,000.00	4,670,000.00*
Dividends Receivable (Constituent Companies)	120,249.25	128,760.25	8,511.00*
Interest and Accounts Receivable		30,004.20	30,004.20*
Prepayments	9,533.33		9,533.33
Subscribers to Stock (By Employees)		10,347.89	10,347.89*
Unadjusted Debits	33,110.66	737.38	32,373.28
Treasury Stock:			
Common		278.19	278.19*
	$105,470,477.93	$102,884,520.37	$2,585,957.56
LIABILITIES			
Preferred Stock†	$ 41,075,434.00	$ 41,074,439.00	$ 995.00
Preferred Stock Scrip	696.50	1,691.50	995.00*
Common Stock‡	58,057,172.85	58,056,042.85	1,130.00
Common Stock Scrip	6,022.50	7,152.50	1,130.00*
Stock Subscribed for (By Employees)		58,680.00	58,680.00*
Notes Payable§	3,300,000.00		3,300,000.00
Accounts Payable	5,631.88	52,027.43	46,395.55*
Accounts Not Yet Due	101,832.15	60,773.42	41,058.73
Earned Surplus	2,923,688.05	3,573,713.67	650,025.62*
	$105,470,477.93	$102,884,520.37	$2,585,957.56

* Decrease.

† Represented by: 158,080 shares $5 (Cumulative) Dividend Convertible Preferred (1930—158,080 shares); 196,932 shares $5.50 Cumulative Dividend Preferred (1930—196,922 shares); and 75,000 shares $6 Cumulative Dividend Preferred (1930—75,000 shares); all of no par value.

‡ Represented by: 1,909,734 shares (1930—1,909,621 shares), of no par value.

§ Note payable to bank secured by pledge of stocks of Constituent Companies.

Engineers' Exhibit No. 37-T.

Excerpts from Annual Report of Engineers Public Service Company for the Year 1932.

ENGINEERS PUBLIC SERVICE COMPANY

DIRECTORS

FRANK L. BABBOTT
Honorary President, Brooklyn Institute of Arts and Sciences, Brooklyn, N. Y.

MATTHEW C. BRUSH
President, American International Corporation, New York

MURRAY W. DODGE
Executive Vice President, Chase Harris Forbes Corporation, New York

HOMER L. FERGUSON
President, Newport News Shipbuilding and Dry Dock Company, Newport News, Va.

ANDREW FLETCHER
Vice President, St. Joseph Lead Company, New York

PHILIP A. S. FRANKLIN
President, International Mercantile Marine Company, New York

CHARLES W. KELLOGG
President, Engineers Public Service Company, New York

GEORGE N. LINDSAY
New York

RAY MORRIS
of Brown Brothers, Harriman & Co., New York

GEORGE O. MUHLFELD
President, Stone & Webster, Inc., New York

ARTHUR W. PAGE
Vice President, American Telephone and Telegraph Company, New York

BAYARD F. POPE
Executive Vice President, Marine Midland Corporation, New York.

HENRY S. PRITCHETT
President Emeritus, The Carnegie Foundation, New York

CHARLES A. STONE
Chairman of the Board, Stone & Webster, Inc., New York

SAMUEL B. TUELL
President, General Public Service Corporation, New York

EDWIN S. WEBSTER
Vice Chairman of the Board, Stone & Webster, Inc., Boston

E. RANDOLPH WILLIAMS
of Hunton, Williams, Anderson, Gay & Moore, Richmond, Va.

BEEKMAN WINTHROP
of Robert Winthrop & Co., New York

WILLIAM E. WOOD
Executive Vice President, Engineers Public Service Company, New York

EXECUTIVE COMMITTEE

ANDREW FLETCHER
PHILIP A. S. FRANKLIN
CHARLES W. KELLOGG
GEORGE O. MUHLFELD
ARTHUR W. PAGE
CHARLES A. STONE
EDWIN S. WEBSTER
BEEKMAN WINTHROP
WILLIAM E. WOOD

EXECUTIVE OFFICERS

CHARLES W. KELLOGG
President

DONALD C. BARNES
Vice President

FRED H. FARNHAM
Treasurer

WILLIAM E. WOOD
Executive Vice President

THOMAS J. HANLON, JR.
Vice President

WILLIAM T. CRAWFORD
Secretary

Engineers' Exhibit No. 37-T (Cont'd)

Pages 5-6:

ENGINEERS PUBLIC SERVICE COMPANY

Wilmington, Delaware,
February 16, 1933.

TO THE STOCKHOLDERS:

Your Company is a public utility holding company. Its purposes are two-fold: first, as to the public served, to improve and develop the service in the areas covered by its constituent companies and to furnish that service to its customers at the lowest reasonable cost; and second, as to the investing public, to offer the opportunity, through purchase of its securities, to participate in an investment which, through diversification, has less risk than investment in such properties individually. Common control through a holding company assists in the raising of new capital when needed for the development of the public service, and, through breadth of view and experience, provides sound engineering and economical operation, and a higher standard of service to many communities which, without the holding company's backing, would have inferior service.

You will be interested in the following approximate figures reviewing what your Company has done during its corporate life to finance the development of its constituent properties.

Since the organization of Engineers Public Service Company in 1925 there has been expended in cash on the physical properties of its constituent companies.....	$126,000,000
Of this amount there was furnished through investment of the retirement reserve and from earnings left in surplus of constituent companies, etc.....	$ 33,000,000

Engineers' Exhibit No. 37-T (Cont'd)

This left a balance to be provided for through the sale of securities of	$ 93,000,000
Of this balance the Engineers Public Service Company has itself furnished, principally from the proceeds of the sale of its own securities	$ 31,000,000
This left a balance representing the net cash raised by the sale to the public of securities of operating companies amounting to	$ 62,000,000

These figures indicate that of the total of $126,000,000 for construction purposes, only about one-half was raised by the sale to the public of securities of the operating properties. They also show that of the amount of $93,000,000 cash raised by new financing, 33% was furnished by Engineers Public Service Company itself. The major part of this 33% could not have been raised as advantageously by the individual companies on their own credit. The Engineers Company has thus throughout its corporate life maintained through its own credit a very substantial equity base for the senior securities of its subsidiaries issued during the period.

Your Company endeavors persistently to furnish to its operating properties the many benefits and services to be derived from centralized supervision and at the same time to preserve to the local officers and employees the greatest degree of autonomy and responsibility in the administration of the affairs of the operating companies in their charge.

The supervisory services are rendered at cost to the constituent companies through the medium of a supervisory organization, Engineers Public Service Company, Inc., the stock of which is wholly owned by the operating companies. From the nature of this setup, therefore, no profit accrues to your Company for the services so rendered.

The earnings of Engineers Public Service Company proper are derived entirely from interest and dividends on

securities of operating companies and from incidental interest on its surplus funds and investments.

Your Company controls directly ten companies through the ownership of over 99% of their total common shares and, in some cases, varying amounts of their preferred stocks. These security holdings are tabulated on page 17. The corporate relationship of Engineers Public Service Company and its constituent companies is shown on page 23.

Page 7:

Reserves and Surplus

It is the policy of your Company to maintain adequate reserves for replacements and retirements, and surplus which are reinvested in the property. The combined reserves and surplus of your Company and Constituent Companies as of December 31, 1932, amounted to 84.3% of the annual gross earnings or 12.1% of the book values of the properties. During 1932, 15.8% of the gross earnings was expended for maintenance or set aside for retirements, and the properties have been maintained in excellent physical condition.

Carrying the record back as far as figures are available on each of the companies of the Engineers group, for a period averaging about 28 years, a total of 9.3% of the entire gross earnings has been expended for maintenance and, in addition, during the same period, a total of 10.4% of these gross earnings has been set aside for reserves or retained as surplus.

Pages 11-12:

Puget Sound Power & Light Company

Business conditions in the Puget Sound territory continued to be very seriously depressed. The lumber industry, which normally provides more than half of the State's in-

dustrial payroll and in 1929 accounted for production valued at $215,000,000 did a business amounting to only about $30,000,000 during the past year. Other lines of business have been less seriously affected but the conditions brought about by the continuation of the depression and competition of goods manufactured in countries with depreciated currencies are serious.

Combined gross earnings of the company declined 14%. Electrical Department earnings, furnishing 82% of the total, declined 11%. Residential earnings were best maintained, recording a 5% decline against 10% for commercial and 19% for industrial classifications. Transportation earnings declined 34% and now furnish but 10% of the total gross earnings. Continuation of the program of rigid economy previously inaugurated produced drastic reductions in operating expenses for the year amounting to 21% of the previous year's total. This excellent showing was made in spite of the fact that only 1.5% of this company's 1931 generation was by steam, so that there was almost no saving in fuel costs resulting from lower output. Balance after operating expenses declined only 8%.

Notwithstanding this relatively good operating record it was necessary, first, to reduce the October 15th dividend payment on the Preferred Stock from $1.50 to $1.00, and, at the end of the year, to defer all dividends on the Prior Preferred and Preferred Stocks. These dividends are cumulative and must be paid in full before Common dividends may be resumed. The compelling factor requiring the reduction and elimination of these dividends while they were still earned was inability to finance the short term debt of the company. On December 31, 1932 the company had Notes Payable amounting to $3,227,714 and it also faced a maturity of underlying bonds of $1,924,000 on June 1, 1933. It had been expected that securities would be sold to discharge this floating debt and to provide for this maturity, and for use in this connection the Federal Power Commission authorized in October the issuance of $7,500,000 of

Engineers' Exhibit No. 37-T (Cont'd)

additional First and Refunding Mortgage Bonds; but investment markets have been in such condition that the necessary securities could not be sold on a reasonable basis.

The company has made continued progress in the simplification of its rate structures and in further reduction of its rates.

Additions to property during the year amounted to $2,482,000 in total, of which $1,547,000 was for the Rock Island Hydroelectric project on the Columbia River, which has now been completed. A picture of this development appears on Page 4. The balance of construction expenditures was almost entirely for improvements to the transmission and distribution system, to improve service and to build short extensions to connect new customers.

Retirements of property amounted to $710,000, leaving a net increase in Plant of $1,772,000.

ENGINEERS PUBLIC SERVICE COMPANY AND CONSTITUENT COMPANIES

Comparative Consolidated Income Statement

	1932	Per Cent of Earnings	1931	Per Cent of Earnings	Increase
EARNINGS					
Light and Power	$32,999,052.54	73.6	$36,335,680.95	71.0	$3,336,628.41*
Transportation	6,869,901.11	15.3	9,067,502.11	17.7	2,197,601.00*
Gas	1,480,163.95	3.3	1,661,862.00	3.2	181,698.05*
Steam	1,890,896.69	4.2	2,025,651.52	4.0	134,754.83*
Ice	686,651.95	1.6	1,031,339.04	2.0	344,687.09*
Other	908,411.54	2.0	1,079,504.66	2.1	171,093.12*
Total Earnings	$44,835,077.78	100.0	$51,201,540.28	100.0	$6,366,462.50*
EXPENSES					
Operation	$17,909,660.69	40.0	$21,457,994.00	41.9	$3,548,333.31*
Maintenance	2,481,047.56	5.5	2,981,630.80	5.8	500,583.24*
Taxes—Incl. Federal income taxes of $470,534.09 (1931—$662,179.44)	3,971,424.83	8.8	4,048,071.49	7.9	76,646.66*
Total Oper. Exp. and Taxes	$24,362,133.08	54.3	$28,487,696.29	55.6	$4,125,563.21*
Balance	$20,472,944.70	45.7	$23,713,843.99	44.4	$2,240,899.29*
Income from Other Sources‡	1,348,841.04	3.0	1,192,358.08	2.3	156,482.96
Balance	$21,821,785.74	48.7	$23,906,202.07	46.7	$2,084,416.33*
Interest and Amortization	8,685,650.54	19.4	8,403,051.50	16.4	282,599.04
Balance	$13,136,135.20	29.3	$15,503,150.57	30.3	$2,367,015.37*
Reserve for Retirements	4,589,182.72	10.2	4,655,160.21	9.1	65,977.49*
Balance	$ 8,546,952.48	19.1	$10,847,990.36	21.2	$2,301,037.88*
Dividends on Preferred Stock of Constituent Companies	4,334,805.96**	9.7	4,345,762.43	8.5	10,956.47*
Balance	$ 4,212,146.52	9.4	$ 6,502,227.93	12.7	$2,290,081.41*
Amount Applicable to Common Stock of Constituent Companies in Hands of Public	22,094.72	.1	61,272.99	.1	39,178.27*
Balance for Dividends and Surplus	$ 4,190,051.80	9.3	$ 6,440,954.94	12.6	$2,250,903.14*
Dividends on Preferred Stock of Engineers Public Service Company	2,323,549.29	5.1	2,323,542.81	4.5	6.48
Balance for Common Stock Dividends and Surplus	$ 1,866,502.51	4.2	$ 4,117,412.13	8.1	$2,250,909.62*

Engineers' Exhibit No. 37-T (Cont'd). 1716a

Comparative Consolidated Surplus Statement

(Minority Interest Excluded)

	1932	1931	Increase
Prior Earned Surplus	$5,292,091.16	$5,001,638.18	$ 290,452.98
Balance as above	1,866,502.51	4,117,412.13	2,250,909.62*
Plus: Cumulative Dividend on Preferred Stock of a Constituent Company not declared but deducted above	665,475.00		665,475.00
Total	$7,824,068.67	$9,119,050.31	$1,294,981.64*
Net Direct Charges:			
Operating items applicable to prior years	260,636.28		260,636.28
Adjustment of Constituent Companies' taxes for prior years	529,317.19§		529,317.19
Non-operating adjustments	43,247.73	198,515.95	155,268.22*
Balance	$6,990,867.47	$8,920,534.36	$1,929,666.89*
Dividends on Common Stock of Engineers Public Service Company	1,145,852.70	3,628,443.20	2,482,590.50*
Earned Surplus (see note)	$5,845,014.77§§	$5,292,091.16	$ 552,923.61

* Decrease.

‡ Income from miscellaneous investments and interest on funds for construction purposes including interest of $886,033.43 (1931—$669,256.87) on the Rock Island project of Puget Sound Power & Light Company which was placed in service February 1, 1933.

§§ Includes cumulative dividends unpaid or not declared of $665,475.00.

§ This non-recurrent item is that portion charged to consolidated earned surplus and set up in the liabilities of the Balance Sheet for property taxes of Puget Sound Power & Light Company and El Paso Electric Company accruing during the year 1932 but payable in the following year. With this adjustment the method of accruing for taxes will be the same for all the Constituent Companies. Property taxes actually paid in the year 1932 covering a full year, have been charged against the current year's income.

§§ Before provision for $665,475.00 cumulative dividends on Preferred Stock of a Constituent Company unpaid or not declared.

NOTE: Excludes surplus of Constituent Companies accumulated prior to acquisition in the amount of $8,541,690.79 (1931—$8,976,772.09).

Engineers' Exhibit No. 37-T (Cont'd)

Page 15:

ENGINEERS PUBLIC SERVICE COMPANY AND CONSTITUENT COMPANIES

Comparative Consolidated Balance Sheet

ASSETS	December 31, 1932	December 31, 1931	Increase
Plant and Property	$326,116,384.54	$325,797,947.73	$ 318,436.81
Investments	13,207,383.53§	13,266,703.45	59,319.92*
Cash	5,344,389.43	4,532,243.16	812,146.27
Notes Receivable	666,058.06	411,468.40	254,589.66
Accounts Receivable	6,591,212.71	7,216,790.75	625,578.04*
Materials and Supplies	2,437,003.80	3,009,037.46	572,033.66*
Prepayments	263,754.20	510,079.41	246,325.21*
Subscribers to Stock	2,593.61	19,940.94	17,347.33*
Sinking Funds	148,864.82	139,702.81	9,162.01
Special Deposits	234,712.07	227,245.45	7,466.62
Unamortized Debt Discount and Expense	8,330,544.75	8,246,411.82	84,132.93
Unadjusted Debits	402,606.43	716,807.90	314,201.47*
	$363,745,507.95	$364,094,379.28	$ 348,871.33*
LIABILITIES			
Preferred Stock†	$ 41,075,434.00	$ 41,075,434.00	
Preferred Stock Scrip	696.50	696.50	
Common Stock‡	58,057,522.85	58,057,172.85	$ 350.00
Common Stock Scrip	5,672.50	6,022.50	350.00*
Constituent Companies:			
Preferred Stock (1932—741,163 shares; 1931—740,225 shares)	69,620,590.79	69,606,219.73	14,371.06
Premium on Stock	49,519.00	107,503.00	57,984.00*
Stock Subscribed For	3,761.00	37,791.00	34,030.00*
Bonds**	148,800,800.00	144,454,800.00	4,346,000.00
Coupon Notes	2,919,500.00	3,000,000.00	80,500.00*
Notes Payable††	6,470,181.42	11,736,846.00	5,266,664.58*
Accounts Payable	1,055,166.20	1,312,829.18	257,662.98*
Accounts Net Yet Due	4,450,720.43	3,578,749.74	871,970.69
Dividends Declared	54,480.50	587,870.75	533,390.25*
Retirement Reserve	23,679,516.52	23,434,893.74	244,622.78
Contributions for Extensions	386,735.96	370,782.62	15,953.34
Operating Reserves	304,676.82	292,999.90	11,676.92
Unadjusted Credits	338,455.71	413,857.21	75,401.50*
Minority Interest in Common Capital and Surplus of directly controlled companies (Earned Surplus $103,149.89; 1931—$128,289.09)	627,062.98	727,819.40	100,756.42*
Earned Surplus (see note)	5,845,014.77§§	5,292,091.16	552,923.61
	$363,745,507.95	$364,094,379.28	$ 348,871.33*

Engineers' Exhibit No. 37-T (Cont'd)

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* Decrease.

§Includes:

City of Seattle Municipal Street Railway 5% Bonds of 1919 (Pledged under the First and Refunding Mortgage of Puget Sound Power & Light Co.)	$8,336,000.00
6,870 shares Stone & Webster, Incorporated, Capital Stock (market value $52,383.75)	436,157.42
Western Gas Company, 1st Mortgage 6% Gold Bond, due January 1, 1934	3,500,000.00
Miscellaneous stocks, bonds and notes (no quoted value)	935,226.11

† Represented by: 158,080 shares $5 (Cumulative) Dividend Convertible Preferred; 196,932 shares $5.50 Cumulative Dividend Preferred and 75,000 shares $6 Cumulative Dividend, Preferred, all of no par value.

‡ Represented by: 1,909,769 shares (1931—1,909,734 shares), of no par value.

** Excludes $8,765,000 (1931—$8,097,000) bonds of Constituent Companies held in Sinking Funds and in Escrow, uncancelled. Also excludes $5,000,000 principal amount of Virginia Electric and Power Company, First and Refunding Mortgage 5% Bonds due October 1, 1955 pledged as security for $4,000,000 principal amount of Ten-Year 5½% Secured Convertible Gold Bonds issued March 1, 1932, which are convertible, March 1, 1933 and thereafter, into a like principal amount of the pledged bonds. The company agrees to pay the holder upon conversion $50 cash per $1,000 principal amount of these bonds so converted.

‡‡ Includes notes of Engineers Public Service Company of $1,700,000 (1931—$3,300,000) and of Eastern Texas Electric Company (Delaware) of $1,200,000 secured by pledge of stock and/or bonds of Constituent Companies.

§§ Before provision for $665,475.00 cumulative dividends on Preferred Stock of a Constituent Company unpaid or not declared.

NOTE: Excludes surplus of Constituent Companies accumulated prior to acquisition in the amount of $[illegible]41,690.79 (1931—$8,976,772.09).

The Federal income taxes for the years 1926 to date have not yet been finally settled. No provision has been made in the above balance sheet for any additional taxes which may have to be paid in excess of claims for refunds which have been filed.

Engineers' Exhibit No. 37-T (Cont'd)

Page 18:

ENGINEERS PUBLIC SERVICE COMPANY

Comparative Income Statement

	1932	1931	Increase
EARNINGS			
Dividend Revenue	$3,497,781.20	$4,674,888.95	$1,177,107.75*
Interest Revenue	621,227.47	1,013,533.26	392,305.79*
Miscellaneous Revenue		795.47	795.47*
Total Earnings	$4,119,008.67	$5,689,217.68	$1,570,209.01*
EXPENSES			
Operating Expenses	$ 82,707.48	$ 148,506.53	$ 65,799.05*
Taxes—Incl. Federal income taxes of $52,391.88 (1931—$85,625.52)	65,445.14	98,150.52	32,705.38*
Total Oper. Exp. and Taxes	$ 148,152.62	$ 246,657.05	$ 98,504.43*
Balance	$3,970,856.05	$5,442,560.63	$1,471,704.58*
Interest	171,722.22	141,315.62	30,406.60
Balance	$3,799,133.83	$5,301,245.01	$1,502,111.18*
Dividends on Preferred Stock	2,323,549.29	2,323,542.81	6.48
Balance for Common Stock Dividends and Surplus	$1,475,584.54	$2,977,702.20	$1,502,117.66*

Comparative Surplus Statement

	1932	1931	Increase
Prior Earned Surplus	$2,923,688.05	$3,573,713.67	$ 650,025.62*
Balance as above	1,475,584.54	2,977,702.20	1,502,117.66*
	$4,399,272.59	$6,551,415.87	$2,152,143.28*
Net Direct Credits		715.38	715.38*
Balance	$4,399,272.59	$6,552,131.25	$2,152,858.66*
Common Dividends	1,145,852.70	3,628,443.20	2,482,590.50*
Earned Surplus	$3,253,419.89	$2,923,688.05	$ 329,731.84

* Decrease.

Engineers' Exhibit No. 37-T (Cont'd)

Page 19:

ENGINEERS PUBLIC SERVICE COMPANY

Comparative Balance Sheet

	Dec. 31, 1932	Dec. 31, 1931	Increase
ASSETS			
Investment in Constituent Companies	$ 95,116,675.96	$ 91,018,219.67	$4,098,456.29
Cash	262,701.58	199,365.02	63,336.56
Notes Receivable (Constituent Companies)	8,630,000.00	14,090,000.00	5,460,000.00*
Interest and Dividends Receivable (Constituent Companies)	128,840.50	120,249.25	8,591.25
Prepayments		9,533.33	9,533.33*
Unadjusted Debits	33,110.66	33,110.66	
	$104,171,328.70	$105,470,477.93	$1,299,149.23*
LIABILITIES			
Preferred Stock†	$ 41,075,434.00	$ 41,075,434.00	
Preferred Stock Scrip	696.50	696.50	
Common Stock‡	58,057,522.85	58,057,172.85	$ 350.00
Common Stock Scrip	5,672.50	6,022.50	350.00*
Notes Payable§	1,700,000.00	3,300,000.00	1,600,000.00*
Accounts Payable	2,884.13	5,631.88	2,747.75*
Accounts Not Yet Due	75,698.83	101,832.15	26,133.32*
Earned Surplus	3,253,419.89	2,923,688.05	329,731.84
	$104,171,328.70	$105,470,477.93	$1,299,149.23*

Contingent Liability:

This Company has agreed to furnish funds sufficient to meet any deficiency in payments of sinking fund, interest, principal and/or other mortgage requirements for $3,200,000 principal amount of First Mortgage 6% Gold Bonds due 1939 of Louisiana Steam Generating Corporation, a Constituent Company, of which Bonds $1,050,000 principal amount are owned by Engineers Public Service Company.

* Decrease.

† Represented by: 158,080 shares $5 (Cumulative) Dividend Convertible Preferred; 196,932 shares $5.50 Cumulative Dividend Preferred and 75,000 shares $6 Cumulative Dividend Preferred, all of no par value.

‡ Represented by: 1,909,769 shares (1931—1,909,734 shares), of no par value.

§ Notes payable to bank secured by pledge of stock of a Constituent Company.

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Vol. V

TRANSCRIPT OF RECORD

(Pages 1722a to 2153a)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 226

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 227

THOMAS W. STREETER, ET AL., PETITIONERS,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 243

THE HOME INSURANCE COMPANY AND TRADESMENS NATIONAL BANK AND TRUST COMPANY, PETITIONERS,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 266

CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, PETITIONERS,

vs.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR CERTIORARI FILED { AUGUST 16, 1948 (Nos. 226 and 227). AUGUST 24, 1948 (No. 243). SEPTEMBER 8, 1948 (No. 266).

CERTIORARI GRANTED OCTOBER 25, 1948.

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

Nos. 9428, 9435, 9440.

IN THE MATTER

of

ENGINEERS PUBLIC SERVICE COMPANY

ON APPEAL FROM ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE, DATED MAY 29, 1945.

JOINT APPENDIX.

THOMAS W. STREETER, *et al.*,
THE HOME INSURANCE COMPANY, *et al.*,
SECURITIES AND EXCHANGE COMMISSION,
Appellants.

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Parkside Press, [illegible] Thomas St., New York 8, N. Y., U. S. A.

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Engineers' Exhibit No. 38.

MUDGE, STERN, WILLIAMS & TUCKER
20 Pine Street
New York

July 26, 1945

To the Board of Directors
ENGINEERS PUBLIC SERVICE COMPANY,
(Incorporated)
90 Broad Street,
New York City

Dear Sirs:

As you well know, on September 16, 1942, in proceedings under Section 11(b)(1) of the Public Utility Holding Company Act, the Securities and Exchange Commission entered an order in effect requiring your Company to divest itself of all of its public utility subsidiaries except Virginia Electric and Power Company and to cease engaging, through that Company, in the gas and transportation businesses. On appeal by your Company to the United States Court of Appeals for the District of Columbia, that court, in our opinion, set that order aside in its entirety on account of legal errors of the Commission and remanded the case to the Commission for further consideration in the light of its opinion. Both your Company and the Securities and Exchange Commission applied to the Supreme Court of the United States for writs of certiorari, which were granted and the case has been pending undecided in that court since June, 1944. For most of the period since that time, the case has been on a suspense list for lack of a quorum of the qualified Justices to decide the issues, some of the Justices having disqualified themselves on the basis of interest. Recently, due, I understand, to the waiver by the Chief Justice of his disqualification, we were advised that the case was set for argument on a definite day, namely,

Engineers' Exhibit No. 38 (Cont'd)

October 8, 1945. A few days ago, however, on account of the resignation from the Court of Justice Roberts, the Engineers Section 11 case has been again put on the suspense list for lack of a quorum. Accordingly, when that case will be argued and decided is again indefinite.

Meantime, your Company finds itself in a somewhat serious dilemma. When it could do so advantageously, it has, in view of that order of the Commission above mentioned and the provisions of the Act, been selling various of its properties until now there remains only three substantial utility properties, namely, Gulf States Utilities Company, El Paso Electric Company and Virginia Electric and Power Company. Due to the disposition of these other properties and the fact that your Company has not been paying dividends on its common stock, it is my understanding that it will find itself with approximately $14,000,000 of cash or its equivalent by the end of the present year. Under the Act, your Company is unable advantageously to invest this money in other utility properties, and although it has attempted to do so, has been unable to acquire in the market at $100 or less any appreciable amount of its preferred stock for retirement. With nothing or practically nothing, in the way of income, coming to your Company from this cash, and the continuation of the dividend requirements on the preferred stock, your Company obviously finds itself in a situation which it cannot afford to let continue very long.

Under these circumstances, your officers have taken up informally with the SEC and from time to time considered with me a solution of the problem. Various plans have been under consideration as to which your President has reported to you from time to time.

In its case before the Supreme Court above mentioned, your Company is, among other things, contesting the constitutionality of the Act under the Commerce Power of the Federal Government. Substantially the same attack is being made in two other cases similarly pending before the Su-

Engineers' Exhibit No. 38 (Cont'd)

preme Court. Although from the start I have felt that the Act was invalid under the Commerce Power and should be so held, I have little hope as the Supreme Court is now constituted and in the present state of administration of the Act, that a favorable opinion of the Court to that effect can be expected. Other constitutional questions are raised in the case under the Fifth Amendment but here again I have no confidence of success. Also, various points of interpretation are raised in the case as to some of which I have more hope of success, but since even if we won on these points in the Supreme Court, the case would be remanded to the Commission for further hearing and they all depend largely on factual issues over which the Commission, if there is any substantial evidence, has the final say, I have little confidence that any permanent relief would be obtained on the interpretation points. The most those points would produce it seems to me is delay.

Practically, therefore, your Company is faced with the necessity sooner or later of complying with the Act, which means that it will have, in some manner, to dispose of its interests in both Gulf States and El Paso. Your Company was organized for the purpose of bringing together under one ownership various scattered public utility companies. If Gulf States and El Paso are to be disposed of, only Virginia Electric and Power Company would remain. Accordingly, the functional reason for the existence of your Company would, under these circumstances, have ceased to exist and there would seem to be no logical reason for incurring the expense of the maintenance of your Company if it is to control only Virginia Electric and Power Company. Thus the plans which have been under consideration have had as one objective the complete liquidation and dissolution of your Company. Faced as your Company is with the practical difficulty with respect to dividends on its outstanding preferred stock and to accumulation of substantial amounts of cash, it seems to me that the pending Supreme Court case, furnishing as it does so little hope of ultimate

Engineers' Exhibit No. 38 (Cont'd)

success, should not stand in the way of carrying out in the near future a plan which will have as its ultimate objective the complete liquidation and dissolution of your Company.

The most serious problem confronting your Company in this connection involves the question of the basis on which its outstanding shares of preferred stock shall be retired. There are three series of preferred stock, namely, $5 dividend, $5.50 dividend and $6 dividend stock. Under the provisions of the Company's charter, in case of involuntary liquidation of your Company, the three series are entitled to a preference over the common stock of $100 per share and accrued dividends. If the liquidation be voluntary, however, the $5 stock is entitled to a premium of $5 per share and the $5.50 and $6 preferred stocks are entitled to a premium of $10 per share. Naturally, therefore, the questions arises as to whether the preferred stock is to be retired on the basis of $100 and accrued dividends or whether the premiums are payable thereon.

Although, as will appear, I am unable with assurance to advise you that the premium is not payable, I have no hesitancy in advising you that, as directors, I think you should, for your own protection, take the position that the premiums are not payable. This is so because if you should, as a Board, voluntarily pay the premiums and it should later, as the law on the subject develops further, be determined that the premiums were not payable, it is possible that you might incur liability to the common stockholders on the ground of waste of assets.

On the question of whether legally the premium is payable, it is necessary, I think, for me to review for you the present state of the law.

For the first time, in January of this year, the Supreme Court of the United States had before it, in *Otis v. Securities and Exchange Commission,* decided January 29, 1945, Supreme Court Reporter, Vol. 65, No. 7, page 483, a case which involved the effect of a preferred stock charter preference over the common stock on liquidation and dissolution

Engineers' Exhibit No. 38 (Cont'd)

under a simplification proceeding arising under Section 11(b) (2) of the Act. The case was decided by a 5 to 3 decision, written for the court by Justice Reed, with a strong dissenting opinion by the Chief Justice in which Justices Roberts and Frankfurter concurred.

Prior to the decision of that case, both the Commission and the lower federal courts had taken the position that when companies were being liquidated under the impact of the Act, the senior securities would be paid off at their face amount or on an involuntary liquidation basis, plus accrued interest or dividends, without the payment of premiums which might otherwise have to be paid if the liquidation were voluntary or if the senior securities were paid off at their redemption prices.

While I do not deny the fact that the opinion of the Court in the *Otis* case probably gives to the preferred stockholders of Engineers who feel they should be paid the premiums some basis for argument, the opinion must necessarily be interpreted in the light of the facts there involved and when it is so interpreted, personally I think the opinion affords only slight comfort to such stockholders.

The facts involved in the *Otis* case were as follows:

The Commission had ordered the United Power & Light Company (Power) to dissolve because it found it was an intermediate holding company in violation of the great-grandfather clause. Dividends were in arrears on the preferred stock to the extent of $64.50 per share, and the total priority of the preferred stock when these accumulated dividends were taken into account amounted to $98,706,000. Power's total gross assets had a value of only about $81,000,000 and, therefore, were less than the preferred stock preference even though all of the assets were given to the preferred stock. The principal assets of Power were shares of common stock of United Light & Railways Company (Railways).

Power filed a Section 11(e) Plan which provided for an allocation of the Railway's common stock on the basis of

Engineers' Exhibit No. 38 (Cont'd)

94.52% to Power's preferred stockholders and 5.48% to Power's common stockholders. The Commission found this Plan under the provisions of Section 11(e) to be "fair and equitable" and the Supreme Court sustained the Commission's finding.

For your consideration of the effect of this case on your case, I think the following quotations sufficiently show the reasoning of the Court:

> "We think, however, the charter preference is inoperative in simplification under section 11(b)(2). The provision having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a 'simplification' under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated 'liquidation' within the meaning of Power's charter provision. Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders. Nor should common stock values be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the devices of merger or consolidation, which would not run afoul of a charter provision formulated years before adoption of the Act in question. The Commission in its enforcement of the policies of the Act should not be hampered in its determination of the proper type of holding company structure by considerations of avoidance of harsh effects on various stock interests which might result from enforcement of charter provisions of doubtful applicability to the procedures undertaken. Where pre-existing contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time

> the contract was made, they cannot be permitted to operate. Compare *New York Trust Co.* v. *Securities and Exchange Comm.*, 2 Cir., 131 F. 2d 274; *In re Lacelede Gas Light Company*, D. C., 57 F. Supp. 997. The reason does not lie in the fact that the business of Power continues in another form. That is true of bankruptcy and equity reorganization. It lies in the fact that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors. We must assume that Congress intended to exercise its power with the least possible harm to citizens''.

And in speaking of the allocation of the assets between the preferred and common stock, which was made by the Commission on the basis of future earnings, the Court said:

> "The allocation properly may be made without dollar valuation so long as each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered.' ''

So far as your matter is concerned, I think the principal points in these quotations you should note are that the court said that in a simplification proceeding under the Act, the dissolution of one company in a holding company system, was not an anticipated "liquidation" within the meaning of Power's charter adopted six years prior to the enactment of the Act and, accordingly, that in such a proceeding the charter preference would be inoperative, saying that "Where pre-existing contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate", and further

saying that the reason "lies in the fact that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors". It should be noted also that the Court said "Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders." I should perhaps, also point out that the Court, in approving the allocation, also said that what a stockholder was entitled to was "the equitable equivalent of the rights surrendered."

After considering the *Otis* case and its effect on the question of the basis on which your preferred stock should, under all the circumstances, be retired, I feel that it should be your position in any plans which are filed with the Securities and Exchange Commission in connection with the liquidation and dissolution of your Company, that the preferred stock should be retirable at $100 and accrued dividends, that is, without payment of any premium.

Although, the Court in the *Otis* case said that the Charter preference was in that case to be considered inoperative, personally I do not see how the relative rights of the stockholders can be fairly determined in a vacuum, or how a fair determination of those relative rights in a liquidation proceeding can be arrived at without taking into consideration and giving effect to the Charter provisions. I think the Supreme Court could have arrived at the conclusion it did in the *Otis* case without broadly brushing aside the Charter preferences, and, accordingly, that that case must be interpreted in the light of the circumstances there involved. In that case, if the Court had applied the Charter preferences strictly and given all the assets to the preferred stock, it would have meant that the interest of the common stockholders would have been wiped out and that, too, in the face of the fact that, but for the impact of the Act, the

common stockholders had a right which no one could have taken away from them without their voluntary act, to continue the Company in existence with the possibility, at least, that the Company might in a period of years have paid up the defaulted dividends on the preferred stock so that their interest in the common stock would again have become of value.

On my analysis, the only points the Supreme Court were required to decide in that case (and all it did in fact decide) were (a) that under impact of the Act there cannot be taken away from the common stock and handed to the preferred stock, rights of the common stock which, except for that impact, would have continued indefinitely into the future and possibly have led to the regaining of value for the common stock, without giving the common stock some compensation therefor; (b) that the compensation given to the common stock for the cutting off of such right, namely, 5.48% of Power's assets was fair and equitable to it; and (c) that giving to the preferred stock the remainder of those assets, namely, 94.52% was fair and equitable to it although it had the effect of cutting down its strict preferential right had the liquidation been brought about by "foreseeable" circumstances rather than through impact of the Act. With that decision, I have no quarrel. It seems sound to me. But it certainly did not require the broad brushing aside of the Charter provisions. Accordingly, to me some language which the Court used in deciding the case seems to me quite unnecessary for its decision and, therefore, *dicta*.

In view of the fact that in the Engineers case there are assets of value sufficient to pay off the preferred stock at $100 and accrued dividends, or even to pay the premiums and still leave something of substantial value for the common stock, it is obvious that the questions really involved in the *Otis* case have no application whatsoever in the Engineers case.

When the circumstances involved in the Engineers case are all taken into consideration, it is my belief that the

Engineers' Exhibit No. 38 (Cont'd)

Engineers preferred stockholders will be equitably treated if they are paid on retirement of their shares $100 and accrued dividends without the payment of more as a premium or otherwise, although I do not deny that the langauge used in the *Otis* case gives some basis for a contrary argument.

In other words, to use the language of the Supreme Court in the *Otis* case, it is my feeling that under all the circumstances, to pay the preferred stock on its retirement more than $100 and accrued dividends, would result, as against the common stock, in having the effect of the Act "visited on one class (the common stock) with a corresponding windfall to another class (the preferred stock) of security holders".

Some, at least, of the reasons which led me to this conclusion are as follows:

(1) I do not think the fact that the preferred stockholders contracted that in the case of an involuntary liquidation of Engineers their preference was to be $100 and accrued dividends, can equitably be ignored in considering their rights vis-a-vis those of the common stock. It was no doing of the common stockholders that the Act was passed any more than it was the doing of the preferred stockholders. Yet, the Act forces on both classes of stockholders the termination of their rights in Engineers as a corporation performing the function for which it was incorporated. Under these circumstances, I see no reason why the burden of complying with the Act should not be equitably shared by both the preferred and common stock; and to pay a premium to the preferred, I think is inequitably to shift the whole burden to the common stock.

(2) If the voluntary-involuntary charter provision is to be given any effect (as I strongly think it should) then in no proper sense can it be said that liquidation of Engineers is, under the circumstances, a voluntary liquidation. There can be no question but that except for the impact of the Act, Engineers would have continued as a corporation into

the future indefinitely to serve the function for which it was organized, namely, to hold in one corporation control of its scattered utility companies. The Act has taken away from Engineers the possibility of continuing that function. As interpreted by the Commission in the Engineers "integration" case, Engineers can only continue to hold Virginia Electric and Power Company and for that purpose Engineers as a separate corporation is unnecessary and the expenses of its continuance, a waste of money. Because of the Act, Engineers finds itself with a large sum of money for which it has no economic use. It is impossible for Engineers to continue to carry its burden of preferred dividends after it has been forced to sell the properties with which it earned those dividend requirements. To regard the liquidation of Engineers under these circumstances as a voluntary liquidation, is to close one's eyes to obvious contrary facts. Nor does the fact that that liquidation may result from the filing by Engineers of a voluntary Section 11(e) plan change the situation. This has been consistently held in several court cases.

(3) If the preferred stockholders are paid the premiums, they will be getting the most that they ever could have expected to get from the Company. This is true because if the premiums are to be paid, the amount which the preferred stockholders will receive will be the same as they would have received if the Company, for reasons induced by its own advantage, had exercised its option to call the preferred stock for redemption; and no one has yet asserted that the impact of the Act suspended that option in the Company. If under impact of the Act the preferred stockholders are to receive the most which they could have received under any circumstances, operation of the Act has certainly been advantageous to the preferred stockholders at the expense of the common stockholders; and it would seem to me that so to hold would be again inequitably to throw the entire burden arising from the Act on the common stockholders.

Engineers' Exhibit No. 38 (Cont'd)

(4) Furthermore, when the circumstances under which the preferred stock was issued and its course in the market since its issuance are considered, they seem equitably to lead to the fact that the preferred stockholders will be fairly treated if they receive on retirement $100 and accrued dividends. None of the series of preferred stock were issued by the Company on a basis higher than $100 per share. Furthermore, it is the fact that until the year 1944, the shares of preferred stock have never sold in the market above $100 except for a period of about 13 or 14 months in the years 1929, 1930 and 1931, when, due to market action induced by an attached warrant, the $5.50 stock sold somewhat above $100, and for a period of a few months in 1929 and 1930, the $5 stock sold above $100 induced by a conversion privilege. Also, for most of the period since its issuance, the preferred stock has not only sold below $100, but for a considerable period, very much below $100. In fact, during the years 1933 and 1934, all series of the preferred stock sold in the market from around $15 to $30 per share. Thus, financially, except for a few persons who may have bought their stock within the past year or so, $100 per share and accrued dividends would certainly constitute fair treatment, and for many of the stockholders even that amount is more than generous treatment and in the nature of a windfall.

(5) No dividends have been paid on the common stock of Engineers since 1932. On a consolidated basis, about $22,000,000 of earnings applicable to Engineers common stock have been plowed back into the underlying properties since passage of the Holding Company Act in 1935. It is true that not all of this amount could have been paid out in dividends. But a substantial part of it could have been; and if that had been done the position of the preferred stock would be much less favorable than it is today. The uncertainties presented by the passage of the Act largely motivated the no-common-dividend policy. Under these circum-

stances, to compel the common stock to make the further sacrifice of paying a premium to the preferred stock on liquidation is unfair.

So much for the reasons why it seems to me the preferred stock should equitably be paid no more than $100 and accrued dividends. I realize that the preferred stock will argue that the right to receive their prescribed dividends in the future (now apparently reasonably assured as reflected in the present market price) is a valuable right which in liquidation the preferred stockholders will have to surrender, and that as against the common stock, the premiums should be paid to compensate for that loss. The answer to that argument seems to me to be that the necessity for that surrender is forced on the preferred stock by the Act, and that the preferred stock should no more expect to be paid for that forced surrender than the common stock should expect the preferred stock to pay it for the loss of the diversity factor which adhered in the ownership in one corporation of utilities located in different sections of the country having entirely different economic backgrounds. It may be convenient to throw all the burden of the Act on the common stock, but is it fair to do so? The common stock would have been willing to abide by its contract to continue to pay the dividends which the preferred stock carry until, for some reason of advantage to it, the corporation should exercise its right to call the preferred stock at the redemption prices or voluntarily liquidate and pay the premiums. The impact of the Act, however, takes that option away from the Company and if the premium is to be paid to the preferred stock, it gives to the preferred stock the benefit which it would have had in such case with no corresponding benefit to the common stock. The contract was that in the case of involuntary liquidation, the preferred stock was to get $100 and accrued dividends and it was only in the case of a liquidation or a redemption, carried out for the purposes of obtaining advantage for the common stock, that the premiums were to be paid. The Act makes it impos-

Engineers' Exhibit No. 38 (Cont'd)

sible for the common stock to get that advantage. Since the common stock can no longer get that advantage, there seems to be no logical reason why it should pay for it. When what has happened is analyzed, the involuntary liquidation basis seems more nearly to fit the facts and I believe that basis should be followed.

In view of another recent decision of the Supreme Court, in the case of *Securities and Exchange Commission* v. *Okin*, decided June 4, 1945 (not yet officially reported), I think opportunity is afforded to the preferred stockholders within the structure of the Act itself to settle the premium question. In the Okin case the Supreme Court held that a security holder of a holding company in a case arising under the Act was "an aggrieved party" and entitled to a review in the courts of the decision of the Commission in a case arising under the Act which involves his company. On this point, I doubt whether it makes any difference whether your Company proceeds in its liquidation matter through the instrumentality of a Section 11(e) plan or whether it proceeds through an application and/or declaration filed under various other applicable sections. In either case the Commission will be acting by order and, I think, a court review by the preferred stockholders of any such order would lie.

As above intimated, two possible methods of procedure are open to your Company in connection with its liquidation. One is by means of a so-called voluntary Section 11(e) Plan; the other is by an application and/or declaration under the various other applicable sections of the Act. For reasons which I will develop orally, I am inclined to prefer the Section 11(e) plan.

It seems to me advisable whatever procedure is adopted that it should envisage the ultimate liquidation and dissolution of your Company even though the complete liquidation and dissolution might be postponed for a period of time, since that is the logical thing to do under the circumstances and the question whether a premium would be pay-

Engineers' Exhibit No. 39

able on the preferred stock is more squarely raised under such circumstances.

I will be glad at the meeting to explain further any of the points above discussed or answer, if I can, any question which may occur to you.

Yours very truly,

WILLIAM E. TUCKER.

Engineers' Exhibit No. 39.

SECURITIES AND EXCHANGE COMMISSION
Eighteenth and Locust Streets
Philadelphia 3, Pennsylvania.

ENGINEERS PUBLIC SERVICE COMPANY

(Incorporated)

File No. 54-132

Amendment No. 4 to Application Dated September 10, 1945

Engineers Public Service Company (Incorporated) hereby further amends the Plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters of Engineers Public Service Company (Incorporated) filed as Exhibit A to application dated September 10, 1945 as follows:

1. By striking from the table of contents of the Plan references to Part III under Division C and Division D and references to Exhibits A, B, C, D and E.

2. By adding a new paragraph under Part I of Division A of the Plan reading as follows:

"3. The dissolution and liquidation of Engineers."

Engineers' Exhibit No. 39 (Cont'd)

3. By striking out Part III from Division A of the Plan.

4. By striking out the references to Exhibits A, B, C, D and E under Division B of the Plan.

5. By adding a new paragraph to be numbered 9 to follow paragraph 8 under Part I of Division C of the Plan which paragraph 9 will read as follows:

"9. Within 60 days after Part I of the Plan becomes effective as provided in paragraph 2 above, the President or a Vice President, and the Secretary or an Assistant Secretary, of Engineers shall, without further action by the directors or stockholders of Engineers:

(1) deposit for filing in the office of the Secretary of State of the State of Delaware, a certificate signed by them and verified by the oath of one of said officers, which shall state that Engineers is dissolved, in which certificate there shall be included a list of names and residences of the directors and officers of Engineers as of the date of such filing;

(2) deposit for recordation in the office of the Recorder of Kent County, Delaware, being the county in which the principal office of Engineers is maintained, a duplicate original of the certificate referred to in (1) above;

(3) cause to be published a copy of such certificate in one issue of a newspaper published in Kent County, Delaware, being the county in which the principal office of Engineers in the State of Delaware is situated; and

(4) deposit for filing in the office of the Secretary of State of the State of Delaware an affidavit

Engineers' Exhibit No. 39 (Cont'd)

of the Manager or Publisher of the newspaper referred to in (3) above, that said certificate had been published one time in said newspaper;

and thereupon, when the steps specified in (1), (2), (3) and (4) above shall have been taken, the dissolution of Engineers shall thereby become effective, but Engineers shall, nevertheless, be continued as a body corporate for the purposes and for the term specified in Section 42 of the General Corporation Law of the State of Delaware. Upon the dissolution of Engineers becoming effective as aforesaid, the persons who shall constitute the members of the Board of Directors of Engineers at the time of such dissolution, as specified in the certificate filed as provided in (1) above, shall thereupon be and become Trustees of the estate and effects of Engineers and it shall be their duty to collect the debts and property due and belonging to Engineers with power to prosecute and defend, in the name of Engineers or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them and do any other acts which might be done by Engineers, if in being, that may be necessary for the final settlement of the unfinished business of Engineers, and the powers of such Trustees shall be continued as long as shall be necessary for the purposes aforesaid. Such Trustees shall, with the approval of the Commission, have the power and authority to borrow in the name and on behalf of Engineers at any time or from time to time any amount or amounts of money deemed by them to be necessary or advisable to facilitate the liquidation of Engineers in the manner provided for in this paragraph 9 for such term not exceeding three years from the effective date of such dissolution, and upon such other terms and

Engineers' Exhibit No. 39 (Cont'd)

conditions, including security, if any, for the payment thereof, as they shall determine. If, by reason of death, resignation, incapacity or otherwise, vacancies shall occur among such Trustees, prior to the final consummation of their duties as aforesaid, such vacancies may be filled by vote of one-third (not less than two) of the Trustees then in office. Such Trustees may adopt such reasonable rules and regulations for the carrying on of their activities as they may deem to be desirable, including provision for notice of and the holding of meetings. A quorum of such Trustees for the transaction of business shall be one-third of the Trustees at any time in office (but not less than two). It shall be the duty of such Trustees to the extent possible, to liquidate the debts and obligations of Engineers from the estate and assets of Engineers other than the shares of common stock of Virginia Electric and Power Company, to the end that the final liquidation of Engineers shall be accomplished by the distribution, pro rata, among its common stockholders of as many of the shares as possible of common stock of Virginia Electric and Power Company, and no common stockholder of Engineers shall have any right to require any different method of liquidation. In connection with such distribution of the shares of common stock of Virginia Electric and Power Company, such Trustees, with the consent of any regulatory authorities having jurisdiction, may cause the shares of common stock of Virginia Electric and Power Company to be reclassified in such manner as they shall deem to be advisable, in order to facilitate such distribution."

6. By striking out the proviso from the third paragraph under Part II of Division C of the Plan and inserting in lieu thereof the following:

Engineers' Exhibit No. 39 (Cont'd)

"provided, however, that such automatic amendment, if any, of this Part II of the Plan shall be without prejudice to the right of Engineers to contest before the Commission and/or in any court having jurisdiction any finding or order of the Commission as a result of which Engineers shall be directed or required to pay to its Preferred Stockholders any amount in addition to $100 per share plus accrued dividends to the date of deposit provided to be paid under Part I of this Plan, which right is hereby expressly reserved."

7. By striking out Part III under Division C of the Plan.

8. By striking out Part III under Division D of the Plan.

9. By striking out Exhibits A, B, C, D and E to the Plan; so that as amended the Plan will read as set forth in Exhibit A-1 attached thereto.

10. To bring up to date certain statements contained therein and to make certain other statements contained therein consistent with the above changes.

Pursuant to the requirements of the Public Utility Holding Company Act of 1935, the Company set forth below caused this instrument to be duly executed on its behalf by its authorized officers on this the 14th day of December, 1945.

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

By D. C. BARNES,
D. C. BARNES, President

(CORPORATE SEAL)

Attest:

R. N. BENJAMIN,
R. N. BENJAMIN, Secretary

Engineers' Exhibit No. 39 (Cont'd)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

The undersigned being duly sworn deposes and says that he has duly executed the attached instrument for and on behalf of the Company named therein; that he is the President of such Company; and that all action by stockholders, directors, and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and the transactions referred to therein, and that to the best of his knowledge, information and belief the statements made in such instrument are true.

D. C. BARNES

D. C. BARNES

Subscribed and sworn to before me at New York, New York, this 14th day of December, 1945.

VIETTA E. GIBBS

VIETTA E. GIBBS

NOTARY PUBLIC KINGS CO.
Kings Co. Clk's No. 229, Reg. No. 250-G-6
Certificates filed in New York County
N. Y. Co. Clk's No. 342, Reg. No. 201-G-6
Commission Expires March 30, 1946

My commission expires March 30, 1946

(NOTARIAL SEAL)

Engineers' Exhibit No. 39 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY

(INCORPORATED)

PLAN PURSUANT TO SECTION 11(e) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

SEPTEMBER 10, 1945

as amended December 14, 1945

PLAN FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

OF

ENGINEERS PUBLIC SERVICE COMPANY

(Incorporated)

Pursuant to Section 11(e) of the

Engineers' Exhibit No. 39 (Cont'd)

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

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Engineers' Exhibit No. 39 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY

(Incorporated)

Plan Pursuant to Section 11(e) of the

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

DIVISION A

Purposes of Plan

Part I has the following purposes:

1. Compliance with orders of the Securities and Exchange Commission ("the Commission") directing the divestment by Engineers Public Service Company (Incorporated) ("Engineers") of its interest in El Paso Electric Company ("El Paso") and Gulf States Utilities Company ("Gulf States").

2. The retirement of the Preferred Stock of Engineers at $100 per share and accrued dividends (the question as to whether or not any additional amount is payable to such Stockholders to be determined under Part II).

3. The dissolution and liquidation of Engineers.

Part II has the following purpose:

The purpose of Part II is to request the Commission to issue a separate order finding that it is fair and equitable to the Preferred Stockholders of Engineers to pay $100 per share plus accrued dividends to the date of deposit in trust of funds therefor in complete liquidation of their stock. (This Part of the Plan

Engineers' Exhibit No. 39 (Cont'd)

provides, in the event the Commission finds that some additional amount shall be payable, for the automatic amendment of this Part so as to provide for such additional payment, preserving to Engineers, however, the right to apply for a review of any order providing for or requiring any additional payment.)

DIVISION B

Introductory Statement

Engineers, organized and existing under the laws of the State of Delaware, is a registered holding company under the Public Utility Holding Company Act of 1935 ("the Act"). Engineers holds the following securities:

150,000 shares of Common Stock without par value of El Paso, being all of the authorized and issued Common Stock of said Company. These shares are to be reclassified into 381,994 shares of Common Stock, without par value, prior to the consummation of Part I of the Plan.

280,000 shares of Common Stock without par value of Gulf States, being all of the issued Common Stock of said Company, there being 20,000 shares of such Common Stock authorized but unissued. The 280,000 outstanding shares of Common Stock are to be reclassified into 1,909,968 shares of Common Stock, without par value, prior to the consummation of Part I of the Plan.

2,932,065 shares of Common Stock without par value of Virginia Electric and Power Company ("Virginia"), there being, in addition, 6,360 shares of such Common Stock in the hands of the public and 20 shares of such Common Stock reserved for scrip and 1,061,555 shares of such Common Stock authorized but unissued.

Engineers' Exhibit No. 39 (Cont'd)

$508,800 principal amount of 5% note payable and 15,000 shares of capital stock of the par value of $40 per share of The Western Public Service Company ("Western"), being all of the authorized and outstanding amounts of such securities.

Engineers has outstanding the following securities:

143,951 shares of $5 Dividend Convertible Preferred Stock ("$5 Preferred") without par value, entitled ot receive $100 per share, plus accrued dividends, in involuntary liquidation and $105 per share, plus accrued dividends, on redemption or voluntary liquidation.

183,406 shares of $5.50 Cumulative Dividend Preferred Stock ("$5.50 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $110 per share, plus accrued dividends, on redemption or voluntary liquidation.

65,098 shares of $6 Cumulative Dividend Preferred Stock ("$6 Preferred"), without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $110 per share, plus accrued dividends, on redemption or voluntary liquidation.

1,909,968 shares of Common Stock of the par value of $1 per share.

Early in 1940 the Commission brought a proceeding against Engineers and its subsidiaries under Section 11(b)(1) of the Act. This Section provides for the restriction of integrated systems and incidental businesses which a holding company may control. On July 23, 1941, the Commission issued an order in that proceeding directing Engineers to dispose of its interest in The Key West Elec-

Engineers' Exhibit No. 39 (Cont'd)

tric Company and Puget Sound Power & Light Company. This order has been fully complied with. On December 29, 1941, the Commission issued a further order under Section 11(b)(1) directing Engineers to dispose of its interest in Missouri Service Company, The Northern Kansas Power Company and Western. Engineers' interests in Missouri Service Company and The Northern Kansas Power Company have been sold and a contract for the sale of Western has been signed. On September 16, 1942 and October 6, 1942, the Commission issued further orders under the same Section directing Engineers to dispose of all of its remaining investments except that in Virginia, which, if retained, must dispose of its gas and transportation operations. Engineers has complied with these 1942 orders by disposing of all of the investments ordered divested by those orders except its investments in Gulf States, El Paso and Virginia and with respect to the latter two companies, has partially complied with said orders by the disposal of their transportation properties. Engineers filed a petition with the United States Court of Appeals for the District of Columbia for a review of the 1942 orders and on November 22, 1943, the Court set these orders aside and remanded the case to the Commission for further proceedings in accordance with its opinion.

The Supreme Court of the United States granted writs of certiorari to both the Commission and Engineers and the case was argued in the Supreme Court in November, 1945 but has not yet been decided. It is not expected that any portion of this Plan shall be consummated until after the decision of this case.

DIVISION C

The Plan

Part I

1. Engineers will sign an agreement with a bank to borrow, subject to the consummation of Part I of the

Engineers' Exhibit No. 39 (Cont'd)

Plan, $3,000,000 on a two-year note, payable $750,000 semi-annually. The agreement will provide that Engineers shall not, until the bank loan is fully paid, pay any dividends in cash on its Common Stock, or make any other distribution in respect thereof other than such as may be provided for in this Part I of the Plan. Provision will be made in this agreement to permit, if needed, the borrowing of additional amounts, which provision may be availed of, in the event Western is not sold before the effective date of Part I of the Plan or in the event that some delay is involved in selling shares of Gulf States Common Stock not subscribed for under subscription warrants or for any other reason.

2. Engineers will mail warrants to its Common Stockholders of record on a date to be fixed by the Board of Directors of Engineers, each of which warrants will evidence the right to acquire from Engineers shares of Gulf States Common Stock on the basis of one share of Gulf States Common Stock for each share of Engineers Common Stock held by such Stockholders on such date either

   (a) by purchasing from Engineers whole shares of such Gulf States Common Stock at the rate of $11.50 per share, payable in United States funds, or in the alternative,

   (b) by exchanging with Engineers whole shares of Engineers Preferred Stock for shares of Gulf States Common Stock on the basis of equivalent values, assigning $11.50 per share for each share of Gulf States Common Stock and $100 plus accrued dividends to the expiration date of the warrant for each share of Engineers Preferred Stock; provided that, on the basis of the relative values above stated, the value of the whole shares of Engineers Preferred Stock surren-

Engineers' Exhibit No. 39 (Cont'd)

dered in exchange shall not exceed the value of the shares of Gulf States Common Stock which the warrant holder is entitled to and intends to acquire, but to the extent that the value of such shares of Engineers Preferred Stock surrendered in exchange is less than the value of such shares of Gulf States Common Stock to which the warrant holder is intitled and intends to acquire, the excess shall be paid by the warrant holder to Engineers in United States funds. Any holder of Engineers Prefetred Stock who surrenders his stock in exchange for Gulf States Common Stock will, in respect of such surrendered shares, retain the right to receive the same amount which stockholders surrendering their stock under the provisions of Paragraph 5 of this Part I shall receive, in addition to $100 per share plus accrued dividends to the date of deposit therein provided for, if any such amount is finally determined to be payable.

The Board of Directors of Engineers may, however, withhold the mailing of such warrants in the event that, in its opinion, market conditions are such as to render it inadvisable to proceed with the issuance of the warrants. Upon the mailing of such warrants, Part I of the Plan shall be deemed to be effective. In cases where the addresses of such Stockholders are unknown or are outside continental United States and Canada, warrants will not be mailed to Common Stockholders of this Company of record on such date but will be held against instructions of the record owners, or their duly authorized agents, until the opening of business on the day before the expiration date of the warrant period, at which time all warrants so held with respect to which no such instructions have been received may be sold by the Company

Engineers' Exhibit No. 33 (Cont'd)

and the pro rata share of the aggregate net proceeds, if any, remitted to each Stockholder on whose behalf warrants are so sold, or, in cases where such remittance is not lawful or the address is unknown, held for the account of each such Stockholder subject to payment upon receipt of lawful instructions. The warrants must be exercised on or before a specified date (to be approximately ten days after the date of mailing warrants). All warrants will be registered in the names of the Common Stockholders and will be transferable on the books of Engineers. Such warrants will be issued and distributed without the surrender by the Common Stockholders of Engineers of their Common Stock.

3. The Transfer Agent will mail or deliver certificates for Gulf States Common Stock to those persons who exercise the warrants. To the extent warrants are not exercised, Engineers will sell shares of Gulf States Common Stock represented thereby as promptly thereafter and in such manner as the Board of Directors of Engineers deems to be in the best interests of Engineers, subject to the obtaining of the requisite regulatory approvals.

4. Engineers will issue its note to bank.

5. Engineers will deposit in trust for the benefit of its Preferred Stockholders with a solvent bank or trust company an amount equal to $100 per share plus accrued dividends to the date of such deposit for each share of Preferred Stock not surrendered in exchange pursuant to (b) of paragraph 2 of this Part I and will give to all holders of such Preferred Stock five days' prior notice of such deposit at their respective registered addresses, and such notice shall state that upon surrender by the Preferred Stockholders of their certificates for Preferred Stock to

Engineers' Exhibit No. 39 (Cont'd)

the Transfer Agent, they will be paid $100 per share plus such accrued dividends; and from and after the date of such deposit, dividends on the Preferred Stock will cease and determine. Such distribution will be in cancellation of the whole of the outstanding Preferred Stock of Engineers and thereafter the only right remaining to the registered holder of each certificate of Preferred Stock will be the right to receive an additional amount if any is determined to be payable (see Part II). The President or a Vice President and the Secretary or an Assistant Secretary of Engineers shall, without further action by Directors and Stockholders of Engineers, file a certificate or certificates of Engineers reflecting the elimination of the capital represented by the Preferred Stock and the elimination of the authorized Preferred Stock in the Office of the Secretary of State of the State of Delaware and shall record in the Office of the Recorder of Deeds of New Castle County, Delaware, a copy or copies thereof certified by the Secretary of State.

6. Engineers will distribute as a dividend in partial liquidation Common Stock of El Paso pro rata to the Engineers Common Stockholders on the basis of 1/5th of a share of El Paso Common Stock for each share of Engineers Common Stock. No fractional shares of Common Stock will be issued or delivered, but in lieu thereof scrip will be issued and delivered. Such distribution, issue and delivery will be without the surrender by the Common Stockholders of Engineers of their Common Stock. Such scrip will not be entitled to dividends, voting rights or any other stockholders' rights. When combined in lots aggregating one or more full shares of stock, scrip may, up to the date of sale (hereinafter in this paragraph described) of such shares of stock, be exchanged for such shares, together with any dividends which shall

Engineers' Exhibit No. 39 (Cont'd)

have been paid to Stockholders of record on any date subsequent to the effective date of this Part I of the Plan. Engineers will undertake to provide facilities whereby any holder of scrip certificates may dispose of such scrip, or acquire additional scrip so as to enable the holder to exchange such scrip for full shares of stock. All shares of stock reserved for issuance and delivery upon the exchange of scrip which shall not have been issued or delivered in connection with such exchange within two years after the effective date of this Part I, shall, promptly after the expiration of such period, be sold by the Transfer Agent and the Transfer Agent shall, as soon as possible thereafter, distribute to the holders of scrip certificates not theretofore surrendered their proportionate part of the proceeds of sale, plus their proportionate part of any dividends which shall have been declared to holders of record as of a date prior to the date of sale.

7. In order to provide a reserve for the purpose of making the payment, if any, to which Engineers Preferred Stockholders shall, on final determination, be held to be entitled in addition to $100 per share and accrued dividends to the date of the deposit provided for in paragraph 5 of this Part I, Engineers will retain its interest in the Virginia Common Stock until such a final determination is made.

8. Epsco, Inc., the mutual service corporation, will cancel its service contracts with Engineers, Virginia, Gulf States and El Paso.

9. Within 60 days after Part I of the Plan becomes effective as provided in paragraph 2 above, the President or a Vice President, and the Secretary or an Assistant Secretary, of Engineers shall, without further action by the directors or stockholders of Engineers:

Engineers' Exhibit No. 39 (Cont'd)

(1) deposit for filing in the office of the Secretary of State of the State of Delaware, a certificate signed by them and verified by the oath of one of said officers, which shall state that Engineers is dissolved, in which certificate there shall be included a list of names and residences of the directors and officers of Engineers as of the date of such filing;

(2) deposit for recordation in the office of the Recorder of Kent County, Delaware, being the county in which the principal office of Engineers is maintained, a duplicate original of the certificate referred to in (1) above;

(3) cause to be published a copy of such certificate in one issue of a newspaper published in Kent County, Delaware, being the county in which the principal office of Engineers in the State of Delaware is situated; and

(4) deposit for filing in the office of the Secretary of State of the State of Delaware an affidavit of the Manager or Publisher of the newspaper referred to in (3) above, that said certificate had been published one time in said newspaper;

and thereupon, when the steps specified in (1); (2), (3) and (4) above shall have been taken, the dissolution of Engineers shall thereby become effective, but Engineers shall, nevertheless, be continued as a body corporate for the purposes and for the term specified in Section 42 of the General Corporation Law of the State of Delaware. Upon the dissolution of Engineers becoming effective as aforesaid, the persons who shall constitute the members of the Board of Directors of Engineers at the time of such dissolution, as specified in the certificate filed as provided in (1) above, shall thereupon be and become

Engineers' Exhibit No. 39 (Cont'd)

Trustees of the estate and effects of Engineers and it shall be their duty to collect the debts and property due and belonging to Engineers with power to prosecute and defend, in the name of Engineers or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them and do any other acts which might be done by Engineers, if in being, that may be necessary for the final settlement of the unfinished business of Engineers, and the powers of such Trustees shall be continued as long as shall be necessary for the purposes aforesaid. Such Trustees shall, with the approval of the Commission, have the power and authority to borrow in the name and on behalf of Engineers at any time or from time to time any amount or amounts of money deemed by them to be necessary or advisable to facilitate the liquidation of Engineers in the manner provided for in this paragraph 9 for such term not exceeding three years from the effective date of such dissolution, and upon such other terms and conditions, including security, if any, for the payment thereof, as they shall determine. If, by reason of death, resignation, incapacity or otherwise, vacancies shall occur among such Trustees, prior to the final consummation of their duties as aforesaid, such vacancies may be filled by vote of one-third (not less than two) of the Trustees then in office. Such Trustees may adopt such reasonable rules and regulations for the carrying on of their activities as they may deem to be desirable, including provision for notice of and the holding of meetings. A quorum of such Trustees for the transaction of business shall be one-third of the Trustees at any time in office (but not less than two). It shall be the duty of such Trustees to the extent possible, to liquidate the debts and obligations of Engineers from the estate and assets of Engineers other than

Engineers' Exhibit No. 39 (Cont'd)

the shares of common stock of Virginia Electric and Power Company, to the end that the final liquidation of Engineers shall be accomplished by the distribution, pro rata, among its common stockholders of as many of the shares as possible of common stock of Virginia Electric and Power Company, and no common stockholder of Engineers shall have any right to require any different method of liquidation. In connection with such distribution of the shares of common stock of Virginia Electric and Power Company, such Trustees, with the consent of any regulatory authorities having jurisdiction, may cause the shares of common stock of Virginia Electric and Power Company to be reclassified in such manner as they shall deem to be advisable in order to facilitate such distribution.

Engineers believes and alleges that the approval of this Part I of the Plan is necessary for compliance with the orders issued by the Commission on September 16, 1942 and October 6, 1942 under Section 11 of the Act and to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby, and if the Commission shall find Part I of the Plan necessary to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby, Engineers prays that the Commission shall enter a separate order approving Part I of the Plan containing a recitation that the relevant transactions of Part I of the Plan are necessary or appropriate to the integration or simplification of the holding company system of which Engineers is a member and necessary or appropriate to effectuate the provisions of subsection (b) of Section 11 of the Act, all in accordance with the meaning and requirements of the Internal Revenue Code, as amended, including Sections 371 and 1808(f) and Supplement R thereof.

Engineers' Exhibit No. 39 (Cont'd)

Part II

Engineers shall pay to its Preferred Stockholders no amount in addition to the $100 per share, plus accrued dividends to the date of deposit, provided to be paid under Part I of this Plan.

Engineers believes and alleges that the approval of this Part II of the Plan is necessary, if Part I of the Plan is consummated, to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby, and if the Commission shall find Part II of the Plan necessary to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the peresons affected thereby, Engineers prays that the Commission shall enter a separate order approving Part II of the Plan.

To the end that there may be determined by the Commission in the proceedings in connection with Part II of this Plan the amount, if any, which, in the opinion of the Commission, it is fair and equitable that Engineers shall pay to its Preferred Stockholders in addition to $100 per share plus accrued dividends to the date of deposit provided to be paid under Part I of this Plan, Engineers agrees that in the event the Commission shall in any findings or order respecting Part II of this Plan find that it is not fair and equitable to the persons affected thereby that Engineers shall pay to its Preferred Stockholders no amount in addition to $100 per share plus accrued dividends to the date of deposit provided to be paid under Part I of this Plan and shall in such findings or order specify an amount in addition thereto which Engineers should pay to its Preferred Stockholders, then and in such events this Part II of the Plan shall be and thereby become automatically amended so as to provide that Engineers shall pay to its Preferred Stockholders such additional amount as the Commission shall have so specified; provided, however, that such automatic amendment, if any, of this Part II of the Plan shall be with-

out prejudice to the right of Engineers to contest before the Commission and/or in any court having jurisdiction any finding or order of the Commission as a result of which Engineers shall be directed or required to pay to its Preferred Stockholders any amount in addition to $100 per share plus accrued dividends to the date of deposit provided to be paid under Part I of this Plan, which right is hereby expressly reserved.

DIVISION D

Conditions to Effectuation of the Plan

Part I

The effectuation of Part I of the Plan is dependent upon the satisfaction of the following conditions:

1. Gulf States shall have reclassified its Common Stock into 1,909,968 shares of Common Stock, without par value; Gulf States shall have given to its Preferred Stock seven votes per share instead of the one vote per share it now carries; and El Paso shall have reclassified its Common Stock into 381,994 shares of Common Stock, without par value.

2. The Commission shall have issued the order prayed for in Part I of this Plan.

3. The Commission, when requested by Engineers, shall have instituted a proceeding in a court of competent jurisdiction pursuant to Section 11(e) of the Act and such court shall have entered a separate decree or order finding Part I of the Plan to be fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act and such court shall have taken action to enforce and carry out the terms and provisions of Part I of the Plan.

4. There shall have been obtained from the United States Treasury Department (unless Engineers, in its dis-

cretion, shall waive this condition) a closing agreement or ruling or closing agreements or rulings as to the tax consequences of the transactions necessary to carry out Part I of the Plan and such agreements or rulings shall be satisfactory to counsel for Engineers.

5. Any corporate action in connection with Part I of the Plan, which may be deemed necessary by counsel for Engineers shall have been carried out in a manner satisfactory to such counsel.

6. Authorization satisfactory to counsel for Engineers shall have been given for the carrying out of Part I of the Plan and for the issuance for all securities provided to be issued pursuant to Part I by the Plan, by all regulatory commissions, the consent of which is legally necessary.

7. Engineers shall have made arrangements to borrow requisite funds to enable it, together with cash on hand and cash from the exercise of the warrants, to pay $100 per share plus accrued dividends to the date of deposit on the outstanding Engineers Preferred Stock.

8. The warrants referred to in paragraph 2 of Part I of the Plan shall have been mailed to Engineers Common Stockholders.

Part II

The effectuation of Part II of the Plan is dependent upon the satisfaction of the following conditions:

1. The Commission shall have taken the requisite action under Part II of this Plan.

2. Part I of the Plan shall have been consummated.

Engineers' Exhibit No. 39 (Cont'd)

DIVISION E

Amendments to the Plan and Other Provisions

Until approved by the Commission, the Plan or any Part thereof may be modified or amended in any respect or particular by Engineers. After being approved by the Commission and before being approved by a court, the Plan or any part thereof may be modified or amended in any respect or particular by Engineers with the approval of the Commission. After the approval by the Court and before any Part of the Plan has been consummated, pursuant to the order or decree of a court of competent jursidiction, such Part may be modified or amended in any respect or particular by Engineers with the approval of both the Commission and the Court. No amendments to the Plan or any Part thereof shall be made without the consent or agreement of Engineers.

Engineers may employ such agents, attorneys or others as it may deem desirable for the purpose of carrying out the Plan or any Part thereof. Engineers may from time to time delegate to others any power or discretion conferred upon it by the Plan.

The statements, opinions and conclusions contained in the Plan are intended solely for the purpose of assisting the Commission, any court and the Stockholders in any steps or proceedings with respect to the Plan and are not intended for use or information by prospective purchasers of the securities whether now existing or proposed to be issued or for any purposes other than the purposes set forth in this paragraph; and no one is authorized to make any statements regarding the Plan, whether with reference to any securities referred to herein or otherwise which are not set forth herein.

Engineers' Exhibit No. 39 (Cont'd)

DIVISION F

Reservation of Rights

In filing this Plan, Engineers does so solely under compulsion and upon the basis that such Plan constitutes a means whereby Engineers may comply with the orders of the Commission entered on September 16, 1942 and October 6, 1942 and otherwise comply with the Act. This Plan is filed without waiver and with full reservation of all constitutional and legal rights of Engineers and its subsidiaries to attack the validity and legality of any section or any subdivision of any section of, or any order, rule or regulation under, the Act, including, without limitation, the right to proceed with their case involving Section 11 of the Act pending in the Supreme Court of the United States, and it is respectfully requested that the Commission's order or orders herein shall reserve to Engineers and its subsidiaries the rights hereinabove referred to.

By Order of the Board of Directors

Engineers Public Service Company
(Incorporated)

By D C Barnes
President

Engineers' Exhibit No. 40.

Twenty Largest Holders
of Record—October 31, 1945

ENGINEERS PUBLIC SERVICE COMPANY

$6.00 PREFERRED — $6.00 PREFERRED

Name and Address	Number of Shares Held
Mara & Co. Wall Street Station, Box 26, New York, N. Y.	2,170
The Home Insurance Company 59 Maiden Lane, New York, N. Y.	2,000
President and Fellows of Harvard College c/o William H. Claflin, Jr., Treas., 24 Milk Street, Boston 9, Mass.	2,000
Hare & Co., c/o Bank of New York, A/C 1, Bank Window, Church St. Annex, New York 15, N. Y.	1,580
Brown Brothers Harriman & Co. 59 Wall Street, New York 5, N. Y.	1,210
Hunter & Co. c/o Railway and Lt. Sec. Co., 49 Federal St., Boston, Mass.	1,200
King & Co. c/o City Bank Farmers Trust Co., 22 William Street, New York 15, N. Y.	1,086

Engineers' Exhibit No. 40.

Geo. L. Maxwell Tuxedo Park, New York	1,000
National Liberty Insurance Company of America, 59 Maiden Lane, New York N. Y.	1,000
The Continental Insurance Company 80 Maiden Lane, New York 8, N. Y.	1,000
Empire State Insurance Company Watertown, New York	1,000
H. A. Whitten & Co. c/o Chemical Bank & Trust Co., Personal Trust Depart., 165 Broadway, New York 15, N. Y.	941
Modern Woodmen of America An Illinois Corporation, Rock Island, Illinois	780
Pratt Bros. c/o Investors Record Corp., 90 Broad Street, New York 4, N. Y.	690
Sigler & Co. Central Hanover Bank & Tr. Co., Personal Trust Dept., 70 Broadway, New York 15, N. Y.	650
The Clark Foundation 149 Broadway, 25th Floor, New York 6, N. Y.	600

Engineers' Exhibit No. 41

Anderson and Company c/o Fidelity-Philadelphia Tr. Co., Trust Dept., 135 So. Broad St., Philadelphia, Penna.	500
Shaw & Co. 23 Wall Street, New York 8, N. Y.	500
Stone Farm Association c/o Investors Records Corp., 90 Broad Street, New York 4, N. Y.	500
St. Paul Fire & Marine Insurance Co. 111 West Fifth St., St. Paul 2, Minn.	500
	20,907

Engineers' Exhibit No. 41.

Twenty Largest Holders
of Record—October 31, 1945

ENGINEERS PUBLIC SERVICE COMPANY

$5.50 PREFERRED — $5.50 PREFERRED

Name and Address	Number of Shares Held
J. M. Forbes & Co. 614 Sears Bldg., Boston 8, Mass.	10,295
Pratt Bros. c/o Investors Record Corp., 90 Broad Street, New York 4, N. Y.	4,750

Engineers' Exhibit No. 41 (Cont'd)

Brown Brothers Harriman & Co. 59 Wall Street, New York 5, N. Y.	3,664
Hunter & Co. c/o Railway and Lt. Sec. Co., 49 Federal St., Boston, Mass.	2,178
Sigler & Co. c/o Central Hanover Bank & Trust Co., Personal Trust Dept., 70 Broadway, New York, N. Y.	2,178
H. A. Whitten & Co. Chemical Bank and Trust Co., Personal Trust Dept., 165 Broadway, New York 15, N. Y.	2,080
The Home Insurance Company 59 Maiden Lane, New York, N. Y.	2,000
Mrs. Clara D. Kellogg Langshaws, Queen Anne, Maryland	1,600
Anderson and Company c/o Fidelity-Philadelphia Tr. Co., 135 So. Broad Street, Philadelphia, Penna.	1,575
Fidelity and Casualty Co. of N. Y. 80 Maiden Lane, New York 8, N. Y.	1,500
The Amoskeag Co. c/o F. C. Dumaine, 199 Washington St., Rm. 601, Boston, Mass.	1,500

Engineers' Exhibit No. 41 (Cont'd)

Harris, Upham & Co. 14 Wall Street, New York 5, N. Y.	1,340
Hare & Co. c/o Bank of New York, A/C 1, Bank Window, Church St. Annex, New York 15, N. Y.	1,320
Niagara Fire Insurance Co. 80 Maiden Lane, New York 8, N. Y.	1,300
Touchstone & Co. c/o The Penna. Co., Packard Bldg., Philadelphia, Penna.	1,300
Atwell & Co. c/o U. S. Trust Co., 45 Wall St., New York, N. Y.	1,255
King & Co. c/o City Bank Farmers Trust Co., 22 William Street, New York 15, N. Y.	1,209
Boehm & Co. c/o Bankers Tr. Co., Box 704, Church St. Annex, New York, N. Y.	1,200
Catton & Co. c/o Second National Bank, Trust Department, 111 Franklin St., Boston, Mass.	1,110
Cyrus Y. Ferris c/o Stone & Webster and Blodget, Inc., 49 Federal St., Boston, Mass.	1,100
	44,454

Engineers' Exhibit No. 42.

Twenty Largest Holders
of Record—October 31, 1945

ENGINEERS PUBLIC SERVICE COMPANY

$5.00 PREFERRED — $5.00 PREFERRED

Name and Address	Number of Shares Held
Edwin S. Webster, Jr. c/o George W. Elwell, Accounting Service Corp., 49 Federal St., 8th Floor, Boston, Mass.	5,750
Frank Jay Gould 165 Broadway, Rm. 1308, New York, N. Y.	5,601
Brown Brothers Harriman & Co. 59 Wall Street, New York 5, N. Y.	3,555
H. A. Whitten & Co. Chemical Bank and Trust Co., Personal Trust Dept., 165 Broadway, New York 15, N. Y.	3,096
Sigler & Co. c/o Central Hanover Bank & Trust Co., Personal Trust Dept., 70 Broadway, New York, N. Y.	2,951

Engineers' Exhibit No. 42 (Cont'd)

Pratt Bros. c/o Investors Record Corp., 90 Broad Street, New York 4, N. Y.	2,800
Great American Insurance Co. 1 Liberty Street, New York, N. Y.	2,200
The Continental Insurance Company 80 Maiden Lane, New York 8, N. Y.	2,000
Indemnity Insurance Company of N. A. 1600 Arch Street, Philadelphia, Penna.	2,000
Carnegie Corporation of New York Rm. 1025, 522 Fifth Ave., New York 18, N. Y.	1,880
Hare & Co. c/o Bank of New York, A/C 1, Bank Window, Church St., Annex, New York 15, N. Y.	1,600
Hussey & Co., 'A Partnership' 7 Hanover Square, New York, N. Y.	1,429
Lerche & Co. c/o Bank of New York, —4—, 48 Wall Street, New York 15, N. Y.	1,400

Engineers' Exhibit No. 42 (Cont'd)

Atwell & Co. c/o U. S. Trust Co., 45 Wall Street, New York, N. Y.	1,300
King & Co. c/o City Bank Farmers Trust Co., 22 William Street, New York 15, N. Y.	1,300
Salkeld & Co. Bankers Trust Co., Box 704, Church St., Annex, New York 8, N. Y.	1,200
American Surety Co. of N. Y. 100 Broadway, New York, N. Y.	1,000
George R. Agassiz, Maximilian Agassiz & Henry Lee Shattuck, Trs. U/W Alexander Agassiz, Tr. Dept. 3395, Rhode Island Hospital Tr. Co., Providenee, R. I.	1,000
The Fidelity and Casualty Co. of N. Y. 80 Maiden Lane, New York 8, N. Y.	1,000
Schmidt & Co. Custody Clear. Div., Guaranty Trust Co. of N. Y., 140 Broadway, New York 15, N. Y.	1,000
	44,062

Engineers' Exhibit No. 43.

Twenty Largest Holders
of Record—October 31, 1945

ENGINEERS PUBLIC SERVICE COMPANY

COMMON — COMMON

Name and Address	Number of Shares Held
Pratt Bros., c/o Investors Record Corp., 90 Broad Street, New York 4, N. Y.	90,643
Kidder, Peabody & Co. Box 7, Boston, Mass.	79,432
Labb & Co. Box 2016, Boston 6, Mass.	60,000
Frank Jay Gould 165 Broadway, Rm. 1308, New York, N. Y.	48,105
Lehman Bros. 1 William Street, New York 4, N. Y.	46,700
Lake & Co. c/o Manufacturers Tr. Co., Personal Trust Dept., 55 Broad Street, New York, N. Y.	42,556

Engineers' Exhibit No. 43 (Cont'd)

Lazard Freres & Co. 44 Wall Street, New York 5, N. Y.	41,001
Whitney Stone & Edward C. Brewster Executors Est. Charles A. Stone, c/o Investors Record Corp., 90 Broad Street, New York 4, N. Y.	37,935
Edwin S. Webster, Jr. c/o Mr. George W. Elwell, Accounting Service Corp., 49 Federal St., Boston, Mass.	34,200
Bear, Stearns & Co. 1 Wall St., Room 1020, New York 5, N. Y.	25,335

ENGINEERS PUBLIC SERVICE—COMMON

Clarence J. Shearn, Tr. U/Dec. Trust by Stone & Webster, Incorporated, Dated 2/14/38 1 Wall Street, New York, N. Y.	23,335
Goodbody & Co. 115 Broadway, New York 6, N. Y.	21,488
Abraham & Co. 120 Broadway, New York 5, N. Y.	20,235

Engineers' Exhibit No. 43 (Cont'd)

J. M. Forbes & Co. 614 Sears Bldg., Boston 8, Mass.	19,131
Merrill Lynch, Pierce, Fenner & Beane 70 Pine Street, New York 5, N. Y.	18,655
Mrs. Jane de P. Webster c/o Mr. Elwell, c/o Accounting Service Corporation, 49 Federal St., Boston, Mass.	16,000
*Hirsch & Co. 25 Broad Street, New York 4, N. Y.	15,808
Margaret S. Winthrop c/o Investors Records Corp., 90 Broad Street, New York 4, N. Y.	15,563
Whitney Stone c/o Investors Records Corp., 90 Broad Street, New York 4, N. Y.	15,463
Thomas & Co. 2 Wall Street, New York, N. Y.	14,500
	686,085

* Includes 8,658 shares in the name of Hirsch, Lilienthal & Co.

Engineers' Exhibit No. 44.

ENGINEERS PUBLIC SERVICE COMPANY

Fifty of the Largest Holders of Common Stock Who Also Hold Preferred Stock, Eliminating Common Holders Only

As of October 31, 1945

Name and Address	Common	$5. Div. Pref'd	$5.50 Div. Pref'd	$6.00 Div. Pref'd
Abbott, Proctor & Paine, 14 Wall Street, New York 5, N. Y.	4,704			10
Amoskeag Co., c/o F. C. Dumaine, 199 Washington St., Rm. 601, Boston, Mass.	4,000		1,500	
*Bache & Co., 36 Wall Street, New York 5, N. Y.	12,175	8		
Baker, Weeks & Harden, 52 Wall Street, New York 5, N. Y.	9,737	50		
E. C. Bradlee, H. G. Bradlee & M. C. Bradlee Trs. U/D/T 12/31/21 for M. C. Bradlee for Life & Others, 84 State Street, Boston, Mass.	5,200		200	
Henry G. Bradlee, Jr., 49 Federal Street, Boston, Mass.	4,400		70	
Brown Bros. Harriman & Co., 59 Wall Street, New York, N. Y.	4,557	3,555	3,664	1,210
Burton, Cluett & Dana, 120 Broadway, New York 5, N. Y.	10,240	50		
Cudd & Co., c/o The Chase National Bank of New York, Personal Trust Dept., 11 Broad Street, New York 5, N. Y.	6,024			410
C. A. England & Co., Chemical Bank & Trust Co., 165 Broadway, New York 5, N. Y.	12,651	420	700	410
Fahnestock & Co., 65 Broadway, New York 6, N. Y.	5,293		10	

* Includes 8,829 shares of Common Stock in name of J. S. Bache & Co.

Engineers' Exhibit No. 44 (Cont'd)

Name and Address	Common	$5. Div. Pref'd	$5.50 Div. Pref'd	$6.00 Div. Pref'd
J. M. Forbes & Co., 614 Sears Bldg., Boston 8, Mass.	19,131	340	10,295	
W. Cameron Forbes, c/o J. M. Forbes & Co., 614 Sears Bldg., Boston 8, Mass.	5,828		175	
Goodbody & Co., 115 Broadway, New York 6, N. Y.	21,488	330	245	
Frank Jay Gould, 165 Broadway, Rm. 1808, New York, N. Y.	48,105	5,601	1,000	
Gunn & Co., c/o Bank Manhattan, 40 Wall Street, New York 15, N. Y.	5,150		3	340
Harris, Upham & Co., 14 Wall Street, New York 5, N. Y.	12,159	933	1,340	
R. Harte, E. S. Webster, Jr. & Chandler Hovey Tr. U/D/T 12/15/23 B/o Edwin S. Webster, Jr., et al., c/o Accounting Service Corp., 49 Federal St., Boston 7, Mass.	10,000		200	
Hayden, Stone & Co., Box 2317, Boston, Mass.	4,450		25	
H. Hentz & Co., 60 Beaver St., New York 4, N. Y.	5,766		40	
Hornblower & Weeks, 60 Congress Street, Boston, Mass.	5,094	150	75	30
Hurley & Co., c/o National City Bank, 55 Wall Street, New York, N. Y.	8,175		275	200
Hussey & Co. (A Partnership), 7 Hanover Sq., New York, N. Y.	7,492	1,429	269	190
E. F. Hutton & Co., 61 Broadway, New York 6, N. Y.	8,587	34		

Engineers' Exhibit No. 44 (Cont'd)

Name and Address	Common	$5. Div. Pref'd	$5.50 Div. Pref'd	$6.00 Div. Pref'd
Ince & Co., Guaranty Trust Co. of New York, Custody Collection Div., 140 Broadway, New York 15, N. Y.	4,200		220	100
Josephthal & Co., 120 Broadway, New York 5, N. Y.	4,754		10	
Kidder, Peabody & Co., Box 7, Boston, Mass.	79,432	403	270	50
Lake & Co., c/o Manufacturers Trust Co., Personal Trust Dept., 55 Broad St., New York, N. Y.	42,556	100	300	
Cyrus J. Lawrence & Sons, 115 Broadway, New York 6, N. Y.	4,937		160	80
Lazard Freres & Co., 44 Wall Street, New York 5, N. Y.	41,001	650	620	100
Lehman Bros., 1 William St., New York 4, N. Y.	46,700		780	100
Carl M. Loeb, Rhoades & Co., 61 Broadway, New York 6, N. Y.	8,210	50	245	95
Lowell & Co., 140 Broadway, New York 15, N. Y.	6,000	200		140
Merrill Lynch, Pierce, Fenner & Beane; 70 Pine Street, New York, N. Y.	18,655	50	190	140
Montgomery, Scott & Co., 120 Broadway, New York 5, N. Y.	13,188			30
Paine, Webber, Jackson & Curtis, 25 Broad Street, New York 4, N. Y.	7,083	195	10	
Elizabeth B. Perry, 112 Dudley St., Brookline, Mass.	4,400		30	
Pratt Bros., c/o Investors Records Corp., 90 Broad Street, New York 4, N. Y.	90,643	2,800	4,750	690

Engineers' Exhibit No. 44 (Cont'd)

Name and Address	Common	$5. Div. Pref'd	$5.50 Div. Pref'd	$6.00 Div. Pref'd
Reynolds & Co., 120 Broadway, New York, N. Y.	9,377			10
#Sartorius & Co., 39 Broadway, New York 6, N. Y.	12,330			50
Shields & Co., 44 Wall Street, New York 5, N. Y.	3,910	100		
Sigler & Co., c/o Central Hanover Bank & Tr. Co., Personal Trust Dept., 70 Broadway, New York 15, N. Y.	7,393	2,951	2,178	650
Smith Barney & Co., 14 Wall Street, New York 5, N. Y.	12,570	310	210	10
Stern, Lauer & Co., 30 Pine Street, New York 5, N. Y.	9,650	10	70	220
Whitney Stone, c/o Investors Records Corp., 90 Broad Street, New York 4, N. Y.	15,463		250	
Thomson & McKinnon, 11 Wall Street, New York 5, N. Y.	10,454		85	
Tucker, Anthony & Co., 120 Broadway, New York 5, N. Y.	7,880	460	235	365
Edwin S. Webster, Jr., c/o Accounting Service Corp., 49 Federal Street, Boston, Mass.	34,200	5,750	20	
Mrs. Jane DeP. Webster, c/o Accounting Service Corp., 49 Federal Street, Boston, Mass.	16,000			100
Margaret S. Winthrop, c/o Investors Records Corp., 90 Broad Street, New York, N. Y.	15,563	500	100	10
	766,955	27,429	30,819	5,740

Includes 975 shares of Common Stock in name of Sartorius Engel & Co.

Engineers' Exhibit No. 45.

ENGINEERS PUBLIC SERVICE COMPANY—COMMON STOCK

Balances as of June 30, 1945

Name and Address	Shares
Abbott, Proctor & Paine 14 Wall Street, New York 5, N. Y.	5,903
Abraham & Co. 120 Broadway, New York 5, N. Y.	11,075
Auchincloss, Parker & Redpath 52 Wall Street, New York 5, N. Y.	1,585
*Bache & Co. 36 Wall Street, New York 5, N. Y.	13,477
Bacon, Stevenson & Co. 39 Broadway, New York 6, N. Y.	500
Baer Bros. 270 Park Ave., New York, N. Y.	200
Baker, Weeks & Harden 52 Wall Street, New York 5, N. Y.	11,847
Barstow Campbell & Co. 65 Pine Street, New York, N. Y.	1,000
Bateman, Eichler & Co. 453 So. Spring Street, Los Angeles 13, Calif.	2,000

*Includes 11,530 shares name of J. S. Bache & Co.

Engineers' Exhibit No. 45 (Cont'd)

Bear, Stearns & Co. 1 Wall Street, Rm. 1020, New York 5, N. Y.	22,990
Bendix, Luitweiler & Co. 52 Wall Street, New York 5, N. Y.	2,730
James E. Bennett & Co. 141 W. Jackson Blvd., Chicago 4, Illinois.	2,530
Biddel, Whelen & Co. 1606 Walnut St., Philadelphia 2, Pa.	340
Bioren & Co. 1508 Walnut St., Philadelphia 2, Pa.	310
Bond, McEnany & Co. 60 Beaver St., New York 4, N. Y.	490
Elmer H. Bright & Co. 84 State St., Boston 9, Mass.	2,456
Alex Brown & Sons 135 E. Baltimore St., Baltimore 3, Md.	1,000
Brown Brothers, Harriman & Co. 59 Wall St., New York 5, N. Y.	3,586
Brown Brothers, Harriman & Co. 10 Post Office Square, Boston, Mass.	252
Richard J. Buck & Co. 39 Broadway, New York 6, N. Y.	500

Engineers' Exhibit No. 45 (Cont'd)

Burgess & Leith 30 State St., Boston 9, Mass.	560
W. E. Burnet & Co. 11 Wall Street, New York 5, N. Y.	800
Burnham & Co. 30 Pine Street, New York 5, N. Y.	3,700
Burren & Co. 230 Park Ave., Rm. 1911, New York, N. Y.	1,000
Burton, Cluett & Dana 120 Broadway, New York 5, N. Y.	16,530
Frank B. Cahn & Co. Equitable Bldg., Baltimore 3, Md.	180
Carlisle & Jacquelin 120 Broadway, New York 5, N. Y.	503
Carreau & Co. 63 Wall Street, New York 5, N. Y.	205
H. Cassel & Co. 61 Broadway, New York 6, N. Y.	124
Clark, Dodge & Co. 51 Wall Street, New York 5, N. Y.	1,864
Clement, Curtis & Co. 134 So. La Salle St., Chicago 3, Illinois	525

Engineers' Exhibit No. 45 (Cont'd)

Henry Clews & Co. 9 Broadway, New York 4, N. Y.	425
Jacques Coe & Co. 39 Broadway, New York 6, N. Y.	250
Cohen, Simonson & Co. 120 Broadway, New York 5, N. Y.	1,450
Davenport & Co. Box 1377, Richmond 11, Virginia	1,328
Morgan, Davis & Co. 60 Beaver St., New York 6, N. Y.	671
R. L. Day & Co. 111 Devonshire St., Boston, Mass.	220
DeCoppet & Doremus 63 Wall Street, New York 5, N. Y.	224
Delafield & Delafield 14 Wall Street, New York 5, N. Y.	1,805
Dominick & Dominick 14 Wall Street, New York 5, N. Y.	2,726
Drysdale & Co. 71 Broadway, New York 6, N. Y.	2,181
Francis I. duPont & Co. 1 Wall Street, New York 5, N. Y.	2,504

Engineers' Exhibit No. 45 (Cont'd)

Eastman, Dillon & Co. 15 Broad St., New York 5, N. Y.	1,191
Eisile & King, Libaire, Stout & Co. 50 Broadway, New York 4, N. Y.	158
Emanuel & Co. 52 William St., New York 5, N. Y.	2,400
Ernst & Co. 120 Broadway, New York 5, N. Y.	1,100
Estabrook & Co. 15 State St., Boston, Mass.	221
Fahnestock & Co. 65 Broadway, New York 6, N. Y.	5,163
Foster & Adams 120 Broadway, New York 5, N. Y.	352
Fox O'Hara & Co. 60 Broad Street, New York 4, N. Y.	365
Friedman, Brokaw & Samish 711 St. Charles Street, St. Louis 1, Mo.	1,850
Glore, Forgan & Co. 40 Wall Street, New York 3, N. Y.	1,100
Goldman, Sachs & Co. 30 Pine St., New York 5, N. Y.	2,834

Engineers' Exhibit No. 45 (Cont'd)

Goodbody & Co. 115 Broadway, New York 6, N. Y.	24,476
Cranbery, Maranche & Lord 65 Broadway, New York 6, N. Y.	248
Gruntal & Co. 30 Broad Street, New York 4, N. Y.	2,260
Gude, Winmill & Co. 1 Wall St., New York, N. Y.	4,110
Halle & Stieglitz 23 Broad St., New York 4, N. Y.	6,142
Hallgarten & Co. 44 Wall St., New York 5, N. Y.	1,140
Harris, Upham & Co. 14 Wall St., New York 5, N. Y.	10,819
Ira Haupt & Co. 111 Broadway, New York 6, N. Y.	4,402
Hayden, Stone & Co. Box 2317, Boston, Mass.	5,477
Hecker & Co. Liberty Tr. Bldg., Broad & Arch Sts., Philadelphia 7, Pa.	405

Engineers' Exhibit No. 45 (Cont'd)

Hemphill Noyes & Co. 15 Broad Street, New York 5, N. Y.	1,090
H. Hentz & Co. 60 Beaver St., New York 4, N. Y.	8,361
Herzfeld & Stern 30 Broad Street, New York 4, N. Y.	574
J. J. B. Hilliard & Son 419 W. Jefferson St., Louisville 2, Ky.	350
Hirsch & Co. 25 Broad St., New York, N. Y.	7,032
Hirsch, Lilienthal & Co. 25 Broad Street, New York 4, N. Y.	9,737
Hoppin Bros. & Co. 120 Broadway, New York 5, N. Y.	440
Hornblower & Weeks 60 Congress St., Boston, Mass.	4,668
E. F. Hutton & Co. 61 Broadway, New York 6, N. Y.	10,207
W. E. Hutton & Co. 14 Wall St., New York 5, N. Y.	949
Jesup & Lamont 26 Broadway, New York 4, N. Y.	325

Engineers' Exhibit No. 45 (Cont'd)

Josephthal & Co. 120 Broadway, New York 5, N. Y.	5,057
Kean, Taylor & Co. 14 Wall St., New York 5, N. Y.	1,753
A. M. Kidder & Co. 1 Wall St., New York 5, N. Y.	7,124
Kidder, Peabody & Co. Box 7, Boston, Mass.	79,997
Laidlaw & Co. 26 Broadway, Rm. 150, New York 4, N. Y.	1,596
Laird & Co. 61 Broadway, New York, N. Y.	978
Laird Bissell & Meeds 120 Broadway, New York 5, N. Y.	1,667
Lehman Bros. 1 William St., New York 4, N. Y.	36,525
Lamson Bros. & Co. 141 W. Jackson Blvd., Chicago 4, Illinois	544
Cyrus J. Lawrence & Sons 115 Broadway, New York 6, N. Y.	5,237
Lazard Freres & Co. 44 Wall St., New York 5, N. Y.	33,701

Engineers' Exhibit No. 45 (Cont'd)

Adolph Lewisohn & Sons 61 Broadway, New York 6, N. Y.	202
Lober Brothers & Co. 30 Broad Street, New York 4, N. Y.	200
Lockwood, Peck & Co. 111 Broadway, New York 6, N. Y.	400
Carl M. Loeb, Rhoades & Co. 61 Broadway, New York, N. Y.	8,677
Mabon & Co. 115 Broadway, New York 6, N. Y.	700
Mallory, Adee & Co. 120 Broadway, New York 5, N. Y.	550
Peter P. McDermott & Co. 65 Broadway, New York, N. Y.	758
McDonnell & Co. 120 Broadway, New York 5, N. Y.	1,445
Merrill, Lynch, Pierce, Fenner & Beane 70 Pine Street, New York 5, N. Y.	19,663
Mitchell, Hutchins & Co. 231 South LaSalle Street, Chicago 4, Illinois	2,336
Mixter & Co. 82 Devonshire Street, Boston, Mass.	3,104

Engineers' Exhibit No. 45 (Cont'd)

Montgomery, Scott & Co. 120 Broadway, New York 5, N. Y.	14,101
Moors & Cabot 111 Devonshire Street, Boston 9, Mass.	2,020
John Muir & Co. 39 Broadway, New York 6, N. Y.	380
Newborg & Co. 30 Broad Street, New York 4, N. Y.	3,433
O'Connell & Co. 49 Federal Street, Boston, Mass.	306
Jas. H. Oliphant & Co. 61 Broadway, New York 6, N. Y.	6,260
Orvis Brothers & Co. 14 Wall Street, New York, N. Y.	1,667
Paine, Webber, Jackson & Curtis 25 Broad Street, New York 4, N. Y.	5,970
Parrish & Co. 40 Wall Street, New York 5, N. Y.	370
Penington, Colket & Co. 70 Pine Street, New York 5, N. Y.	310
Pershing & Co. 120 Broadway, New York 5, N. Y.	832

Engineers' Exhibit No. 45 (Cont'd)

R. W. Pressprich & Co. 68 William Street, New York 5, N. Y.	300
Pyne, Kendall & Hollister 52 Wall Street, New York 5, N. Y.	3,808
Rakestraw, Betz & Co. 123 South Broad Street, Philadelphia, Pennsylvania.	150
Reynolds & Co. 120 Broadway, New York 5, N. Y.	10,780
C. B. Richard & Co. 60 Beaver Street, New York 4, N. Y.	502
F. P. Ristine & Co. 15 Broad Street, New York, N. Y.	576
Riter & Co. 40 Wall Street, New York 5, N. Y.	150
L. F. Rothschild & Co. 120 Broadway, New York 5, N. Y.	5,260
Sartorius & Co. 39 Broadway, New York 6, N. Y.	6,230
Sartorius, Engel & Co. 39 Broadway, New York 6, N. Y.	975
Schirmer, Atherton & Co. 50 Congress Street, Boston 3, Mass.	2,493

Engineers' Exhibit No. 45 (Cont'd)

Scott & Stringfellow Box 1575, Richmond 13, Virginia.	555
Seasongood & Haas 63 Wall Street, New York, N. Y.	400
J. & W. Seligman & Co. 65 Broadway, New York 6, N. Y.	2,340
Shaskan & Co. 40 Exchange Place, New York 5, N. Y.	2,400
Shearson, Hammill & Co. 14 Wall Street, New York 5, N. Y.	3,443
Shields & Co. 44 Wall Street, New York 5, N. Y.	3,525
I. M. Simon & Co. 315 North Fourth Street, St. Louis 2, Missouri.	1,790
Smith, Barney & Co. 14 Wall Street, New York 5, N. Y.	16,340
J. W. Sparks & Co. 50 Broadway, New York 4, N. Y.	300
A. L. Stamm & Co. 120 Broadway, New York 5, N. Y.	6,550
Steiner, Rouse & Co. 25 Broad Street, New York 4, N. Y.	4,182

Engineers' Exhibit No. 45 (Cont'd)

Stern, Lauer & Co. 30 Pine Street, New York 5, N. Y.	12,750
Stillman, Maynard & Co. 61 Broadway, New York 6, N. Y.	800
Strauss, Phillips & Co. 120 Broadway, New York 5, N. Y.	700
Sutro Bros. & Co. 120 Broadway—Room 1419, New York 5, N. Y.	2,280
James B. Taylor & Co. 48 Wall Street, New York 5, N. Y.	340
Thomson & McKinnon 11 Wall Street, New York 5, N. Y.	11,613
Tobey & Kirk 52 Wall Street, New York 5, N. Y.	3,835
Toerge & Schiffer New York 5, N. Y. 40 Wall Street,	600
Townsend, Dabney & Tyson 30 State Street, Boston, Mass.	634
Spencer Trask & Co. 25 Broad Street, New York 4, N. Y.	1,271
Tucker, Anthony & Co. 120 Broadway, New York 5, N. Y.	7,387

Engineers' Exhibit No. 45 (Cont'd)

Lawrence Turnure & Co., Blyth & Bonner 50 Broadway, New York 4, N. Y.	2,660
Van Alstyne, Noel & Co. 52 Wall Street, New York, N. Y.	400
Vilas & Hickey 49 Wall Street, New York 5, N. Y.	1,100
Wagner, Stott & Co. 11 Wall Street, New York 5, N. Y.	1,000
Ward, Gruver & Co. 40 Exchange Place, New York 5, N. Y.	225
Watling, Lerchen & Co. Ford Building—3rd Floor, Detroit 26, Michigan	500
T. L. Watson & Co. 40 Wall Street, New York 5, N. Y.	661
Wellington & Co. 120 Broadway, New York 5, N. Y.	400
Wertheim & Co. 120 Broadway, New York, N. Y.	1,400
White, Weld & Co. 40 Wall Street, New York 5, N. Y.	2,546
H. N. Whitney, Goadby & Co. 49 Wall Street, New York 5, N. Y.	1,200

Engineers' Exhibit No. 45 (Cont'd)

J. R. Williston & Co. 115 Broadway, New York 6, N. Y.	820
Robert Winthrop & Co. 20 Exchange Place, New York 5, N. Y.	941
Dean Witter & Co. 14 Wall Street, New York, N. Y.	1,298
Yarnall & Co. 1526 Walnut Street, Philadelphia, Pennsylvania	916
	623,675

Engineers' Exhibit No. 47.

Schedule A

p. 1791a ENGINEERS' EXHIBIT No. 47.

Page 1

Engineers Public Service Company
(Incorporated)

Pro Forma Balance Sheet, as at June 30, 1945 Giving Effect to the Consummation of Parts I and II of the Plan as Proposed

* asterisk denotes decrease.
Numbered items refer to pro forma entries appended hereto.

	Actual	Adjustments	Pro Forma
ASSETS			
Investments:			
Investments in subsidiary companies:			
Common stocks:			
El Paso Electric Co.	$ 6,645,389	$ 6,645,389*(6)	$ —0—
Gulf States Utilities Co.	19,914,347	19,914,347*(3)	—0—
Virginia Electric and Power Co.	27,762,261	—0—	27,762,261
The Western Public Service Co.	1,233,200	1,233,200*(2)	—0—
	55,555,197	27,792,936*	27,762,261
Note—The Western Public Service Co.	508,800	508,800*(2)	—0—
	56,063,997	28,301,736*	27,762,261
Less reserve for depreciation in value of investments	3,160,535	3,160,535*(2)(7)	—0—
	52,903,462	25,141,201*	27,762,261
Miscellaneous investments	6,079	—0—	6,079
Total investments	52,909,541	25,141,201*	27,768,340
Special fund	92,000	92,000*(2)	—0—
Current assets:			
Cash in banks and on hand	6,935,768	11,173,323*(1-5)	412,445
United States treasury securities, at cost	4,650,000		
Accounts receivable	401	—0—	401
Interest receivable	3,971	—0—	3,971
Total current assets	11,590,140	11,173,323*	416,817
Deferred charges	246,688	—0—	246,688
	$64,838,369	$36,406,524*	$28,431,845
LIABILITIES			
Capital stock:			
Preferred stock	$39,245,500	$39,245,500*(5)	$ —0—
Common stock (a)	1,909,968	—0—	1,909,968
Total capital stock	41,155,468	39,245,500*	1,909,968
Long-term debt:			
Contract payments	81,812	—0—	81,812
Note payable	—0—	1,500,000 (4)	1,500,000
Total long-term debt	81,812	1,500,000	1,581,812
Current liabilities:			
Note payable, due within one year	—0—	1,500,000 (4)	1,500,000
Accounts payable	999	—0—	999
Taxes accrued	331,359	—0—	331,359
Other current liabilities	218	—0—	218
Total current liabilities	332,576	1,500,000	1,832,576
Reserve for taxes on income of prior years	15,450	—0—	15,450
Surplus:			
Capital surplus	16,158,041	3,726,854*(6-7)	12,431,187
Earned surplus (since May 31, 1938)	7,095,022	3,565,830 (1)(3)	10,660,852(b)
	$64,838,369	$36,406,524*	$28,431,845

Contingent liability, pro forma:

Redemption premiums up to $3,204,795 may be payable to the preferred stockholders if the Securities and Exchange Commission and the Courts so determine. It is the opinion of Company counsel that no such redemption premium is payable.

(a) Represented by 1,909,968 shares of $1 par value. Authorized 1,909,968 shares.

(b) Engineers will covenant that it will not pay any dividends on its common stock until the $3,000,000 note payable is fully paid.

Engineers' Exhibit No. 47 (Cont'd)

Schedule A

Page 2

(1792a) Engineers' Exh. No. 47 (Cont'd)

Engineers Public Service Company
(Incorporated)

Pro Forma Entries, Giving Effect to the Consummation of Parts I and II of the Plan as Proposed

—1—

Dr. Cash	$ 1,515,545	
Cr. Earned surplus		$ 1,515,545

Estimated cash from income, July 1 to December 31, 1945, inclusive.

—2—

Dr. Cash	1,592,000	
Dr. Reserve for depreciation in value of investments	242,000	
Cr. Investment in common stock of The Western Public Service Company		1,233,200
Cr. Investment in note of The Western Public Service Company		508,800
Cr. Special Fund		92,000

Sell investment in securities of The Western Public Service Company for $1,500,000 cash and release special funds originally deposited at time of sale of securities of The Western Public Service Company (Maryland).

—3—

Dr. Cash	21,964,632	
Cr. Investment in common stock of Gulf States Utilities Company		19,914,347
Cr. Earned surplus		2,050,285

Sell common stock of Gulf States Utilities Company to common stockholders under rights.
1,909,968 shares @ $11.50=$21,964,632

—4—

Dr. Cash	3,000,000	
Cr. Note payable, long-term debt		1,500,000
Cr. Note payable, due within one year		1,500,000

Borrow $3,000,000 on a note payable to bank bearing interest at the rate of 1½% per annum, payable $750,000 semi-annually.

—5—

Dr. Preferred stock	39,245,500	
Cr. Cash		39,245,500

Liquidate preferred stock at $100 per share.

—6—

Dr. Capital surplus	6,645,389	
Cr. Investment in common stock of El Paso Electric Co.		6,645,389

Distribute as a partial dividend in liquidation from the capital of the Company the common stock of El Paso Electric Company pro rata to common stockholders

—7—

Dr. Reserve for depreciation in value of investments	2,918,535	
Cr. Capital surplus		2,918,535

Transfer unused portion of reserve for depreciation in value of investments to capital surplus

Engineers' Exhibit No. 47 (Cont'd)

Schedule A

Page 3

Engineers' Exh. No. 47 (cont'd) (p. 1793a)

Engineers Public Service Company
(Incorporated)

Pro Forma Income Statement for 12 Months Ended June 30, 1945 Giving Effect to the Consummation of Parts I and II of the Plan as Proposed

*denotes decrease.

Income	Actual	Adjustments (1)	Pro Forma
From subsidiary companies:			
Common dividends	$5,091,739	$2,159,674*	$2,932,065
Preferred dividends	24,999	24,999*	—0—
Interest	48,440	48,440*	—0—
From miscellaneous investments	534,155	534,155*	—0—
Miscellaneous revenue	21,568	21,568*	—0—
Total income	5,720,901	2,788,836*	2,932,065
Expenses, taxes and interest			
Expenses	256,779	124,779*	132,000
Taxes—Federal income (a)	259,880	95,480*	164,400
—Other	15,995	105 (2)	16,100
Interest	—0—	45,000 (3)	45,000
Total expenses, taxes and interest	532,654	175,154*	357,500
Balance for dividends and surplus	5,188,247	2,613,682*	2,574,565
Preferred dividends	2,119,092	2,119,092*	—0—
Balance for common stock and surplus	$3,069,155	$ 494,590*	$2,574,565

(a) The Company does not consider that it has any liability for excess profits taxes.

(1) Elimination of nonrecurring income, expenses, taxes and preferred dividends except as noted.

(2) Increase due to New York state and city taxes.

(3) Interest at 1½% per annum on proposed $3,000,000 bank loan.

Engineers Public Service Company (Incorporated) and Subsidiary Companies Pro Forma Balance Sheet Consolidated as at June 30, 1945 Giving Effect to the Consummation of Parts I and II of the Plan as Proposed and to Income Tax Adjustments Made on the Books of Virginia in August, 1945

*denotes decrease.

ASSETS	Actual	El Paso	Gulf States	Western Public Service	Adjustments	Pro Forma
Plant and other investments:						
Utility plant	$213,750,763	$12,466,430*	$64,476,718*	$1,436,759*	$ 2,570,000 (2)	$137,940,856(a)
Investments in subsidiary companies	24,752,442	—0—	—0—	—0—	12,231,119*(3, 4, 7)	12,521,323(b)
Other physical property, less reserve	1,922,754	42,850*	118,704*	—0—	—0—	1,761,200
Investment in associated company	63,295	4,435*	18,410*	470*	39,980*(9)	—0—
Excess profits tax refund bonds	650,858	35,797*	—0—	—0—	—0—	615,061
Total plant and other investments	241,140,112	12,549,512*	64,613,832*	1,437,229*	9,701,099*	152,838,440
Special funds	1,112,266	1,020,266*	—0—	—0—	92,000*(3)	—0—
Current assets:						
Cash in banks and on hand	17,770,223	533,265*	3,263,028*	296,001*	11,330,343*(2-6, 9)	8,769,586
United States treasury securities, at cost	10,536,500	2,017,500*	2,075,000*	22,000*		
Special deposits	65,355	15,002*	2,500*	—0—	—0—	47,853
Notes and warrants receivable	5,503	—0—	1,883*	—0—	—0—	3,620
Accounts receivable, less reserves	4,052,265	226,693*	1,189,019*	9,862*	—0—	2,626,691
Materials and supplies, less reserves	2,331,975	142,123*	675,803*	14,483*	—0—	1,499,566
Prepayments	1,054,904	63,480*	181,862*	2,143*	—0—	807,419
Total current assets	35,816,725	2,998,063*	7,389,095*	344,489*	11,330,343*	13,754,735
Deferred debits:						
Unamortized debt discount and expense	3,441,367	—0—	—0—	—0—	—0—	3,441,367
Post-war refund of Federal excess profits tax	1,039,104	29,348*	137,180*	—0—	219,755*(1)	652,821
Capital stock expense	566,532	—0—	257,987*	—0—	—0—	308,545
Other deferred debits	720,638	13,774*	79,429*	243*	—0—	627,192
Total deferred debits	5,767,641	43,122*	474,596*	243*	219,755*	5,029,925
	$283,836,744	$16,610,963*	$72,477,523*	$1,781,961*	$21,343,197*	$171,623,100

See explanatory notes and detail of adjustments on following pages to this Schedule.

Schedule B

Page 1

Engineers Public Service Company (Incorporated) and Subsidiary Companies Pro Forma Balance Sheet Consolidated as at June 30, 1945 Giving Effect to the Consummation of Parts I and II of the Plan as Proposed and to Income Tax Adjustments Made on the Books of Virginia in August, 1945

*denotes decrease.

LIABILITIES	Actual	El Paso	Gulf States	Western Public Service	Adjustments	Pro Forma
Capital stock:						
Preferred stock	$ 39,245,500	$ —0—	$ —0—	$ —0—	$39,245,500* (6)	$ —0—
Common stock (c)	1,909,968	—0—	—0—	—0—	—0—	1,909,968
Subsidiary companies:						
Preferred stock	42,447,100	1,500,000*	12,000,000*	—0—	—0—	28,947,100
Premium and discount on preferred stock	340,620	33,750*	306,870*	—0—	—0—	—0—
Total capital stock	83,943,188	1,533,750*	12,306,870*	—0—	39,245,500*	30,857,068
Long-term debt:						
Contract payments	81,812	—0—	—0—	—0—	—0—	81,812
Note payable	—0—	—0—	—0—	—0—	1,500,000 (5)	1,500,000
Subsidiary companies:						
Bonds	92,843,000	6,500,000*	27,300,000*	43,000*	—0—	59,000,000
Notes payable	10,435,000	140,000*	—0—	508,800*	626,200* (2, 3)	9,160,000
Total long-term debt	103,359,812	6,640,000*	27,300,000*	551,800*	873,800	69,741,812
Current liabilities:						
Bonds and notes payable, due within one year	2,742,000	140,000*	—0—	182,000*	1,500,000 (5)	3,920,000
Accounts payable	1,607,496	101,159*	563,471*	9,885*	—0—	932,981
Customers' deposits	1,228,829	135,113*	176,369*	12,091*	—0—	905,256
Taxes accrued	11,429,437	1,048,759*	4,331,556*	42,580*	1,268,122* (1, 2)	4,738,420
Interest accrued	1,025,421	39,272*	192,181*	5,831*	—0—	788,137
Other current liabilities	465,159	1,300*	16,714*	100*	18,459* (1)	428,586
Total current liabilities	18,498,342	1,465,603*	5,280,291*	252,487*	213,419	11,713,380
Deferred credits:						
Unamortized premium less expense on bonds	1,350,836	159,873*	951,913*	—0—	—0—	239,050
Customers' advances for construction	699,358	3,376*	276,504*	—0—	—0—	419,478
Other deferred credits	364,085	263*	44,103*	15*	—0—	319,704
Total deferred credits	2,414,279	163,512*	1,272,520*	15*	—0—	978,232
Reserves:						
Depreciation	32,957,634	2,162,199*	11,859,127*	277,360*	1,633,600	20,292,348
Amortization of plant acquisition adjustments	3,028,818	—0—	807,553*	—0—	—0—	2,221,265 (a)
Injury and damage claims	513,945	14,909*	141,660*	9,554*	—0—	347,822
Taxes on income of prior years	1,668,283	320,235*	139,752*	16,831*	—0—	1,191,465
Other	430,486	—0—	—0—	—0—	194,590* (2)	235,896
Total reserves	38,599,166	2,497,343*	12,948,092*	303,945*	1,439,010	24,288,796
Parent Company's reserve for depreciation in value of investments in subsidiaries	3,160,535	—0—	—0—	—0—	3,160,535* (3, 8)	—0—
Capital surplus	16,158,041	—0—	—0—	—0—	301,816* (7, 8, 10)	15,856,225
Earned surplus, minority interest	18,352	—0—	—0—	—0—	6,787 (1, 2)	25,139
Earned surplus 5/31/38, Parent Company's proportion	3,661,847	78,189*	158,620*	—0—	3,425,038* (10)	—0—
Earned surplus since 5/31/38, Parent Company's proportion	13,991,551	383,874*	2,110,005*	61,714*	6,694,859 (1, 2, 4)	18,130,797 (d)
Common stock, minority interests	31,651	3,848,692*	11,101,125*	612,000*	15,561,817 (3, 4, 7)	31,651
	$283,836,744	$16,610,963*	$72,477,523*	$1,781,961*	$21,343,197*	$171,623,100

See explanatory notes on page 3 to Exhibit B and detail of adjustments on pages 4 and 5 to Exhibit B.

Contingent liability, pro forma:

Redemption premiums up to $3,204,795 may be payable to the Engineers preferred stockholders if the Securities and Exchange Commission and the Courts so determine. It is the opinion of Company counsel that no such redemption premiums is payable.

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Engineers' Exhibit No. 47 (Cont'd)

Schedule B

(p. 1796a) Engineers' Exhibit No. 47 (Cont'd)

Page 3

Engineers Public Service Company (Incorporated) and Subsidiary Companies

Explanatory Notes to Pro Forma Balance Sheet Consolidated as at June 30, 1945 Giving Effect to the Consummation of Parts I and II of the Plan as Proposed and to Income Tax Adjustments Made on the Books of Virginia in August, 1945

(a) Utility plant (including intangibles) is stated on the following basis:

(1) At original cost for electric, gas and common properties for which studies have been completed plus plant acquisition adjustments of $11,237,468	$132,427,009
(2) At cost of construction and/or acquisition based on cash paid and par or stated value of securities issued therefor, for gas property for which original cost studies are required but not completed (extension to September 30, 1945 for the completion of such studies has been granted by State regulatory body)	5,513,847
Total	$137,940,856

Provision is being made, pursuant to orders of regulatory commissions, for the amortization of plant acquisition adjustments shown under (1) above by charges to income over 15-year periods commencing in 1943 and 1944.

While studies relating to the original cost of properties included under (2) above are not complete, it is not expected that any material adjustments will be required in connection with the reclassification of such properties on the basis of original cost.

(b) Represents the excess of the recorded gross investment in shares of Virginia over the adjusted net assets applicable to such shares at dates of acquisition.

Virginia common shares owned by Engineers	2,932,065
Capital represented by such shares	$14,546,228
Acquired surplus	694,711
Total	15,240,939
Cost to Engineers	27,762,262
Excess	$12,521,323

(c) Represented by 1,909,968 shares of $1 par value. Authorized 1,909,968 shares.

(d) Approximately $6,034,000 of the pro forma consolidated earned surplus is not available for the payment of dividends on common stock of Virginia due to covenants made by such company restricting the payment of dividends on common stock, and the parent company earned surplus of $10,660,852 included in the pro forma consolidated earned surplus would not be available for the payment of dividends on its common stock until the $3,000,000 note payable is paid in full.

There is a contingent asset of approximately $3,740,000, representing possible refunds of Federal income and excess profits taxes.

Engineers' Exhibit No. 47 (Cont'd)

Schedule B

(P. 1797a) Engineers Exh. No. 47 (Cont'd)

Page 4

Engineers Public Service Company (Incorporated) and Subsidiary Companies

Detail of Adjustments to Pro Forma Balance Sheet Consolidated as at June 30, 1945 Giving Estimated Effect to the Consummation of Parts I and II of the Plan as Proposed and to Income Tax Adjustments Made on the Books of Virginia in August, 1945

—1—		
Dr. Taxes accrued	$ 3,004,512	
Dr. Other current liabilities	18,459	
Cr. Post-war refund of Federal excess profits tax		$ 219,755
Cr. Earned surplus, minority interest		6,067
Cr. Earned surplus since 5/31/38, Parent Company's proportion		2,797,149
Restore to earned surplus a portion of overaccrual for 1944 Federal income taxes of Virginia and Citizens Rapid Transit Corporation.		
—2—		
Dr. Utility plant	2,570,000	
Dr. Cash	1,318,545	
Dr. Subsidiary companies notes payable	1,135,000	
Dr. Other reserves	194,590	
Cr. Taxes accrued		1,736,390
Cr. Reserve for Depreciation		1,633,600
Cr. Earned surplus, minority interest		720
Cr. Earned surplus since 5/31/38, Parent Co.'s proportion		1,847,425
Estimated cash transactions of Engineers and Virginia from July 1 to December 31, 1945, inclusive.		
—3—		
Dr. Cash	1,592,000	
Dr. Parent Company's reserve for depreciation in value of investments in subsidiaries	242,000	
Cr. Investments in subsidiary companies (excess)		621,200
Cr. Special funds		92,000
Cr. Common stock, minority interests		612,000
Cr. Subsidiary companies notes payable		508,800
Sale by Engineers of investment in securities of The Western Public Service Company for $1,500,000 cash and release of special funds originally deposited at time of sale of securities of The Western Public Service Company (Maryland).		
—4—		
Dr. Cash	21,964,632	
Cr. Investments in subsidiary companies (excess)		8,813,222
Cr. Common stock, minority interests		11,101,125
Cr. Earned surplus since 5/31/38 Parent Co.'s proportion		2,050,285
Sale by Engineers of investment in common stock of Gulf States to common stockholders under rights. 1,909,968 shares @ $11.50=$21,964,632		
—5—		
Dr. Cash	3,000,000	
Cr. Note payable, long-term debt		1,500,000
Cr. Note payable, due within one year		1,500,000
Borrowing by Engineers of $3,000,000 on a note payable to bank, bearing interest at the rate of 1½% per annum payable $750,000 semi-annually.		
—6—		
Dr. Preferred stock	39,245,500	
Cr. Cash		39,245,500
Liquidation of Engineers preferred stock at $100 per share.		

—7—

Engineers' Exhibit No. 47 (Cont'd)

(p. 1798a) Engineers Exhibit No. 47 (cont'd)

Schedule B

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—7—

Dr. Capital surplus	6,645,389	
Cr. Investments in subsidiary companies (excess)		2,796,697
Cr. Common stock, minority interests		3,848,692

Distribution by Engineers as a partial dividend in liquidation from the capital of the Company the common stock of El Paso Electric Company pro rata to common stockholders.

—8—

Dr. Parent Company's reserve for depreciation in value of investments in subsidiaries	2,918,535	
Cr. Capital surplus		2,918,535

Transfer to capital surplus of unused portion of Engineers reserve for depreciation in value of investments in subsidiaries.

—9—

Dr. Cash	39,980	
Cr. Investment in associated company		39,980

Sale by Virginia of its investment in Epsco, Inc. for book value.

—10—

Dr. Earned surplus 5/31/38, Parent Co.'s proportion	3,425,038	
Cr. Capital surplus		3,425,038

Transfer to capital surplus of Engineer's proportion of consolidated earned surplus at May 31, 1938.

Engineers Public Service Company (Incorporated) and Subsidiary Companies
Pro Forma Income Statement for 12 Months Ended June 30, 1945 Giving Effect to the Consummation of Parts I and II of the Plan as Proposed

Combined Income Statement of Subsidiary Companies

* denotes red figure.

	Actual	El Paso	Gulf States	Western Public	Other	Adjustments	Pro Forma
Operating revenues	$72,875,574	$3,962,035*	$18,245,479*	$330,636*	$2,636,926*	—0—	$47,200,498
Operation	27,490,731	1,298,563*	6,438,216*	136,213*	1,281,509*	$ 8,400 (1)	18,344,630
Maintenance	4,786,285	194,895*	891,037*	11,915*	185,468*	—0—	3,502,970
Depreciation	5,451,368	290,622*	1,532,417*	33,716*	221,035*	—0—	3,373,578
Amortization of plant acquisition adjustments	886,978	—0—	193,810*	—0—	—0—	—0—	693,168 (a)
Taxes—Federal income (excluding reductions (1) as shown separately below, and (2) of $4,424,813 (pro forma) related to and applied against items charged directly to surplus)	14,275,035	902,342*	4,300,859*	24,577*	379,586*	7,182*(2)	8,660,489 (b)
Taxes—Other	5,666,747	384,784*	1,316,367*	31,812*	174,126*	—0—	3,759,658
Net operating revenues	13,818,430	890,829*	3,572,773*	92,403*	395,202*	1,218*	8,866,005
Other income—net	56,457*	32,620*	37,707	245	17,732*	—0—	68,857*
Gross income	13,761,973	923,449*	3,535,066*	92,158*	412,934*	1,218*	8,797,148
Interest and amortization	4,418,721	239,047*	1,014,877*	37,232*	211,529*	—0—	2,916,036
Net income before reduction in taxes shown below	9,343,252	684,402*	2,520,189*	54,926*	201,405*	1,218*	5,881,112
Reduction in Federal income taxes resulting from amortization of emergency facilities under the Internal Revenue Code, which facilities are expected to be employed throughout their normal life and not to replace existing facilities	1,387,701	—0—	533,599*	—0—	3,526*	—0—	850,576
Net income	10,730,953	684,402*	3,053,788*	54,926*	204,931*	1,218*	6,731,688
Preferred dividend requirements	2,208,180	67,501*	560,917*	—0—	132,414*	—0—	1,447,348
Balance	8,522,773	616,901*	2,492,871*	54,926*	72,517*	1,218*	5,284,340
Amount applicable to minority interests	11,652	—0—	—0—	—0—	135*	—0—	11,517
Balance applicable to Parent Company	$ 8,511,121	$ 616,901*	$ 2,492,871*	$ 54,926*	$ 72,382*	$ 1,218*	$ 5,272,823

Income Statement of Parent Company Including Undistributed Earnings of Subsidiary Companies Applicable to Parent Company

Balance of earnings applicable to Parent Company, as above	$ 8,511,121	$ 616,901*	$ 2,492,871*	$ 54,926*	$ 72,382*	$ 1,218*	$ 5,272,823
Earnings from subsidiary companies, included as deductions above:							
Preferred dividends declared	23,500	—0—	—0—	—0—	23,500*	—0—	—0—
Interest	48,440	—0—	—0—	25,440*	23,000*	—0—	—0—
Earnings from other sources	105,909	—0—	—0—	—0—	84,341*	21,568*(3)	—0—
Total	8,688,970	616,901*	2,492,871*	80,366*	203,223*	22,786*	5,272,823
Expenses, taxes and interest	532,654	—0—	—0—	—0—	—0—	175,154*(3)	357,500
Balance applicable to stocks of Parent Company	8,156,316	616,901*	2,492,871*	80,366*	203,223*	152,368	4,915,323
Dividends on preferred stock of Parent Company	2,119,092	—0—	—0—	—0—	—0—	2,119,092*(3)	—0—
Balance for common stock and surplus	$ 6,037,224	$ 616,901*	$ 2,492,871*	$ 80,366*	$ 203,223*	$2,271,460	$ 4,915,323

(a) See note (a) to consolidated balance sheet.

(b) Includes provision for estimated excess profits of $1,166,048 after giving effect to reductions (1) as shown separately above and (2) of $4,424,813 related to and applied against items charged directly to surplus.

(1) Increased expenses of Virginia Electric and Power Company due to cancellation of service contract with Epsco, Inc.

(2) Reduction in Federal income taxes due to above increased expenses.

(3) Elimination of nonrecurring income, expenses, taxes and preferred dividends of Engineers.

Engineers' Exhibit No. 47 (Cont'd)

Schedule C-1

Page 1

Virginia Electric and Power Company

Organized under Laws of Virginia

A Subsidiary Company of Engineers Public Service Company

Comparative Income Statement(a)

	MONTH OF June, 1945	June, 1944	Increase
Operating revenues	$ 3,285,475.24	$ 4,259,460.95	$ 973,985.71*
Operation	1,327,872.39	1,654,350.69	326,478.30*
Maintenance	255,465.90	318,370.24	62,904.34*
Depreciation	233,436.51	310,440.15	77,003.64*
Amortization of plant acquisition adjustments	57,764.00	57,764.00	—0—
Taxes—Federal income (excluding reduction as shown separately below)	556,638.15	877,689.00	321,050.85*
—Other	261,100.87	299,048.18	37,947.31*
Net operating revenues	593,197.42	741,798.69	148,601.27*
Other income—net (b)	646.93(c)	15,687.14	16,334.07*
Balance	592,550.49	757,485.83	164,935.34*
Interest and amortization	214,933.76	274,224.33	59,290.57*
Net income	377,616.73	483,261.50	105,644.77*
Reduction in Federal income taxes resulting from amortization of emergency facilities	97,512.00	44,251.00	53,261.00
Balance	$ 475,128.73	$ 527,512.50	$ 52,383.77*

	12 MONTHS ENDING June 30, 1945	June 30, 1944	Increase
Operating revenues	$47,200,497.60	$36,143,971.38	$11,056,526.22
Operation	18,336,229.56	13,974,536.12	4,361,693.44
Maintenance	3,502,970.51	2,704,283.25	798,687.26
Depreciation	3,373,578.48	2,802,735.45	570,843.03
Amortization of plant acquisition adjustments (d)	693,168.00	209,984.65	483,183.35
Taxes—Federal income (excluding reductions (1) as shown separately below, and (2) of $4,424,813.24 (prior period —$2,091,177.00) related to and applied against items charged directly to surplus) (e)	8,667,670.95	7,217,330.33	1,450,340.62
Taxes—Other	3,759,657.59	2,868,428.60	891,228.99
Net operating revenues	8,867,222.51	6,366,672.98	2,500,549.53
Other income—net (b)	68,856.79(c)	97,756.07	166,612.86*
Balance	8,798,365.72	6,464,429.05	2,333,936.67
Interest and amortization	2,916,036.32	2,030,247.39	885,788.93
Net income	5,882,329.40	4,434,181.66	1,448,147.74
Reduction in Federal income taxes resulting from amortization of facilities allowable as emergency facilities under the Internal Revenue Code, which facilities are expected to be employed throughout their normal life and not to replace existing facilities	850,576.00	272,198.00	578,378.00
Balance	6,732,905.40	4,706,379.66	2,026,525.74
Preferred dividend requirements	1,447,348.33	1,189,992.20	257,356.13
Balance for common stock and surplus	$ 5,285,557.07	$ 3,516,387.46	$ 1,769,169.61

*Decrease.

Note: See explanatory notes appended which are to be read as an integral part of the income statement.

Engineers' Exhibit No. 47 (Cont'd)

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Virginia Electric and Power Company

Comparative Balance Sheet

ASSETS

	June 30, 1945	June 30, 1944 (a)	Increase
Plant and other investments:			
Utility plant (including intangibles)	$135,370,855.45 (b)	$154,773,052.25	$19,402,196.80*
Other physical property, less reserve	1,761,200.79	1,899,132.11	137,931.32*
Investment in associated company	39,980.00	39,980.00	—0—
Excess profits tax refund bonds	608,981.44	397,185.86	211,795.58
Total plant and other investments	137,781,017.68	157,109,350.22	19,328,332.54*
Current assets:			
Cash	6,742,160.82	6,360,809.50	381,351.32
United States treasury securities	1,772,000.00	4,100,000.00	2,328,000.00*
Special deposits	47,853.66	36,129.50	11,724.16
Notes receivable	3,619.62	3,969.61	349.99*
Accounts receivable, less reserve	2,622,319.32	2,459,826.35	162,492.97
Materials and supplies, less reserves	1,499,565.98	1,941,831.18	442,265.20*
Prepayments	579,099.89	259,977.64	319,122.25
Total current assets	13,266,619.29	15,162,543.78	1,895,924.49*
Deferred debits:			
Unamortized debt discount and expense	3,441,366.41	3,789,025.73	347,659.32*
Post-war refund of Federal excess profits tax	872,576.00	1,004,377.02	131,801.02*
Capital stock expense	308,544.45	206,872.86	101,671.59
Other deferred debits	608,823.43	727,359.12	118,535.69*
Total deferred debits	5,231,310.29	5,727,634.73	496,324.44*
	$156,278,947.26	$177,999,528.73	$21,720,581.47*

LIABILITIES

Capital stock:			
Preferred stock (c)	$ 28,947,100.00	$ 28,947,100.00	$ —0—
Common stock (d)	13,546,555.00	13,546,555.00	—0—
Total capital stock	42,493,655.00	42,493,655.00	—0—
Long-term debt:			
First and Refunding Mortgage Bonds:			
Series B 3½%, due 1968	—0—	37,500,000.00	37,500,000.00*
Series C 3⅛%, due 1971	—0—	3,000,000.00	3,000,000.00*
Series D 3%, due 1974	—0—	23,000,000.00	23,000,000.00*
Series E 2¾%, due 1975	59,000,000.00	—0—	59,000,000.00
Notes payable, due 1946-1954	10,295,000.00	12,715,000.00	2,420,000.00*
Total long-term debt	69,295,000.00	76,215,000.00	6,920,000.00*
Current liabilities:			
Notes payable, due within one year	2,420,000.00	1,970,000.00	450,000.00
Accounts payable	931,980.58	1,243,418.64	311,438.06*
Customers' deposits	905,255.46	953,017.61	47,762.15*
Taxes accrued	5,675,183.35	10,350,537.56	4,675,354.21*
Interest accrued	788,137.47	878,942.23	90,804.76*
Other current liabilities	446,826.98	300,920.12	145,906.86
Total current liabilities	11,167,383.84	15,696,836.16	4,529,452.32*
Deferred credits:			
Unamortized premium on debt	239,050.44	753,109.30	514,058.86*
Customers' advances for construction	419,478.00	612,874.96	193,396.96*
Other deferred credits	52,546.93	10,480.09	42,066.84
Total deferred credits	711,075.37	1,376,464.35	665,388.98*
Reserves:			
Depreciation	18,658,748.75	23,444,631.83	4,785,883.08*
Amortization of utility plant acquisition adjustments (b)	2,221,265.00	1,496,159.00	725,106.00
Amounts in excess of original cost of utility plant	—0—	7,947,076.04	7,947,076.04*
Injury and damage claims	347,821.19	505,631.45	157,810.26*
Taxes on income of prior years	1,176,014.37	1,107,830.24	68,184.13
Other	430,486.43	241,191.43	189,295.00
Total reserves	22,834,335.74	34,742,519.99	11,908,184.25*
Contributions in aid of construction	267,156.47	253,347.37	13,809.10
Surplus:			
Capital surplus	1,031,324.36	—0—	1,031,324.36
Earned surplus (e)	8,479,016.48	7,221,705.86	1,257,310.62
	$156,278,947.26	$177,999,528.73	$21,720,581.47*

*Decrease.

Note: See explanatory notes appended which are to be read as an integral part of the balance sheet.

Engineers' Exhibit No. 47 (Cont'd)

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INCOME STATEMENT NOTES

(a) The comparative income statement includes for the period May 26, 1944 to March 30, 1945, inclusive, operations of Citizens Rapid Transit Corporation, a wholly owned subsidiary acquired in merger May 25, 1944, and includes since May 25, 1944 only, operations of the properties of Virginia Public Service Company which were acquired by the Company in the merger. During December 1944 and March 1945, all of the investments in transportation properties, including th capital stock of Citizens Rapid Transit Corporation, were sold. Net income from such transportation properties included in the income statement was not material.

(b) Includes credits resulting from capitalization of interest on funds used for construction purposes:

	1945	1944
June	$. —0—	$10,373.75
12 Months	10,703.13	95,905.09

(c) Loss.

(d) See note (b) to balance sheet.

(e) The provisions for Federal income taxes for the 12 months ending June 30, 1945 includes provision for estimated excess profits taxes of $1,166,048 (prior period—$3,122,044) after giving effect to reductions (1) as shown separately in the income statement and (2) of $4,424,813.24 (prior period—$2,091,177) related to and applied against items charged directly to surplus, and after deducting estimated post-war credit of $129,559 (prior period—$345,895).

BALANCE SHEET NOTES

(a) Consolidated balance sheet of Virginia Electric and Power Company and Citizens Rapid Transit Corporation, a former subsidiary. During December 1944 and March 1945, all of the investments in transportation properties, including the capital stock of Citizens Rapid Transit Corporation, were sold.

(b) Utility plant (including intangibles) as at June 30, 1945 is stated on the following basis:

(1) At original cost for electric, gas and common properties for which studies have been completed plus plant acquisition adjustments of $11,237,468.36	$129,857,008.71
(2) At cost of construction and/or acquisition based on cash paid and par or stated value of securities issued therefor, for gas property for which original cost studies are required but not completed (extension to September 30, 1945 for the completion of such studies has been granted by State regulatory body)	5,513,846.74
Total	$135,370,855.45

Provision is being made, pursuant to orders of regulatory commissions, for the amortization of plant acquisition adjustments shown under (1) above by charges to income over 15-year periods commencing in 1943 and 1944.

While studies relating to the original cost of properties included under (2) above are not complete, it is not expected that any material adjustments will be required in connection with the reclassification of such properties on the basis of original cost.

(c) Represented by 289,471 shares of $100 par value $5 dividend preferred stock, cumulative, entitled to $117.50 per share prior to March 20, 1947 (1950—$115.50; 1953—$113.50; thereafter—$112.50 per share) upon redemption or voluntary liquidation, and to $100 per share upon involuntary liquidation, together with dividends accrued or in arrears in all cases. Total preferred stock authorized 500,000 shares.

(d) Represented by 2,938,445 shares of no par value, including 20 shares reserved for exchange of outstanding scrip. Authorized 4,000,000 shares.

(e) The Company has covenanted that so long as any of the Series E Bonds remain outstanding it will not declare or pay any dividend or make any other distribution to any holder of its common stock (other than a dividend payable in shares of its common stock) except out of net income (as defined in the indenture securing the bonds) accumulated subsequent to September 30, 1944, after deducting the sum of (1) $55,000 per month in respect of such of the first 25 full calendar months after September, 1944 as shall have elapsed, and (2) $75,000 a month in respect of such of the first 116 full calendar months after September, 1944 as shall have elapsed. Earned surplus unrestricted as to common dividends amounted to $1,886,000 at June 30, 1945.

(f) On September 16, 1942 and October 6, 1942 the Securities and Exchange Commission issued Orders against the Company, Engineers Public Service Company, its parent, and the other subsidiaries of that company under Section 11(b)(1) of the Public Utility Holding Company Act of 1935. The Orders, among other things, in effect directed Engineers to divest itself, within one year, of all of its investments except that in the Company unless it should elect within a brief period of time to choose Gulf States Utilities Company as its single system. If the Company should be retained as the single system, the Orders required it to dispose of its gas and transportation operations. During December 1944 and March 1945, all the Company's investments in transportation properties were sold.

The Company filed a petition with the United States Court of Appeals for the District of Columbia for a review of the September 16, 1942 and October 6, 1942 Orders and on November 22, 1943 the Court set the Commission's Orders aside and remanded the case to the Commission for further proceedings in accordance with its opinion. The grounds for the reversal were, in substance, that Engineers was entitled to more time to make its choice of its single system and that the interpretation of the Act upon which the Commission directed the divestment of the transportation business was incorrect. Both the Securities and Exchange Commission and the Company have applied to the Supreme Court of the United States for writs of certiorari which have been granted. No date has now been set for argument.

P. R. WILLIAMS,
Comptroller

Engineers' Exhibit No. 47 (Cont'd)

Schedule C-2

Page 1

Gulf States Utilities Company

Louisiana and Texas

Organized under the Laws of Texas

A Subsidiary Company of Engineers Public Service Company

Comparative Income Statement

	MONTH OF June, 1945	June, 1944	Increase
Operating revenues	$ 1,541,678.33	$ 1,481,374.12	$ 60,304.21
Operation	539,636.23	481,196.94	58,439.29
Maintenance	77,368.95	66,340.45	11,028.50
Depreciation	128,600.00	126,482.52	2,117.48
Amortization of plant acquisition adjustments	16,150.82	16,150.82	—0—
Taxes—Federal income (excluding reduction as shown separately below)	367,043.00	376,136.00	9,093.00*
—Other	111,478.98	106,974.92	4,504.06
Net operating revenues	301,400.35	308,092.47	6,692.12*
Other income—net (a)	346.51(b)	8,340.94	8,687.45*
Balance	301,053.84	316,433.41	15,379.57*
Interest and amortization (c)	77,126.36	100,130.30	23,003.94*
Net income	223,927.48	216,303.11	7,624.37
Reduction in Federal income taxes resulting from amortization of emergency facilities	45,341.00	43,592.00	1,749.00
Balance	$ 269,268.48	$ 259,895.11	$ 9,373.37

	12 MONTHS ENDING June 30, 1945	June 30, 1944	Increase
Operating revenues	$18,245,479.28	$16,540,092.13	$ 1,705,387.15
Operation	6,438,216.28	5,647,838.77	790,377.51
Maintenance	891,037.49	901,666.04	10,628.55*
Depreciation	1,532,416.87	1,488,807.29	43,609.58
Amortization of plant acquisition adjustments (d)	193,809.84	193,809.84	—0—
Taxes—Federal income (excluding reduction as shown separately below) (e)	4,300,859.00	3,774,563.00	526,296.00
—Other	1,316,366.52	1,204,197.91	112,168.61
Net operating revenues	3,572,773.28	3,329,209.28	243,564.00
Other income—net (a)	37,707.20(b)	35,213.86	72,921.06*
Balance	3,535,066.08	3,364,423.14	170,642.94
Interest and amortization (c)	1,014,877.18	1,210,289.39	195,412.21*
Net income	2,520,188.90	2,154,133.75	366,055.15
Reduction in Federal income taxes resulting from amortization of facilities allowable as emergency facilities under the Internal Revenue Code, which facilities are expected to be employed throughout their normal life and not to replace existing facilities	533,599.00	303,800.00	229,799.00
Balance	3,053,787.90	2,457,933.75	595,854.15
Preferred dividend requirements	560,916.60	584,967.59	24,050.99*
Balance for common stock and surplus	$ 2,492,871.30	$ 1,872,966.16	$ 619,905.14

* Decrease.

(a) Includes credits resulting from capitalization of interest on funds used for construction purposes:

	1945	1944
June	$ —0—	$ —0—
12 Months	299.73(f)	21,799.05

(b) Loss.

(c) Amortization charges were reduced beginning November 1944 due to the charge-off to earned surplus of the unamortized balance of debt discount and expense applicable to securities no longer outstanding.

(d) See note (a) to balance sheet.

(e) The provision for Federal income taxes for the 12 months ending June 30, 1945 includes provision for estimated excess profits taxes of $2,652,722.00 (1944—$2,446,933.00) after giving effect to reductions shown separately in the income statement and after deducting estimated post-war credit of $294,747 (1944—$271,883).

(f) Debit.

Engineers' Exhibit No. 47 (Cont'd)

Schedule C-2

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Gulf States Utilities Company
Comparative Balance Sheet

	June 30, 1945	June 30, 1944	Increase
ASSETS			
Plant and other investments:			
Utility plant (including intangibles):			
Electric plant, at original cost	$56,761,267.26	$55,608,886.96	$ 1,152,380.30
Other utility plant, at cost	4,485,274.43	4,285,829.38	199,445.05
Plant acquisition adjustments (a)	3,230,176.37	3,230,176.37	—0—
Other physical property	118,703.58	122,768.08	4,064.50*
Investment in associated company	18,410.00	18,410.00	—0—
Total plant and other investments	64,613,831.64	63,266,070.79	1,347,760.85
Current assets:			
Cash	3,263,028.31	2,810,624.31	452,404.00
United States treasury securities	2,075,000.00	840,000.00	1,235,000.00
Special deposits	2,500.00	3,040.51	540.51*
Notes and warrants receivable	1,883.13	4,459.91	2,576.78*
Accounts receivable, less reserve	1,189,018.69	1,182,943.85	6,074.84
Materials and supplies	675,803.35	606,105.27	69,698.08
Prepayments	181,861.94	80,747.25	101,114.69
Total current assets	7,389,095.42	5,527,921.10	1,861,174.32
Deferred debits:			
Capital stock expense	257,987.08	—0—	257,987.08
Unamortized debt discount and expense	—0—	2,264,061.72	2,264,061.72*
Post-war refund of Federal excess profits tax	137,180.00	131,940.00	5,240.00
Other deferred debits	79,428.93	66,176.79	13,252.14
Total deferred debits	474,596.01	2,462,178.51	1,987,582.50*
	$72,477,523.07	$71,256,170.40	$ 1,221,352.67
LIABILITIES			
Capital stock:			
Preferred stock	$12,000,000.00(b)	$ 9,999,400.00	$ 2,000,600.00
Common stock (c)	11,101,124.84	11,101,124.84	—0—
Premium on preferred stock	306,870.00	—0—	306,870.00
Total capital stock	23,407,994.84	21,100,524.84	2,307,470.00
Long-term debt:			
First Mortgage and Refunding Bonds:			
Series D 3¼%, due 1969	27,300,000.00	27,300,000.00	—0—
Note payable to bank	—0—	700,000.00	700,000.00*
Total long-term debt	27,300,000.00	28,000,000.00	700,000.00*
Current liabilities:			
Note payable to bank, due within one year	—0—	600,000.00	600,000.00*
Accounts payable	563,471.51	552,548.34	10,923.17
Customers' deposits	176,368.91	221,454.74	45,085.83*
Taxes accrued	4,331,555.58	3,944,589.30	386,966.28
Interest accrued	192,181.17	217,551.07	25,369.90*
Other current liabilities	16,714.16	43,443.12	26,728.96*
Total current liabilities	5,280,291.33	5,579,586.57	299,295.24*
Deferred credits:			
Unamortized premium on debt	951,912.86	991,853.30	39,940.44*
Customers' advances for construction	276,504.19	435,425.82	158,921.63*
Other deferred credits	44,103.03	21,093.41	23,009.62
Total deferred credits	1,272,520.08	1,448,372.53	175,852.45*
Reserves:			
Depreciation	11,859,126.67	10,430,218.65	1,428,908.02
Amortization of plant acquisition adjustments (a)	807,552.90	613,743.06	193,809.84
Injury and damage claims	141,659.72	138,853.85	2,805.87
Taxes on income of prior years	139,752.34	114,743.18	25,009.16
Total reserves	12,948,091.63	11,297,558.74	1,650,532.89
Earned surplus (d)	2,268,625.19	3,830,127.72	1,561,502.53*
	$72,477,523.07	$71,256,170.40	$ 1,221,352.67

* Decrease.

Note: See explanatory notes on the following page which are to be read as an integral part of the balance sheet.

On September 16, 1942 and October 6, 1942 the Securities and Exchange Commission issued Orders against the Company, Engineers Public Service Company, its parent, and the other subsidiaries of that company under Section 11(b)(1) of the Public Utility Holding Company Act of 1935. The Orders, among other things, in effect directed Engineers to divest itself, within one year, of its investment in the Company unless it should elect within a brief period of time to choose the Company as its single system. The Company filed a petition with the United States Court of Appeals for the District of Columbia for a review of the September 16, 1942 and October 6, 1942 Orders and on November 22, 1943

Engineers' Exhibit No. 47 (Cont'd)

Schedule C-2

(P. 1805 a)

COMPARATIVE BALANCE SHEET NOTES

June 30, 1945

the Court set the Commission's Orders aside and remanded the case to the Commission for further proceedings in accordance with its opinion. The grounds for the reversal were, in substance, that Engineers was entitled to more time to make its choice of its single system and that the interpretation of the Act upon which the Commission directed the divestment of businesses other than electric or gas business was incorrect. Both the Securities and Exchange Commission and the Company have applied to the Supreme Court of the United States for writs of certiorari which have been granted. No date has now been set for argument.

(a) Pursuant to an order of the Federal Power Commission, the Company is providing a reserve for amortization of plant acquisition adjustments by charges to income over a 15-year period beginning January 1943. The Company may, at its option, accelerate the charges to income and credits to the reserve for amortization of plant acquisition adjustments by utilizing certain anticipated reductions in taxes arising through the amortization of emergency facilities.

(b) Represented by 120,000 shares of $4.40 dividend preferred stock, $100 par value, cumulative, authorized and outstanding, entitled to $111.00 per share prior to October 1, 1949 (1954—$109.50; thereafter—$108.00 per share) upon redemption or voluntary liquidation, and to $100 per share upon involuntary liquidation, together with dividends accrued or in arrears in all cases. On October 9, 1944 68,855 shares of the $4.40 dividend preferred stock were issued in exchange for a similar number of shares in the aggregate of $6 dividend and $5.50 dividend preferred stock and 51,145 shares were sold for cash. The remaining shares of $6 dividend and $5.50 dividend preferred stock were called for redemption on November 9, 1944 at redemption prices of $110 and $108 per share respectively plus accrued dividends to the redemption date in each case. A portion of the proceeds from the sale of the $4.40 dividend preferred stock was used to retire the bank note of $1,000,000.

(c) Represented by 280,000 shares of no par value. Authorized 300,000 shares.

(d) The Company has covenanted that, so long as any shares of its $4.40 dividend preferred stock remain outstanding, it will not declare or pay any dividend or make any other distribution to the holders of its common stock (other than a dividend in common stock of the Company) except out of net income (as defined in the Company's amended charter) accumulated subsequent to June 30, 1944, after deducting the sum of $18,190 per month in respect of such of the first 120 full calendar months after October 9, 1944 as shall have elapsed; (provided, however, that no common stock dividend may be paid in excess of 75% of the net income available as aforesaid, if, after giving effect thereto, the common stock capital and surplus (excluding premiums) would be less than 25% of the Company's capitalization (including surplus but excluding premiums). Earned surplus unrestricted as to common stock dividends amounted to $608,000 at June 30, 1945.

H. W. FABER,
Treasurer.

Engineers' Exhibit No. 47 (Cont'd)

Schedule C-3

Page 1

(p. 1806a)

El Paso Electric Company

El Paso, Texas

Organized under the Laws of Texas

A Subsidiary Company of Engineers Public Service Company

Comparative Income Statement

	MONTH OF June, 1945	June, 1944	Increase
Operating revenues	$ 327,206.46	$ 314,737.15	$ 12,469.31
Operation	106,378.87	107,402.28	1,023.41*
Maintenance	16,518.63	16,811.98	293.35*
Depreciation	24,370.97	24,095.14	275.83
Taxes—Federal income	79,692.00	61,979.00	17,713.00
—Other	33,790.38	30,882.92	2,907.46
Net operating revenues	66,455.61	73,565.83	7,110.22*
Other income—net	1,083.19	4,781.63	3,698.44*
Balance	67,538.80	78,347.46	10,808.66*
Interest and amortization	18,261.47	21,459.76	3,198.29*
Balance	$ 49,277.33	$ 56,887.70	$ 7,610.37*

	12 MONTHS ENDING June 30, 1945	June 30, 1944(b)	Increase
Operating revenues	$ 3,962,035.47	$ 3,780,883.39	$ 181,152.08
Operation	1,298,563.05	1,291,831.67	6,731.38
Maintenance	194,894.62	179,342.46	15,552.16
Depreciation	290,622.30	286,494.13	4,128.17
Taxes—Federal income (c)	902,342.00	816,472.00	85,870.00
—Other	384,784.24	368,356.32	16,427.92
Net operating revenues	890,829.26	838,386.81	52,442.45
Other income—net	32,620.10	4,332.26(a)	36,952.36
Balance	923,449.36	834,054.55	89,394.81
Interest and amortization	239,046.65	259,054.85	20,008.20*
Balance	684,402.71	574,999.70	109,403.01
Preferred dividend requirements	67,501.27	67,501.36	.09*
Balance for common stock and surplus	$ 616,901.44	$ 507,498.34	$ 109,403.10

*Decrease.

(a) Loss.

(b) Excludes operations of properties sold December 31, 1943. See note (d) below.

(c) The amounts shown above for Federal income taxes include provision for estimated excess profits taxes of $703,952 for the 12 months ending June 30, 1945 (1944—$612,446) after deducting estimated post-war credit of $78,217 (1944—$68,050).

(d) On September 16, 1942 and October 6, 1942 the Securities and Exchange Commission issued Orders against the Company, Engineers Public Service Company, its parent, and the other subsidiaries of that company under Section 11(b)(1) of the Public Utility Holding Company Act of 1935. The Orders directed, among other things, Engineers to divest itself, within one year, of its investment in the Company and directed the Company to dispose, within one year, of the transportation business in and around El Paso and the American halves of two international toll bridges operated by the Company. The Company disposed of its transportation and bridge businesses on December 31, 1943.

The Company filed a petition with the United States Court of Appeals for the District of Columbia for a review of the September 16, 1942 and October 6, 1942 Orders and on November 22, 1943 the Court set these Orders aside and remanded the case to the Commission for further proceedings in accordance with its opinion. The grounds for the reversal were, in substance, that Engineers was entitled to more time to determine whether it desired to retain Virginia Electric and Power Company or Gulf States Utilities Company as its single system and that the interpretation of the Act upon which the Commission directed the divestment of the transportation and other incidental businesses was incorrect. Both the Securities and Exchange Commission and the Company have applied to the Supreme Court of the United States for writs of certiorari which have been granted. No date has now been set for argument.

Engineers' Exhibit No. 47 (Cont'd)

Schedule C-3

Page 2

El Paso Electric Company
Comparative Balance Sheet

ASSETS

	June 30, 1945	June 30, 1944	Increase
Plant and other investments:			
Electric plant (including intangibles), at original cost	$12,466,429.94	$12,336,551.89	$ 129,878.05
Other physical property	42,850.10	42,850.10	—0—
Investment in associated company	4,435.00	4,435.00	—0—
Excess profits tax refund bonds	35,797.33	—0—	35,797.33
Miscellaneous special funds	1,035,267.82(a)	804,406.25	230,861.57
Total plant and other investments	13,584,780.19	13,188,243.24	396,536.95
Current assets:			
Cash	533,264.63	937,181.41	403,916.78*
United States treasury securities	2,017,500.00	2,311,000.00	293,500.00*
Special deposits	—0—	20.00	20.00*
Warrants receivable	—0—	72.24	72.24*
Accounts receivable, less reserve	226,692.91	220,162.75	6,530.16
Materials and supplies, less reserve	142,123.15	134,950.51	7,172.64
Prepayments	63,480.40	33,066.44	30,413.96
Total current assets	2,983,061.09	3,636,453.35	653,392.26*
Deferred debits:			
Unamortized debt discount and expense	—0—	18,573.24	18,573.24*
Post-war refund of Federal excess profits tax	29,348.32	43,860.33	14,512.01*
Other deferred debits	13,774.05	17,168.30	3,394.25*
Total deferred debits	43,122.37	79,601.87	36,479.50*
	$16,610,963.65	$16,904,298.46	$ 293,334.81*

LIABILITIES

Capital stock:			
Preferred stock (b)	$ 1,500,000.00	$ 1,500,000.00	$ —0—
Common stock (c)	3,848,691.60	3,848,691.60	—0—
Premium on preferred stock	33,750.00	33,750.00	—0—
Total capital stock	5,382,441.60	5,382,441.60	—0—
Long-term debt:			
First Mortgage Bonds, Series A, 3¼%, due 1970	6,500,000.00	6,500,000.00	—0—
Note payable to bank, 2¼%, due 1946-1947	140,000.00	280,000.00	140,000.00*
Total long-term debt	6,640,000.00	6,780,000.00	140,000.00*
Current liabilities:			
Note payable to bank, due within one year	140,000.00	140,000.00	—0—
Accounts payable	101,159.18	98,800.49	2,358.69
Customers' deposits	135,113.31	121,949.17	13,164.14
Taxes accrued	1,048,759.35	1,029,626.85	19,132.50
Interest accrued	39,271.53	39,193.91	77.62
Other current liabilities	1,300.00	30,074.55	28,774.55*
Total current liabilities	1,465,603.37	1,459,644.97	5,958.40
Deferred credits:			
Unamortized premium on debt	159,872.82	166,183.62	6,310.80*
Other deferred credits	3,639.46	5,007.44	1,367.98*
Total deferred credits	163,512.28	171,191.06	7,678.78*
Reserves:			
Depreciation	2,162,198.68	1,912,813.11	249,385.57
Injury and damage claims	14,909.08	62,693.66	47,784.58*
Taxes on income of prior years	320,235.25	316,763.36	3,471.89
Total reserves	2,497,343.01	2,292,270.13	205,072.88
Earned surplus (d)	462,063.39	818,750.70	356,687.31*
	$16,610,963.65	$16,904,298.46	$ 293,334.81*

*Decrease.

(a) Includes $1,017,753.85 deposited with Trustee under First Mortgage of the Company.

(b) Authorized and outstanding 15,000 shares of no par value $4.50 Dividend Preferred Stock, cumulative, entitled to $109 per share upon redemption or voluntary liquidation, and to $100 per share ($1,500,000) upon involuntary liquidation, together with dividends accrued or in arrears in all cases.

(c) Authorized and outstanding 150,000 shares of no par value.

(d) The Company has covenanted that it will not declare or pay any dividend or make any other distribution to the holders of its common stock (other than a dividend payable in common stock of the Company) except out of net income (as defined in the charter of the Company) accumulated subsequent to December 31, 1939 reduced by the aggregate principal amount of note payable to bank which has matured ($630,000 to June 30, 1945), until such reductions aggregate $1,000,000. Earned surplus unrestricted as to common stock dividends amounted to $284,000 at June 30, 1945.

L. F. YETMAN, *Treasurer*.

Virginia Electric and Power Company
Income Statements for Years 1939 Through 1944(a)

* denotes red figure.

	1939	1940	1941	1942	1943	1944
Operating revenues:						
Electric	$21,751,707	$23,754,356	$27,323,896	$30,356,052	$33,360,345	$36,159,474
Gas	1,294,887	1,436,662	1,623,266	1,956,164	2,296,219	2,516,815
Transportation	5,073,747	5,596,085	6,984,491	10,663,379	12,745,554	13,005,490
Ice and miscellaneous	235,845	212,611	301,267	107,951	2,974	—0—
Total	28,356,186	30,999,714	36,232,920	43,083,546	48,405,092	51,681,779
Operating expenses and taxes:						
Operation	10,710,628	11,401,943	13,273,677	15,580,846	18,061,315	20,362,625
Maintenance	1,968,677	2,212,927	2,491,393	2,982,775	3,305,747	4,012,362
Depreciation	3,288,696	3,558,398	4,035,448	4,395,740	4,150,980	3,862,381
Amortization of plant acquisition adjustments	—0—	—0—	—0—	—0—	341,040	693,168
Taxes—Federal income and excess profits (b)	1,014,719	1,709,323	4,166,758	8,207,592	9,680,184	9,880,832
—Other	2,638,625	2,811,147	3,111,012	3,468,674	3,840,591	4,131,408
Total	19,621,345	21,693,738	27,078,288	34,635,827	39,379,857	42,942,776
Net operating revenues	8,734,841	9,305,976	9,154,632	8,447,719	9,025,235	8,739,003
Other income—net	5,974*	7,261*	46,814*	197,103*	35,144	45,359*
Gross income	8,728,867	9,298,715	9,107,818	8,250,616	9,060,379	8,693,644
Deductions from income:						
Interest on long-term debt	3,338,452	3,408,613	3,411,692	3,202,906	3,059,587	2,729,076
Other interest	39,065	57,950	52,371	65,354	63,798	67,485
Amortization of discount, premium and expense, net	490,900	496,282	487,921	382,648	300,452	306,651
Interest charged to construction	40,783*	66,482*	75,486*	47,462*	113,901*	76,853*
Total	3,827,634	3,896,363	3,876,498	3,603,446	3,309,936	3,026,359
Net income before reduction in taxes shown below	4,901,233	5,402,352	5,231,320	4,647,170	5,750,443	5,667,285
Reduction in Federal income and excess profits taxes resulting from amortization of emergency facilities	—0—	—0—	—0—	—0—	13,391	537,496
Net income	$ 4,901,233	$ 5,402,352	$ 5,231,320	$ 4,647,170	$ 5,763,834	$ 6,204,781

(a) Figures in these income statements represent the combined operations of Virginia Electric and Power Company and Virginia Public Service Company (merged into Virginia Electric and Power Company on May 25, 1944) and their subsidiaries after intercompany eliminations but without further adjustments.

(b) Excludes reductions (1) as shown separately above and (2) of $1,571,158 in 1942 and $4,148,050 in 1944 related to and applied against items charged directly to surplus. Includes provision for estimated excess profits taxes (after giving effect to the aforesaid reductions) of —0— —0— $ 1,692,689 $ 4,589,567 $ 7,456,110 $ 3,055,790

Note: These income statements should be read in conjunction with the notes to Schedule C-1 insofar as they are applicable.

RECENT SALES OF TRANSPORTATION PROPERTIES

The Company sold all of its transportation properties in Richmond, Norfolk and South Norfolk, Virginia, on December 29, 1944. The effect of the sale of these properties on the net operating revenues of the Company is negligible because of the high Federal excess profits tax rates and the Company's recent policy of absorbing substantially all of the net operating revenues from these operations in depreciation charges which charges were substantially in excess of current depreciation allowable for Federal income tax purposes.

The Company sold its remaining transportation properties on March 31, 1945. The effect of the sale of these properties on March 31, 1945 on the net income of the Company is a reduction of $319,000 based on war time results of the full year 1944.

Schedule D-1

Gulf States Utilities Company

Income Statements for the Years 1939 Through 1944

* denotes red figure.

	1939	1940	1941	1942	1943	1944
Operating revenues:						
Electric	$ 9,391,949	$ 9,740,739	$10,792,128	$11,380,042	$14,041,836	$16,035,120
Gas	582,770	638,711	666,202	764,319	793,176	851,576
Water	229,169	235,375	246,743	297,826	367,002	459,836
Ice	165,209	118,643	131,084	129,617	196,185	137,770
Total	10,369,097	10,733,468	11,836,157	12,571,804	15,398,189	17,484,302
Operating expenses and taxes:						
Operation	3,242,342	3,319,263	3,861,877	4,088,825	5,073,299	6,032,723
Maintenance	571,397	584,278	574,582	686,600	753,085	899,658
Depreciation	1,411,403	1,456,930	1,552,856	1,602,267	1,460,357	1,519,712
Amortization of plant acquisition adjustments	—0—	—0—	—0—	—0—	193,810	193,810
Taxes:						
Federal income and excess profits (excluding reductions as shown separately below) (a)	178,413	681,000	1,507,817	2,004,858	3,358,659	4,162,409
Other	899,000	1,002,754	1,093,806	1,124,414	1,188,976	1,272,973
Total	6,302,555	7,044,225	8,590,938	9,506,964	12,028,186	14,081,285
Net operating revenues	4,066,542	3,689,243	3,245,219	3,064,840	3,370,003	3,403,017
Other income—net	5,214	16,986	20,210	62,409*	54,012	15,551*
Gross income	4,071,756	3,706,229	3,265,429	3,002,431	3,424,015	3,387,466
Interest and amortization:						
Interest on long-term debt	1,243,264	1,061,200	1,025,344	1,007,775	994,275	976,513
Other interest	31,007	14,750	15,237	18,516	29,965	12,895
Amortization of discount and expense	159,391	203,945	203,945	203,945	203,945	163,297
Total	1,433,662	1,279,895	1,244,526	1,230,236	1,225,185	1,152,705
Net income before reduction in taxes shown below	2,638,094	2,426,334	2,020,903	1,772,195	2,198,830	2,234,761
Reduction in Federal excess profits taxes resulting from amortization of emergency facilities	—0—	—0—	—0—	—0—	84,497	523,102
Net income	$ 2,638,094	$ 2,426,334	$ 2,020,903	$ 1,772,195	$ 2,283,327	$ 2,757,863
(a) Includes provision for estimated excess profits taxes (after giving effect to reductions shown separately above) of	—0—	—0—	$ 561,661	$ 1,056,711	$ 2,324,172	$ 2,605,558

Note: These income statements should be read in conjunction with the notes to Schedule C-2 insofar as they are applicable.

El Paso Electric Company
Income Statements for the Years 1939 Through 1944

* denotes red figure.

	1939(a)	1940(a)	1941	1942	1943	1944(c)
Operating revenues:						
Electric	$2,592,518	$2,782,918	$3,167,046	$3,407,899	$3,658,629	$3,849,729
Transportation	484,201	508,513	760,359	1,046,095	1,515,492	—0—
Bridge	64,016	70,619	85,067	79,502	112,249	—0—
Total	3,140,735	3,362,050	4,012,472	4,533,496	5,286,370	3,849,729
Operating expenses and taxes:						
Operation	1,262,544	1,342,130	1,507,723	1,686,440	1,922,176	1,271,825
Maintenance	184,282	188,236	245,361	270,683	362,440	181,869
Depreciation	400,339	401,100	417,040	439,473	439,409	288,978
Taxes—Federal income and excess profits (b)	61,697	108,571	460,034	901,219	1,243,509	829,490
—Other	345,461	367,439	412,855	428,003	440,960	371,782
Total	2,254,323	2,407,476	3,043,013	3,725,818	4,408,494	2,943,944
Net operating revenues	886,412	954,574	969,459	807,678	877,876	905,785
Other income—net	13,994	11,090	3,874*	38,235*	6,238*	25,369
Gross income	900,406	965,664	965,585	769,443	871,638	931,154
Interest and amortization:						
Interest on long-term debt	400,000	400,000	265,369	227,310	224,349	221,225
Interest on notes payable to El Paso Electric Company (Delaware)	72,700	51,589	—0—	—0—	—0—	—0—
Other interest	5,955	5,874	6,069	6,123	6,429	6,967
Taxes assumed on bond interest	3,313	3,429	1,898*	—0—	—0—	—0—
Amortization of discount, premium and expense, net	28,358	28,358	29,617	29,638	29,638	29,638
Total	510,326	489,250	299,157	263,071	260,416	257,830
Net Income	$ 390,080	$ 476,414	$ 666,428	$ 506,372	$ 611,222	$ 673,324
(b) Includes provision for estimated excess profits taxes of	—0—	—0—	$ 226,636	$ 693,043	$1,032,879	$ 633,690

(a) Includes operations for the entire period of system acquired December 30, 1940 from Mesilla Valley Electric Company.

(c) Transportation and bridge properties sold December 31, 1943.

Note: These income statements should be read in conjunction with the notes to Schedule C-3 insofar as they are applicable.

Engineers' Exhibit No. 49.

GULF STATES UTILITIES COMPANY

Income Statements for the Years 1939 Through 1945 (last two months of 1945 estimated) Pro Forma Giving Effect to Present Fixed Charges, Preferred Dividends, Proposed Number of Shares of Common Stock, Applying Tax Reduction Resulting From Amortization of Emergency Facilities Against Taxes and Reflecting Amortization of Plant Acquisition Adjustments as a Deduction from Income

* denotes red figure

	1939	1940	1941	1942	1943	1944	1945 Estimated
Operating revenues:							
Electric	391,949	9,740,739	10,792,128	11,380,042	14,041,826	16,035,120	$16,344,000
Gas	582,770	638,711	666,202	764,319	793,176	851,576	829,800
Water	229,169	235,375	246,743	297,826	367,002	459,836	480,600
Ice	165,209	118,643	131,084	129,617	196,185	137,770	161,600
Total	10,369,097	10,733,468	11,836,157	12,571,804	15,398,189	17,484,302	17,816,000
Operating expenses and taxes:							
Operation	3,242,342	3,319,263	3,861,877	4,088,825	5,073,299	6,032,723	6,532,400
Maintenance	571,397	584,278	574,582	686,600	753,085	899,658	984,600
Depreciation	1,411,403	1,456,930	1,552,856	1,602,267	1,460,357	1,519,712	1,546,700
Taxes:							
Federal income and excess profits (a)	483,151	706,368	1,358,645	1,921,901	3,235,611	3,617,928	2,625,877
Other	899,000	1,002,754	1,093,806	1,124,414	1,188,976	1,272,973	1,298,000
Total	6,607,293	7,069,593	8,441,766	9,424,007	11,711,328	13,342,994	12,987,577
Net operating revenues	3,761,804	3,663,875	3,394,391	3,147,797	3,686,861	4,141,308	4,828,423
Other income - net	5,214	16,986	20,210	62,409*	54,012	15,551*	43,000*
Gross income	3,767,018	3,680,861	3,414,601	3,085,388	3,740,873	4,125,757	4,785,423
Interest and amortization	946,567	930,310	930,797	934,076	945,525	926,455	926,300
Amortization of plant acquisition adjustments	-0-	-0-	-0-	-0-	193,810	193,810	193,800
Net income	2,820,451	2,750,551	2,483,804	2,151,312	2,601,538	3,003,492	3,665,323
Preferred dividend requirements	528,000	528,000	528,000	528,000	528,000	528,000	528,000
Balance for common stock and surplus	$ 2,292,451	2,222,551	1,955,804	1,623,312	2,073,538	2,475,492	$ 3,137,323(b)
Earnings per share of common stock, based on 1,909,968 shares	$1.20	$1.16	$1.02	$.85	$1.09	$1.30	$1.64
Federal income taxes as shown above have been reduced through allowance for amortization of emergency facilities by	-0-	-0-	-0-	-0-	$84,497	$523,102	$1,254,290(c)
Earnings per share of common stock, based on 1,909,968 shares, before giving effect to reduction in Federal income taxes resulting from amortization of emergency facilities	-0-	-0-	-0-	-0-	$1.04	$1.02	$.99
(a) Includes provision for estimated excess profits taxes of	-0-	-0-	$314,091	$805,678	$2,173,908	$2,507,130	$1,508,620

(b) Common dividends are currently being paid at the rate of $1,512,000 per year. The Company has covenanted that, so long as any shares of its $4.40 dividend preferred stock remain outstanding, it will not declare or pay any dividend or make any other distribution to the holders of its common stock (other than a dividend in common stock of the Company) except out of net income (as defined in the Company's amended charter) accumulated subsequent to June 30, 1944, after deducting the sum of $16,190 per month in respect of such of the first 120 full calendar months after October 9, 1944 as shall have elapsed; provided, however, that no common stock dividend may be paid in excess of 75% of the net income available as aforesaid, if, after giving effect thereto, the common stock capital and surplus (excluding premiums) would be less than 25% of the Company's capitalization (including surplus but excluding premiums).

(c) Includes accelerated amortization for amount applicable to 1945 due to termination by the President of the United States on September 29, 1945 of the period for amortizing emergency facilities. Tax refunds of approximately $1,163,000 are anticipated for years prior to 1945 due to the shortened emergency amortization period of which $1,073,000 and $90,000 applies to 1944 and 1943, respectively. Such refunds when received will be credited to Earned Surplus.

EL PASO ELECTRIC COMPANY

Income Statements for the Years 1939 Through 1945 (Last Two Months of 1945 Estimated)

Pro Forma Giving Effect to Present Fixed Charges and Preferred Dividends and Proposed Number of Shares of Common Stock

* denotes red figure.

	1939(a)	1940(a)	1941	1942	1943(c)	1944(c)	1945 Estimated
Operating revenues:							
Electric	$2,592,518	2,782,918	3,167,046	3,407,899	3,707,992	3,849,729	4,011,900
Transportation	484,201	508,513	760,359	1,046,095	-0-	-0-	-0-
Bridge	64,016	70,619	85,067	79,502	-0-	-0-	-0-
Total	3,140,735	3,362,050	4,012,472	4,533,496	3,707,992	3,849,729	4,011,900
Operating expenses and taxes:							
Operation	1,262,544	1,342,130	1,507,723	1,686,440	1,292,260	1,271,825	1,371,300
Maintenance	184,282	188,236	245,361	270,683	185,629	181,869	184,000
Depreciation	400,339	401,100	417,040	439,473	287,508	288,978	292,100
Taxes - Federal income and excess profits (b)	107,401	170,000	485,077	901,219	751,756	829,490	964,600
- Other	345,461	367,439	412,855	428,003	370,105	371,782	337,900
Total	2,300,027	2,468,905	3,068,056	3,725,818	2,887,258	2,943,944	3,192,300
Net operating revenues	840,708	893,145	944,416	807,678	820,734	905,785	812,000
Other income - net	13,994	11,090	3,874*	38,235*	6,450*	25,369	7,200
Gross income	854,702	904,235	940,542	769,443	814,284	931,154	819,200
Interest and amortization:							
Interest on long-term debt	231,250	231,250	230,316	227,310	224,349	221,225	218,100
Other interest	5,955	5,874	6,869	6,123	6,429	6,967	14,300
Amortization of premium, net	6,311*	6,311*	6,311*	6,311*	6,311*	6,311*	6,300*
Total	230,894	230,813	230,074	227,122	224,467	221,881	226,100
Net income	623,808	673,422	710,468	542,321	589,817	709,273	593,100
Preferred dividend requirements	67,500	67,500	67,500	67,500	67,500	67,500	67,500
Balance for common stock and surplus	$ 556,308	605,922	642,968	474,821	522,317	641,773	525,600
Earnings per share of common stock based on 381,994 shares	$1.46	$1.59	$1.68	$1.24	$1.45	$1.68	$1.38

(a) Includes operations for the entire period of system acquired December 30, 1940 from Mesilla Valley Electric Company.

(b) Includes provision for estimated excess profits taxes of -0- -0- $246,602 $693,043 $540,000 $633,690 $765,000

(c) Excludes operations of transportation and bridge properties sold December 31, 1943.

Engineers' Exhibit No. 51 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES CONSOLIDATING INCOME STATEMENT 12 MONTHS ENDED JUNE 30, 1945

Showing Tax Adjustment Applied Against Taxes and Reflecting Amortization of Plant Acquisition Adjustments as a Deduction From Inc ⁄

* Denotes decrease or red figure

	El Paso Elec.Co. (Del.)	El Paso Elec. Co. (Texas)	Gulf States Utilities Company	Missouri Service Company#	Northern Kansas Power Co.#	Savannah Elec. and Power Co.#	Virginia Elec.and Power Co.	Western Pub.Serv. Co.(Del.)	Eliminations between Sub.Cos.	Combined	Eng. Pub. Serv. Co (Incorp.)	Eliminations per Sched. A	Consolidated
Operating revenues	$	3,962,035	18,245,479	115,332	1,937	2,520,584	47,200,498	330,636	927* ¢	72,375,574	5,165,179	5,165,179*	$72,375,574
Operation	8,524	1,298,563	6,438,216	46,617	1,548	1,225,748	18,336,229	136,213	927* ¢	27,490,731	256,512		27,747,243
Maintenance		194,895	891,037	6,034	16	179,417	3,502,971	11,915		4,786,285			4,786,285
Depreciation		290,622	1,532,417	15,906	225	204,903	3,373,579	33,716		5,451,368			5,451,368
Taxes - Federal income (after reduction of $4,424,813 shown separately below related to and applied against items charged directly to surplus)	844*	902,342	3,767,260	1,379		375,525	3,392,282	24,577		8,462,521	259,880		8,722,401©
Taxes - Other	288	384,784	1,316,367	8,916	114	164,810	3,759,656	31,812		5,666,747	15,995		5,682,742
Net operating revenues	7,656*	890,829	4,300,182	36,480	34	370,181	14,835,781	92,403	-0-	20,517,922	4,632,792	5,165,179*	19,985,535
Other income - net		32,620	37,707*	682*	1	18,412	68,856*	245*		56,457*	555,723	449,814*	49,452
Gross income	7,968*	923,449	4,262,475	35,798	35	388,593	14,766,935	92,158	-0-	20,461,465	5,188,515	5,614,993*	20,034,987
Special charges of those portions of premium and expenses on redemption of bonds ($2,367,940) and of loss on sale of property ($2,056,873) which are equivalent to resulting reduction in Federal excess profits taxes							4,424,813			4,424,813			4,424,813
Interest and amortization	4	239,047	1,014,877	23,386	8	188,130	2,916,037	37,232		4,418,721	267	48,440*	4,370,548
Amortization of plant acquisition adjustments			193,810				693,168			886,978			886,978
Net income	7,972*	684,402	3,053,788	12,412	27	200,463	6,732,907	54,926		10,730,953	5,188,248	5,566,553*	10,352,648
Preferred dividend requirements subsidiary companies	27,856	67,501	560,917			104,557	1,447,349			2,208,180		23,500*	2,184,680
Balance	35,828*	616,901	2,492,871	12,412	27	95,906	5,285,558	54,926		8,522,773	5,188,248	5,543,053*	8,167,968
Amount applicable to minority interests						135	11,517			11,652			11,652
Balance	$35,828*	616,901	2,492,871	12,412	27	95,771	5,274,041	54,926	-0-	8,511,121	5,188,248	5,543,053*	8,156,316
Dividends on preferred stock of parent company													2,119,092
Balance for common stock and surplus Parent Co.													$ 6,037,224

\# Engineers Public Service Company sold its interests in Savannah Electric and Power Company in April 1945 and sold its interests in Missouri Service Company and The Northern Kansas Power Company in June 1945. Consequently, the consolidated income statement does not include the operations of such companies subsequent to December 31, 1944 and the amount of income received by Engineers Public Service Company from such companies subsequent to December 31, 1944 is included in consolidated earnings from other sources only to the extent of the net income of such companies accruing to Engineers Public Service Company between December 31, 1944 and the date of sale.

¢ Power sales between Missouri Service Company and Northern Kansas Power Company.

© The provision for Federal income taxes includes provision for estimated excess profits taxes of $4,836,481 after reductions (1) of $1,387,701 resulting from amortization of emergency facilities and (2) of $4,424,813 related to and applied against items charged directly to surplus and after deducting estimated post-war credit of $537,385.

Engineers' Exhibit No. 51.

Schedule 4

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED)
AND SUBSIDIARY COMPANIES CONSOLIDATING INCOME
STATEMENT 12 MONTHS ENDED JUNE 30, 1945

Detail of Intercompany Eliminations
* denotes decrease

From operating revenues:			
Virginia Elec. and Pr. Co.	Common div.		$2,725,739
Gulf States Utilities Co.	" "		1,330,000
El Paso Elec. Co. (Texas)	" "		993,750
The West. Pub. Serv. Co.	" "		41,250
El Paso Elec. Co. (Del.)	Preferred div.		3,000
Savannah Elec. & Pw. Co.	" "		22,000
The West. Pub. Serv. Co.	Note interest		25,440
Missouri Service Co.	Bond "		23,000
Total eliminations from Operating revenues			$5,165,179
From Other income - net:			
Portion of income received by Engineers assigned to consolidated surplus:			
Savannah Elec. & Pw. Co.	Common div.		$ 415,315
Missouri Service Co.	Bond interest		34,499
Total eliminations from Other income - net			$ 449,814
From interest and amortization:			
The Western Pub. Serv. Co.	Note interest		$ 25,440
Missouri Service Co.	Bond interest		23,000
Total eliminations from interest and amortization			$ 48,440
From preferred dividends - sub. cos.:			
Savannah Elec. & Pw. Co.	Preferred		$ 22,000
El Paso Elec. Co. (Del.)	Preferred	$3,000	
Adjustment to accrual basis		1,500*	1,500
Total eliminations from preferred dividends - sub. cos.			$ 23,500

Engineers' Exhibit No. 52.

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES PRO FORMA CONSOLIDATING INCOME STATEMENT 12 MONTHS ENDED JUNE 30, 1945 GIVING ESTIMATED EFFECT TO THE CONSUMMATION OF PARTS I AND II OF THE PLAN

Showing Tax Adjustment Applied Against Taxes and Reflecting Amortization of Plant Acquisition Adjustments as a Deduction From Income

* Denotes decrease or red figure

	Consolidated	El Paso Elec. Co. (Del.)	El Paso Elec. Co. (Texas)	Gulf States Utilities Company	Missouri Service Co.	Northern Kansas Power Co.	Savannah Elec. & Power Co.	Western Public Service Co. (Del.)	Eliminations and Adjustments Per Sch. B	Pro Forma Consolidated
Operating revenues	$72,375,574		3,962,035*	1 245,479*	115,332*	1,937*	2,520,584*	330,636*	927	$47,200,498
Operation	27,747,243	8,524*	1,298,563*	6,438,216*	46,617*	1,548*	1,225,748*	136,213*	115,184*	18,476,630
Maintenance	4,786,285		194,895*	891,037*	6,034*	16*	179,417*	11,915*		3,502,971
Depreciation	5,451,368		290,622*	1,532,417*	15,906*	225*	204,903*	33,716*		3,373,579
Taxes—Federal income (after reduction of $4,424,813 shown separately below related to and applied against items charged directly to surplus)	8,722,401	844	902,342*	3,767,260*	1,379*		375,525*	24,577*	102,662*	3,549,500(a)
Taxes—other	5,682,742	288*	384,784*	1,316,367*	8,916*	114*	164,810*	31,812*	105	3,775,756
Net operating revenues	19,985,535	7,968	890,829*	4,300,182*	36,480*	34*	370,181*	92,403*	218,668	14,522,062
Other income—net	49,452		32,620*	37,707	682	1*	18,412*	245	105,909*	68,856*
Gross income	20,034,987	7,968	923,449*	4,262,475*	35,798*	35*	388,593*	92,158*	112,759	14,453,206
Special charges of those portions of premium and expenses on redemption of bonds ($2,367,940) and of loss on sale of property ($2,056,873) which are equivalent to resulting reduction in Federal excess profits taxes	4,424,813									4,424,813
Interest and amortization	4,370,548	4*	239,047*	1,014,877*	23,386*	8*	188,130*	37,232*	93,172	2,961,036
Amortization of plant acquisition adjustments	886,978			193,810*						693,168
Net income	10,352,648	7,972	684,402*	3,053,788*	12,412*	27*	200,463*	54,926*	19,587	6,374,189
Preferred dividend requirements subsidiary companies	2,184,680	27,856*	67,501*	560,917*			104,557*		23,500	1,447,349
Balance	8,167,968	35,828	616,901*	2,492,871*	12,412*	27*	95,906*	54,926*	3,913*	4,926,840
Amount applicable to minority interests	11,652						135*			11,517
Balance	8,156,316	35,828	616,901*	2,492,871*	12,412*	27*	95,771*	54,926*	3,913*	4,915,323
Dividends on preferred stock of parent company	2,119,092								2,119,092*	—0—
Balance for common stock and surplus of parent Co.	$ 6,037,224	35,828	616,901*	2,492,871*	12,412*	27*	95,771*	54,926*	2,115,179	$ 4,915,323

(a) The provision for Federal income taxes includes provision for estimated excess profits taxes of $1,166,048 after reductions (1) of $850,000 resulting from amortization of emergency facilities and (2) of $4,424,813 related to and applied against items charged directly to surplus and after deducting estimated post-war credit of $129,561.

Engineers' Exhibit No. 52 (Cont'd)

Schedule B

Engineers Public Service Company (Incorporated) and Subsidiary Companies Prp Forma Çonsolidating Income Statement 12 Months, Ended June 30, 1945 Giving Estimated Effect to the Consummation of Parts I and II of the Plan

Detail of Intercompany Eliminations and Adjustments
* Denotes decrease

Operating revenues	
Power sales between Missouri Service Company and The Northern Kansas Power Company	$ 927
Operation	
Decrease in expenses of Engineers Public Service Company (Incorporated)	124,511*
Increase in expenses of Virginia Electric and Power Company due to concellation of service contract with Epsco, Inc.	8,400
Power sales between Missouri Service Company and The Northern Kansas Power Company	927
Decrease in operation	115,184*
Taxes—Federal income	
Reduction due to increase in expenses of Virginia Electric and Power Company	7,182*
Reduction due to decrease in income of Parent Company	95,480*
Decrease in taxes—Federal income	102,662*
Taxes—Other	
Increase in New York State and City taxes	5,039
Less reduction in Federal capital stock, Delaware franchise and miscellaneous taxes	4,934*
Increase in taxes—other	105

Other income—net

Decrease in earnings from other sources is as follows:

	Total Received by Engineers Corporate	Portion Assigned to Consolidated Surplus	Earnings From Other Sources (a)
Savannah Electric and Power Co. Preferred dividends	$ 11,000	—0—	$ 11,000
Savannah Electric and Power Co. Common dividends	458,555	415,315	43,240
Missouri Service Co. Bond interest	64,475	34,499	29,976
The Northern Kansas Power Co. Open Acct. interest	125	—0—	125
	$534,155	449,814	$ 84,341

Miscellaneous Revenue	
Interest on U. S. Treasury securities	$ 19,447
Premium on sale U. S. Treasury securities	1,987
Interest on overpayment of Federal income taxes	121
Unearned insurance premium	11
Dividend from defunct bank	2
	$ 21,568
Decrease in Other income—net	$105,909

Engineers' Exhibit No. 52 (Cont'd)

Schedule B
Page 2

Detail of Intercompany Eliminations and Adjustments (Cont'd)

*** Denotes decrease**

(a) Engineers Public Service Company sold its interests in Savannah Electric and Power Company in April 1945 and sold its interests in Missouri Service Company and The Northern Kansas Power Company in June 1945. Consequently, the consolidated income statement does not include the operations of such companies subsequent to December 31, 1944 and the amount of income received by Engineers Public Service Company from such companies subsequent to December 31, 1944 is included in consolidated earnings from other sources only to the extent of the net income of such companies accruing to Engineers Public Service Company between December 31, 1944 and the date of sale.

Interest and amortization

Interest income to Engineers from subsidiary companies as follows:	
The Western Public Service Company note interest	$25,440
Missouri Service Company bond interest	23,000
	48,440
Interest on proposed $3,000,000 bank loan of Engineers	45,000
Eliminate Engineers nonrecurring interest	268*
Increase in interest and amortization	$93,172

Preferred dividend requirements Subsidiary companies

Preferred dividend income to Engineers from subsidiary companies as follows:		
Savannah Electric and Power Company preferred		$22,000
El Paso Electric Company (Del.) preferred	$3,000	
Adjustment to accrual basis	1,500*	1,500
Increase in preferred dividend requirements of subsidiary companies		$23,500

Engineers' Exhibit No. 53.

VIRGINIA ELECTRIC AND POWER COMPANY

Estimated Income Statement Year 1945 Excluding Transportation Operations for 3 Months Ended 3/31/45 (Last 2 Months Estimated) and Pro Forma Income Statement Year 1944 Giving Estimated Effect as at January 1, 1944 to Merger and Sale of Transportation Properties

	1945	1944
Operating revenues	$40,425,000	$39,372,508
Operating expenses and taxes:		
Operation	15,775,100	14,806,805
Maintenance	2,794,900	2,284,599
Depreciation	2,802,000	2,709,512
Taxes - Federal taxes on income (after extraordinary reductions of $6,307,617 in 1945 and $6,896,102 in 1944 as explained in Note A)	623,383	(91,124)
Taxes - Other	3,177,000	3,292,193
Total	25,172,383	23,001,985
Net operating revenues after extraordinary reductions in taxes indicated above	15,252,617	16,370,523
Other income - net loss	93,000	45,361
Balance	15,159,617	16,325,162
Deductions from income and special charges:		
Interest and amortization of debt discount and expense	2,681,000	2,740,710
Amortization of plant acquisition adjustments	700,000	693,168
Special charges of (1) those portions of premium and expenses on redemption of bonds ($2,367,940 in 1945; $2,091,177 in 1944) which are equivalent to resulting reduction in Federal taxes on income, and (2) loss on sale of transportation property ($3,076,274 in 1944) in excess of provision for taxes on transportation earnings	2,367,940	5,167,451
Total	5,748,940	8,601,329
Net income	$ 9,410,677	$ 7,723,833
Extraordinary reductions in Federal taxes on income which are not offset by Special Charges include amounts (shown opposite) which result from deductions, in excess of depreciation at usual rates, allowable for tax purposes as amortization of emergency facilities but not recognized in the accounts since such facilities are expected to be employed throughout their normal life and to not replace existing facilities	$ 3,939,677	$ 1,728,651
Earnings before giving effect to tax reductions resulting from amortization of emergency facilities	5,471,000	5,995,182
Preferred dividend requirements	1,448,000	1,447,355
Applicable to common stock:		
Total	4,023,000	4,547,827
Per share, based on 2,938,425 shares	$1.37	$1.55

( ) Parenthesis denotes red figure

See note on next page.

Engineers' Exhibit No. 53 (Cont'd)

VIRGINIA ELECTRIC AND POWER COMPANY

Note to Estimated Income Statement Year 1945 Excluding Transportation Operations for 3 Months Ended 3/31/45 (Last 2 Months Estimated) and Pro Forma Income Statement Year 1944 Giving Estimated Effect as at January 1, 1944 to Merger and Sale of Transportation Properties

NOTE A

The provision for Federal taxes on income for the year 1945 was reduced (1) $2,367,940 by reason of deductions for tax purposes of redemption premiums and expenses incurred in refunding of bonds; and (2) $3,939,677 (including $143,808 representing reduction in tax due to carry-back of unused excess profits credit from 1945 to 1943) by reason of deductions for tax purposes of amounts, in excess of depreciation provided for at usual rates, allowable as amortization of emergency facilities under Section 124 of the Internal Revenue Code.

The provision for Federal taxes on income for the year 1944 was reduced (1) $2,091,177 by reason of deductions for tax purposes of redemption premiums and expenses incurred in refunding of bonds; (2) $3,076,274 by reason of deductions for tax purposes of loss on the sale of transportation property in excess of provision for taxes on transportation earnings; and (3) $1,728,651 (including $956,479 representing reduction in tax due to carry-back of net operation loss deduction and unused excess profits credit from 1944 to 1942 and 1943) by reason of deductions for tax purposes of amounts, in excess of depreciation provided at usual rates, allowable as amortization of emergency facilities under Section 124 of the Internal Revenue Code.

Because of the extraordinary deductions enumerated, the Company does not consider that it has any liability for excess profits taxes for 1945 or 1944.

On September 29, 1945 the President of the United States of America issued a proclamation terminating the emergency period and as a result of such proclamation the Company has elected to terminate the amortization period with respect to all emergency facilities effective September 30, 1945. Federal income taxes shown above have been restated to include the reduction resulting from the shortened amortization period. Also, as a result of studies conducted during 1945, the deduction for loss on sale of transporation property as claimed in the returns filed for 1944 eliminates all liabilit for Federal taxes on income for that year and gives rise to possible refunds of taxes of prior years of approximately $2,600,000. Such returns have, however, not as yet been examined by the Treasury Department. Pending such examination the Company has recognized in its accounts only the elimination of tax liability for 1944. The above income statement for 1944 has been correspondingly restated.

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED)

Summary of Common Stock Issues

Year	Shares	Price	Amount	
1925	100,000	$11.875	$ 1,187,500.00 (1)	Issued with Allotment Certificates
1925	400,000	11.875	4,750,000.00	Sold to Bankers
1928	100,000	38.00	3,800,000.00	" " "
1928-1929-1930	294,880	52.165	15,382,400.00 (2)	Conversion of $5.00 Preferred
1928-1929-1930	181,449	27.507	4,991,160.00 (3)	Account of Option Warrants
1929	197,911	42.50	8,183,619.85 (4)	Sold under rights
Total	1,274,240	Average $30.05	$38,294,679.85 (Cash)	
1929-1930	99,708½	10.00	997,085.00	Stock Dividends
1925 thru 1930	535,638	35.03	18,762,772.50	In connection with acquisitions
1930	34½	43.64	1,505.50	Conversion of Scrip
1931	113	10.00	1,130.00	Conversion of Scrip
1932	35	10.00	350.00	Conversion of Scrip
1933	33	10.00	330.00	Conversion of Scrip
1934	15	10.00	150.00	Conversion of Scrip
1935	151	10.00	1,510.00	Conversion of Scrip
12/31/35	1,909,968	Average 30.40	$58,059,512.85	
5/31/36			56,149,544.85	Reduction of Capital
	1,909,968	Average 1.00	$ 1,909,968.00 (5)	

(1) This amount assigned to common on basis of price paid for 400,000 shares sold at same time to Bankers, who received therewith 200,000 Option Warrants.

(2) Conversion ranged from 21 shares down to 15 shares for each 10 shares of Preferred. Company received $95 for each share of Preferred which price was used as basis for setting up Common issued through conversions.

(3) Warrants were exercisable at $27.50 on or before July 1, 1930 and thereafter at $30 on or before January 2, 1933.

(4) $1.15 per share was credited to Surplus. Rights were issued to all stockholders in the ratio of one new share for each ten shares of Common and $5.50 Preferred; 1½ shares for each ten shares of $5.00 Preferred and ½ share for each 10 option Warrants, holders of record February 14, 1939.

(5) Changed from no par value to $1 par value, effective May 25, 1936.

Engineers' Exhibit No. 57.

For Immediate Release Wednesday, December 31, 1941

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON

Holding Company Act
Release No. 3230

United States of America

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Washington, D. C., on the 29th day of December, A. D., 1941.

In the Matter of The Western Public Service Company, a Maryland Corporation The Western Public Service Company, a Delaware Corporation Engineers Public Service Company File No. 70-453 Engineers Public Service Company and Its Subsidiary Companies, Respondents. File No. 59-4 Public Utility Holding Company Act of 1935	Order Granting Applications and Permitting Declarations To Become Effective Pursuant to Sections 7, 10, and 12, and Order of Divestment Pursuant to Section 11 (b) (1)

Engineers Public Service Company, a registered holding company, The Western Public Service Company, a Maryland corporation, and The Western Public Service Company, a Delaware corporation, its subsidiaries, having filed applications and declarations pursuant to Sections 7,

Engineers' Exhibit No. 57 (Cont'd)

10, and 12 of the Public Utility Holding Company Act of 1935 and appropriate rules promulgated thereunder, and also pursuant to instructions 8 (c) to the Uniform System of Accounts for Public Utility Holding Companies, regarding the following transactions:

The contribution by Engineers Public Service Company to The Western Public Service Company, a Maryland corporation, of $1,032,000 principal amount of First Mortgage Bonds, 31,341 shares of Preferred Stock Series A, and 10,000 shares of Preferred Stock Series B of said The Western Public Service Company and the acquisition and retirement of said securities by said The Western Public Service Company, a Maryland corporation;

The amendment of the charter of The Western Public Service Company, a Maryland corporation, so as to change the common stock from no par to $1 par value and the capitalization represented by its common stock from $5,000,000 to $500,000;

The call for redemption by The Western Public Service Company, a Maryland corporation, of 8,292 shares of Preferred Stock, Series A at $27.50 per share plus accrued dividends;

The declaration by The Western Public Service Company, a Maryland corporation, of a dividend in partial liquidation, to Engineers Public Service Company, of all the securities of Missouri Service Company and The Northern Kansas Power Company;

The acquisition by Engineers Public Service Company of all of the securities of The Western Public Service Company, a Delaware corporation, The Northern Kansas Power Company, and Missouri Service Company;

The transfer by The Western Public Service Company, a Maryland corporation, at the direction of Engineers Public Service Company, of all its Wyoming properties to The Western Public Service Company, a Delaware corporation, and the acquisition thereof by said Delaware corporation;

Engineers' Exhibit No. 57 (Cont'd)

The issuance by The Western Public Service Company, a Delaware corporation of the $508,800 5% notes payable and $653,200 of par value common stock and the assumption of $258,000 principal amount of municipal bonds heretofore assumed by The Western Public Service Company, a Maryland Corporation, and the acquisition of said notes and stock by Engineers Public Service Company;

The execution by Engineers Public Service Company of a $300,000 bond of indemnity covering liability for payment of said $258,000 principal amount of municipal bonds;

The method of recordation on the books of Engineers Public Service Company of the securities of The Western Public Service Company, a Delaware Corporation, The Northern Kansas Power Company, and Missouri Service Company to be acquired by it;

All other transactions necesary to facilitate the sale of the Nebraska and South Dakota assets of The Western Public Service Company, a Maryland corporation, to Consumers Public Power District, and instrumentality and political subdivision of the State of Nebraska;

The acquisition and retirement by Engineers Public Service Company of not to exceed 35,000 shares of its own preferred stock outstanding in the hands of the public by invitation for tenders and by open market purchases.

The Commission having heretofore issued its Notice of and Order for Hearing pursuant to Section 11 (b) (1) of the Act, in *Engineers Public Service Company and Its Subsidiary Companies, Respondents,* File No. 59-4, but having as yet issued no order of divestment with respect to The Western Public Service Company, a Maryland corporation, and finding it necessary and appropriate that the applications and declarations in File No. 70-453 should be consolidated with said File No. 59-4;

Engineers Public Service Company having filed its written consent to an order of divestment pursuant to Section 11 (b) (1) of the Act;

Engineers' Exhibit No. 57 (Cont'd)

IT IS ORDERED that the applications and declarations in File No. 70-453 be and they hereby are consolidated with the proceedings in File No. 59-4;

That jurisdiction be and the same hereby is reserved as to the proposed acquisition and retirement by Engineers Public Service Company of not to exceed 35,000 shares of its own Preferred Stock;

That otherwise said applications be and the same hereby are granted and said declarations be and the same hereby are permitted to become effective forthwith.

IT IS FURTHER ORDERED pursuant to Section 11 (b) (1) of the Public Utility Holding Company Act of 1935, that Engineers Public Service Company shall divest itself of its interest in the securities of Missouri Service Company, The Northern Kansas Power Company and The Western Public Service Company, a Delaware corporation, proposed to be acquired by it pursuant to applications and declarations now pending before the Commission in File No. 70-453, if and when Engineers Public Service Company acquires direct ownership of said securities.

IT IS FURTHER ORDERED that Engineers Public Service Company, in accordance with subparagraph (c) of Section 11 of said Act, shall comply with the preceding paragraph of this Order within one year from the date when it acquires direct ownership of said securities, without prejudice to its right to apply for additional time to comply with such Order as provided in such Section.

By the Commission.

Francis P. Brassor,
Secretary.

(SEAL)

Engineers' Exhibit No. 63.

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED)

Income Statement Year 1943 (Last 2 Months Estimated

Income	
Dividends from subsidiary companies:	
El Paso Electric Co. common	$1,181,250
Gulf States Utilities Co. common	1,456,000
Virginia Electric and Power Co. common	2,842,085
The Western Public Service Co. common	30,000
Interest from subsidiary company:	
The Western Public Service Co. Note	25,440
From miscellaneous investments	
Savannah Electric and Power Co. common dividend	458,555
" " " " " preferred dividend	11,000
Missouri Service Co. bond interest	64,475
The Northern Kansas Power Co. open acct. interest	125
Miscellaneous	32,000
Total income	$6,190,910
Expenses and taxes	
Expenses	335,000
Taxes - Federal income	348,900
- Other	49,035
Total expenses and taxes	732,935
Balance for dividends and surplus	5,457,975
Preferred dividend requirements	2,119,076
Balance for common stock and surplus	$3,338,899
Balance for preferred dividends per share	$13.91

Engineers' Exhibit No. 63 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES CONSOLIDATING INCOME STATEMENT YEAR 1945 (LAST 2 MONTHS ESTIMATED)

Does not Give Effect to Reduction in Federal Income and Excess Profits Taxes Resulting from Extraordinary Nonrecurring Deduction Items

* Denotes decrease or red figure

	V.E.& P.Co.(a)	G.S.U.Co.	El Paso	Western	Combined	E.P.S.Co.	Eliminations Per Sch. A	Consolidated
Operating revenues	$40,425,000	17,816,000	4,011,900	298,900	62,551,800	5,624,755	5,624,755*	$62,551,800
Operation	15,775,100	6,532,400	1,371,300	122,200	23,801,000	335,000		24,136,000
Maintenance	2,794,900	984,600	184,000	11,600	3,975,100			3,975,100
Depreciation	2,802,000	1,546,700	292,100	33,900	4,674,700			4,674,700
Taxes - Federal income (b)	6,931,000	3,880,167	964,600	17,600	11,793,367	348,900		12,142,267
" - Other	3,177,000	1,298,000	387,900	32,800	4,895,700	49,035		4,944,735
Total	31,480,000	14,241,867	3,199,900	218,100	49,139,867	732,935	-0-	49,872,802
Net operating revenues	8,945,000	3,574,133	812,000	80,800	13,411,933	4,891,820	5,624,755*	12,678,998
Other income - net	93,000*	43,000*	7,200	1,700*	130,500*	566,155	449,814*	14,159*
Gross income	8,852,000	3,531,133	819,200	79,100	13,281,433	5,457,975	6,074,569*	12,664,839
Interest and amortization	2,681,000	926,300	226,100	35,100	3,868,500	-0-	25,440*	3,843,060
Amortization of plant acquisition adjustments	700,000	193,800	-0-	-0-	893,800			893,800
Net income	5,471,000	2,411,033	593,100	44,000	8,519,133	5,457,975	6,049,129*	7,927,979
Preferred dividend requirements subsidiary companies	1,448,000	528,000	67,500	-0-	2,043,500			2,043,500
Balance	4,023,000	1,883,033	525,600	44,000	6,475,633	5,457,975	6,049,129*	5,884,479
Amount applicable to minority interests	8,707	-0-	-0-	-0-	8,707			8,707
Balance	$ 4,014,293	1,883,033	525,600	44,000	6,466,926	5,457,975	6,049,129*	5,875,772
Preferred dividend requirements - parent co.								2,119,076
Balance for common stock and surplus of parent co.								$ 3,756,696
Balance for Engineers preferred dividends - per share								$14.97
Times charges and preferred dividends earned - consolidated								1.47
(b) Includes excess profits taxes of	$ 4,743,000	2,762,900	764,600	-0-	8,270,500	-0-		$ 8,270,500

(a) Excludes transportion operations for 3 months ended 3/31/45.

Engineers' Exhibit No. 63 (Cont'd)

Schedule A

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES CONSOLIDATING INCOME STATEMENT YEAR 1945 (LAST 2 MONTHS ESTIMATED)

Detail of Eliminations

From operating revenues:		
Virginia Elec. and Pr. Co.	Common div.	$2,932,065
Gulf States Utilities Co.	" "	1,456,000
El Paso Elec. Co. (Texas)	" "	1,181,250
The West. Pub. Serv. Co.	" "	30,000
The West. Pub. Serv. Co.	Note interest	25,440
Total eliminations from Operating revenues		$5,624,755
From Other income - net:		
Portion of income received by Engineers Assigned to consolidated surplus:		
Savannah Elec. & Pr. Co.	Common div.	$ 415,315
Missouri Service Co.	Bond interest	34,499
Total eliminations from Other income - net		$ 449,814
From interest and amortization:		
The Western Pub. Serv. Co.	Note interest	$ 25,440

Engineers' Exhibit No. 63 (Cont'd)

CONFIDENTIAL

ENGINEERS PUBLIC SERVICE CO. (INCORPORATED)

1946 Estimated Income Statement /
Assuming Continuation of Engineers System

Income		
Dividends from Sub. Cos.:		
El Paso Electric Co.	Common	$ 375,000
Gulf States Utilities Co.	"	1,512,000
Virginia Electric & Power Co.	"	2,932,065
Total Income		4,819,065
Expenses and Taxes		
Expenses		250,000
Taxes - Federal income		259,586
- Other		14,918
Total Expenses and Taxes		524,504
Balance for Dividends and Surplus		4,294,561
Preferred Dividend Requirements		2,119,076
Balance for Common Stock and Surplus		$2,175,485
Balance for preferred dividends per share		$10.94

Engineers' Exhibit No. 63 (Cont'd)

CONFIDENTIAL

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED)
AND SUBSIDIARY COMPANIES 1946 ESTIMATED CONSOLIDATING
INCOME STATEMENT ASSUMING CONTINUATION OF ENGINEERS SYSTEM

* Denotes decrease or red figure

	V.E.& P.Co.	G.S.U. Co.	El Paso	Combined	E.P.S.Co.	Intercompany Eliminations(a)	Consolidated
Operating revenues	$38,375,000	15,344,000	3,655,800	57,374,800	4,819,065	4,819,065*	$57,374,800
Operation	16,607,500	5,755,000	1,540,000	23,902,500	250,000		24,152,500
Maintenance	2,742,500	996,000	210,000	3,948,500			3,948,500
Depreciation	2,950,000	1,600,000	300,000	4,850,000			4,850,000
Taxes - Federal income	3,470,000	1,654,200	316,600	5,440,800	259,586		5,700,386
- Other	3,500,000	1,274,200	377,400	5,151,600	14,918		5,166,518
Total	29,270,000	11,279,400	2,744,000	43,293,400	524,504	-0-	43,817,904
Net operating revenues	9,105,000	4,064,600	911,800	14,081,400	4,294,561	4,819,065*	13,556,896
Other income - net	100,000*	16,500*	5,000	111,500*	-0-	-0-	111,500*
Gross income	9,005,000	4,048,100	916,800	13,969,900	4,294,561	4,819,065*	13,445,396
Interest and amortization	2,180,000	926,300	215,900	3,322,200	-0-		3,322,200
Amortization of plant acquisition adjustments	700,000	193,800	-0-	893,800	-0-		893,800
Net income	6,125,000	2,928,000	700,900	9,753,900	4,294,561	4,819,065*	9,229,396
Preferred dividend requirements subsidiary companies	1,448,000	528,000	67,500	2,043,500			2,043,500
Balance	4,677,000	2,400,000	633,400	7,710,400	4,294,561	4,819,065*	7,185,896
Amount applicable to minority interests	10,121	-0-	-0-	10,121			10,121
Balance	$ 4,666,879	2,400,000	633,400	7,700,279	4,294,561	4,819,065*	7,175,775
Preferred dividend requirements- parent company							2,119,076
Balance for common stock and surplus of parent company							$ 5,056,699
Balance for Engineers preferred dividends - per share							$18.28
Times charges and preferred dividends earned - consolidated							1.68

(a) Dividends from Subsidiary Companies.

Engineers' Exhibit No. 65.

Confidential

EL PASO ELECTRIC COMPANY

Estimated Income Statement Year 1946 and Income Statement Year 1945

(Last 2 Months Estimated)

	1946	1945	Increase (Decrease)
Operating revenues	$3,655,800	$4,011,900	$(356,100)
Operation	1,540,000	1,371,300	168,700
Maintenance	210,000	184,000	26,000
Depreciation	300,000	292,100	7,900
Taxes—Federal income	316,600	964,600	(648,000)
—Other	377,400	387,900	(10,500)
Total	2,744,000	3,199,900	(455,900)
Net operating revenues	911,800	812,000	99,800
Other Income—Net	5,000	7,200	(2,200)
Gross income	916,800	819,200	97,600
Interest and amortization	215,900	226,100	(10,200)
Net income	700,900	593,100	107,800
Preferred dividend requirements	67,500	67,500	—0—
Balance for common stock and surplus	$ 633,400	$ 525,600	$ 107,800
Earnings per share of common stock based on 381,994 shares	$1.66	$1.38	$.28

Engineers' Exhibit No. 66.

Confidential

GULF STATES UTILITIES COMPANY

Estimated Income Statement Year 1946 and Pro Forma (a) Income Statement Year 1945 (Last 2 Months Estimated)

	1946	1945	Increase (Decrease)
Operating revenues	$15,344,000	$17,816,000	$(2,472,000)
Operation	5,755,000	6,532,400	(777,400)
Maintenance	996,000	984,600	11,400
Depreciation	1,600,000	1,546,700	53,300
Taxes—Federal income	1,654,200	3,880,167 (a)	(2,225,967)
—Other	1,274,200	1,298,000	(23,800)
Total	11,279,400	14,241,867	(2,962,467)
Net operating revenues	4,064,600	3,574,133	490,467
Other income—net loss	16,500	43,000	(26,500)
Gross income	4,048,100	3,531,133	516,967
Interest and amortization	926,300	926,300	—0—
Amortization of plant acquisition adjustments	193,800	193,800	—0—
Net income	2,928,000	2,411,033	516,967
Preferred dividend requirements	528,000	528,000	—0—
Balance for common stock and surplus	$ 2,400,000	$ 1,883,033	$ 516,967
Earnings per share of common stock based on 1,909,968 shares	$1.26	$.99	$.27

(a) Excludes reduction of $1,254,290 due to accelerated amortization of emergency facilities.

Engineers' Exhibit No. 67.

Confidential

VIRGINIA ELECTRIC AND POWER COMPANY

Estimated Income Statement Year 1946 and Pro Forma Income Statement Year 1945 as per Adjustments Indicated in Footnotes and Excluding Transportation Operations for 3 Months Ended 3/31/45

(Last 2 Months Estimated)

	1946	1945	Increase (Decrease)
Operating revenues	$38,375,000	$40,425,000	$(2,050,000)
Operation	16,607,500	15,775,100	832,400
Maintenance	2,742,500	2,794,900	(52,400)
Depreciation	2,950,000	2,802,000	148,000
Taxes—Federal income	3,470,000	6,931,000 (a)	(3,461,000)
—Other	3,500,000	3,177,000	323,000
Total	29,270,000	31,480,000	(2,210,000)
Net operating revenues	9,105,000	8,945,000	160,000
Other income—net loss	100,000	93,000	7,000
Gross income	9,005,000	8,852,000	153,000
Interest and amortization	2,180,000	2,681,000 (b)	(501,000)
Amortization of plant acquisition adjustments	700,000	700,000	—0—
Net income	6,125,000	5,471,000	654,000
Preferred dividend requirements	1,448,000	1,448,000	—0—
Balance for common stock and surplus	$ 4,677,000	$ 4,023,000	$ 654,000
Earnings per share of common stock based on 2,938,425 shares	$1.59	$1.37	$.22

(a) Excludes reductions in taxes resulting from extraordinary nonrecurring deduction items.

(b) Excludes special amortization representing tax reduction from 1945 refinancing.

Engineers' Exhibit No. 68.

MUDGE, STERN, WILLIAMS & TUCKER
(Rushmore, Bisbee & Stern)
20 Pine Street
New York 5, N. Y.

January 22, 1946.

Dear Sirs:

You have requested our opinion with respect to certain Federal income tax questions raised at a hearing held on January 9, 1946 before an examiner of the Securities and Exchange Commission in proceedings with respect to your Company under the Public Utility Holding Company Act of 1935. The request particularly relates to the treatment for Federal income tax purposes of the loss sustained by your Company on the sale in 1944 of shares of stock of Puget Sound Power and Light Company.

It is our understanding and, in fact, it was testified by Mr. S. E. Ratcliffe, an Assistant Treasurer of your Company, at Commission hearings (Trans., p. 475, *et seq.*) that Engineers Public Service Company (Incorporated) (Engineers) and affiliated corporations filed consolidated excess profits tax returns for the years 1941 to 1944, inclusive, and consolidated income tax returns for the years 1942 to 1944, inclusive, that there was a capital loss included in the 1944 consolidated income tax return of approximately $33,000,000 resulting from the sale by you of shares of stock of Puget Sound Power and Light Company, and that approximately $31,000,000 of the loss remains unused. Although Federal income tax and excess profits tax returns for 1945 have not yet been filed, we understand that consolidated returns will be filed.

Under the provisions of the Federal income tax law now in effect a net capital loss for a taxable year may be carried over to the five succeeding years and applied against the

Engineers' Exhibit No. 68 (Cont'd)

net capital gains of each of such five succeeding years. A capital loss may not be used to offset ordinary operating profits. The loss in question was sustained during a consolidated return period and, under the present law and regulations, the loss may be carried over and applied against the net capital gain reflected in the consolidated income tax returns of the same affiliated group for each of the succeeding five taxable years. This capital loss carry-over would be available to the affiliated group for the balance of the five year period if Engineers and any one of the corporations with which it filed a consolidated income tax return for 1944 continued to file consolidated income tax returns. If, therefore, the only remaining members of the affiliated group were Engineers and Virginia Electric and Power Company and they continued to file consolidated returns, the loss in question could be carried over and applied for the indicated period against net capital gains reflected in the consolidated returns.

Under the amended Plan for Divestment of Assets of Engineers pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935, it is contemplated that Engineers will be dissolved but will continue for some time to hold shares of stock of Virginia Electric and Power Company. It is our opinion that for the period after the dissolution but prior to liquidation, Engineers will be treated for Federal income tax purposes as a corporation and will be entitled to the benefits of the net capital loss carry-over from 1944, and that if Engineers and Virginia Electric and Power Company continue to file consolidated returns, this capital loss carry-over may be applied during the balance of the five year period against net capital gains reflected in the consolidated returns. It is also our opinion that the dissolution of Engineers will not terminate its privilege of filing consolidated returns with Virginia Electric and Power Company, and that consolidated returns may be filed while Engineers continues to maintain sufficient stock ownership

Engineers' Exhibit No. 68 (Cont'd)

in Virginia Electric and Power Company to permit the filing of consolidated returns.

If separate returns should be filed for 1946 or a subsequent taxable year, the net capital loss for 1944 could be used in any such year only by Engineers to be applied against the net capital gains of Engineers and the loss could not be used by any other corporation to be applied against its net capital gains.

A question was also asked at the hearing with respect to the tax effect of the proposed sale of stock of The Western Public Service Company. We understand from you that the sale of this stock, pursuant to a contract which has already been entered into, will result in a loss recognized for income tax purposes of approximately $262,000. This loss is of a similar nature to that sustained on the sale of stock of Puget Sound Power and Light Company and the comments we have made with respect to the tax treatment of that loss would be generally applicable. In the light of the large capital loss carry-over from 1944, it would appear that the relatively small loss sustained on the sale of stock of The Western Public Service Company would have no practical tax consequences to Engineers.

At the hearings referred to above, the question was raised as to what advantages might result in the filing of consolidated returns by Engineers and Virginia Electric and Power Company as a result of operating loss carry-overs and carry-backs. Under the present law and regulations, subject to certain limitations, consolidated net operating losses may be carried back to offset consolidated net income of the affiliated group for the preceding two years and any unused balance may be carried forward to offset consolidated net income of such group for the two succeeding years. It is our understanding that there was a consolidated net operating loss for 1944 arising principally from the sale of transportation properties of Virginia Electric and Power Company and increased amortization de-

Engineers' Exhibit No. 68 (Cont'd)

ductions in respect of emergency facilities of Virginia Electric and Power Company due to the termination in September, 1945 of the emergency period, but that this loss has been absorbed by profits of earlier years so that no part of it will be available for 1945 or 1946. We understand from you that a consolidated net operating loss was not sustained for 1945 and that substantial profits are estimated for 1946 so that no question arises as to the carrying backward or forward of an operating loss from either of those years. We also understand from you that in view of the past history of Virginia Electric and Power Company and present known conditions, you would consider the possibility of Virginia Electric and Power Company sustaining operating losses in subsequent years as remote. On the basis of available information, therefore, we should think it unlikely that possible advantages from operating losses would be a factor in any consideration of the advisability of the filing of consolidated rather than separate returns by Engineers and Virginia Electric and Power Company after the affiliated group is reduced to these two corporations.

You will appreciate that the opinions we have expressed are based on existing law and regulations.

Very truly yours,

MUDGE, STERN, WILLIAMS & TUCKER

Engineers Public Service Company (Incorporated),
90 Broad Street,
New York 4, N. Y.

Engineers' Exhibit No. 71.

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES PRO FORMA BALANCE SHEET CONSOLIDATED AS AT JUNE 30, 1945 GIVING ESTIMATED EFFECT TO (A) SALE OF INVESTMENT IN THE WESTERN PUBLIC SERVICE COMPANY, OPERATIONS FOR THE PERIOD JULY 1, TO DECEMBER 31, 1945 OF ENGINEERS AND VIRGINIA, TAX ADJUSTMENTS BY VIRGINIA RESULTING FROM LOSS CLAIMED ON SALE OF TRANSPORTATION PROPERTIES AND ACCELERATED AMORTIZATION OF WAR FACILITIES DUE TO TERMINATION OF WAR EMERGENCY PERIOD, PAYMENT ON DECEMBER 31, 1945 OF $5,100,000 NOTES PAYABLE OF VIRGINIA PRIOR TO MATURITY AND MISCELLANEOUS ADJUSTMENTS, AND (B) THE CONSUMMATION OF PARTS I AND II OF THE PLAN

* Denotes decrease

Assets	Actual	Western Pub. Serv.	Adjustments	Pro Forma Prior to Plan	Parts I and II of Plan: El Paso	Parts I and II of Plan: Gulf States	Parts I and II of Plan: Adjustments	Pro Forma	
Plant and other investments									
Utility plant (including intangibles):									
Electric & common, at original cost	$186,794,647	1,436,759*	2,570,000 (2)	187,927,888	12,466,430*	56,761,267*	-0-	$118,700,191	
Gas, at original cost	2,489,349	-0-	5,420,473 (2A)	7,909,822	-0-	-0-	-0-	7,909,822	(a)
Other, at cost	9,999,122	-0-	5,513,847* (2A)	4,485,275	-0-	4,485,275*	-0-	-0-	(a)
Plant acquisition adjustments	14,467,645	-0-	93,374 (2A)	14,561,019	-0-	3,230,176*	-0-	11,330,843	(a)
Investments in subsidiary co's (excess)	24,752,442	-0-	528,028* (2A-3)	24,224,414	-0-	-0-	11,609,919* (4)(7)	12,614,495	(k)
Total utility plant	238,503,205	1,436,759*	2,041,972	239,108,418	12,466,430*	64,476,718*	11,609,919*	150,555,351	
Other physical prop. less reserve	1,922,754	-0-	-0-	1,922,754	42,850*	118,704*	-0-	1,761,200	
Investment in associated company	63,295	470*	-0-	62,825	4,435*	18,410*	39,980* (9)	-0-	
Excess profits tax refund bonds.	650,858	-0-	-0-	650,858	35,797*	-0-	-0-	615,061	
Total plant and other investments	241,140,112	1,437,229*	2,041,972	241,744,855	12,549,512*	64,613,832*	11,649,899*	152,931,612	
Special funds	1,112,266	-0-	92,000* (3)	1,020,266	1,020,266*	-0-	-0-	-0-	
Current assets:									
Cash in banks and on hand	17,770,223	296,001*	847,455* (2-3)	16,626,767	533,265*	3,263,028*	9,590,888* (4-6)(9)	3,239,586	
United States treasury securities, at cost	10,536,500	22,000*	-0-	10,514,500	2,017,500*	2,075,000*	4,650,000* (4A)	1,772,000	
Special deposits	65,355	-0-	-0-	65,355	15,002*	2,500*	-0-	47,853	
Notes and warrants receivable	5,503	-0-	-0-	5,503	-0-	1,883*	-0-	3,620	
Accounts receivable, less reserves	4,052,265	9,862*	-0-	4,042,403	226,693*	1,189,019*	-0-	2,626,691	
Materials and supplies, less reserves	2,331,975	14,483*	-0-	2,317,492	142,123*	675,803*	-0-	1,499,566	
Prepayments	1,054,904	2,143*	-0-	1,052,761	63,480*	181,862*	-0-	807,419	
Total current assets	35,816,725	344,489*	847,455*	34,624,781	2,998,063*	7,389,095*	14,240,888*	9,996,735	
Deferred debits:									
Unamortized debt discount and expense	3,441,367	-0-	-0-	3,441,367	-0-	-0-	-0-	3,441,367	
Post-war refund of Fed. excess profits tax	1,039,104	-0-	219,755* (1)	819,349	29,348*	137,180*	-0-	652,821	
Capital stock expense	566,532	-0-	-0-	566,532	-0-	257,987*	-0-	308,545	
Other deferred debits	720,638	243*	1,986,093 (2)	2,706,488	13,774*	79,429*	-0-	2,613,285	
Total deferred debits	5,767,641	243*	1,766,338	7,533,736	43,122*	474,596*	-0-	7,016,018	
	$283,836,744	1,781,961*	2,868,855	284,923,638	16,610,963*	72,477,523*	25,890,787*	$169,944,365	

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES PRO FORMA BALANCE SHEET CONSOLIDATED AS AT JUNE 30, 1945 GIVING ESTIMATED EFFECT TO (A) SALE OF INVESTMENT IN THE WESTERN PUBLIC SERVICE COMPANY, OPERATIONS FOR THE PERIOD JULY 1 TO DECEMBER 31, 1945 OF ENGINEERS AND VIRGINIA, TAX ADJUSTMENTS BY VIRGINIA RESULTING FROM LOSS CLAIMED ON SALE OF TRANSPORTATION PROPERTIES AND ACCELERATED AMORTIZATION OF WAR FACILITIES DUE TO TERMINATION OF WAR EMERGENCY PERIOD, PAYMENT ON DECEMBER 31, 1945 OF $5,100,000 NOTES PAYABLE OF VIRGINIA PRIOR TO MATURITY AND MISCELLANEOUS ADJUSTMENTS, AND (B) THE CONSUMMATION OF PARTS I AND II OF THE PLAN

* Denotes Decrease

LIABILITIES	Actual	Western Pub.Serv.	Adjustments	Pro Forma Prior To Plan	Parts I and II of Plan: El Paso	Parts I and II of Plan: Gulf States	Parts I and II of Plan: Adjustments	Pro Forma
Capital stock:								
Preferred stock	$ 39,245,500	-0-	-0-	39,245,500	-0-	-0-	39,245,500*(6)	$ -0-
Common stock	1,909,968	-0-	-0-	1,909,968	-0-	-0-	-0-	1,909,968(c)
Subsidiary companies:								
Preferred stock	42,447,100	-0-	-0-	42,447,100	1,500,000*	12,000,000*	-0-	28,947,100
Premium on preferred stock	340,620	-0-	-0-	340,620	33,750*	306,870*	-0-	-0-
Total capital stock	83,943,188	-0-	-0-	83,943,188	1,533,750*	12,306,870*	39,245,500*	30,857,068
Long-term debt:								
Contract payments	81,812	-0-	-0-	81,812	-0-	-0-	-0-	81,812
Note payable	-0-	-0-	-0-	-0-	-0-	-0-	1,500,000 (5)	1,500,000
Subsidiary companies:								
Bonds	92,843,000	43,000*	-0-	92,800,000	6,500,000*	27,300,000*	-0-	59,000,000
Notes payable	10,435,000	508,800*	5,726,200*(2-3)	4,200,000	140,000*	-0-	-0-	4,060,000
Total long-term debt	103,359,812	551,800*	5,726,200*	97,081,812	6,640,000*	27,300,000*	1,500,000	64,641,812
Current liabilities:								
Bonds and notes payable, due within one year	2,742,000	182,000*	-0-	2,560,000	140,000*	-0-	1,500,000 (5)	3,920,000
Accounts payable	1,607,496	9,885*	-0-	1,597,611	101,159*	563,471*	-0-	932,981
Customers' deposits	1,228,829	12,091*	-0-	1,216,738	135,113*	176,369*	-0-	905,256
Taxes accrued	11,429,437	42,580*	3,151,177*(1-2)	8,235,680	1,048,759*	4,331,556*	-0-	2,855,365
Interest accrued	1,025,421	5,831*	-0-	1,019,590	39,272*	192,181*	-0-	788,137
Other current liabilities	465,159	100*	146,223*(1-2)	318,836	1,300*	16,714*	-0-	300,822
Total current liabilities	18,498,342	252,487*	3,297,400*	14,948,455	1,465,603*	5,280,291*	1,500,000	9,702,561
Deferred credits:								
Unamortized premium less expense on bonds	1,350,836	-0-	-0-	1,350,836	159,873*	951,913*	-0-	239,050
Customers' advances for construction	699,358	-0-	-0-	699,358	3,376*	276,504*	-0-	419,478
Other deferred credits	364,085	15*	-0-	364,070	263*	44,103*	-0-	319,704
Total deferred credits	2,414,279	15*	-0-	2,414,264	163,512*	1,272,520*	-0-	978,232
Reserves:								
Depreciation	32,957,634	277,560*	1,633,600 (2)	34,313,674	2,162,199*	11,859,127*	-0-	20,292,348
Amortization of plant acquisition adjustments	3,028,818	-0-	93,374 (2A)	3,122,192	-0-	807,553*	-0-	2,314,639
Injury and damage claims	513,945	9,554*	-0-	504,391	14,909*	141,660*	-0-	347,822
Taxes on income of prior years'	1,668,283	16,831*	-0-	1,651,452	320,235*	139,752*	-0-	1,191,465
Other	430,486	-0-	-0-	430,486	-0-	-0-	-0-	430,486
Total reserves	38,599,166	303,945*	1,726,974	40,022,195	2,497,343*	12,948,092*	-0-	24,576,760
Parent Company's reserve for depreciation in value of investments in subsidiaries	3,160,535	-0-	1,160,535*(3)	2,000,000	-0-	-0-	2,000,000	-0-
Capital surplus	16,158,041	-0-	918,535 (3)	17,076,576	-0-	-0-	1,220,351*(7-8)(10)	15,856,225
Earned surplus, minority interest	18,352	-0-	17,719 (1-2A)	36,071	-0-	-0-	-0-	36,071
Earned surplus 5/31/38, Parent Company's proportion	3,661,847	-0-	-0-	3,661,847	78,189*	158,620*	3,425,038*(10)	-0-
Earned surplus since 5/31/38, Parent Company's proportion	13,991,531	61,714*	9,777,752 (1-2)	23,707,579	383,874*	2,110,005*	2,050,285 (4)	23,263,985 (d)
Common stock, minority interests	31,651	612,000*	612,000 (3)	31,651	3,848,692*	11,101,125*	14,949,817 (4)(7)	31,651
	$283,836,744	1,781,961*	2,868,855	284,923,638	16,610,963*	72,477,523*	25,890,787*	169,944,365

Engineers' Exhibit No. 71 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES

Explanatory Notes to Pro Forma Balance Sheet Consolidated as at June 30, 1945 Giving Effect to (a) Sale of Investment in the Western Public Service Company, Operations for the Period July 1, to December 31, 1945 of Engineers and Virginia, Tax Adjustments by Virginia Resulting From Loss Claimed on Sale of Transportation Properties and Accelerated Amortization of War Facilities Due to Termination of War Emergency Period, Payment on December 31, 1945 of $5,100,000 Notes Payable of Virginia Prior to Maturity and Miscellaneous Adjustments, and (b) the Consummation of Parts I and II of the Plan.

(a) Utility plant (including intangibles) is stated on the following basis:

(1) At original cost for electric, gas and common properties for which studies have been completed and reviewed by Federal and State regulatory bodies, plus plant acquisition adjustments of $11,237,468	$132,427,009
(2) At original cost for gas properties for which studies were filed with State regulatory body during September 1945 plus plant acquisition adjustments of $93,374. Subject to such changes, if any; as may be determined to be necessary upon review of the aforesaid study by the State regulatory body, the subsidiary company during September 1945 provided for the disposition of above amount by charge to earned surplus and contra credit to reserve for amortization of utility plant acquisition adjustments. It is not expected that any material adjustments will be required	5,513,847
Total	$137,940,856

Provisions is being made, pursuant to orders of regulatory commissions, for the amortization of plant acquisition adjustments shown under (1) above by charges to income over 15-year periods commencing in 1943 and 1944.

Engineers' Exhibit No. 71 (Cont'd)

(b) Represents the excess ($12,614,495) of the recorded investment in shares of Virginia over the adjusted net assets applicable to such shares at dates of acquisition, as follows:

Virginia common shares owned by Engineers	2,932,065
Capital represented by such shares	$14,546,228
Acquired surplus	601,539
Total	15,147,767
Cost to Engineers	27,762,262
	$12,614,495

(c) Represented by 1,909,968 shares of $1 par value. Authorized 1,909,968 shares.

(d) Approximately $7,042,000 of the pro forma consolidated earned surplus is not available for the payment of dividends on common stock of Virginia due to covenants made by such company restricting the payment of dividends on common stock, and the parent company earned surplus of $10,660,852 included in the pro forma consolidated earned surplus would not be available for the payment of dividends on its common stock until the $3,000,000 note payable is paid in full.

There is a contingent asset of approximately $2,600,000, representing possible refunds of Federal income and excess profits taxes.

Contingent liability.

An amount in excess of $100 per share and accrued dividends may be payable to the Engineers Preferred Stockholders if the Securities and Exchange Commission and the Courts so determine. It is the opinion of Company counsel that no such additional amount is payable. If the Commission and the Courts determine that the voluntary redemption premium is payable this would amount to $3,204,795.

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES

Pro Forma Adjustments to Balance Sheet Consolidated as at June 30, 1945, Giving Estimated Effect to (a) Sale of Investment in the Western Public Service Company, Operations for the Period July 1 to December 31, 1945 of Engineers and Virginia, Tax Adjustments by Virginia Resulting From Loss Claimed on Sale of Transportation Properties and Accelerated Amortization of War Facilities Due to Termination of War Emergency Period, Payment on December 31, 1945 of $5,100,000 Notes Payable of Virginia Prior to Maturity and Miscellaneous Adjustments, and (b) the Consummation of Parts I and II of the Plan.

Engineers' Exhibit No. 71 (Cont'd)

(1)

Dr.	Taxes accrued	$ 3,004,512	
Dr.	Other current liabilities	18,459	
Cr.	Post-war refund of Federal excess profits tax		$ 219,755
Cr.	Earned surplus, minority interest		6,067
Cr.	Earned surplus since 5/31/38, Parent Company's proportion		2,797,149

Restore to earned surplus a portion of overaccrual for 1944 Federal income taxes of Virginia and Citizens Rapid Transit Corporation.

(2)

Dr.	Utility plant	$ 2,570,000	
Dr.	Other deferred debits	1,986,093	
Dr.	Subsidiary companies notes payable	6,235,000	
Dr.	Taxes accrued	146,665	
Dr.	Other current liabilities	127,764	
Cr.	Cash		$ 2,439,455
Cr.	Reserve for depreciation		1,633,600
Cr.	Earned surplus, minority interest		11,854
Cr.	Earned surplus since 5/31/38 Parent Co.'s proportion		6,980,613

To record estimated cash transactions of Engineers and Virginia from July 1 to December 31, 1945, inclusive, together with extraordinary Federal income tax adjustments.

(2A)

Dr.	Utility plant, gas, at original cost	$ 5,420,473	
Dr.	Plant acquisition adjustments	93,374	
Dr.	Investments in subsidiary companies (excess)	93,172	
Dr.	Earned surplus, minority interest	202	
Cr.	Utility plant, other, at cost		$ 5,513,847
Cr.	Amortization of plant acquisition adjustments		93,374

To state Norfolk, Va., gas plant at original cost and to provide for disposition of excess of book cost of such plant over original cost in accordance with Report on original cost filed in September 1945 with State regulatory body having jurisdiction, subject to such changes, if any, as may be necessary upon examination by such regulatory body of the company's records.

Engineers' Exhibit No. 71 (Cont'd)

(3)

Dr.	Cash	$ 1,592,000	
Dr.	Parent Company's reserve for depreciation in value of investments in subsidiaries	1,160,535	
Cr.	Investments in subsidiary companies (excess)		$ 621,200
Cr.	Special funds		92,000
Cr.	Common stock, minority interest		612,000
Cr.	Subsidiary companies notes payable		508,800
Cr.	Capital surplus		918,535

Sale by Engineers of investment in securities of The Western Public Service Company for $1,500,000 cash and release of special funds originally deposited at time of sale of securities of The Western Public Service Company (Maryland), and transfer to capital surplus unused portion of reserve for depreciation in value of investments applicable to securities of The Western Public Service Company.

(4)

Dr.	Cash	$21,964,632	
Cr.	Investments in subsidiary companies (excess)		$ 8,813,222
Cr.	Common stock, minority interests		11,101,125
Cr.	Earned surplus since 5/31/38 Parent Co.'s proportion		2,050,285

Sale by Engineers of investment in common stock of Gulf States to common stockholders under rights. 1,909,968 shares @ $11.50 = $21,964,632.

(4A)

Dr.	Cash	$ 4,650,000	
Cr.	United States treasury securities, at cost		$ 4,650,000

Conversion of United States treasury securities held by Engineers into cash.

(5)

Dr.	Cash	$ 3,000,000	
Cr.	Note payable, long-term debt		$ 1,500,000
Cr.	Note payable, due within one year		1,500,000

Borrowing by Engineers of $3,000,000 on a note payable to bank, bearing interest at the rate of 1½% per annum, payable $750,000 semi-annually.

(6)

Dr.	Preferred stock	$39,245,500	
Cr.	Cash		$39,245,500

Liquidation of Engineers preferred stock at $100 per share.

Engineers' Exhibit No. 71 (Cont'd)

(7)

Dr.	Capital surplus	$ 6,645,389	
Cr.	Investments in subsidiary companies (excess)		$ 2,796,697
Cr.	Common stock, minority interests		3,848,692

Distribution by Engineers as a partial dividend in liquidation from the capital of the Company the common stock of El Paso Electric Company pro rata to common stockholders.

(8)

Dr.	Parent Company's reserve for depreciation in value of investments in subsidiaries	$ 2,000,000	
Cr.	Capital surplus		$ 2,000,000

Transfer to capital surplus of unused portion of Engineers reserve for depreciation in value of investments applicable to securities of El Paso Electric Co.

(9)

Dr.	Cash	$ 39,980	
Cr.	Investment in associated company		$ 39,980

Sale by Virginia of its investment in Epsco, Inc. for book value.

(10)

Dr.	Earned surplus 5/31/38, Parent Co.'s proportion	$ 3,425,038	
Cr.	Capital surplus		$ 3,425,038

Transfer to capital surplus of Engineer's proportion of consolidated earned surplus at May 31, 1938.

Engineers' Exhibit No. 73.

STANDARD & POOR'S RATINGS

5 Public Utility Preferreds Used for Comparative Purposes with Engineers Public Service Company Preferreds

	As Per Corporation & Municipal Bond Guide September 11, 1944	As Per Year End Stock Guide January, 1946
Columbia Gas & Electric, 5% Cumulative Pfd., Call. @ $105	C**	Ab-A
Niagara Hudson Power, 5% Cumulative, 1st, Call. @ $107½	B	Ab-A
Pacific Public Service, $1.30 Cum. 1st Pfd. Call. @ $27½	B	Not Rated
Public Service of New Jersey, $5, Cumulative Pfd. Non-Callable	B*	Ab-A
Wisconsin Electric Power, $4.75 Cum. Pfd., Call. @ $105	B**	Not Rated
ENGINEERS PUBLIC SERVICE COMPANY $5, $5.50, & $6 Cum. Pfd.	C**	Ab-A

10 Medium-Grade Selected Utility Preferred Stocks

Bangor Hydro-Electric Co., 7% Cumulative Pfd., Non-Callable	A	Not Rated
California Oregon Power Co., 6% Cumulative Pfd., Non-Callable	B*	Not Rated
Central Illinois Light Co., 4½% Cumulative, Call. @ $110	A	Av-B
Consumers Power Co., 4½% Cumulative, Call. @ $110	A	Not Rated
Georgia Power Co., $5 Cumulative Pfd., Call. @ $110	B**	Av-B
Kansas Power & Light Co., 4½% Cum. Pfd., Call. @ $108	B**	Not Rated
New Orleans Public Service, 4¾% Cum. Pfd., Call. @ $111½	A	Not Rated
Pennsylvania Power & Light, $5 Cumulative Pfd., Call. @ $110	B*	Not Rated
Public Service Co. of Indiana, 5% Cumulative, Ser. "A", @ $105	Not Rated	Ab-A
West Penn Electric Co., 6% Cumulative Pfd., Call. @ $110	B	Ab-A

Engineers' Exhibit No. 74.

STANDARD & POOR'S STOCK QUALITY RATINGS

A** Highest grade preferred stocks which have demonstrated their ability to pass successfully through prolonged periods of depression. Dividend records are long and unbroken, and the equity in assets is strong.

A* High grade preferred stocks, with dividends earned by a wide margin even during periods of general business depression. Dividend records are long and favorable, and the equity in assets is large.

A Sound grade preferred stocks, with dividends earned by an adequate margin even in periods of general business depression. The dividend record is favorable, and the equity in assets is good.

B** Medium grade preferred stocks, with dividends earned by an adequate margin except in periods of severe depression. The dividend record is good, but not necessarily unbroken, and the equity in assets is ample. Such stocks are a "business risk," and their position is largely contingent upon earnings.

B*-B Speculative preferred stocks, generally in the dividend paying class. Payments either have a small margin of protection in earnings, or for some other reason their continuation is not assured.

C** Preferred stocks with erratic dividend records, and which can be expected to make payments only under favorable conditions.

C* Non-dividend paying preferreds showing very small or no earnings available for dividends. Entirely speculative, but not without hope of improvement.

C Non-dividend paying preferreds which show no earnings available for dividends and without much prospect of any early payments.

Engineers' Exhibit No. 74

D** Preferreds with little apparent equity and whose future is entirely contingent upon unforeseen developments.

D* Showing default, receivership or similar unfavorable condition. Some equity, however, may be saved to stockholders through reorganization or other readjustment.

D Applied to preferreds which, owing to default or enforcement of prior liens, appear to be worthless, from a practical standpoint, although occasionally dealt in by speculators.

Engineers' Exhibit No. 75.

STANDARD & POOR'S MARKET RATINGS

Purpose of the Ratings

Standard & Poor's Stock Ratings express the *relative* degree of market attraction at the time the current bulletin is published. Since the rating is, of necessity, limited to a word or two, it is obviously impossible to explain the basis of attraction or lack of attraction, the type of portfolio for which the stock is suitable, or the extent to which the fundamental position of the company, its long term earnings trend, temporary industry or stock market factors enter into the determination of the current rating. These complete expressions of opinion are to be found in Standard & Poor's Industry Surveys and Standard & Poor's Guide Reports.

With these limitations in mind the stock ratings will be found highly useful as a quick check of a security or list of securities to determine whether further investigation is necessary. They are particularly helpful in checking portfolios to determine weak spots that should be eliminated and in selecting new securities for replacement or employment of idle funds. For the latter purpose, two lists of common stocks are presented on pages 2 and 3. The list on page 2 includes stocks rated Buy for appreciation; the list on page 3 consists of the most attractive income issues.

Explanation of Ratings

The market rating is designed to characterize the current stock market position of individual securities and is never a guide to the fundamental quality of the security or the strength of the company represented. As a result, there are times when securities of a well-entrenched organization in a prospering industry may carry a Switch rating because they are over-priced. Conversely, the stock of a marginal enterprise may at times be so deflated as to give it speculative attraction.

Engineers' Exhibit No. 75 (Cont'd)

Buy—This rating is assigned to stocks that are judged to be in the most favorable position in relation to the market as a whole. These are shares with the brightest earnings prospects, holding promise of outstanding market performance because of some special development, judged to be far under-priced, or outstandingly attractive for income.

Above Average—Stocks carrying this rating are relatively well situated with respect to market or income prospects, but for one reason or another do not measure up to a BUY rating. Under normal conditions, stocks rated ABOVE AVERAGE are suitable holdings on the expectation of relatively favorable market performance or dividend return. However, they carry a somewhat higher degree of risk, enjoy a less active market, or for some other reason have less general attraction than BUY issues.

Average to Below—Common and preferred stocks in this classification are (1) those that are expected to move more or less in line with the general market or usually offer no better than average yields or (2) stocks which have definitely sub-average income or market attraction, but with some factor in the situation which dictates against an outright SWITCH rating. It will ordinarily be possible to strengthen portfolios by replacing stocks in this group with those rated BUY or ABOVE AVERAGE and, when general market policy warrants increasing cash reserves, these shares become candidates for liquidation.

Switch—Normally, the bulk of shares rated SWITCH are fundamentally undesirable, though the group will, at times, include sound stocks that have over-discounted earnings or dividend prospects. As a general rule, SWITCH-rated stocks should be disposed of promptly.

Engineers' Exhibit No. 79 (Cont'd)

in respect of the common stock of each thereof (in the case of Gulf States, the Preferred Stock also) and (2) for pre-emptive rights to the holders of common stock of each thereof in respect of common stock, or securities convertible into such stock, issued for cash, except in respect of any such stock or securities issued in connection with a public offering; and Engineers hereby agrees that at each such stockholders' meeting it will vote all shares of such company then held by it in favor of the adoption of such amendment, and upon the appropriate approval thereof by the stockholders, will cause an appropriate amendment to each of said charters to be properly filed in such a manner as to make such amendment effective; all subject, however, to any necessary approval of any public service commissions or other regulatory bodies having jurisdiction thereof.

We wish to advise you that the proposed organization of Engineers after the distribution of all of the securities owned by it except 162,612 shares of Common Stock of Virginia Electric and Power Company will be as follows:

Jason C. Leighton, President and Treasurer, with salary of	$18,000 per year
Part time services of tax consultant	6,000 " "
	$24,000
Estimated overhead including two clerical assistants who would also serve as officers of the Company	$24,000
One Transfer Agent and Registrar	20,000
Total estimated annual expense of operation	$68,000

There would be no income to Engineers until June 15, 1948 since the Common Stock of Virginia Electric and Power Company is not expected to pay dividends until that time. It is estimated that the annual dividend rate on Virginia

Engineers' Exhibit No. 79 (Cont'd)

Common Stock would be $1 per share so that the Company would receive (assuming the present rate of common dividends are maintained) $162,612 per year after June 15, 1948 until the stock was either sold or distributed. The sole purpose of the Company after its dissolution would be to marshal its assets and pay its liabilities with the retention of 162,612 shares of Virginia Common Stock, which, in the judgment of the Management, will reasonably provide for the satisfaction of possible contingent liabilities. Upon the final satisfaction of these liabilities, the balance of the Virginia Common Stock held by the Company or the net proceeds thereof together with other cash, if any, held by the Company, would be distributed pro rata to the Common Stockholders of Engineers in exchange for their Engineers Common Stock certificates.

There is attached hereto as Exhibit B copy of cash estimate as of March 24, 1947 from which estimate it will be seen that Engineers expects to have by that date sufficient cash to carry out the Plan.

There is attached hereto as Exhibit C copy of tentative time schedule. Changes in this schedule will necessarily have to be made to accord with the times by which the Commission and the District Court take action on the enclosed Plan. The dates mentioned for Commission and Court action are merely estimates by the Company.

There is attached hereto as Exhibit D copy of proposed letter to Preferred and Common Stockholders of the Company summarizing the amended Plan, with which would be enclosed a copy of the notice issued by the Commission concerning the filing of this Amendment.

1849a

Engineers' Exhibit No. 76.

STANDARD & POOR'S
PREFERRED STOCK YIELDS

POOR'S
K YIELDS

In the matter of: Lagunas Nitrate Corporation et al
Date 2-4-46 Witness Lenahan
ALDERSON REPORTING COMPANY

S&P Index

Source:- Standard & Poor's Trade and Securities - STATISTICS.

YIELD - Per Cent.

FEDERAL RESERVE BOARD INDEX OF PRODUCTION

YIELD BASIS
ENGINEERS 5% PREFERRED
(Plotted at June and December)
Source: Appl. Ex. 25

Regular Dividends Deferred

Dec. to 32½

FEDERAL RESERVE INDEX OF PRODUCTION

1918 9 1920 1 2 3 4 1925 6 7 8 9 1930 1 2 3 4 1935 6 7 8 9 1940 1 2 3 4 5 1946

KEUFFEL & ESSER CO. N. Y.

ENGRAVING 334-3, 10 X 10 TO THE HALF INCH.
WHEN ORDERING STATE COLOR DRAWING OR TRACING PAPER.
MADE IN U. S. A.
100% RAG PAPER

COMPARATIVE STUDY - BALANCE SHEET ITEMS
5 PUBLIC UTILITY HOLDING COMPANIES WITH
ENGINEERS PUBLIC SERVICE COMPANY, INC.

(5 Public Utility Holding Companies Revised to include certain Reserve Items)

		Columbia Gas & Electric	Niagara Hudson Power	Pacific Public Service	Public Service of N.J.	Wisconsin Electric Power Co.	Engineers [illegible]
Balance Sheet Comparison:							
% Prior Oblig.:Total Capital. -	1942	44.55	65.21	62.15	46.02	58.58	71.62
	1943	42.30	66.13	60.71	45.46	57.12	60.37
	1944	42.76	65.26	57.89	44.71	55.37	68.27
Book Value Equity Per Sh. Pfd. -	1942	$273.51	$512.90	$132.06	$190.53	$226.92	$225.65
	1943	273.27	494.92	135.70	192.52	233.14	192.40
	1944	264.65	484.14	141.98	193.97	235.41	192.50

(Engineers Public Service Revised - Deducting Reserves)

Balance Sheet Comparison:							
% Prior Oblig.:Total Capital. -	1942	44.97	65.73	62.15	46.67	58.58	74.85
	1943	42.77	67.11	60.71	46.38	57.12	61.69
	1944	43.11	66.46	57.89	45.85	55.37	69.54
Book Value Equity Per Sh. Pfd. -	1942	$268.95	$500.15	$132.06	$185.64	$226.92	$191.31
	1943	267.99	473.66	135.70	185.49	233.14	181.99
	1944	260.84	458.88	141.98	185.22	235.41	181.31

Pacific Public Service and Wisconsin Electric Power, respectively, showed Reserves of little consequence and/or none.

Engineers' Exhibit No. 77.
1850a

Engineers' Exhibit No. 79 (Cont'd)

There is attached hereto as Exhibit E copies of the October, 1946 balance sheets and income statements of Engineers, Virginia, Gulf States and El Paso.

Pursuant to the requirements of the Public Utility Holding Company Act of 1935, the Company set forth below caused this instrument to be duly executed on its behalf by its authorized officers on this the 16th day of December, 1946.

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

By D C BARNES
D. C. Barnes, President

(CORPORATE SEAL)

Attest:

R. N. BENJAMIN
R. N. Benjamin, Secretary

(SEAL)

Engineers' Exhibit No. 79 (Cont'd)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

The undersigned being duly sworn deposes and says that he has duly executed the attached instrument for and on behalf of the Company named therein; that he is the President of such Company; and that all action by stockholders, directors, and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and the transactions referred to therein, and that to the best of his knowledge, information and belief the statements made in such instrument are true.

D C BARNES
D. C. Barnes

Subscribed and sworn to before me at New York, New York, this 16th day of December, 1946.

VIETTA E. GIBBS
Vietta E. Gibbs
Notary Public Kings Co.
VIETTA E. GIBBS
Notary Public, State of New York
Residing in Kings County
Kings Co. Clk's No. 117, Reg. No. 250-G-8
Certificates filed in New York County
N. Y. Co. Clk's No. 250, Reg. No. 201-G-8
Commission Expires March 30, 1948

(SEAL)

BALANCE SHEET ITEMS - COMPARATIVE STUDY
5 PUBLIC UTILITY HOLDING COMPANIES & ENGINEERS PUBLIC SERVICE COMPANY, INC.
INCLUDING RESERVE ITEMS AND DEDUCTING ADJUSTMENT ACCOUNTS 100.5 & 107
(Federal Power Commission Classification for the year 1944)

	Columbia Gas & Electric	Niagara Hudson Power	Pacific Public Service	Public Service of N.J.	Wisconsin Electric Power	Engineers Public Service
Total Prior Obligations	$193,583,387	$344,544,994	$ 9,101,800	$252,284,938	$ 89,692,500	$162,450,451.43
Adj. Avail. for Preferred	$259,185,790	$183,426,798	$ 6,620,612	$311,981,908	$ 72,293,378	$ 75,551,842.09
Deduct 100.5 Items	54,774,155	31,000,000*	888,018	49,838,147	-	17,299,411.71
" 107 "	22,000,000	-	-	55,340,722	-	14,712,293.70(2)
Avail. for Pfd. Excl. 100.5 & 107	$182,411,635	$152,426,798	$ 5,732,594	$206,803,039	$ 72,293,378	$ 43,540,136.68
Total Investment	$374,995,022	$496,971,792	$14,834,394	$459,087,977	$161,985,878	$205,990,588.11
% Prior Oblig.:Total Investment	51.49	69.33	61.36	54.95	55.37	78.86
% Pfd. & Jr. Oblig.:Total Invest.	48.51	30.67	38.64	45.05	44.63	21.14
Book Value Preferred	$186.26	$402.31	$122.93	$128.58	$235.41	$110.94

EXCLUDING RESERVE ITEMS AND DEDUCTING ADJUSTMENT ACCOUNTS 100.5 & 107

Total Prior Obligations	$193,583,387	$344,544,994	$ 9,101,800	$252,284,938	$ 89,692,500	$162,450,451.43
Available for Preferred	$255,451,519	$173,858,014	$ 6,620,612	$297,907,040	$ 72,293,378	$ 71,157,137.89
Deduct 100.5 Items	54,774,155	31,000,000*	888,018	49,838,147	-	17,299,411.71
" 107 "	22,000,000	-	-	55,340,722	-	14,712,293.70(2)
Avail. for Pfd. Excl. 100.5 & 107	$178,677,364	$142,858,014	$ 5,732,594	$192,728,171	$ 72,293,378	$ 39,145,432.48
Total Investment	$372,260,751	$487,403,008	$14,834,394	$445,013,109	$161,985,878	$201,595,883.91
% Prior Oblig.:Total Investment	52.00	70.69	61.36	56.69	55.37	80.58
% Preferred:Total Investment	48.00	29.31	38.64	43.31	44.63	19.42
Book Value Preferred	$182.44	$377.06	$122.93	$119.83	$235.41	$99.75

* Total Adjustments Public Service Commission New York.

(2) Plant Account Adjustment, See explanation attached.

Engineers' Exhibit No. 79 (Cont'd)

Exhibit A-2

ENGINEERS PUBLIC SERVICE COMPANY
(INCORPORATED)

PLAN PURSUANT TO SECTION 11(e) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

SEPTEMBER 10, 1945

as amended by amendment No. 5 dated December 16, 1946

PLAN FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

OF

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

Pursuant to Section 11(e) of the

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

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THE PLAN

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DIVISION D—Conditions to Effectuation of the Plan	6
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Engineers' Exhibit No. 79 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

Plan Pursuant to Section 11(e) of the

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

DIVISION A

Purposes of Plan

1. Compliance with orders of the Securities and Exchange Commission ("the Commission") directing the divestment by Engineers Public Service Company (Incorporated) ("Engineers") of its interest in El Paso Electric Company ("El Paso") and Gulf States Utilities Company ("Gulf States").

2. The divestment by Engineers of its interest in Virginia Electric and Power Company ("Virginia").

3. The retirement of the Preferred Stock of Engineers at $110 per share and accrued dividends in the case of the $6 Cumulative Dividend Preferred Stock and the $5.50 Cumulative Dividend Preferred Stock and at $105 per share and accrued dividends in the case of the $5 Dividend Convertible Preferred Stock.

4. The dissolution and liquidation of Engineers.

DIVISION B

Introductory Statement

Engineers, organized and existing under the laws of the State of Delaware, is a registered holding company under the Public Utility Holding Company Act of 1935 ("the Act").

Engineers' Exhibit No. 79 (Cont'd)

Engineers holds the following securities:

150,000 shares of Common Stock without par value of El Paso, being all of the authorized and issued Common Stock of said Company. These shares are to be reclassified into 381,994 shares of Common Stock, without par value, prior to the divestment of El Paso by Engineers.

280,000 shares of Common Stock without par value of Gulf States, being all of the issued Common Stock of said Company, there being 20,000 shares of such Common Stock authorized but unissued. The 280,000 outstanding shares of Common Stock are to be reclassified into $1,909,968 shares of Common Stock, without par value, prior to the divestment of Gulf States by Engineers.

2,932,065 shares of Common Stock without par value of Virginia Electric and Power Company ("Virginia"), there being, in addition, 6,360 shares of such Common Stock in the hands of the public and 20 shares of such Common Stock reserved for scrip and 1,061,555 shares of such Common Stock authorized but unissued.

Engineers has outstanding the following securities:

143,951 shares of $5 Dividend Convertible Preferred Stock ("$5 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $105 per share, plus accrued dividends, on redemption or voluntary liquidation.

183,406 shares of $5.50 Cumulative Dividend Preferred Stock ("$5.50 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $110 per share, plus accrued dividends, on redemption or voluntary liquidation.

Engineers' Exhibit No. 78 (Cont'd)

Note (2)

COMPUTATION 100.5 ACCOUNT & PLANT ADJUSTMENTS RE ENGINEERS PUBLIC SERVICE COMPANY, INC.

	Account 100.5
Excess investments over Cost	$25,246,487.75
Less Reserves	7,947,076.04
Net -	$17,299,411.71

	Plant Adjustments
Plant acquisition adjustment	$17,297,622.68
Less Reserves	2,585,328.98
Net -	$14,712,293.70

Engineers' Exhibit No. 79 (Cont'd)

65,098 shares of $6 Cumulative Dividend Preferred Stock ("$6 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $110 per share, plus accrued dividends, on redemption or voluntary liquidation.

1,909,968 shares of Common Stock of the par value of $1 per share.

Early in 1940 the Commission brought a proceeding against Engineers and its subsidiaries under Section 11(b)(1) of the Act. This Section provides for the restriction of integrated systems and incidental businesses which a holding company may control. On July 23, 1941, the Commission issued an order in that proceeding directing Engineers to dispose of its interest in The Key West Electric Company and Puget Sound Power & Light Company. This order has been fully complied with. On December 29, 1941, the Commission issued a further order under Section 11(b)(1) directing Engineers to dispose of its interest in Missouri Service Company, The Northern Kansas Power Company and The Western Public Service Company. This order also has been fully complied with. On September 16, 1942 and October 6, 1942, the Commission issued further orders under the same Section directing Engineers to dispose of all of its remaining investments except that in Virginia, which, if retained, must dispose of its gas and transportation operations. Engineers has complied with these 1942 orders by disposing of all of the investments ordered divested by those orders except its investments in Gulf States, El Paso and Virginia and with respect to the latter two companies, has partially complied with said orders by the disposal of their transportation properties. Engineers filed a petition with the United States Court of Appeals for the District of Columbia, for a review of the 1942 orders and on November 22, 1943, the Court set these orders aside

Engineers' Exhibit No. 79.

SECURITIES AND EXCHANGE COMMISSION
Eighteenth and Locust Streets
Philadelphia 3, Pennsylvania

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

File No. 54-132

AMENDMENT NO. 5 TO APPLICATION DATED SEPTEMBER 10, 1945

Engineers Public Service Company (Incorporated) hereby further amends the Plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters of Engineers Public Service Company (Incorporated) by striking out all of said Plan as heretofore filed and amended and inserting in lieu thereof the Plan attached hereto as Exhibit A-2.

If the Commission shall find such Plan, as amended as aforesaid, necessary to effectuate the provisions of Subsection (b) of the Public Utility Holding Company Act and fair and equitable to the persons affected thereby and shall make an order approving such Plan, Engineers hereby requests the Commission to apply to an appropriate district court of the United States in accordance with the provisions of Section 11 (e) and Subsection (f) of Section 18 of the Act to enforce and carry out the terms and provisions of said Plan as amended as aforesaid.

Engineers agrees that it will cause Virginia, Gulf States and El Paso to take such corporate action as shall be necessary to submit to the stockholders of each such company at a meeting thereof to be held prior to the date on which the court of competent jurisdiction shall hear the application of the Securities and Exchange Commission for an order of such court to enforce and carry out said Plan as amended hereby, an amendment to the charter of each thereof providing (1) for cumulative voting for the election of directors

Engineers' Exhibit No. 79 (Cont'd)

and remanded the case to the Commission for further proceedings in accordance with its opinion.

The Supreme Court of the United States granted writs of certiorari to both the Commission and Engineers but the case has not yet been decided.

DIVISION C

The Plan

1. Engineers, except as below provided, will mail warrants to its Common Stockholders of record on a date to be fixed by the Board of Directors of Engineers, each of which warrants will evidence the right to acquire from Engineers shares of Gulf States Common Stock (reclassified) on the basis of one share of Gulf States Common Stock for each share of Engineers Common Stock held by such Stockholders on such date either

   (a) by purchasing from Engineers whole shares of such Gulf States Common Stock at the rate of $11.50 per share, or in the alternative,

   (b) by exchanging with Engineers whole shares of Engineers Preferred Stock for shares of Gulf States Common Stock on the basis of equivalent values, assigning $11.50 per share for each share of Gulf States Common Stock and $105 plus accrued dividends to the expiration date of the warrant for each share of $5 Preferred and $110 plus accrued dividends to the expiration date of the warrant for each share of $5.50 Preferred and $6 Preferred; provided that, on the basis of the relative values above stated, the value of the whole shares of Engineers Preferred Stock surrendered in exchange shall not exceed the value of the shares of Gulf States Common Stock which the warrant holder is entitled to and in-

Engineers' Exhibit No. 79 (Cont'd)

tends to acquire, but to the extent that the value of such shares of Engineers Preferred Stock surrendered in exchange is less than the value of such shares of Gulf States Common Stock to which the warrant holder is entitled and intends to acquire, the difference shall be paid by the warrant holder to Engineers.

The Board of Directors of Engineers may, however, withhold the mailing of such warrants in the event that, in its opinion, market conditions are such as to render it inadvisable to proceed with the issuance of the warrants. Upon the mailing of such warrants, the Plan shall be deemed effective. In cases where the addresses of such Stockholders are unknown or are outside continental United States and Canada, warrants will not be mailed to Common Stockholders of this Company of record on such date but will be held in the name of Transfer Agent against instructions of the record owners, or their duly authorized agents, until the opening of business on the second business day before the expiration date of the warrant period, at which time all warrants so held with respect to which no such instructions have been received shall, subject to the provisions of paragraph 9 hereof, be sold by the Company and the pro rata share of the aggregate net proceeds, if any, remitted to each Stockholder on whose behalf warrants are so sold, or, in cases where such remittance is not lawful or the address is unknown, held for the account of each such Stockholder subject to payment upon receipt of lawful instructions. In cases where the Engineers' Common Stockholder cannot be located and where no valid claim is made for such net proceeds within a period of ten years from the effective date of the Plan, such net proceeds shall be paid to Gulf States. The warrants must be exercised on or before a speci-

Engineers' Exhibit No. 79 (Cont'd)

fied date (to be approximately sixteen days after the date of mailing warrants). All warrants will be registered in the names of the Common Stockholders, except as above provided, and will be transferable on the books of Engineers. Such warrants will be issued and distributed without the surrender by the Common Stockholders of Engineers of their Common Stock certificates.

2. The Transfer Agent will mail or deliver certificates for Gulf States Common Stock to those persons who exercise the warrants. To the extent warrants are not exercised, Engineers shall sell shares of Gulf States Common Stock represented thereby as promptly thereafter and in such manner as the Board of Directors of Engineers deems to be in the best interests of Engineers, subject to the provisions of paragraph 9 hereof.

3. Engineers will deposit in trust for the benefit of its Preferred Stockholders with a solvent bank or trust company an amount equal to $105 per share plus accrued dividends to the date of such deposit for each share of $5 Preferred and $110 per share plus accrued dividends to the date of such deposit for each share of $5.50 Preferred and $6 Preferred not surrendered in exchange pursuant to (b) of paragraph 1 and will give to all holders of such Preferred Stock five days' prior notice of such deposit at their respective registered addresses, and such notice shall state that upon surrender by the Preferred Stockholders of their certificates for Preferred Stock to the Transfer Agent, they will be paid $105 per share plus such accrued dividends for each share of $5 Preferred and $110 per share plus such accrued dividends for each share of $5.50 Preferred and $6 Preferred; and from and after the date of such deposit, dividends on the Preferred Stock will

Engineers' Exhibit No. 79 (Cont'd)

cease and determine. Such deposit will be in cancellation of the whole of the outstanding Preferred Stock of Engineers. The President or a Vice President and the Secretary or an Assistant Secretary of Engineers shall, without further action by Directors and Stockholders of Engineers, file a certificate or certificates of Engineers reflecting the elimination of the capital represented by the Preferred Stock and the elimination of the authorized Preferred Stock in the Office of the Secretary of State of the State of Delaware and shall record in the office of the Recorder of Deeds of New Castle County, Delaware, a copy or copies thereof certified by the Secretary of State.

4. Immediately after filing the certificate provided for in paragraph 3, the President or a Vice President, and the Secretary or an Assistant Secretary, of Engineers, shall without further action by the directors or stockholders of Engineers:

(1) Deposit for filing in the office of the Secretary of State of the State of Delaware, a certificate signed by them and verified by the oath of one of said officers, which shall state that Engineers is dissolved, in which certificate there shall be included a list of names and residences of the directors and officers of Engineers as of the date of such filing;

(2) deposit for recordation in the office of the Recorder of Kent County, Delaware, being the county in which the principal office of Engineers is maintained, a duplicate original of the certificate referred to in (1) above;

(3) cause to be published a copy of such certificate in one issue of a newspaper published in Kent County, Delaware, being the county in which the

Engineers' Exhibit No. 79 (Cont'd)

principal office of Engineers in the State of Delaware is situated; and

(4) deposit for filing in the office of the Secretary of State of the State of Delaware an affidavit of the Manager or Publisher of the newspaper referred to in (3) above, that said certificate has been published one time in said newspaper;

and thereupon, when the steps specified in (1), (2), (3) and (4) above shall have been taken, the dissolution of Engineers shall thereby become effective.

5. Promptly after the dissolution of Engineers shall have so become effective Engineers will distribute (1) all of the Common Stock (reclassified) of El Paso pro rata to the Engineers Common Stockholders, on the basis of one-fifth of a share of El Paso Common Stock for each share of Engineers Common Stock and (2) approximately 94.4% of the Common Stock of Virginia pro rata to the Engineers Common Stockholders on the basis of 1.45 shares of Virginia Common Stock for each share of Engineers Common Stock. Such distribution will be without the surrender by the Common Stockholders of Engineers of their Common Stock certificates. No fractional shares of Common Stock of either El Paso or Virginia will be issued or delivered, but in lieu thereof scrip will be issued and delivered. Such scrip will not be entitled to dividends, voting rights or any other stockholders' rights. When combined in lots aggregating one or more full shares of stock, scrip may, up to the date of sale (hereinafter in this paragraph described) of such shares of stock, be exchanged for such shares, together with any dividends which shall have been paid to Stockholders of record on any date subsequent to the effective date of the Plan and prior to the date of such exchange. Engi-

Engineers' Exhibit No. 79 (Cont'd)

neers will undertake to provide facilities whereby, prior to the date on which the distribution referred to in this paragraph is made, any holder of scrip certificates may dispose of such scrip, or acquire additional scrip so as to enable the holder to exchange such scrip for full shares of stock. All shares of stock reserved for delivery upon the exchange of scrip which shall not have been delivered in connection with such exchange within two years after the effective date of the Plan, shall, promptly after the expiration of such period and subject to the conditions of paragraph 9 hereof, be sold by the Transfer Agent and the Transfer Agent shall, as soon as possible thereafter, distribute to the holders of scrip certificates not theretofore surrendered their proportionate part of the net proceeds of sale, plus their proportionate part of any dividends which shall have been declared to holders of record as of a date after the effective date of the Plan and prior to the date of sale. In cases where the Engineers' Common Stockholders cannot be located and where no valid claim is made for the net proceeds from the sale of stock and the proportionate part of dividends referred to above and within a period of ten years from the effective date of the Plan, such net proceeds and proportionate part of dividends shall be paid, with respect to net proceeds of El Paso stock and dividends, to El Paso, and with respect to net proceeds of Virginia stock and dividends, to Virginia.

In cases where the Engineers' Common Stockholder cannot be located and where no valid claim is made for the whole shares of El Paso and Virginia Common Stocks distributable to such stockholder within a period of ten years from the effective date of the Plan, such shares of stock shall be returned to the issuing Company for cancellation and the claims

Engineers' Exhibit No. 79 (Cont'd)

to dividends payable to holders of record of said shares after the effective date of the Plan shall be cancelled.

6. After the dissolution of Engineers shall have been effective as aforesaid, Engineers shall, nevertheless, be continued as a body corporate for the purposes and for the term specified in Section 42 of the General Corporation Law of the State of Delaware, and Engineers, acting under the direction of its Board of Directors, shall collect its assets and settle its debts and liabilities, with full power, subject to the provisions of paragraph 9 hereof, to sell and dispose of any or all of the assets of Engineers not distributed as aforesaid. Any vacancy occurring in the Board during the continuance of Engineers as a body corporate as aforesaid may be filled by the Board, as provided in its By-laws. After the final settlement of the affairs of Engineers and payment of or provision for its debts and liabilities, the Directors shall cause the distribution to the Engineers Common Stockholders of the remaining assets of the Company either in kind or in cash in exchange for their certificates of Engineers Common Stock. The Directors shall have power to authorize an agent to vote all shares of Virginia Common Stock held by the Company at any time after the making of the distribution referred to in paragraph 5 above at all meetings of stockholders at which such stock is entitled to vote except as to any matter which is being contested by any stockholder.

7. Within 60 days after the dissolution of Engineers shall become effective in accordance with paragraph 4 above, Epsco, Inc., the mutual service corporation, will cancel its service contracts with Engineers, Virginia, Gulf States and El Paso, and Epsco, Inc. will then be dissolved and liquidated.

Engineers' Exhibit No. 79 (Cont'd)

8. Engineers will pay all fees and expenses by whomsoever incurred in connection with the Plan or the proceedings in respect thereto, to the extent approved by the Commission.

9. Sales by Engineers of warrants in cases where the addresses of stockholders are unknown or are outside the Continental United States or Canada provided to be made under the provisions of paragraph 1 above, by Engineers of shares of Gulf States Common Stock represented by warrants not exercised provided to be made under the provisions of paragraph 2 above, by Engineers of any assets not distributed provided to be made under the provisions of paragraph 6 above, and by the Transfer Agent of shares of stock of Virginia and El Paso, represented by scrip, which shall not have been delivered in connection with the rights of combination of such scrip provided to be made under the provisions of paragraph 5 above, shall all be made subject to the following provisions: Engineers or the Transfer Agent, as the case may be, may sell such warrants or shares of stock on the New York Stock Exchange without further action by the Commission, but neither the Company nor the Transfer Agent shall sell any such warrants or shares in any other manner unless the Company or the Transfer Agent, as the case may be, shall by telephone or telegraph have given to the Commission at least 24 hours prior notice of its intention so to do and of the details in respect thereof. Upon the expiration of such 24 hour period the Company or the Transfer Agent, as the case may be, may proceed with such sale in the manner specified in such notice unless during such period the Company or the Transfer Agent, as the case may be, shall have been informed by the Commission that the Commission intends to issue an order to show cause why the sale should be

Engineers' Exhibit No. 79 (Cont'd)

consummated, in which event such sale shall not be consummated without the approval of the Commission.

Engineers believes and alleges that the approval of this Plan is necessary for compliance with the orders issued by the Commission on September 16, 1942 and October 6, 1942 under Section 11 of the Act and to effectuate the provisions of subsection (b) of Section 11 of the Act, and if the Commission shall find the Plan necessary to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby, Engineers prays that the Commission shall enter an order approving the Plan containing a recitation that the relevant transactions of the Plan are necessary or appropriate to the integration or simplification of the holding company system of which Engineers is a member and necessary or appropriate to effectuate the provisions of subsection (b) of Section 11 of the Act, all in accordance with the meaning and requirements of the Internal Revenue Code, as amended, including Sections 371 and 1808(f) and Supplement R thereof.

DIVISION D

Conditions to Effectuation of the Plan

The effectuation of the Plan is dependent upon the satisfaction of the following conditions:

1. Gulf States shall have reclassified its Common Stock into 1,909,968 shares of Common Stock, without par value; Gulf States shall have given to its Preferred Stock seven votes per share instead of the one vote per share it now carries; El Paso shall have reclassified its Common Stock into 381,994 shares of Common

Engineers' Exhibit No. 79 (Cont'd)

Stock, without par value; and the charters of Virginia, Gulf States and El Paso shall have been amended to provide for cumulative voting in respect of the Common Stock (in the case of Gulf States, the Preferred Stock also) for the election of Directors and for pre-emptive rights to Common Stockholders to subscribe for additional Common Stock issued for cash except in the case of public offerings.

2. The Commission shall have issued the order prayed for.

3. The Commission shall have instituted a proceeding in a court of competent jurisdiction pursuant to Section 11(e) of the Act and such court shall have entered a decree or order for the purpose of enforcing the Plan.

4. There shall have been obtained from the United States Treasury Department (unless Engineers, in its discretion, shall waive this condition) a closing agreement or ruling or closing agreements or rulings as to the tax consequences of the transactions necessary to carry out the Plan and such agreements or rulings shall be satisfactory to counsel for Engineers.

5. Any corporate action in connection with the Plan, which may be deemed necessary by counsel for Engineers shall have been carried out in a manner satisfactory to such counsel.

6. Authorization satisfactory to counsel for Engineers shall have been given for the carrying out of the Plan and for the issuance for all securities provided to be issued pursuant to the Plan, by all regulatory commissions, the consent of which is legally necessary.

7. The warrants referred to in paragraph 1 of the Plan shall have been mailed to Engineers Common Stockholders within the exceptions therein provided.

Engineers' Exhibit No. 79 (Cont'd)

DIVISION E

Amendments to the Plan and Other Provisions

Until approved by the Commission, the Plan may be modified or amended in any respect or particular by Engineers. After being approved by the Commission and before being approved by a court, the Plan or any part thereof may be modified or amended in any respect or particular by Engineers with the approval of the Commission. After the approval by the Court and before the Plan has been consummated, pursuant to the order or decree of a court of competent jurisdiction, the Plan may be modified or amended in any respect or particular by Engineers with the approval of both the Commission and the Court. No amendments to the Plan shall be made without the consent or agreement of Engineers.

Engineers may employ such agents, attorneys or others as it may deem desirable for the purpose of carrying out the Plan. Engineers may from time to time delegate to others any power or discretion conferred upon it by the Plan.

The statements, opinions and conclusions contained in the Plan are intended solely for the purpose of assisting the Commission, any court and the Stockholders in any steps or proceedings with respect to the Plan and are not intended for use or information by prospective purchasers of any securities whether now existing or proposed to be issued or for any purposes other than the purposes set forth in this paragraph; and no one is authorized to make any statements regarding the Plan, whether with reference to any securities referred to herein or otherwise which are not set forth herein.

By Order of the Board of Directors
Engineers Public Service Company
(Incorporated)
D. C. Barnes

By D. C. Barnes
President

Engineers' Exhibit No. 79 (Cont'd)

Exhibit B

ENGINEERS PUBLIC SERVICE COMPANY

Cash Estimate—March 24, 1947

Cash required for preferred stock	
Principal of preferred stock	$39,246,000
Call premium	3,205,000
	42,451,000
Cash sources	
Treasury cash before special dividends, estimated March 24, 1947	17,000,000 (4)
Proceeds Gulf States warrants at $11.50	22,000,000
Special dividends as follows:	
Virginia Electric and Power Company (1)	2,932,000
Gulf States Utilities Company (2)	756,000
El Paso Electric Company (3)	105,000
	42,793,000
Cash required as above	42,451,000
Balance for retirement allowances, expenses of distribution, operation of Company until June 15, 1948 and contingencies	$ 342,000

Notes

(1) Declared December 13, 1946 contingent upon the issuance of an order of the Court effectuating the plan and payable 10 days after the issuance of such order. Except for the regular quarterly dividend normally payable in March, 1947, no further common dividends to be paid until June 15, 1948.

(2) Directors stated intention December 13, 1946 to declare, contingent upon the issuance of an order of the Court effectuating the plan and payable 10 days after the issuance of such order. Except for the regular quarterly dividend normally payable in March, 1947, no further common dividends to be paid until December 15, 1947.

(3) Declared December 13, 1946 payable December 27, 1946.

(4) Includes $1,223,516 regular quarterly dividends normally payable March 15, 1947. Cash balance December 13, 1946 is approximately $17,000,000, after deduction of Preferred Stock dividends payable January 2, 1947.

Engineers' Exhibit No. 79 (Cont'd)

Exhibit C

December 16, 1946

PROGRAM

ENGINEERS

Date December 1946

13 Hold Engineers Directors meeting to:

(a) authorize officers to amend Plan, amendment No. 5 and to take action in connection therewith.

(b) authorize mailing of letter to Preferred and Common Stockholders.

Hold Gulf States Directors' Meeting to state intention of Directors to declare one-half year's dividend on the common stock payable ten days after the district court issues an order enforcing the Plan, to holders five days after such action.

Hold El Paso Directors' Meeting to declare dividend of 70 cents per share on the common stock payable on December 27, 1946.

Hold Virginia Directors' Meeting to declare one full year's dividend in advance, payable at the same time as provided for in the Gulf States action, and in addition, the Virginia Directors will consider taking action to:

(a) appoint the Chase National Bank of the City of New York and State Planters Bank & Trust Company as transfer agents for the Common Stock and Manufacturers Trust Company and Central National Bank of Richmond as Registrars for the Common Stock, and

(b) authorize officers to make application for listing and registration of the Common Stock on the New York Stock Exchange.

The above action has been taken, also the El Paso and Virginia Directors authorized taking of action necessary in connection with charter amendments.

17 File amendment #5 to Plan.

18 File amendments to Gulf States and El Paso declarations providing for cumulative voting and preemptive rights and file original declaration of Virginia to take same action.

Engineers' Exhibit No. 79 (Cont'd).

Date	
December 1946	
19	SEC* issues notice of filing of amendment.
	File State applications for approval of charter amendments wherever required.
20	Mail SEC notice to Common and Preferred Stockholders, together with copy of amended Plan.
Date	
January 1947	
2	SEC files application with the District Court requesting enforcement of the Plan and the Court fixes a date (February 10*) for hearing on the Plan. Mail notices to the Stockholders of the date of the Court hearing.
10	Mail notices of Gulf States and Virginia Stockholders' Meetings to be held January 30, 1947, with holders of record January 20 entitled to vote.
	Hold Gulf States Directors' Meeting to:
	(a) Call Special Stockholders Meeting to be held on January 30, to amend charter. Record date to be January 20.
	(b) Approve new form of Gulf States Common and Preferred Stock Certificates.
	(c) Authorize Stone & Webster Service Corporation Transfer Agent, to issue increased number of Common shares, subject to filing of Charter Amendment.
	(d) Appoint The Chase National Bank as Transfer Agent and State Street Trust Company and Central Hanover Bank and Trust Company as Registrars of the Common Stock and authorize them to take appropriate action in connection with issuance of Common Stock.
	(e) Authorize listing and registration of Common Stock on New York Stock Exchange, both on a "when distributed" and on an issued basis.

* Whenever in this program a date is mentioned for SEC or court action, it is only the best estimate of the Engineers' management and is not intended to indicate that the management thinks that these are the date by which either the SEC or the court should take any action. It may well be, and probably will be, that the SEC and the court will take action on either earlier or later dates than those set forth in this program, but the primary purpose of the program is to indicate the timing between each of the steps required to be taken once the regulatory agencies and court have acted.

Engineers' Exhibit No. 79 (Cont'd)

Date January 1947	
	(f) Authorize registration of Common Stock under the Securities Act of 1933 and filing of registration statement in connection therewith. (No U-1 required.)
	(g) Declare special dividend equal to two regular quarterly dividends payable March 10, 1947 subject to the issuance of the court order prior to the payment date.
	Order imprinting of Gulf States Preferred Stock certificates to reflect charter amendment and order new supply of such Preferred Stock certificates.
13	File with SEC and Department of Stock List, New York Stock Exchange, the following documents relating to Gulf States Common Stock:
	Form 1-J—Application for registration of warrants for "when issued" dealing.
	Form 15-AN—Application for registration of warrants for issued dealing.
	Form 8-A—Application for registration for "when distributed" and issued dealing in Gulf States Common Stock.
	New York Stock Exchange Form of Listing Application for Gulf States Common Stock.
	File Forms 1-J, 15-AN and 8-A with SEC.
	Order supply of warrants and have delivered to S. & W. Service by January 20 and to Chase by January 31.
	Order supply of Gulf States Common Stock Certificates for delivery to Stone & Webster Service by February 26 and to Chase by March 3.
	Order supply of El Paso Common Stock and Scrip Certificates and Virginia Common Stock and Scrip Certificates for delivery to Stone & Webster Service by March 15 and to Chase (no Scrip) by April 3.
	Authorize Stone & Webster to fill in subscription warrants with names, addresses and amounts.
20	Record date for determination of Gulf States and Virginia Stockholders entitled to vote at Special Stockholders' Meetings to be held January 30.
28	90 day notice to Stone & Webster Building terminating lease of fifth floor space as of April 30, 1947.
	Orders of all regulatory Commissions, both State and Federal, required in connection with the amendments of the charters of Virginia, Gulf States and El Paso should be issued by this date.

Engineers' Exhibit No. 79 (Cont'd)

Date	
January 1947	Hold El Paso Directors Meeting to:
	(a) Call Stockholders' Meeting to be held on waiver on January 30, 1947, to amend charter.
	(b) Adopt new form of Common Stock certificates.
	(c) Appoint State Street Trust Company, Registrar.
	(d) Authorize Stone & Webster Service Corporation, Transfer Agent, and State Street Trust Company to take action in connection with the increased number of shares.
30	File Form S-1 for Gulf States Common Stock.
	Hold Special Stockholders' Meetings of Virginia, Gulf States and El Paso, the El Paso meeting to be held on waiver.
Date	
February, 1947	
1	File Virginia, Gulf States and El Paso charter amendments with State authorities.
10	Hearing before U. S. District Court for the District of Delaware on the Plan.
10	Receive deficiency memo. on Gulf States Common Stock Form S-1.
11	New York Stock Exchange gives necessary certification to SEC of Forms 1-J, 15-AN and 8-A subject to receipt of notice from Engineers that Court order is issued and record date for warrants has been fixed.
17	Court order issued.
18	File amendment for Gulf States Common Stock, Form S-1, curing deficiencies and reflecting issuance of Court order and obtain order of SEC under 33 Act.
	Hold Engineers Directors' Meeting to:
	(a) Take action in connection with issuance of warrants, including:
	(1) Approval of form of warrant.
	(2) Fix February 28 as the record date for warrants.
	(3) Authorize mailing of immediate notice to Engineers Common Stockholders of record date for warrants and copy of prospectus and subsequent letter to them after record date enclosing warrants.
	(4) Authorize listing and registration of warrants on New York Stock Exchange on a "when issued" and issued basis.

Engineers' Exhibit No. 79 (Cont'd)

Date	
February 1947	
	(5) Authorize Stone & Webster to issue and mail warrants to Stockholders, subject to taking of final action by Directors on February 26.
	(6) Authorize The Chase Bank to accept subscriptions, transfer and split up warrants and deposit proceeds and hold Engineers Preferred.
	Mail notice to Common Stockholders advising them of record date for subscription warrants and that warrants will be mailed to them on record date.
	Notify New York Stock Exchange of record date on warrants and filing of Gulf States charter amendment and request that "when issued" dealings in the warrants and "when distributed" dealings in the Gulf States Common Stock be [illegible]ted, subject to final action by Engineers Directors on February 26.
	Department of Stock List approves listing application for Gulf States Common Stock, subject to final action by Engineers Directors on February 26 on a "when distributed" basis and subject to distribution on a fully listed basis and certifies application to the SEC with the request that the SEC grant acceleration in order that the listing of the Gulf States Common Stock "when distributed" may become effective subject to final action by Engineers Directors on February 26.
	Amendments to Forms 1-J, 15-AN and 8-A filed with SEC reporting the issuance of Court order and fixing of record date for warrants by Engineers Directors.
26	Deliver definitive Gulf States Common Stock certificates to Stone & Webster.
	Hold Engineers Directors' Meeting to:
	(a) Consider making the Plan effective by authorizing the mailing of the warrants.
	(b) Authorize Stone & Webster and The Chase to transfer certificates for Gulf States from Engineers to the subscribers.
	Notify New York Stock Exchange and SEC before 2 P. M. that the Plan is effective. N. Y. Stock Exchange needs this notice to declare Engineers Common ex-rights on February 28.
	File application with N. Y. Stock Exchange for listing of Virginia Common Stock; also file Form 8-A with SEC for registration on this Exchange.
	The application should request listing and registration of this stock "upon distribution".

Engineers' Exhibit No. 79 (Cont'd)

Date	
February 1947	
28	Record date for subscription warrants.
	Stone & Webster will send air mail (registered) warrants to Stockholders in the Chicago or San Francisco territory and will send regular mail (registered) the balance of the warrants, (together with with Gulf States prospectus in the case of stockholders becoming such since February 18, 1947).
	Engineers Common Stock would be "ex-rights" on the New York Stock Exchange.
Date	
March 1947	
3	Deliver definitive Gulf States Common Stock Certificates to The Chase.
14	Sell warrants being held for foreign stockholders and lost stockholders over the New York Stock Exchange.
15	El Paso Common Stock and scrip certificates and Virginia Common Stock and scrip certificates to be delivered to Stone & Webster Service Corporation.
17	Subscription period for warrants expires.
18	Hold Engineers Directors' Meeting to:
	(a) Authorize the sale of the balance of Gulf States Common Stock.
	(b) Authorize, subject to receipt of proceeds of such sale, the deposit in trust with The Chase of funds necessary to pay $105 per share to the $5 Preferred Stock and $110 per share to the $5.50 and $6 Preferred Stock, plus accrued dividends to the date of deposit.
	(c) Authorize giving of 5 days' notice to Engineers Preferred Stockholders.
	(d) Authorize Stone & Webster and The Chase to accept Engineers Preferred Stock Certificates and to issue checks.
	Authorize Stone & Webster to:
	(a) Mail letters to Preferred Stockholders advising them of proposed deposit on March 24, 1947 with The Chase and enclose Letter of Transmittal.
	(b) Accept Preferred Stock certificates and beginning March 24, 1947 to issue checks.
	Authorize The Chase to accept Engineers Preferred Stock certificates and to issue checks beginning March 24, 1947.

Engineers' Exhibit No. 79 (Cont'd)

Date	
March	
1947	
	Sell over the New York Stock Exchange the unsubscribed portion of the shares of Gulf States common stock. In the event some other method of disposing is selected, notify the Commission and do not sell if Commission raises any objection.
24	Deposit amount in trust with The Chase National Bank sufficient to pay $105 per share to the $5 Preferred Stock and $110 per share to the $5.50 and $6 Preferred Stock, plus accrued dividends to the date of deposit.
	File certificate of elimination of preferred stock capital in Delaware.
24	File Certificate of Dissolution of Engineers in Delaware, and take other action in connection therewith.
	Hold Engineers Directors' Meeting to:
	(a) Authorize distribution to Engineers Common Stockholders of all of the El Paso Common Stock and 94.4% of the Virginia Common Stock on the basis of 1/5 of a share of El Paso Common Stock and 1.45 shares of Virginia Common Stock for each share of Engineers Common Stock of record on April 3 (Necessary to give New York Stock Exchange 10 days notice of record date).
	(b) Adopt El Paso scrip certificates and Virginia scrip certificates.
	(c) Authorize Stone & Webster Service to issue El Paso and Virginia Common Stock and scrip certificates and to maintain scrip adjustment service.
	(d) Authorize application to the New York Stock Exchange and SEC to delist Engineers Common Stock effective on the record date of the distribution.
	(e) Authorize letter to Common Stockholders.
	Authorize Stone & Webster Service to:
	(a) Mail El Paso and Virginia Common Stock and scrip certificates to Engineers Common Stockholders.
26	New York Stock Exchange approves listing application for Virginia Common Stock subject to distribution and certifies application to the SEC with a request that the SEC grant acceleration in order that the listing of the Virginia Common Stock may become effective immediately after the distribution of such stock to the Engineers Stockholders.

Engineers' Exhibit No. 79 (Cont'd)

Date April 1947	
3	Record date for the determination of Engineers' Common Stockholders entitled to receive El Paso and Virginia Common Stock and scrip certificates. Engineers Common Stock to be delisted from the New York Stock Exchange, Virginia Common Stock to be admitted to the list.
	El Paso Common Stock Certificates and Virginia Common Stock Certificates to be delivered to The Chase.
4	El Paso and Virginia Common Stock and scrip certificates to be mailed on this date.
	Cancel service contracts between Epsco, Inc. and Engineers, Virginia, Gulf States and El Paso.
	Hold Epsco, Inc. Directors' and Stockholders' Meeting to take action in connection with the dissolution of the Company and proceed to wind up affairs of Company.

Engineers' Exhibit No. 79 (Cont'd)

Exhibit D

ENGINEERS PUBLIC SERVICE COMPANY
(INCORPORATED)
90 BROAD STREET
NEW YORK 4

December ....., 1946

To the Stockholders:

On September 10, 1945 we sent you copy of a Plan filed that date with the Securities and Exchange Commission under Section 11(e) of the Public Utility Holding Company Act of 1935 for the divestment of assets by Engineers and related matters. Hearings on the Plan were completed on February 13, 1946 and oral argument was held on September 5, 1946. On December 4, 1946 the Commission issued its Findings and Opinion in which it found that the provisions of the Plan providing for the disposition of Gulf States and El Paso and for the dissolution of Engineers are necessary under the requirements of the Act. The Commission disapproved certain mechanics of the Plan including the proposed bank loan and the proposal to retain all of Engineers holdings of the common stock of Virginia during the period of time required to pay off such bank loan and to determine and discharge any other liabilities but stated that it would be appropriate to reserve a part of the Company's assets for liabilities which may later be found against the Company. The Commission further found that fairness requires that the preferred stockholders be paid an amount equal to their respective call prices on retirement and that it would be appropriate to create an escrow fund in the event of controversy over whether any amount in excess of $100 per share and accrued dividends should be paid to the preferred stockholders, which escrow would include the amount of the premium and provision to compensate the preferred

Engineers' Exhibit No. 79 (Cont'd)

stockholders for the time full payment is withheld from them. The Commission also found that provision should be included in the Plan for supervision by the Commission over payment of fees and expenses incurred in connection with the Plan.

Accordingly the Directors approved on December 13, 1946 the filing of an amended plan which they believe conforms fully with the findings of the Commission. It provides that Engineers will mail warrants to its common stockholders of record on a date to be fixed by the Board of Directors after the court shall have entered a decree or order for the purpose of enforcing the Plan, each of which warrants will evidence the right to acquire from Engineers shares of Gulf States common stock (reclassified) on a basis of one share of Gulf States common stock for each share of Engineers common stock held by such stockholders on such date, either (a) by purchasing from Engineers whole shares of such Gulf States common stock at the rate of $11.50 per share or in the alternative (b) by exchanging with Engineers whole shares of Engineers preferred stock for shares of Gulf States common stock on the basis of equivalent values, assigning $11.50 per share for each share of Gulf States common stock and $105 plus accrued dividends to the expiration date of the warrant for each share of $5 preferred and $110 plus accrued dividends to the expiration date of the warrant for each share of $5.50 preferred and $6 preferred. In order to provide the balance of funds in excess of the proceeds of the warrants and cash in the Treasury of Engineers required to redeem the preferred stock at its respective call prices, payment of special dividends on their common stocks by Virginia, Gulf States and El Paso are contemplated. Such special dividends in the case of Virginia are estimated to be equivalent to one year's dividend paid in advance and in the case of Gulf States to two quarterly dividends paid in advance, and in the case of these two companies it is contemplated that no further common dividends would be

paid until June 15, 1948 in the case of Virginia, and December 15, 1947 in the case of Gulf States so that in the proposed distribution these stocks would be ex-dividend for such respective periods.

The Plan proposes the deposit in trust for the benefit of the preferred stockholders, after five days' prior notice, of an amount equivalent to $105 a share plus accrued dividends to the date of such deposit for each share of $5 preferred and $110 per share plus accrued dividends to the date of such deposit for each share of $5.50 and $6 preferred not surrendered in exchange for Gulf States common stock. Engineers will thereupon file a Certificate of Dissolution. Promptly after the dissolution shall have become effective Engineers will distribute all of the common stock (reclassified) of El Paso pro rata to Engineers common stockholders on the basis of 1/5 of a share of El Paso common stock for each share of Engineers common stock and (2) approximately 94.4% of the common stock of Virginia pro rata to Engineers common stockholders on the basis of 1.45 shares of Virginia common stock for each share of Engineers common stock. Scrip certificates will be issued for fractional shares but such scrip will not be entitled to dividends or voting rights but may be combined in lots aggregating one or more full shares of stock and exchanged for such shares. Engineers will retain 162,612 shares of common stock of Virginia and the balance of cash not required for redemption of the preferred stock and the Directors will thereafter marshal the assets and pay the liabilities of the Company and after such liabilities have been determined and satisfied, including fees and expenses incurred in connection with the Plan to the extent approved by the Commission, will cause the distribution to Engineers common stockholders of the remaining assets of the Company, either in kind or in cash.

Effectuation of the Plan is subject to the following conditions among others, namely, (1) that the necessary Commission and Court approvals be had; (2) that the Board of

Engineers' Exhibit No. 79 (Cont'd)

Directors may withhold mailing of warrants in the event conditions make it inadvisable to proceed with the Plan; (3) that unless waived by Engineers there shall have been obtained from the United States Treasury Department satisfactory assurance as to the tax consequences of the transactions necessary to carry out the Plan.

It is anticipated that the receipt and exercise of the warrants and the receipt of the common stocks of Virginia and El Paso will constitute a non-taxable transaction and that preferred stockholders who exchange their preferred stock for Gulf States common stock in the exercise of warrants will realize no taxable gain thereby. It is planned to list the rights to subscribe to Gulf States common stock for trading on the New York Stock Exchange during the period that the warrants are outstanding and preferred stockholders who desire to acquire rights for this purpose may purchase the same through their bank or broker.

In this connection attention of stockholders is directed to Amendment No. 7 of Federal Reserve Bank Regulation U, which permits a stockholder of a public utility holding company who receives rights to subscribe to securities of an operating utility company owned by such holding company, in connection with simplifying the corporate structure of such holding company, to obtain credit for the purposes of exercising his rights and he may do so by pledging securities, which for this purpose shall have a loan value of 50%.

It is anticipated that if the Plan is approved by the Commission and the Court without undue delay, warrants can be mailed to Engineers common stockholders by approximately March 1, 1947 with a period of sixteen (16) days allowed for exercise of warrants. At the time these warrants are mailed out detailed instructions will be sent in reference to procedure to be followed by the stockholders and it is hoped that a ruling of the Treasury Department may be available at that time in reference to the tax consequences of the Plan.

Engineers' Exhibit No. 79 (Cont'd)

You will note that the Company does not propose to contest the findings of the Securities and Exchange Commission that fairness requires the payment of the voluntary redemption price to the preferred stockholders. We are advised by counsel that the Courts are reluctant to override findings of this character by administrative commissions and that, in their opinion, it is not worth while to contest further this issue.

A copy of the notice issued by the Securities and Exchange Commission on December ....., 1946 relating to the filing of this amendment is enclosed.

Copies of the amended plan summarized above are available for distribution on request.

Yours very truly,

D. C. BARNES,
President.

Engineers' Exhibit No. 79 (Cont'd)

Exhibit E

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

and

SUBSIDIARY COMPANIES
including:
Virginia Electric and Power Company
Gulf States Utilities Company
El Paso Electric Company

Condensed Consolidated Financial Statements
and
Parent Company Financial Statements
October, 1946

Figures appearing in this report have been compiled from those shown on the books of the Company and its subsidiary companies except in the case of consolidated figures which have been compiled from figures shown on the books of the Company and its subsidiary companies after inter-company eliminations. All figures reported are subject to such adjustments as the annual audit by independent accountants may disclose to be necessary. The Company, in publishing the information contained herein, does not make or intend to make any representation whatsoever as to the value of the assets or any of them shown in the balance sheets.

Additional copies of this report may be obtained from the office of the Company at

90 Broad Street, New York 4, N. Y.

Engineers' Exhibit No. 79 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES

Comparative Consolidated Income Statement(a)

	Month of October, 1946	Month of October, 1945	Increase
Operating revenues	$ 5,058,819.71	$ 4,999,224.16	$ 59,595.55
Operation	2,406,237.67	2,064,353.07	341,884.60
Maintenance	377,005.81	347,648.89	29,356.92
Depreciation	410,538.00	390,172.07	20,365.93
Amortization of plant acquisition adjustments	74,540.35	73,914.82	625.53
Taxes—Federal income, after extraordinary reductions of $33,076 (prior period—$747,609) as explained in note (b)	370,017.00	105,921.00	264,096.00
Taxes—Other	410,102.39	366,522.95	43,579.44
Net operating revenues after extraordinary reductions in taxes indicated above	1,010,378.49	1,650,691.36	640,312.87*
Other income—net	1,987.65†	15,473.03†	13,485.38
Balance	1,008,390.84	1,635,218.33	626,827.49*
Interest and amortization	260,521.02	292,451.73	31,930.71*
Special charges as explained in note (b)	33,076.00	178,432.00	145,356.00*
Preferred dividend requirements of subsidiary companies	170,237.92	170,237.92	—0—
Applicable to minority interests	567.11	1,512.78	945.67*
Net income	$ 543,988.79		
Net income including $156,942 pro rata amount of tax reduction, resulting from sale of transportation property in 1945		$ 992,583.90	
Net income excluding the $156,942 pro rata amount of tax reduction		$ 835,641.90	
Extraordinary reductions in Federal income taxes through allowance for amortization of emergency facilities	$ —0—	$ 412,235.00	$ 412,235.00*

Engineers' Exhibit No. 79 (Cont'd)

	12 Months Ending October 31, 1946	October 31, 1945	Increase
Operating revenues	$61,711,580.04	$66,525,648.21	$4,814,068.17*
Operation	25,643,554.53	25,680,398.39	36,843.86*
Maintenance	4,416,053.19	4,401,639.53	14,413.66
Depreciation	4,831,087.71	4,976,566.13	145,478.42*
Amortization of plant acquisition adjustments (c)	892,200.92	886,977.84	5,223.08
Taxes—Federal income, after extraordinary reductions of $1,560,051 (prior period—$10,459,996) as explained in note (b)	5,453,025.00	1,989,246.00	3,463,779.00
Taxes—Other	5,160,840.32	5,226,238.94	65,398.62*
Net operating revenues after extraordinary reductions in taxes indicated above	15,314,818.37	23,364,581.38	8,049,763.01*
Other income—net	181,823.38†	12,032.04	193,855.42*
Balance	15,132,994.99	23,376,613.42	8,243,618.43*
Interest and amortization	3,309,437.87	3,991,579.04	682,141.17*
Special charges of (1) $605,533 (prior period—$2,441,702) representing pro rata amount of those portions of premiums and expenses on redemption of bonds which are equivalent to resulting reduction in Federal income taxes, and (2) $569,786 in prior period representing pro rata amount of book loss on sale of transportation property in 1944 which because of write-downs in prior years is less than the pro rata reduction in Federal taxes resulting from such sale (b)	605,533.00	3,011,488.00	2,405,955.00*
Preferred dividend requirements of subsidiary companies	2,042,856.31	2,074,350.27	31,493.96
Applicable to minority interests	12,297.85	21,781.17	9,483.32*
Net income including $260,445 (prior period—$2,303,558) pro rata amount of tax reductions resulting from the sale of transportation property in 1945 and in 1944 in excess of related book loss	$ 9,162,869.96	$14,277,414.94	$5,114,544.98*
Net income excluding $260,445 (prior period—$2,303,558) pro rata amount of tax reductions	$ 8,902,424.96	$11,973,856.94	$3,071,431.98*

(Continued on next page)

Engineers' Exhibit No. 79 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES

Comparative Consolidated Income Statement(a) (Continued)

	12 Months Ending October 31, 1946	12 Months Ending October 31, 1945	Increase
Net income excluding $260,445 (prior period —$2,303,558) pro rata amount of tax reductions (from previous page)	$ 8,902,424.96	$11,973,856.94	$3,071,431.98*
Extraordinary reductions in Federal income taxes which are not offset by special charges include, in addition to the $260,445 (prior period—$2,303,558) referred to above, amounts (shown opposite) which result from deductions, in excess of depreciation at usual rates, allowable for tax purposes as amortization of emergency facilities but not recognized in the accounts since such facilities are expected to be employed throughout their normal life and not to replace existing facilities	$ 694,073.00	$ 5,144,950.00	$4,450,877.00*
Adjustment for minority interests	1,348.95†	12,027.66†	10,678.71
Earnings before giving effect to tax reductions resulting from amortization of emergency facilities and excluding $260,445 (prior period—$2,303,558) pro rata amount of tax reductions resulting from sale of transportation property in excess of book loss	8,209,700.91	6,840,934.60	1,368,766.31
Dividends on preferred stock of Parent Company	2,119,092.40	2,119,092.34	.06
Applicable to common stock of Parent Company:			
Total	$ 6,090,608.51	$ 4,721,842.26	$1,368,766.25
Per share, based on 1,909,968 shares	$3.19	$2.47	$.72

* Decrease.

† Red figure.

(a) During December 1944 and March 1945, all of Virginia Electric and Power Company's investments in transportation properties were sold. Net income from such transportation properties included in the consolidated income statement was not material.

The Company sold its interests in The Western Public Service Company on February 28, 1946. Consequently, the comparative consolidated income statement excludes the operations of such company subsequent to December 31, 1945.

The consolidated income statements are after restatement to reflect the pro rata portion of certain reductions in Federal income taxes occasioned by (1) the losses for tax purposes arising from the sales of transportation properties of a subsidiary in December 1944 and March 1945, and (2) the election of subsidiary companies to terminate the

Engineers' Exhibit No. 79 (Cont'd)

amortizaion period with respect to all emergency facilities, effective September 30, 1945, pursuant to the proclamation issued on September 29, 1945 by the President of the United States.

(b) The provision for Federal income taxes for the 12 months ending October 31, 1946 includes provision for estimated excess profits taxes of $121,874 (prior period—$1,640,859) after giving effect to reductions stated below.

The provision for Federal income taxes for the year 1946 will be reduced $396,918 by reason of deductions for tax purposes of redemption premium and expenses incurred in refunding of bonds. Pro rata portions of this reduction are reflected in the above income statements.

The provision for Federal income taxes for the year 1945 was reduced $9,785,725 (including $1,282,926 representing reduction in tax due to carry-back of unused excess profits credit from 1945 to 1943) of which (1) approximately $2,370,000 was by reason of deductions for tax purposes of redemption premiums and expenses incurred in refunding of bonds; (2) approximately $2,090,000 was by reason of deductions for tax purposes of a loss sustained on the sale of transportation property; and (3) approximately $5,320,000 was by reason of deductions for tax purposes of amounts, in excess of depreciation provided for at usual rates, allowable as amortization of emergency facilities under Section 124 of the Internal Revenue Code. Pro rata portions of these reductions are reflected in the above income statements.

The provision for Federal income taxes for the year 1944 was reduced $11,421,362 (including $956,479 representing reduction in tax due to carry-back of net operating loss deduction and unusued excess profits credit from 1944 to 1942 and 1943), of which approximately $2,090,000 was by reason of deductions for tax purposes of redemption premiums and expenses incurred in refunding of bonds; (2) approximately $6,240,000 was by reason of deductions for tax purposes of a loss sustained on the sale of transportation property; and (3) approximately $3,090,000 was by reason of deductions for tax purposes of amounts, in excess of depreciation provided for at usual rates, allowable as amortization of emergency facilities under Section 124 of the Internal Revenue Code. Pro rata portions of these reductions are reflected in the above income statements.

The subsidiary operating companies elected to terminate the amortization period with respect to all emergency facilities effective September 30, 1945, pursuant to a proclamation issued on September 29, 1945 by the President of the United States. Federal income taxes shown above have been restated to include the reduction resulting from the shortened amortization period. As a result of the deduction for loss on sale of transportation property in 1944, claims for refund of taxes of prior years of approximately $2,600,000 have been filed. Pending review by the Treasury Department of the return for 1944, no effect has been given in the consolidated statements to such refund claims.

(c) See note (b) to consolidated balance sheet.

Engineers' Exhibit No. 79 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet(a)

ASSETS

	Oct. 31, 1946	Oct. 31, 1945	Increase
Plant and other investments:			
Utility plant (including intangibles):			
Electric plant, at original cost	$195,536,167.24	$187,373,733.13	$ 8,162,434.11
Common utility plant, at original cost	1,357,240.66	1,320,245.93	36,994.73
Other utility plant, at cost	12,891,973.52	12,440,149.39	451,824.13
Plant acquisition adjustments (b)	14,544,257.66	14,561,018.50	16,760.84*
Excess of recorded investments in shares of subsidiaries over net assets applicable to such shares at dates of acquisition	24,224,179.85	24,845,379.85	621,200.00*
Total utility plant	248,553,818.93	240,540,526.80	8,013,292.13
Other physical property, at cost or written-down amounts, less reserve	1,837,105.79	1,916,352.11	79,246.32*
Investment in associated company, at cost	62,940.00	63,295.00	355.00*
Total plant and other investments	250,453,864.72	242,520,173.91	7,933,690.81
Special funds	347,408.05	1,112,285.10	764,877.05*
Current assets:			
Cash in banks and on hand	28,868,106.10	19,321,143.36	9,546,962.74
United States treasury securities, at cost	4,579,700.00	10,189,700.00	5,610,000.00*
Special deposits	164,096.65	95,303.11	68,793.54
Accounts receivable from customers and miscellaneous sources, less reserves	4,336,264.25	4,002,116.66	334,147.59
Materials and supplies, at cost or written-down amounts, less reserves	3,587,147.18	2,646,297.40	940,849.78
Prepayments	662,095.14	922,089.77	260,084.63*
Excess profits tax post-war refunds	447.05	1,311,682.45	1,311,235.40*
Claims for adjustment of Federal income taxes relating to unused excess profits credit carry-back	7,613.32	—0—	7,613.32
Claims for adjustment of Federal income taxes relating to amortization of emergency facilities	—0—	1,761,559.00	1,761,559.00*
Total current assets	42,205,379.69	40,249,891.75	1,955,487.94
Deferred debits:			
Unamortized debt discount and expense, including unamortized discount and expense and call premium on refunded issues	2,900,968.35	3,308,084.82	407,116.47*
Claims for refund of overpayment of Federal income taxes	1,891,658.19	1,070,225.40	821,432.79
Capital stock expense	110,843.90	552,370.73	441,526.83*
Other deferred debits	474,038.45	179,926.42	294,112.03
Total deferred debits	5,377,508.89	5,110,607.37	266,901.52
	$298,384,161.35	$288,992,958.13	$ 9,391,203.22

* Decrease.

Note: See explanatory notes appended which are to be read as an integral part of the consolidated balance sheet.

Engineers' Exhibit No. 79 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES

Comparative Consolidated Balance Sheet(a)

LIABILITIES

	Oct. 31, 1946	Oct. 31, 1945	Increase
Capital stock:			
Preferred stock(c)	$ 39,245,500.00	$ 39,245,500.00	$ —0—
Common stock(d)	1,909,968.00	1,909,968.00	—0—
Subsidiary companies:			
Preferred stock	42,447,100.00	42,447,100.00	—0—
Premium on preferred stock	340,620.00	340,620.00	—0—
Total capital stock	83,943,188.00	83,943,188.00	—0—
Long-term debt:			
Contract payments	—0—	81,811.70	81,811.70*
Subsidiary companies:			
Bonds	92,500,000.00	92,837,000.00	337,000.00*
Notes payable	7,650,000.00	9,140,000.00	1,490,000.00*
Total long-term debt	100,150,000.00	102,058,811.70	1,908,811.70*
Current liabilities:			
Bonds, due within one year	—0—	19,000.00	19,000.00*
Notes payable, due within one year	850,000.00	2,720,000.00	1,870,000.00*
Accounts payable	2,459,947.90	1,590,633.81	869,314.09
Customers' deposits	900,988.70	1,182,960.85	281,972.15*
Taxes accrued	7,552,108.61	8,264,346.52	712,237.91*
Interest accrued	439,505.80	493,507.02	54,001.22*
Other current liabilities	578,025.35	496,924.06	81,101.29
Total current liabilities	12,780,576.36	14,767,372.26	1,986,795.90*
Deferred credits:			
Unamortized premium less expense on bonds	411,985.78	1,313,728.60	901,742.82*
Customers' advances for construction	451,943.72	668,241.87	216,298.15*
Other deferred credits	338,802.66	343,942.30	5,139.64*
Total deferred credits	1,202,732.16	2,325,912.77	1,123,180.61*
Reserves:			
Depreciation	36,983,506.82	34,220,256.10	2,763,250.72
Amortization of plant acquisition adjustments(b)	4,280,878.41	3,417,850.95	863,027.46
Injury and damage claims	271,935.08	457,565.78	185,630.70*
Taxes on income of prior years	897,384.37	1,783,331.53	885,947.16*
Other	482,465.39	509,468.16	27,002.77*
Total reserves	42,916,170.07	40,388,472.52	2,527,697.55
Parent Company's reserve for depreciation in value of investments in subsidiaries	2,000,000.00	3,159,760.12	1,159,760.12*
Minority interests in common capital stocks and surplus of subsidiary companies (surplus $46,060.17; 1945—$30,834.49)	77,711.90	62,486.22	15,225.68
Capital surplus	20,623,784.70	19,819,887.53	803,897.17
Earned surplus (since May 31, 1938)	34,689,998.16(e)	22,467,067.01(f)	12,222,931.15
	$298,384,161.35	$288,992,958.13	$ 9,391,203.22

* Decrease.

Note: See explanatory notes appended which are to be read as an integral part of the consolidated balance sheet.

Engineers' Exhibit No. 79 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY (INCORPORATED) AND SUBSIDIARY COMPANIES

Consolidated Balance Sheet Notes

(a) On September 16, 1942 and October 6, 1942 the Securities and Exchange Commission issued further Orders under Section 11(b)(1) of the Public Utility Holding Company Act of 1935, which, with prior Orders, in effect directed the Company to divest itself, within one year, of all of its remaining investments excepting that in Virginia Electric and Power Company, which, if retained, must dispose of its gas and transportation operations. The Company filed a petition with the United States Court of Appeals for the District of Columbia for a review of the September 16, 1942 and October 6, 1942 Orders and on November 22, 1943 the Court set these Orders aside and remanded the case to the Commission for further proceedings in accordance with its opinion. The grounds for the reversal were, in substance, that the Company was entitled to more time to determine whether it desired to retain Virginia Electric and Power Company or Gulf States Utilities Company as its single system and that the interpretation of the Act upon which the Commission directed the divestment of the transportation (since sold) and other incidental businesses was incorrect. Both the Securities and Exchange Commission and the Company applied to the Supreme Court of the United States for writs of certiorari which were granted and the case is still pending. On April 1, 1946, the Court upheld the constitutionality of Section 11(b)(1), one of the issues in the Engineers' case, in a decision relating to The North American Company.

In February 1946 the Company sold its interest in The Western Public Service Company (Delaware).

On September 10, 1945, the Company filed with the Commission a plan, pursuant to Section 11(e) of the Act for divestment of assets and related matters, which plan has subsequently been amended. As amended, Part I of the plan provides that Gulf States Utilities Company will have reclassified its common stock into 1,909,968 shares and El Paso Electric Company will have reclassified its common stock into 381,994 shares; that rights will be issued to the common stockholders of the Company to acquire from the Company for cash or in exchange for whole shares of the Company's preferred stock, shares of Gulf States common stock at $11.50 per share, on the basis of one share of Gulf States common stock for each share of the Company's common stock held; that the proceeds of this sale, together with treasury cash and approximately $3,000,000 of bank borrowings will be used to pay $100 per share, plus accrued dividends, to the holders of the Company's preferred stock not surrendered in exchange as aforesaid; and that the Company will distribute El Paso common stock to the holders of the Company's common stock on the basis of one share for each five shares held as a dividend in partial liquidation; and that the Company will be dissolved within 60 days after Part I of the plan becomes effective but liquidation will be deferred until final settlement of the unfinished business of the Company, including the payment of bank borrowings, at which time the Company's common stockholders would receive a direct interest in the common stock of Virginia Electric and Power Company. Part II of the plan requests the Commission to find that it is fair and equitable to the Company's preferred stockholders to pay them $100 per share, plus accrued dividends, in complete liquidation of their stock but provides, in the event the Commission finds that some additional amount shall be payable, for the automatic amendment of this Part so as to provide for such additional payment to all holders of preferred stock, (including those who surrendered their preferred stock in exchange as aforesaid), reserving to the Company the right to apply for a review of any order providing for or requiring any additional payment. Oral arguments before the Securities and Exchange Commission were held on September 5, 1946.

(b) Provision is being made, pursuant to orders of regulatory commissions, for the amortization of substantially all of plant acquisition adjustments by charges to income over 15-year periods commencing in 1943 and 1944. In accordance with orders of regulatory com-

missions having jurisdiction, the operating companies record the amortization charges as deductions from net operating income but for purposes of these statements such charges have been classified as operating expenses.

(c) See Parent Company note (e).

(d) Represented by 1,909,968 shares of $1 par value. Authorized 1,909,968 shares.

(e) At October 31, 1946, due to covenants made by certain subsidiaries, approximately $13,308,000 of earned surplus is not available for dividends on common stocks of such subsidiaries.

(f) Consolidated earned surplus at October 31, 1945 was increased over that previously reported by $3,247,552, of which $2,027,803 represented the effect of the reduction in Federal income taxes arising from the shortened amortization period for emergency facilities and $1,219,749 arose from the sale of transportation properties in 1944. Reference is made to note (b) to the consolidated income statement.

ENGINEERS PUBLIC SERVICE COMPANY
(INCORPORATED)
(Parent Company Only)

Comparative Income Statement

	12 Months Ending October 31, 1946	12 Months Ending October 31, 1945	Increase
Revenue from subsidiary companies:			
Dividends—common	$ 5,315,124.75	$ 5,242,274.25	$ 72,850.50
Revenue from miscellaneous investments (a)	140,980.00†	631,094.82‡	490,114.82*
Miscellaneous revenue	53,072.79	30,031.42	23,041.37
Total revenues	5,509,177.54	5,903,400.49	394,222.95*
Expenses	291,631.24	310,406.54	18,775.30*
Taxes—Federal income (b)	244,006.00	115,860.00	128,146.00
—Other	24,961.80	40,689.44	15,727.64*
Balance for dividends and surplus	4,948,578.50	5,436,444.51	487,866.01*
Preferred dividends	2,119,092.40	2,119,092.34	.06
Balance for common stock and surplus	$ 2,829,486.10	$ 3,317,352.17	$ 487,866.07*
Earnings per share of common stock	$1.48	$1.74	$.26*

† Includes common dividend of $125,000 paid by The Western Public Service Company incident to the sale.

‡ Includes common dividend of $458,554.82 paid by Savannah Electric and Power Company incident to the sale.

Engineers' Exhibit No. 79 (Cont'd)

Comparative Balance Sheet

	October 31, 1946	October 31, 1945	Increase
ASSETS			
Investments:			
Investments in subsidiary companies (c) (d):			
Common stocks	$54,321,997.19	$55,555,197.19	$1,233,200.00*
Note	—0—	508,800.00	508,800.00*
	54,321,997.19	56,063,997.19	1,742,000.00*
Less reserve for depreciation in value of investments	2,000,000.00	3,159,760.12	1,159,760.12*
Total investments	52,321,997.19	52,904,237.07	582,239.88*
Special fund	—0—	92,000.00	92,000.00*
Current assets:			
Cash in banks and on hand	13,819,119.47	7,343,369.61	6,475,749.86
United States treasury securities, at cost	2,580,000.00	4,650,000.00	2,070,000.00*
Accounts receivable	279.60	288.40	8.80*
Interest receivable	10,650.59	26,056.25	15,405.66*
Excess profits tax post-war refunds	—0—	13,230.10	13,230.10*
Total current assets	16,410,049.66	12,032,944.36	4,377,105.30
Deferred charges	248,257.45	268,070.39	19,812.94*
	$68,980,304.30	$65,297,251.82	$3,683,052.48
LIABILITIES			
Capital stock:			
Preferred stock (e)	$39,245,500.00	$39,245,500.00	$ —0—
Common stock (f)	1,909,968.00	1,909,968.00	—0—
Total capital stock	41,155,468.00	41,155,468.00	—0—
Long-term contract payments	—0—	81,811.70	81,811.70*
Current liabilities:			
Accounts payable	3,411.09	3,820.54	409.45*
Taxes accrued	237,521.17	285,839.05	48,317.88*
Other current liabilities	5,264.00	12,992.60	7,728.60*
Total current liabilities	246,196.26	302,652.19	56,455.93*
Deferred credits	16,288.82	163.04	16,125.78
Reserve for taxes on income of prior years	16,997.20	172,200.14	155,202.94*
Surplus:			
Capital surplus	16,961,938.03	16,158,040.86	803,897.17
Earned surplus (since May 31, 1938)	10,583,415.99	7,426,915.89	3,156,500.10
	$68,980,304.30	$65,297,251.82	$3,683,052.48

* Decrease.

Note: See explanatory notes on following page which are to be read as an integral part of the income statement and balance sheet.

Engineers' Exhibit No. 79 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY
(INCORPORATED)
(Parent Company Only)

Notes to Financial Statements

(a) On February 28, 1946, the Company sold its investment in The Western Public Service Company. Dividends and interest received on this investment have been included in revenue from miscellaneous investments.

(b) The parent company and certain of its subsidiaries join in consolidated Federal income and excess profits tax returns. The provisions shown represent the parent company's pro rata share of the estimated consolidated taxes. Taxes for 1944 were reduced approximately $221,000 and taxes for 1945 were reduced approximately $210,000, due principally to non-recurring deductions of another member of the consolidated group, and have been restated to the Company's aliquot portion of the consolidated taxes due. See note (b) to consolidated income statement.

The parent company does not consider it has any liability for excess profits taxes.

(c) See note (a) to consolidated balance sheet regarding Orders of the Securities and Exchange Commission under Section 11(b)(1) of the Public Utility Holding Company Act of 1935.

(d) Investments in subsidiary companies are carried on the basis of the stated value of securities of the Parent Company issued, and cash paid, therefor, plus contributions to the capital of certain of the subsidiary companies.

(e) Represented by 143,951 shares $5 cumulative dividend preferred of no par value (entitled to $105 per share upon redemption or voluntary liquidation or $100 per share upon involuntary liquidation, plus accrued dividends) and 183,406 shares $5.50 cumulative dividend preferred and 65,098 shares $6 cumulative dividend preferred of no par value (entitled to $110 per share upon redemption or voluntary liquidation or $100 per share upon involuntary liquidation, plus accrued dividends). Total preferred stock authorized 431,000 shares.

(f) Represented by 1,909,968 shares of $1 par value. Authorized 1,909,968 shares.

Engineers' Exhibit No. 79 (Cont'd)

VIRGINIA ELECTRIC AND POWER COMPANY

October, 1946

Figures appearing in this report have been compiled from those shown on the books of the Company. All figures reported as subject to such adjustments as the annual audit by independent accountants may disclose to be necessary. The Company, in publishing the information contained herein, does not make or intend to make any representation whatsoever as to the value of the assets or any of them shown in the balance sheet.

VIRGINIA ELECTRIC AND POWER COMPANY

Organized under Laws of Virginia

A Subsidiary of Engineers Public Service Company (Incorporated)

Comparative Income Statement(a)

	Month of October, 1946	Month of October, 1945	Increase
Operating revenues	$ 3,255,292.11	$ 3,290,242.95	$ 34,950.84*
Operation	1,674,587.83	1,391,140.78	283,447.05
Maintenance	273,828.75	249,569.14	24,259.61
Depreciation	239,160.25	233,436.51	5,723.74
Amortization of plant acquisition adjustments (b)	57,764.00	57,764.00	—0—
Taxes—Federal income, after extraordinary reductions of $582,950 in prior period as explained in note (c)	169,319.00	96,605.00†	265,924.00
Taxes—Other	269,465.26	248,096.52	21,368.74
Net operating revenues after extraordinary reductions in taxes indicated above	571,167.02	1,206,841.00	635,673.98*
Other income—net loss	10,013.63	14,987.14	4,973.51*
Balance	561,153.39	1,191,853.86	630,700.47*
Interest and amortization (d)	178,528.33	196,738.06	18,209.73*
Special charges as explained in note (c)	—0—	175,574.00	175,574.00*
Net income	$ 382,625.06		
Net income including $123,257 pro rata amount of tax reduction, resulting from sale of transportation property in 1945		$ 819,541.80	
Net income excluding the $123,257 pro rata amount of tax reduction		$ 696,284.80	
Extraordinary reductions in Federal income taxes through allowance for amortization of emergency facilities	$ —0—	$ 284,119.00	$ 284,119.00*

* Decrease.

† Red figure.

NOTE: See explanatory notes appended which are to be read as an integral part of the income statement.

Engineers' Exhibit No. 79 (Cont'd)

VIRGINIA ELECTRIC AND POWER COMPANY

Organized under Laws of Virginia

A Subsidiary of Engineers Public Service Company (Incorporated)

Comparative Income Statement(a)
(Continued)

	12 Months Ending October 31, 1946	12 Months Ending October 31, 1945	Increase
Operating revenues	$40,658,352.93	$43,257,312.25	$ 2,598,959.32*
Operation	17,572,054.07	16,904,279.95	667,774.12
Maintenance	3,212,010.60	3,182,122.30	29,888.30
Depreciation	2,861,338.52	3,037,090.92	175,752.40*
Amortization of plant acquisition adjustments (b)	693,168.00	693,168.00	—0—
Taxes—Federal income, after extraordinary reductions of $891,842 (prior period—$8,525,190) explained in note (c)	3,058,905.00	1,294,547.00	4,353,452.00
Taxes—Other	3,400,736.15	3,396,923.72	3,812.43
Net operating revenues after extraordinary reductions in taxes indicated above	9,860,140.59	17,338,274.36	7,478,133.77*
Other income—net loss	251,817.65	92,031.40	159,786.25
Balance	9,608,322.94	17,246,242.96	7,637,920.02*
Interest and amortization (d)	2,210,550.13	2,758,046.54	547,496.41*
Special charges of (1) $268,607 (prior period—$2,414,114) representing pro rata amount of those portions of premiums and expenses on redemption of bonds which are equivalent to resulting reduction in Federal income taxes, and (2) $569,786 in prior period representing pro rata amount of book loss on sale of transportation property in 1944 which because of write-downs in prior years is less than the pro rata reduction in Federal taxes resulting from such sale (c)	268,607.00	2,983,900.00	2,715,293.00*
Net income including $188,567 (prior period —$1,937,199) pro rata amount of tax reductions resulting from sale of transportation property in 1945 and in 1944 in excess of related book loss	$ 7,129,165.81	$11,504,296.42	$ 4,375,130.61*
Net income excluding $188,567 (prior period —$1,937,199) pro rata amount of tax reductions	$ 6,940,598.81	$ 9,567,097.42	$ 2,626,498.61*

Engineers' Exhibit No. 79 (Cont'd)

Extraordinary reductions in Federal income taxes which are not offset by special charges include, in addition to the $188,567 (prior period — $1,937,199) referred to above, amounts (shown opposite) which result from deductions, in excess of depreciation at usual rates, allowable for tax purposes as amortization of emergency facilities but not recognized in the accounts since such facilities are expected to be employed throughout their normal life and not to replace existing facilities	$ 434,668.00	$ 3,604,091.00	$ 3,169,423.00*
Earnings before giving effect to tax reductions resulting from amortization of emergency facilities and excluding the $188,567 (prior period—$1,937,199) pro rata amount of tax reductions resulting from sale of transportation property in excess of book loss	6,505,930.81	5,963,006.42	542,924.39
Preferred dividend requirements	1,447,355.00	1,447,355.00	—0—
Applicable to common stock	$ 5,058,575.81	$ 4,515,651.42	$ 542,924.39

* Decrease.

† Red figure.

NOTE: See explanatory notes appended which are to be read as an integral part of the income statement.

Engineers' Exhibit No. 79 (Cont'd)

VIRGINIA ELECTRIC AND POWER COMPANY

Comparative Balance Sheet(a)

ASSETS

	October 31, 1946	October 31, 1945	Increase
Plant and other investments:			
Utility plant (including intangibles):			
Electric plant, at original cost	$121,579,675.46	$115,836,502.13	$ 5,743,173.33
Gas plant, at original cost	8,188,516.68	7,908,662.06	279,854.62
Common utility plant, at original cost	1,357,240.66	1,320,245.93	36,994.73
Plant acquisition adjustments (b)	11,330,842.13	11,330,842.13	—0—
Total utility plant	142,456,274.93	136,396,252.25	6,060,022.68
Other physical property, less reserve	1,703,890.55	1,756,408.48	52,517.93*
Investment in associated company	40,480.00	40,480.00	—0—
Total plant and other investments	144,200,645.48	138,193,140.73	6,007,504.75
Current assets:			
Cash	8,930,970.39	7,475,074.03	1,455,896.36
United States treasury securities	—0—	1,772,000.00	1,772,000.00*
Special deposits	39,923.95	61,438.75	21,514.80*
Accounts receivable, less reserve	2,734,420.80	2,669,246.78	65,174.02
Materials and supplies, less reserves	2,201,027.42	1,771,441.66	429,585.76
Prepayments	396,250.07	461,654.43	65,404.36*
Excess profits tax post-war refunds	447.05	1,262,655.02	1,262,207.97*
Claim for adjustment of Federal income taxes relating to unused excess profits credit carry-back	7,613.32	—0—	7,613.32
Claims for adjustment of Federal income taxes relating to amortization of emergency facilities	—0—	956,479.00	956,479.00*
Total current assets	14,310,653.00	16,429,989.67	2,119,336.67*
Deferred debits:			
Unamortized debt discount and expense	2,900,968.35	3,308,084.82	407,116.47*
Claims for refund of over-payment of Federal income taxes	1,831,182.79	1,009,750.00	821,432.79
Capital stock expense	—0—	301,898.49	301,898.49*
Other deferred debits	149,073.75	98,500.25	50,573.50
Total deferred debits	4,881,224.89	4,718,233.56	162,991.33
	$163,392,523.37	$159,341,363.96	$ 4,051,159.41

Engineers' Exhibit No. 79 (Cont'd)

LIABILITIES

Capital stock:			
Preferred stock (e)	$ 28,947,100.00	$ 28,947,100.00	$ —0—
Common stock (f)	13,546,555.00	13,546,555.00	—0—
Total capital stock	42,493,655.00	42,493,655.00	—0—
Long-term debt:			
First and Refunding Mortgage Bonds:			
Series E 2¾%, due 1975	59,000,000.00	59,000,000.00	—0—
Notes payable, due 1947-1956	5,850,000.00	9,000,000.00	3,150,000.00*
Total long-term debt	64,850,000.00	68,000,000.00	3,150,000.00*
Current liabilities:			
Notes payable, due within one year	650,000.00	2,580,000.00	1,930,000.00*
Accounts payable	1,425,083.90	949,081.36	476,002.54
Customers' deposits	583,566.05	855,207.94	271,641.89*
Taxes accrued	3,932,211.46	3,345,072.78	587,138.68
Interest accrued	393,035.99	449,164.98	56,128.99*
Other current liabilities	227,753.58	467,478.39	239,724.81*
Total current liabilities	7,211,650.98	8,646,005.45	1,434,354.47*
Deferred credits:			
Unamortized premium on debt	171,370.20	217,360.00	45,989.80*
Customers' advances for construction	285,291.70	391,808.22	106,516.52*
Other deferred credits	21,712.90*	36,484.63	14,771.73*
Total deferred credits	478,374.80	645,652.85	167,278.05*
Reserves:			
Depreciation	21,192,064.71	19,423,767.34	1,768,297.37
Amortization of utility plant acquisition adjustments (b)	3,238,862.77	2,545,694.77	693,168.00
Injury and damage claims	136,692.72	293,942.16	157,249.44*
Taxes on income of prior years	724,002.82	1,176,722.82	452,720.00*
Other	482,465.39	509,468.16	27,002.77*
Total reserves	25,774,088.41	23,949,595.25	1,824,493.16
Contributions in aid of construction	272,869.30	267,383.77	5,485.53
Surplus:			
Capital surplus	1,031,324.36	1,031,324.36	—0—
Earned surplus (g)	21,280,560.52	14,307,747.28	6,972,813.24
	$163,392,523.37	$159,341,363.96	$ 4,051,159.41

* Decrease.

NOTE: See explanatory notes appended which are to be read as an integral part of the balance sheet.

Engineers' Exhibit No. 79 (Cont'd)

Notes to Financial Statements

(a) The comparative income statement includes for the period through March 31, 1945, operations of Citizens Rapid Transit Corporation, a wholly owned subsidiary. During December 1944 and March 1945, all of the investments in transportation properties, including the capital stock of Citizens Rapid Transit Corporation, were sold. Net income from such transportation properties included in the comparative income statement was not material.

The financial statements are after restatement to reflect the pro rata portion of certain reductions in Federal income taxes occasioned by (1) the losses for tax purposes arising from the sales of transportation properties in December 1944 and March 1945, and (2) the election of the Company to terminate the amortization period with respect to all emergency facilities, effective September 30, 1945, pursuant to the proclamation issued on September 29, 1945 by the President of the United States.

(b) Provision is being made, pursuant to orders of regulatory commissions, for the amortization of substantially all of plant acquisition adjustments by charges to income over 15-year periods commencing in 1943 and 1944. In accordance with orders of regulatory commissions having jurisdiction, the Company records the amortization charges as a deduction from net operating income but for purposes of these statements has classified such charges as operating expenses.

(c) The provision for Federal income taxes for the year 1945 was reduced $7,820,988 (including $1,282,926 representing reduction in tax due to carry-back of unused excess profits credit from 1945 to 1943), of which (1) approximately $2,330,000 was by reason of deductions for tax purposes of redemption premiums and expenses incurred in refunding of bonds; (2) approximately $1,700,000 was by reason of deductions for tax purposes of a loss sustained on the sale of transportation property; and (3) approximately $3,790,000 was by reason of deductions for tax purposes of amounts, in excess of depreciation provided for at usual rates, allowable as amortization of emergency facilities under Section 124 of the Internal Revenue Code. Pro rata portions of these reductions are reflected in the above income statement.

The provision for Federal income taxes for the year 1944 was reduced $9,576,265 (including $956,479 representing reduction in tax due to carry-back of net operating loss deduction and unused excess profits credit from 1944 to 1942 and 1943), of which (1) approximately $2,090,000 was by reason of deductions for tax purposes of redemption premiums and expenses incurred in refunding of bonds; (2) approximately $6,000,000 was by reason of deductions for tax purposes of a loss sustained on the sale of transportation property; and (3) approximately $1,490,000 was by reason of deductions for tax purposes of amounts, in excess of depreciation provided for at usual rates, allowable as amortization of emergency facilities under Section 124 of the Internal Revenue Code. Pro rata portions of these reductions are reflected in the above income statement.

Because of the extraordinary deductions enumerated, the Company does not consider that it has any liability for excess profits taxes for 1945 or 1944.

The Company elected to terminate the amortization period with respect to all emergency facilities effective September 30, 1945 pursuant to a proclamation issued on September 29, 1945 by the President of the United States. Federal income taxes shown above have been restated to include the reduction resulting from the shortened amortization period. As a result of the deduction for loss on sale of transportation property in 1944, claims for refund of taxes of prior years of approximately $2,600,00 have been filed. Pending review by the Treasury Department of the return for 1944, no effect has been given in the statements to such refund claims.

(d) Includes credits resulting from capitalization of interest on funds used for construction purposes:

	1946	1945
October	$1,544.70	$ —0—
12 Months	5,433.96	—0—

Engineers' Exhibit No. 79 (Cont'd)

(e) Represented by 289,471 shares of $100 par value $5 Dividend Preferred Stock, cumulative, entitled to $117.50 per share prior to March 20, 1947 (1950—$115.50; 1953—$113.50; thereafter—$112.50 per share) upon redemption or voluntary liquidation, and to $100 per share upon involuntary liquidation, together with dividends accrued or in arrears in all cases. Total preferred stock authorized 500,000 shares.

(f) Represented by 2,938,445 shares of no par value, including 20 shares reserved for exchange of outstanding scrip. Authorized 4,000,000 shares.

(g) The Company has covenanted that so long as any of the Series E Bonds remain outstanding it will not declare or pay any dividend or make any other distribution to any holder of its common stock (other than a dividend payable in shares of its common stock) except out of net income (as defined in the indenture securing the bonds) accumulated subsequent to September 30, 1944, after deducting the sum of (1) $55,000 per month in respect of such of the first 25 full calendar months after September, 1944 as shall have elapsed, and (2) $75,000 a month in respect of such of the first 116 full calendar months after September, 1944, as shall have elapsed. Similar restriction is imposed by reason of the Company's covenant with respect to outstanding preferred shares. Earned surplus unrestricted as to common dividends amounted to $6,782,792.25 at October 31, 1946.

(h) On September 16, 1942 and October 6, 1942 the Securities and Exchange Commission issued Orders against the Company, Engineers Public Service Company, its parent, and the other subsidiaries of that Company under Section 11(b)(1) of the Public Utility Holding Company Act of 1935. The Orders, among other things, in effect directed Engineers to divest itself, within one year, of all of its investments except that in the Company unless it should elect within a brief period of time to choose Gulf States Utilities Company as its single system. If the Company should be retained as the single system, the Orders required it to dispose of its gas and transportation operations. During December 1944 and March 1945, all the Company's investments in transportation properties were sold.

The Company filed a petition with the United States Court of Appeals for the District of Columbia for a review of the September 16, 1942 and October 6, 1942 Orders and on November 22, 1943 The Court set the Commission's Orders aside and remanded the case to the Commission for further proceedings in accordance with its opinion. The grounds for the reversal were, in substance, that Engineers was entitled to more time to make its choice of its single system and that the interpretation of the Act upon which the Commission directed the divestment of the transportation business (since sold) was incorrect. Both the Securities and Exchange Commission and the Company applied to the Supreme Court of the United States for writs of certiorari which were granted and the case is still pending. On April 1, 1946, the Court upheld the constitutionality of Section 11(b)(1), one of the issues in the Engineers' case, in a decision relating to the North American Company. On September 10, 1945, Engineers filed with the Commission a plan pursuant to Section 11(e) of the Act for divestment of assets and related matters, which plan has subsequently been amended. The first part of the plan provides for the divestment by Engineers of its investments in all subsidiaries except its investment in the Company and the prompt dissolution of Engineers, liquidation of which would be deferred until final settlement of its unfinished business, when the common stockholders of Engineers would obtain a direct interest in the common stock of the Company. Oral arguments before the Securities and Exchange Commission were held on September 5, 1946.

P. R. WILLIAMS.
Comptroller

Engineers' Exhibit No. 79 (Cont'd)

GULF STATES UTILITIES COMPANY

October, 1946

Figures appearing in this report have been taken from the books of the Company. All figures reported are subject to such adjustments as the annual audit by independent accountants may disclose to be necessary. The Company, in publishing the information contained herein, does not make or intend to make any representation whatsoever as to the value of the assets or any of them shown in the balance sheet.

GULF STATES UTILITIES COMPANY

Louisiana and Texas

Organized under the Laws of Texas

A Subsidiary Company of Engineers Public Service Company (Incorporated)

Comparative Income Statement

	Month of October, 1946	Month of October, 1945	Increase
Operating revenues	$ 1,426,753.01	$ 1,340,560.80	$ 86,192.21
Operation	552,096.17	504,468.33	47,627.84
Maintenance	82,685.02	79,894.81	2,790.21
Depreciation	146,100.00	129,600.00	16,500.00
Amortization of plant acquisition adjustments (a)	16,776.35	16,150.82	625.53
Taxes—Federal income after extraordinary reductions of $33,076 (prior period—$104,524), as explained in note (b)	141,892.00	158,035.00	16,143.00*
Taxes—Other	107,154.42	80,099.34	27,055.08
Net operating revenues after extraordinary reduction in taxes indicated above	380,049.05	372,312.50	7,736.55
Other income—net	3,874.01	3,806.01†	7,680.02
Balance	383,923.06	368,506.49	15,416.57
Interest and amortization	62,620.32	77,148.73	14,528.41*
Special charges as explained in note (b)	33,076.00	—0—	33,076.00
Net income	$ 288,226.74	$ 291,357.76	$ 3,131.02*
Extraordinary reductions in Federal income taxes through allowance for amortization of emergency facilities	$ —0—	$ 104,524.00	$ 104,524.00*

Engineers' Exhibit No. 79 (Cont'd)

	12 Months Ending October 31, 1946	12 Months Ending October 31, 1945	Increase
Operating revenues	$16,843,067.84	$18,076,250.40	$1,233,182.56*
Operation	6,167,230.42	6,555,590.16	388,359.74*
Maintenance	1,011,425.82	958,431.64	52,994.18
Depreciation	1,664,608.29	1,540,686.82	123,921.47
Amortization of plant acquisition adjustments (a)	199,032.92	193,809.84	5,223.08
Taxes—Federal income after extraordinary reductions of $539,815 (prior period—$1,311,329) explained in note (b)	1,697,845.00	2,573,172.00	875,327.00*
Taxes—Other	1,322,528.13	1,305,241.93	17,286.20
Net operating revenues after extraordinary reduction in taxes indicated above	4,780,397.26	4,949,318.01	168,920.75*
Other income—net	23,508.70†	35,138.27†	11,629.57
Balance	4,756,888.56	4,914,179.74	157,291.18*
Interest and amortization	879,063.30	926,576.57	47,513.27*
Special charges representing pro rata amount of those portions of premium and expenses on redemption of bonds which are equivalent to resulting reduction in Federal income taxes	330,765.00	—0—	330,765.00
Net income	$ 3,547,060.26	$ 3,987,603.17	$ 440,542.91*
Extraordinary reductions in Federal income taxes which result from deductions, in excess of depreciation at usual rates, allowable for tax purposes as amortization of emergency facilities but not recognized in the accounts since such facilities are expected to be employed throughout their normal life and not to replace existing facilities	$ 209,050.00	$ 1,311,329.00	$1,102,279.00*
Earnings before giving effect to tax reductions resulting from amortization of emergency facilities	3,338,010.26	2,676,274.17	661,736.09
Preferred dividend requirements	528,000,000	531,974.47	3,974.47*
Applicable to common stock	$ 2,810,010.26	$ 2,144,299.70	$ 665,710.56

* Decrease.

† Red figure.

(a) See note (b) to balance sheet.

(b) The provision for Federal income taxes for the year 1946 will be reduced $396,918 by reason of deductions for tax purposes of redemption premium and expenses incurred in refunding of bonds. Pro rata portions of this reduction are reflected in the above income statement.

The provision for Federal income taxes for the year 1945 was reduced $1,254,290 (1944—$1,896,542) by reason of deductions for tax purposes of amounts, in excess of depreciation provided for at usual rates, allowable as amortization of emergency facilities under Section 124 of the Internal Revenue Code. Pro rata portions of these reductions are reflected in the above income statement.

The provision for Federal income taxes shown above for 12 months ending October 31, 1946 includes provisions for estimated excess profits taxes of $121,874 (prior period—$1,416,686).

The Company elected to terminate the amortization period with respect to all emergency facilities effective September 30, 1945, pursuant to a proclamation issued on September 29, 1945 by the President of the United States. Federal income taxes shown above have been restated to give effect to the reduction resulting from the shortening amortization period.

Engineers' Exhibit No. 79 (Cont'd)

GULF STATES UTILITIES COMPANY

Comparative Balance Sheet

ASSETS

	October 31, 1946	October 31, 1945	Increase
Plant and other investments:			
Utility plant (including intangibles):			
Electric plant, at original cost	$60,342,754.59	$57,552,932.62	$ 2,789,821.97
Other utility plant, at cost	4,703,456.84	4,531,487.33	171,969.51
Plant acquisition adjustments (b)	3,213,415.53	3,230,176.37	16,760.84*
Other physical property	90,365.14	117,093.53	26,728.39*
Investment in associated company	19,430.00	18,430.00	—0—
Total plant and other investments	68,368,422.10	65,450,119.85	2,918,302.25
Current assets:			
Cash	4,959,767.68	3,894,736.58	1,065,031.10
United States treasury securities	300,000.00	1,635,000.00	1,335,000.00*
Special deposits	93,748.62	4,000.00	89,748.62
Accounts receivable, less reserve	1,251,719.79	1,038,509.44	213,210.35
Materials and supplies	1,197,544.86	696,198.48	501,346.38
Prepayments	175,564.66	177,784.62	2,219.96*
Total current assets	7,978,345.61	7,446,229.12	532,116.49
Deferred debits:			
Capital stock expense	110,843.90	250,472.24	139,628.34*
Other deferred debits	115,122.89	69,067.86	46,055.03
Total deferred debits	225,966.79	319,540.10	93,573.31*
	$76,572,734.50	$73,215,889.07	$ 3,356,845.43

Engineers' Exhibit No. 79 (Cont'd)

LIABILITIES

Capital stock:			
Preferred stock(c)	$12,000,000.00	$12,000,000.00	$ —0—
Common stock(d)	11,101,124.84	11,101,124.84	—0—
Premium on preferred stock	306,870.00	306,870.00	—0—
Total capital stock	23,407,994.84	23,407,994.84	—0—
Long-term debt:			
First Mortgage Bonds:			
2⅝% Series, due 1976	27,000,000.00	—0—	27,000,000.00
First Mortgage and Refunding Bonds:			
Series D 3½%, due 1969	—0—	27,300,000.00	27,300,000.00*
Notes payable to banks, 1¾%, due 1947-1956	1,800,000.00	—0—	1,800,000.00
Total long-term debt	28,800,000.00	27,300,000.00	1,500,000.00
Current liabilities:			
Notes payable to banks due within one year	200,000.00	—0—	200,000.00
Accounts payable	841,573.55	515,431.23	326,142.32
Customers' deposits	164,718.52	175,354.10	10,635.58*
Taxes accrued	2,848,507.48	3,772,511.67	924,004.19*
Interest accrued	40,652.49	33,096.74	7,555.75
Other current liabilities	17,041.11	15,053.07	1,988.04
Total current liabilities	4,112,493.15	4,511,446.81	398,953.66*
Deferred credits:			
Unamortized premium on debt	89,157.16	938,599.38	849,442.22*
Customers' advances for construction	163,027.11	273,083.71	110,056.60*
Other deferred credits	20,551.21	37,709.90	17,158.69*
Total deferred credits	272,735.48	1,249,392.99	976,657.51*
Reserves:			
Depreciation	13,319,590.51	12,295,113.53	1,024,476.98
Amortization of plant acquisition adjustments(b)	1,042,015.64	872,156.18	169,859.46
Injury and damage claims	123,169.43	139,363.73	16,194.30*
Taxes on income of prior years	130,995.97	138,049.35	7,053.38*
Total reserves	14,615,771.55	13,444,682.79	1,171,088.76
Earned surplus(e)	5,363,739.48	3,302,371.64	2,061,367.84
	$76,572,734.50	$73,215,889.07	$ 3,356,845.43

* Decrease.

Note: See explanatory notes on the following page which are to be read as an integral part of the balance sheet.

Engineers' Exhibit No. 79 (Cont'd)

Comparative Balance Sheet Notes

October 31, 1946

(a) On September 16, 1942 and October 6, 1942 the Securities and Exchange Commission issued Orders against the Company, Engineers Public Service Company, its parent, and the other subsidiaries of that company under Section 11(b)(1) of the Public Utility Holding Company Act of 1935. The Orders, among other things, in effect directed Engineers to divest itself, within one year, of its investment in the Company unless it should elect within a brief period of time to choose the Company as its single system. The Company filed a petition with the United States Court of Appeals for the District of Columbia for a review of the September 16, 1942 and October 6, 1942 Orders and on November 22, 1943 the Court set the Commission's Orders aside and remanded the case to the Commission for further proceedings in accordance with its opinion. The grounds for the reversal were, in substance, that Engineers was entitled to more time to make its choice of its single system and that the interpretation of the Act upon which the Commission directed the divestment of businesses other than electric or gas business was incorrect. Both the Securities and Exchange Commission and the Company applied to the Supreme Court of the United States for writs of certiorari which were granted and the case is still pending. On April 1, 1946, the Court upheld the constitutionality of Section 11(b)(1), one of the issues in the Engineers' case, in a decision relating to the North American Company. On September 10, 1945, Engineers filed with the Commission a plan pursuant to Section 11(e) of the Act for divestment of assets and related matters which, if consummated, would result in the issuance of warrants to the common stockholders of Engineers entitling them to acquire all of the common stock of the Company (reclassified into 1,909,968 shares) at $11.50 per share on the basis of one share of the Company's common stock for each share of common stock of Engineers held. Oral arguments before the Securities and Exchange Commission were held on September 5, 1946.

(b) Provision is being made, pursuant to an order of the Federal Power Commission, for the amortization of substantially all of plant acquisition adjustments by charges to income over a 15-year period commencing in 1943. In accordance with an order of the Federal Power Commission, the Company records the amortization charges as deductions from net operating income but for purposes of these statements such charges have been classified as operating expenses.

(c) Represented by 120,00 shares of $4.40 dividend preferred stock, $100 par value, cumulative, authorized and outstanding, entitled to $111.00 per share prior to October 1, 1949 (1954—$109.50; thereafter—$108.00 per share) upon redemption or voluntary liquidation, and to $100 per share upon involuntary liquidation, together with dividends accrued or in arrears in all cases.

(d) Represented by 280,000 shares of no par value. Authorized 300,000 shares.

(e) The Company has covenanted that, so long as any Bonds of the 1976 Series remain outstanding, it will not declare or pay any dividend or make any other distribution on any shares of its common stock except out of net income (as defined in the indenture securing the bonds) accumulated subsequent to December 31, 1945. Earned surplus unrestricted as to common stock dividends amounted to $2,218,110.05 at October 31, 1946.

H. V. FABER,

Treasurer.

Engineers' Exhibit No. 79 (Cont'd)

EL PASO ELECTRIC COMPANY

October, 1946

Figures appearing in this report have been taken from the books of the Company. All figures reported are subject to such adjustments as the annual audit by independent accountants may disclose to be necessary. The Company, in publishing the information contained herein, does not make or intend to make any representation whatsoever as to the value of the assets or any of them shown in the balance sheet.

EL PASO ELECTRIC COMPANY

El Paso, Texas

Organized under the Laws of Texas

A Subsidiary Company of Engineers Public Service Company (Incorporated)

Comparative Income Statement

	Month of October, 1946	Month of October, 1945	Increase
Operating revenues	$ 376,774.59	$ 343,190.27	$ 33,584.32
Operation	161,435.90	120,045.30	41,390.60
Maintenance	20,492.04	17,357.81	3,134.23
Depreciation	25,000.00	24,313.89	686.11
Amortization of franchise	277.75	—0—	277.75
Taxes—Federal income after extraordinary reduction of $49,314 in prior period, as explained in note (a)	36,723.00	32,583.00	4,140.00
Taxes—Other	32,308.75	29,964.45	2,344.30
Net operating revenues after extraordinary reduction in taxes indicated above	100,537.15	118,925.82	18,388.67*
Other income—net (b)	523.67	85.06	438.61
Balance	101,060.82	119,010.88	17,950.06*
Interest and amortization	17,827.67	18,286.59	458.92*
Net income	$ 83,233.15	$ 100,724.29	$ 17,491.14*
Extraordinary reduction in Federal income taxes which resulted principally from non-recurring deductions of another member of the consolidated group in 1945	$ —0—	$ 49,314.00	$ 49,314.00*

Engineers' Exhibit No. 79 (Cont'd)

	12 Months Ending October 31, 1946	12 Months Ending October 31, 1945	Increase
Operating revenues	$ 4,151,394.53	$ 4,015,654.35	$ 135,740.18
Operation	1,592,692.55	1,350,919.58	241,772.97
Maintenance	190,616.36	188,860.64	1,755.72
Depreciation	298,981.72	291,395.19	7,586.53
Amortization of franchise	565.50	—0—	565.50
Taxes—Federal income after extraordinary reduction of $106,799 (prior period—$472,685) explained in note (a)	451,073.00	472,844.00	21,771.00*
Taxes—Other	406,741.61	392,861.12	13,880.49
Net operating revenues after extraordinary reduction in taxes indicated above	1,210,723.79	1,318,773.82	108,050.03*
Other income—net (b)	15,128.92	16,271.14	1,142.22*
Balance	1,225,852.71	1,335,044.96	109,192.25*
Interest and amortization	213,929.96	232,657.58	18,727.62*
Net income	$ 1,011,922.75	$ 1,102,387.38	$ 90,464.63*
Extraordinary reduction in Federal income taxes which resulted principally from nonrecurring deductions of another member of the consolidated group in 1945	$ 106,799.00	$ 472,685.00	$ 365,886.00*
Earnings before giving effect to extraordinary reduction in Federal income taxes	905,123.75	629,702.38	275,421.37
Preferred dividend requirements	67,501.31	67,501.26	.05
Applicable to common stock	$ 837,622.44	$ 562,201.12	$ 275,421.32

* Decrease.

(a) In 1945, the Company became eligible to join with its parent company, Engineers Public Service Company (Incorporated) and others in a consolidated Federal income and excess profits tax return. The provisions shown for the periods subsequent to December 31, 1944 represent the Company's pro rata share of the estimated consolidated income taxes. Taxes for 1945 were reduced approximately $579,000 due principally to nonrecurring deductions of another member of the consolidated group, and have been restated to the Company's aliquot portion of the consolidated tax due.

(b) Includes credits resulting from capitalization of interest on funds for construction purposes:

	1946	1945
October	$ —0—	$247.85
12 months	17,660.36	698.73

(c) On September 16, 1942 and October 6, 1942 the Securities and Exchange Commission issued Orders against the Company, Engineers Public Service Company, its parent, and the other subsidiaries of that company under Section 11(b)(1) of the Public Utility Holding Company Act of 1935. The Orders directed, among other things, Engineers to divest itself, within one year, of its investment in the Company.

The Company filed a petition with the United States Court of Appeals for the District of Columbia for a review of the September 16, 1942 and October 6, 1942 Orders and on November 22, 1943 the Court set these Orders aside and remanded the case to the Commission for further proceedings in accordance with its opinion. The grounds for the reversal were, in substance, that Engineers was entitled to more time to determine whether it desired to retain Virginia Electric and Power Company or Gulf States Utilities Company as its single system and that the interpretation of the Act upon which the Commission directed the divestment of the transportation (since sold) and other incidental businesses was incorrect. Both the Securities and Exchange Commission and the Company applied to the Supreme Court of the United States for writs of certiorari which were granted and the case is still pending. On April 1, 1946, the Court upheld the constitutionality of Section 11(b)(1), one of the issues in the Engineer's case, in a decision relating to the North American Company. On September 10, 1945, Engineers filed with the Commission a plan pursuant to Section 11(e) of the Act for divestment of assets and related matters which, if consummated, would [illegible]

Engineers' Exhibit No. 79 (Cont'd)

EL PASO ELECTRIC COMPANY

Comparative Balance Sheet

ASSETS

	October 31, 1946	October 31, 1945	Increase
Plant and other investments:			
Electric plant (including intangibles), at original cost	$13,613,737.19	$12,556,056.85	$ 1,057,680.34
Other physical property	42,850.10	42,850.10	—0—
Investment in associated company	4,030.00	4,030.00	—0—
Special funds	347,408.05(a)	1,020,285.10	672,877.05*
Total plant and other investments	14,008,025.34	13,623,222.05	384,803.29
Current assets:			
Cash	1,158,248.56	449,981.48	708,267.08
United States treasury securities	1,699,700.00	2,110,700.00	411,000.00*
Special deposits	30,424.08	29,864.36	559.72
Accounts receivable, less reserve	339,193.47	266,130.98	73,062.49
Materials and supplies, less reserve	188,574.90	160,056.03	28,518.87
Prepayments	89,447.69	66,367.48	23,080.21
Excess profits tax post-war refunds	—0—	35,797.33	35,797.33*
Total current assets	3,505,588.70	3,118,897.66	386,691.04
Deferred debits	22,802.48	12,041.23	10,761.25
	$17,536,416.52	$16,754,160.94	$ 782,255.58

Engineers' Exhibit No. 79 (Cont'd)

LIABILITIES

Capital stock:			
Preferred stock (b)	$ 1,500,000.00	$ 1,500,000.00	$ —0—
Common stock (c)	3,848,691.60	3,848,691.60	—0—
Premium on preferred stock	33,750.00	33,750.00	—0—
Total capital stock	5,382,441.60	5,382,441.60	—0—
Long-term debt:			
First Mortgage Bonds, Series A, 3¼%, due 1970 (d)	6,500,000.00	6,500,000.00	—0—
Note payable to bank, 2¼%	—0—	140,000.00	140,000.00*
Total long-term debt	6,500,000.00	6,640,000.00	140,000.00*
Current liabilities:			
Note payable to bank, due within one year	—0—	140,000.00	140,000.00*
Accounts payable	189,879.36	112,357.35	77,522.01
Customers' deposits	152,704.13	139,996.02	12,708.11
Taxes accrued	533,868.50	1,122,801.48	588,932.98*
Interest accrued	5,817.32	8,410.82	2,593.50*
Other current liabilities	327,966.66	1,300.00	326,666.66
Total current liabilities	1,210,235.97	1,524,865.67	314,629.70*
Deferred credits:			
Unamortized premium on debt	151,458.42	157,769.22	6,310.80*
Other deferred credits	11,005.34	5,515.07	5,490.27
Total deferred credits	162,463.76	163,284.29	820.53*
Reserves:			
Depreciation	2,471,286.10	2,218,025.34	253,260.76
Amortization of franchise	565.50	—0—	565.50
Injury and damage claims	12,072.93	14,705.20	2,632.27*
Taxes on income of prior years	25,388.38	256,381.21	230,992.83*
Total reserves	2,509,312.91	2,489,111.75	20,201.16
Earned surplus (e)	1,771,962.28	554,457.63	1,217,504.65
	$17,536,416.52	$16,754,160.94	$ 782,255.58

* Decrease.

(a) Represents deposit with Trustee under First Mortgage of the Company.

(b) Authorized and outstanding 15,000 shares of no par value $4.50 Dividend Preferred Stock, cumulative, entitled to $109 per share upon redemption or voluntary liquidation, and to $100 per share ($1,500,000) upon involuntary liquidation, together with dividends accrued or in arrears in all cases.

(c) Authorized and outstanding 150,000 shares of no par value.

(d) In November 1946, the Company sold $6,000,000 principal amount of First Mortgage Bonds, 2¾% Series due 1976. The proceeds from the above, together with an additional amount from general funds of the Company, are being applied to the redemption of all of the Company's First Mortgage Bonds, Series A 3¼%, due November 1, 1970, at 108.

(e) The Company has covenanted that it will not declare or pay any dividends or make any other distributions to the holders of its common stock (other than a dividend payable in common stock of the Company) except out of net income (as defined in the charter of the Company) accumulated subsequent to December 31, 1939, reduced by the amount of $140,000 per year from 1941 through 1946 and $160,000 in 1947, an aggregate reduction of $1,000,000 ($770,000 to October 31, 1946). Earned surplus unrestricted as to common stock dividends amounted to $1,452,854.80 at October 31, 1946.

L. F. YETMAN, *Treasurer*

Engineers' Exhibit No. 80.

Telegrams addressed to William E. Tucker by Baker, Botts, Andrews & Walne relative to amendment of El Paso Electric Company and Gulf States Utilities Company Charters.

1946 DEC 21 PM 4 07

AA95

A. HSB 149 NL PD-HOUSTON TEX 21

WILLIAM E TUCKER, MUDGE, STERN, WILLIAM. & TUCKER

40 WALL ST NYK—

IN EL PASO ELECTRIC OPINION IF YOU WILL INSERT QUOTE EXCEPT THAT SUCH AMENDMENT MUST BE APPROVED BY VOTE OF ALL THE OUTSTANDING COMMON STOCK UNQUOTE ON PAGE TWO, FOURTH LINE AFTER WORD QUOTE FIRM UNQUOTE, WE CAN THEN GIVE OPINION SUGGESTED BY YOU—

BAKER BOTTS ANDREWS & WALNE.

1946 DEC 21 PM 5 06

AA96

A.HSB 150 NL PD-HOUSTON TEX 21

WILLIAM E TUCKER —

MUDGE, STERN, WILLIAMS & TUCKER 40 WALL ST NYK—

AS GULF STATES CHARTER AMENDMENT GIVES CUMULATIVE VOTING BOTH TO PREFERRED STOCK AND COMMON STOCK, THIS CHANGE IN OUR OPINION WILL HAVE TO BE APPROVED BY THE HOLDERS OF ALL OF THE PREFERRED STOCK AND THE COMMON STOCK. AS TO THE COMMON STOCK, SEE OUR WIRE OF THIS DATE ON EL PASO IN REFERENCE TO A CHANGE OF YOUR OPINION BUT THIS STILL DOES NOT CURE THE SITUATION AS TO THE PREFERRED STOCK

BAKER BOTTS ANDREWS & WALNE.

Engineers' Exhibit No. 81.

SECURITIES AND EXCHANGE COMMISSION

Eighteenth and Locust Streets

Philadelphia 3, Pennsylvania

ENGINEERS PUBLIC SERVICE COMPANY

(Incorporated)

File No. 54-132

Amendment No. 6 to Application Dated September 10, 1945

Engineers Public Service Company (Incorporated) hereby further amends the Plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters of Engineers Public Service Company (Incorporated) by deleting from Section 1 of Division D of the Plan reference to the granting of cumulative voting to the Preferred and Common Stock of Gulf States, so that as amended said Plan shall read as set forth in Exhibit A-3 attached hereto.

If the Commission shall find such Plan, as amended as aforesaid, necessary to effectuate the provisions of Subsection (b) of Section 11 of the Public Utility Holding Company Act and fair and equitable to persons affected thereby and shall make an order approving such Plan, Engineers hereby requests the Commission to apply to an appropriate district court of the United States in accordance with the provisions of Section 11 (e) and Subsection (f) of Section 18 of the Act to enforce and carry out the terms and provisions of said Plan as amended as aforesaid.

Pursuant to the requirements of the Public Utility Holding Company Act of 1935, the Company set forth below

Engineer's Exhibit No. 81 (Cont'd)

caused this instrument to be duly executed on its behalf by its authorized officers on this 30th day of December, 1946.

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

By D. C. BARNES
D. C. Barnes, President

(SEAL)

Attest:

R. N. BENJAMIN,
R. N. Benjamin, Secretary.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

The undersigned being duly sworn deposes and says that he has duly executed the attached instrument for and on behalf of the Company named therein; that he is the President of such Company; and that all action by stockholders, directors, and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and the transactions referred to therein, and that to the best of his knowledge, information and belief the statements made in such instrument are true.

(Signature) D. C. BARNES
D. C. Barnes

Subscribed and sworn to before me at New York, New York, this 30th day of December, 1946.

VIETTA E. GIBBS
Vietta E. Gibbs
Notary Public Kings Co.
Residing in Kings County
Kings Co. Clk's No. 117, Reg. No. 250-G-8
Certificates filed in New York County
N. Y. Co. Clk's No. 230, Reg. No. 201-G-8
Commission Expires March 30, 1948

My commission expires March 30, 1948.

(SEAL)

Engineer's Exhibit No. 81 (Cont'd)

Exhibit A-3

ENGINEERS PUBLIC SERVICE COMPANY

(INCORPORATED)

PLAN PURSUANT TO SECTION 11(e) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

SEPTEMBER 10, 1945

as amended by amendment No. 6 dated December 30, 1946

Engineer's Exhibit No. 81 (Cont'd)

PLAN FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

OF

ENGINEERS PUBLIC SERVICE COMPANY

(Incorporated)

Pursuant to Section 11(e) of the

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

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THE PLAN

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Engineer's Exhibit No. 81 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY

(Incorporated)

Plan Pursuant to Section 11(e) of the

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 FOR DIVESTMENT OF ASSETS AND RELATED MATTERS

DIVISION A

Purposes of Plan

1. Compliance with orders of the Securities and Exchange Commission ("the Commission") directing the divestment by Engineers Public Service Company (Incorporated) ("Engineers") of its interest in El Paso Electric Company ("El Paso") and Gulf States Utilities Company ("Gulf States").

2. The divestment by Engineers of its interest in Virginia Electric and Power Company ("Virginia").

3. The retirement of the Preferred Stock of Engineers at $110 per share and accrued dividends in the case of the $6 Cumulative Dividend Preferred Stock and the $5.50 Cumulative Dividend Preferred Stock and at $105 per share and accrued dividends in the case of the $5 Dividend Convertible Preferred Stock.

4. The dissolution and liquidation of Engineers.

DIVISION B

Introductory Statement

Engineers, organized and existing under the laws of the State of Delaware, is a registered holding company under the Public Utility Holding Company Act of 1935 ("the Act").

Engineer's Exhibit No. 81 (Cont'd)

Engineers holds the following securities:

150,000 shares of Common Stock without par value of El Paso, being all of the authorized and issued Common Stock of said Company. These shares are to be reclassified into 381,994 shares of Common Stock, without par value, prior to the divestment of El Paso by Engineers.

280,000 shares of Common Stock without par value of Gulf States, being all of the issued Common Stock of said Company, there being 20,000 shares of such Common Stock authorized but unissued. The 280,000 outstanding shares of Common Stock are to be reclassified into 1,909,968 shares of Common Stock, without par value, prior to the divestment of Gulf States by Engineers.

2,932,065 shares of Common Stock without par value of Virginia Electric and Power Company ("Virginia"), there being, in addition, 6,360 shares of such Common Stock in the hands of the public and 20 shares of such Common Stock reserved for scrip and 1,061,555 shares of such Common Stock authorized but unissued.

Engineers has outstanding the following securities:

143,951 shares of $5 Dividend Convertible Preferred Stock ("$5 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $105 per share, plus accrued dividends, on redemption or voluntary liquidation.

183,406 shares of $5.50 Cumulative Dividend Preferred Stock ("$5.50 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $110

Engineer's Exhibit No. 81 (Cont'd)

per share, plus accrued dividends, on redemption or voluntary liquidation.

65,098 shares of $6 Cumulative Dividend Preferred Stock ("$6 Preferred") without par value, entitled to receive $100 per share, plus accrued dividends, in involuntary liquidation and $110 per share, plus accrued dividends, on redemption or voluntary liquidation.

1,909,968 shares of Common Stock of the par value of $1 per share.

Early in 1940 the Commission brought a proceeding against Engineers and its subsidiaries under Section 11(b)(1) of the Act. This Section provides for the restriction of integrated systems and incidental businesses which a holding company may control. On July 23, 1941, the Commission issued an order in that proceeding directing Engineers to dispose of its interest in The Key West Electric Company and Puget Sound Power & Light Company. This order has been fully complied with. On December 29, 1941, the Commission issued a further order under Section 11(b)(1) directing Engineers to dispose of its interest in Missouri Service Company, The Northern Kansas Power Company and The Western Public Service Company. This order also has been fully complied with. On September 16, 1942 and October 6, 1942, the Commission issued further orders under the same Section directing Engineers to dispose of all of its remaining investments except that in Virginia, which, if retained, must dispose of its gas and transportation operations. Engineers has complied with these 1942 orders by disposing of all of the investments ordered divested by those orders except its investments in Gulf States, El Paso and Virginia and with respect to the latter two companies, has partially complied with said orders by the disposal of their transportation properties. Engineers filed a petition with the United States Court of Appeals for the District of Co-

Engineer's Exhibit No. 81 (Cont'd)

lumbia, for a review of the 1942 orders and on November 22, 1943, the Court set these orders aside and remanded the case to the Commission for further proceedings in accordance with its opinion.

The Supreme Court of the United States granted writs of certiorari to both the Commission and Engineers but the case has not yet been decided.

DIVISION C

The Plan

1. Engineers, except as below provided, will mail warrants to its Common Stockholders of record on a date to be fixed by the Board of Directors of Engineers, each of which warrants will evidence the right to acquire from Engineers shares of Gulf States Common Stock (reclassified) on the basis of one share of Gulf States Common Stock for each share of Engineers Common Stock held by such Stockholders on such date either

   (a) by purchasing from Engineers whole shares of such Gulf States Common Stock at the rate of $11.50 per share, or in the alternative,

   (b) by exchanging with Engineers whole shares of Engineers Preferred Stock for shares of Gulf States Common Stock on the basis of equivalent values, assigning $11.50 per share for each share of Gulf States Common Stock and $105 plus accrued dividends to the expiration date of the warrant for each share of $5 Preferred and $110 plus accrued dividends to the expiration date of the warrant for each share of $5.50 Preferred and $6 Preferred; provided that, on the basis of the relative values above stated, the value of the whole shares of Engineers Preferred Stock surrendered in exchange shall not exceed the value of the shares of Gulf States Common Stock which

Engineer's Exhibit No. 81 (Cont'd)

the warrant holder is entitled to and intends to acquire, but, to the extent that the value of such shares of Engineers Preferred Stock surrendered in exchange is less than the value of such shares of Gulf States Common Stock to which the warrant holder is entitled and intends to acquire, the difference shall be paid by the warrant holder to Engineers.

The Board of Directors of Engineers may, however, withhold the mailing of such warrants in the event that, in its opinion, market conditions are such as to render it inadvisable to proceed with the issuance of the warrants. Upon the mailing of such warrants, the Plan shall be deemed effective. In cases where the addresses of such Stockholders are unknown or are outside continental United States and Canada, warrants will not be mailed to Common Stockholders of this Company of record on such date but will be held in the name of Transfer Agent against instructions of the record owners, or their duly authorized agents, until the opening of business on the second business day before the expiration date of the warrant period, at which time all warrants so held with respect to which no such instructions have been received shall, subject to the provisions of paragraph 9 hereof, be sold by the Company and the pro rata share of the aggregate net proceeds, if any, remitted to each Stockholder on whose behalf warrants are so sold, or, in cases where such remittance is not lawful or the address is unknown, held for the account of each such Stockholder subject to payment upon receipt of lawful instructions. In cases where the Engineers' Common Stockholder cannot be located and where no valid claim is made for such net proceeds within a period of ten years from the effective date of the Plan, such net proceeds shall be paid to Gulf States. The warrants must be exercised on or before a specified date

Engineer's Exhibit No. 81 (Cont'd)

(to be approximately sixteen days after the date of mailing warrants). All warrants will be registered in the names of the Common Stockholders, except as above provided, and will be transferable on the books of Engineers. Such warrants will be issued and distributed without the surrender by the Common Stockholders of Engineers of their Common Stock certificates.

2. The Transfer Agent will mail or deliver certificates for Gulf States Common Stock to those persons who exercise the warrants. To the extent warrants are not exercised, Engineers shall sell shares of Gulf States Common Stock represented thereby as promptly thereafter and in such manner as the Board of Directors of Engineers deems to be in the best interests of Engineers, subject to the provisions of paragraph 9 hereof.

3. Engineers will deposit in trust for the benefit of its Preferred Stockholders with a solvent bank or trust company an amount equal to $105 per share plus accrued dividends to the date of such deposit for each share of $5 Preferred and $110 per share plus accrued dividends to the date of such deposit for each share of $5.50 Preferred and $6 Preferred not surrendered in exchange pursuant to (b) of paragraph 1 and will give to all holders of such Preferred Stock five days' prior notice of such deposit at their respective registered addresses, and such notice shall state that upon surrender by the Preferred Stockholders of their certificates for Preferred Stock to the Transfer Agent, they will be paid $105 per share plus such accrued dividends for each share of $5 Preferred and $110 per share plus such accrued dividends for each share of $5.50 Preferred and $6 Preferred; and from and after the date of such deposit, dividends on the Preferred Stock will cease and determine. Such deposit

Engineer's Exhibit No. 81 (Cont'd)

will be in cancellation of the whole of the outstanding Preferred Stock of Engineers. The President or a Vice President and the Secretary or an Assistant Secretary of Engineers shall, without further action by Directors and Stockholders of Engineers, file a certificate or certificates of Engineers reflecting the elimination of the capital represented by the Preferred Stock and the elimination of the authorized Preferred Stock in the Office of the Secretary of State of the State of Delaware and shall record in the office of the Recorder of Deeds of New Castle County, Delaware, a copy or copies thereof certified by the Secretary of State.

4. Immediately after filing the certificate provided for in paragraph 3, the President or a Vice President, and the Secretary or an Assistant Secretary, of Engineers, shall without further action by the directors or stockholders of Engineers:

(1) deposit for filing in the office of the Secretary of State of the State of Delaware, a certificate signed by them and verified by the oath of one of said officers, which shall state that Engineers is dissolved, in which certificate there shall be included a list of names and residences of the directors and officers of Engineers as of the date of such filing;

(2) deposit for recordation in the office of the Recorder of Kent County, Delaware, being the county in which the principal office of Engineers is maintained, a duplicate original of the certificate referred to in (1) above;

(3) cause to be published a copy of such certificate in one issue of a newspaper published in Kent County, Delaware, being the county in which the principal office of Engineers in the State of Delaware is situated; and

Engineer's Exhibit No. 81 (Cont'd)

(4) deposit for filing in the office of the Secretary of State of the State of Delaware an affidavit of the Manager or Publisher of the newspaper referred to in (3) above, that said certificate has been published one time in said newspaper;

and thereupon, when the steps specified in (1), (2), (3) and (4) above shall have been taken, the dissolution of Engineers shall thereby become effective.

5. Promptly after the dissolution of Engineers shall have so become effective Engineers will distribute (1) all of the Common Stock (reclassified) of El Paso pro rata to the Engineers Common Stockholders, on the basis of one-fifth of a share of El Paso Common Stock for each share of Engineers Common Stock and (2) approximately 94.4% of the Common Stock of Virginia pro rata to the Engineers Common Stockholders on the basis of 1.45 shares of Virginia Common Stock for each share of Engineers Common Stock. Such distribution will be without the surrender by the Common Stockholders of Engineers of their Common Stock certificates. No fractional shares of Common Stock of either El Paso or Virginia will be issued or delivered, but in lieu thereof scrip will be issued and delivered. Such scrip will not be entitled to dividends, voting rights or any other stockholders' rights. When combined in lots aggregating one or more full shares of stock, scrip may, up to the date of sale (hereinafter in this paragraph described) of such shares of stock, be exchanged for such shares, together with any dividends which shall have been paid to Stockholders of record on any date subsequent to the effective date of the Plan and prior to the date of such exchange. Engineers will undertake to provide facilities whereby, prior to the date on which the distribution referred to in this paragraph is made, any holder of scrip certificates may dispose of such scrip, or acquire additional

Engineer's Exhibit No. 81 (Cont'd)

scrip so as to enable the holder to exchange such scrip for full shares of stock. All shares of stock reserved for delivery upon the exchange of scrip which shall not have been delivered in connection with such exchange within two years after the effective date of the Plan, shall, promptly after the expiration of such period and subject to the conditions of paragraph 9 hereof, be sold by the Transfer Agent and the Transfer Agent shall, as soon as possible thereafter, distribute to the holders of scrip certificates not theretofore surrendered their proportionate part of the net proceeds of sale, plus their proportionate part of any dividends which shall have been declared to holders of record as of a date after the effective date of the Plan and prior to the date of sale. In cases where the Engineers' Common Stockholders cannot be located and where no valid claim is made for the net proceeds from the sale of stock and the proportionate part of dividends referred to above and within a period of ten years from the effective date of the Plan, such net proceeds and proportionate part of dividends shall be paid, with respect to net proceeds of El Paso stock and dividends, to El Paso, and with respect to net proceeds of Virginia stock and dividends, to Virginia.

In cases where the Engineers' Common Stockholder cannot be located and where no valid claim is made for the whole shares of El Paso and Virginia Common Stocks distributable to such stockholder within a period of ten years from the effective date of the Plan, such shares of stock shall be returned to the issuing Company for cancellation and the claims to dividends payable to holders of record of said shares after the effective date of the Plan shall be cancelled.

6. After the dissolution of Engineers shall have been effective as aforesaid, Engineers shall, nevertheless, be

Engineer's Exhibit No. 81 (Cont'd)

continued as a body corporate for the purposes and for the term specified in Section 42 of the General Corporation Law of the State of Delaware, and Engineers, acting under the direction of its Board of Directors, shall collect its assets and settle its debts and liabilities, with full power, subject to the provisions of paragraph 9 hereof, to sell and dispose of any or all of the assets of Engineers not distributed as aforesaid. Any vacancy occurring in the Board during the continuance of Engineers as a body corporate as aforesaid may be filled by the Board, as provided in its By-laws. After the final settlement of the affairs of Engineers and payment of or provision for its debts and liabilities, the Directors shall cause the distribution to the Engineers Common Stockholders of the remaining assets of the Company either in kind or in cash in exchange for their certificates of Engineers Common Stock. The Directors shall have power to authorize an agent to vote all shares of Virginia Common Stock held by the Company at any time after the making of the distribution referred to in paragraph 5 above at all meetings of stockholders at which such stock is entitled to vote except as to any matter which is being contested by any stockholder.

7. Within 60 days after the dissolution of Engineers shall become effective in accordance with paragraph 4 above, Epsco, Inc., the mutual service corporation, will cancel its service contracts with Engineers, Virginia, Gulf States and El Paso, and Epsco, Inc. will then be dissolved and liquidated.

8. Engineers will pay all fees and expenses by whomsoever incurred in connection with the Plan or the proceedings in respect thereto, to the extent approved by the Commission.

9. Sales by Engineers of warrants in cases where the addresses of stockholders are unknown or are outside

Engineer's Exhibit No. 81 (Cont'd)

the Continental United States or Canada provided to be made under the provisions of paragraph 1 above, by Engineers of shares of Gulf States Common Stock represented by warrants not exercised provided to be made under the provisions of paragraph 2 above, by Engineers of any assets not distributed provided to be made under the provisions of paragraph 6 above, and by the Transfer Agent of shares of stock of Virginia and El Paso, represented by scrip, which shall not have been delivered in connection with the rights of combination of such scrip provided to be made under the provisions of paragraph 5 above, shall all be made subject to the following provisions: Engineers or the Transfer Agent, as the case may be, may sell such warrants or shares of stock on the New York Stock Exchange without further action by the Commission, but neither the Company nor the Transfer Agent shall sell any such warrants or shares in any other manner unless the Company or the Transfer Agent, as the case may be, shall by telephone or telegraph have given to the Commission at least 24 hours prior notice of its intention so to do and of the details in respect thereof. Upon the expiration of such 24 hour period the Company or the Transfer Agent, as the case may be, may proceed with such sale in the manner specified in such notice unless during such period the Company or the Transfer Agent, as the case may be, shall have been informed by the Commission that the Commission intends to issue an order to show cause why the sale should be consummated, in which event such sale shall not be consummated without the approval of the Commission.

Engineers believes and alleges that the approval of this Plan is necessary for compliance with the orders issued by the Commission on September 16, 1942 and October 6, 1942 under Section 11 of the Act and to effectuate the provisions of subsection (b) of Section

Engineer's Exhibit No. 81 (Cont'd)

11 of the Act, and if the Commission shall find the Plan necessary to effectuate the provisions of subsection (b) of Section 11 of the Act and fair and equitable to the persons affected thereby, Engineers prays that the Commission shall enter an order approving the Plan containing a recitation that the relevant transactions of the Plan are necessary or appropriate to the integration or simplification of the holding company system of which Engineers is a member and necessary or appropriate to effectuate the provisions of subsection (b) of Section 11 of the Act, all in accordance with the meaning and requirements of the Internal Revenue Code, as amended, including Sections 371 and 1808(f) and Supplement R thereof.

DIVISION D

Conditions to Effectuation of the Plan

The effectuation of the Plan is dependent upon the satisfaction of the following conditions:

1. Gulf States shall have reclassified its Common Stock into 1,909,968 shares of Common Stock, without par value; Gulf States shall have given to its Preferred Stock seven votes per share instead of the one vote per share it now carries; El Paso shall have reclassified its Common Stock into 381,994 shares of Common Stock, without par value; the charters of Virginia and El Paso shall have been amended to provide for cumulative voting in respect of the Common Stock for the election of Directors; and the charters of Virginia, Gulf States and El Paso shall have been amended to provide for pre-emptive rights to Common Stockholders to subscribe for additional Common Stock issued for cash except in the case of public offerings.

2. The Commission shall have issued the order prayed for.

Engineer's Exhibit No. 8 (Cont'd)

3. The Commission shall have instituted a proceeding in a court of competent jurisdiction pursuant to Section 11(e) of the Act and such court shall have entered a decree or order for the purpose of enforcing the Plan.

4. There shall have been obtained from the United States Treasury Department (unless Engineers, in its discretion, shall waive this condition) a closing agreement or ruling or closing agreements or rulings as to the tax consequences of the transactions necessary to carry out the Plan and such agreements or rulings shall be satisfactory to counsel for Engineers.

5. Any corporate action in connection with the Plan, which may be deemed necessary by counsel for Engineers shall have been carried out in a manner satisfactory to such counsel.

6. Authorization satisfactory to counsel for Engineers shall have been given for the carrying out of the Plan and for the issuance for all securities provided to be issued pursuant to the Plan, by all regulatory commissions, the consent of which is legally necessary.

7. The warrants referred to in paragraph 1 of the Plan shall have been mailed to Engineers Common Stockholders within the exceptions therein provided.

DIVISION E

Amendments to the Plan and Other Provisions

Until approved by the Commission, the Plan may be modified or amended in any respect or particular by Engineers. After being approved by the Commission and before being approved by a court, the Plan or any part thereof may be modified or amended in any respect or particular by Engineers with the approval of the Commission. After the approval by the Court and before the Plan has been consummated, pursuant to the order or decree of a court of

Engineer's Exhibit No. 81 (Cont'd)

competent jurisdiction, the Plan may be modified or amended in any respect or particular by Engineers with the approval of both the Commission and the Court. No amendments to the Plan shall be made without the consent or agreement of Engineers.

Engineers may employ such agents, attorneys or others as it may deem desirable for the purpose of carrying out the Plan. Engineers may from time to time delegate to others any power or discretion conferred upon it by the Plan.

The statements, opinions and conclusions contained in the Plan are intended solely for the purpose of assisting the Commission, any court and the Stockholders in any steps or proceedings with respect to the Plan and are not intended for use or information by prospective purchasers of any securities whether now existing or proposed to be issued or for any purposes other than the purposes set forth in this paragraph; and no one is authorized to make any statements regarding the Plan, whether with reference to any securities referred to herein or otherwise which are not set forth herein.

By Order of the Board of Directors

Engineers Public Service Company
(Incorporated)

By D. C. Barnes,
D. C. Barnes,
President.

Engineers' Exhibit No. 82.

Affidavit of Richard N. Benjamin as to mailing of Letter and Notice.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I, Richard N. Benjamin, being first duly sworn, do affirm and say that I am Secretary of Engineers Public Service Company (Incorporated), a company created and existing under the laws of the State of Delaware; that I caused to be mailed on December 20 and December 21, 1946 to each holder of Preferred Stock and Common Stock of Engineers Public Service Company (Incorporated) of record at his or her registered address then appearing on the stock books of the Company

(1) A copy of the attached letter of D. C. Barnes, President of the Company, dated December 20, 1946, and

(2) A copy of the attached notice of filing of amendment and Order for argument and hearing on Plan, as amended, pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 and Order for reopening record of the securities and Exchange Commission, dated December 19, 1946

I do further certify and affirm that I caused to be mailed copies of the documents listed in (1) and (2) of the preceding sentence to all persons becoming stockholders of Engineers Public Service Company (Incorporated) through the close of business December 27, 1946.

WITNESS my hand and the seal of said Company this 2nd day of January, 1947.

RICHARD N. BENJAMIN

(Seal)

Subscribed and sworn to before me this 2nd day of January, 1947.

VIETTA E. GIBBS
Vietta E. Gibbs
Notary Public, State of New York
Residing in Kings County
Kings Co. Clk's No. 117, Reg. No. 250-G-8
Certificates filed in New York County
N. Y. Co. Clk's No. 230, Reg. No. 201-G-8
Commission Expires March 30, 1948

Engineers' Exhibit No. 82 (Cont'd)

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)
90 Broad Street
New York 4

December 20, 1946

To the Stockholders:

On September 10, 1945 we sent you copy of a Plan filed that date with the Securities and Exchange Commission under Section 11(e) of the Public Utility Holding Company Act of 1935 for the divestment of assets by Engineers and related matters. Hearings on the Plan were completed on February 13, 1946 and oral argument was held on September 5, 1946. On December 4, 1946 the Commission issued its Findings and Opinion in which it found that the provisions of the Plan providing for the disposition of Gulf States and El Paso and for the dissolution of Engineers are necessary under the requirements of the Act. The Commission disapproved certain mechanics of the Plan including the proposed bank loan and the proposal to retain all of Engineers holdings of the common stock of Virginia during the period of time required to pay off such bank loan and to determine and discharge any other liabilities but stated that it would be appropriate to reserve a part of the Company's assets for liabilities which may later be found against the Company. The Commission further found that fairness requires that the preferred stockholders be paid an amount equal to their respective call prices on retirement and that it would be appropriate to create an escrow fund in the event of controversy over whether any amount in excess of $100 per share and accrued dividends should be paid to the preferred stockholders, which escrow would include the amount of the premium and provision to compensate the preferred stockholders for the time full payment is withheld from them. The Commission also found that provision should be included in the Plan for supervision by the Commission over

payment of fees and expenses incurred in connection with the Plan.

Accordingly the Directors approved on December 13, 1946 the filing of an amended plan which they believe conforms fully with the findings of the Commission. It provides that Engineers will mail warrants to its common stockholders of record on a date to be fixed by the Board of Directors after the court shall have entered a decree or order for the purpose of enforcing the Plan, each of which warrants will evidence the right to acquire from Engineers shares of Gulf States common stock (reclassified) on a basis of one share of Gulf States common stock for each share of Engineers common stock held by such stockholders on such date, either (a) by purchasing from Engineers whole shares of such Gulf States common stock at the rate of $11.50 per share or in the alternative (b) by exchanging with Engineers whole shares of Engineers preferred stock for shares of Gulf States common stock on the basis of equivalent values, assigning $11.50 per share for each share of Gulf States common stock and $105 plus accrued dividends to the expiration date of the warrant for each share of $5 preferred and $110 plus accrued dividends to the expiration date of the warrant for each share of $5.50 preferred and $6 preferred. In order to provide the balance of funds in excess of the proceeds of the warrants and cash in the Treasury of Engineers required to redeem the preferred stock at its respective call prices, payment of special dividends on their common stocks by Virginia, Gulf States and El Paso are contemplated. Such special dividends in the case of Virginia are estimated to be equivalent to one year's dividend paid in advance and in the case of Gulf States to two quarterly dividends paid in advance, and in the case of these two companies it is contemplated that no further common dividends would be paid until June 15, 1948 in the case of Virginia, and December 15, 1947 in the case of Gulf States so that in the proposed distribution these stocks would be ex-dividend for such respective periods.

Engineers' Exhibit No. 82 (Cont'd)

The Plan proposes the deposit in trust for the benefit of the preferred stockholders, after five days' prior notice, of an amount equivalent to $105 a share plus accrued dividends to the date of such deposit for each share of $5 preferred and $110 per share plus accrued dividends to the date of such deposit for each share of $5.50 and $6 preferred not surrendered in exchange for Gulf States common stock. Engineers will thereupon file a Certificate of Dissolution. Promptly after the dissolution shall have become effective Engineers will distribute all of the common stock (reclassified) of El Paso pro rata to Engineers common stockholders on the basis of ⅕ of a share of El Paso common stock for each share of Engineers common stock and (2) approximately 94.4% of the common stock of Virginia pro rata to Engineers common stockholders on the basis of 1.45 shares of Virginia common stock for each share of Engineers common stock. Scrip certificates will be issued for fractional shares but such scrip will not be entitled to dividends or voting rights but may be combined in lots aggregating one or more full shares of stock and exchanged for such shares. Engineers will retain 162,612 shares of common stock of Virginia and the balance of cash not required for redemption of the preferred stock and the Directors will thereafter marshal the assets and pay the liabilities of the Company and after such liabilities have been determined and satisfied, including fees and expenses incurred in connection with the Plan to the extent approved by the Commission, will cause the distribution to Engineers common stockholders of the remaining assets of the Company, either in kind or in cash.

Effectuation of the Plan is subject to the following conditions among others, namely, (1) that the necessary Commissions and Court approvals be had; (2) that the Board of Directors may withhold mailing of warrants in the event market conditions make it inadvisable to proceed with the Plan; (3) that unless waived by Engineers there shall have

Engineers' Exhibit No. 82 (Cont'd)

been obtained from the United States Treasury Department satisfactory assurance as to the tax consequences of the transactions necessary to carry out the Plan.

It is anticipated that the receipt and exercise of the warrants and the receipt of the common stocks of Virginia and El Paso will constitute a non-taxable transaction and that preferred stockholders who exchange their preferred stock for Gulf States common stock in the exercise of warrants will realize no taxable gain thereby. It is planned to list the rights to subscribe to Gulf States common stock for trading on the New York Stock Exchange during the period that the warrants are outstanding and preferred stockholders who desire to acquire rights for this purpose may purchase the same through their bank or broker.

In this connection attention of stockholders is directed to Amendment No. 7 of Federal Reserve Bank Regulation U, which permits a stockholder of a public utility holding company who receives rights to subscribe to securities of an operating utility company owned by such holding company, in connection with simplifying the corporate structure of such holding company, to obtain credit for the purposes of exercising his rights and he may do so by pledging securities, which for this purpose shall have a loan value of 50%.

It is anticipated that if the Plan is approved by the Commission and the Court without undue delay, warrants can be mailed to Engineers common stockholders by approximately March 1, 1947 with a period of sixteen (16) days allowed for exercise of warrants. At the time these warrants are mailed out financial data regarding Gulf States and detailed instructions in reference to procedure to be followed by the stockholders will be sent. It is hoped that a ruling of the Treasury Department may be available at that time in reference to the tax consequences of the Plan.

You will note that the Company does not propose to contest the findings of the Securities and Exchange Commission that fairness requires the payment of the voluntary redemption price to the preferred stockholders. We are

Engineers' Exhibit No. 82 (Cont'd)

advised by counsel that the Courts are reluctant to override findings of this character by administrative commissions and that, in their opinion, it is not worth while to contest further this issue.

A copy of the notice issued by the Securities and Exchange Commission on December 19, 1946 relating to the filing of this amendment is enclosed.

Copies of the amended plan summarized above are available for distribution on request.

Yours very truly,

D. C. BARNES,
President.

Engineers' Exhibit No. 82 (Cont'd)

UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pa., on the 19th day of December, A. D., 1946.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY File No. 54-132 EL PASO ELECTRIC COMPANY File No. 70-1149 GULF STATES UTILITIES COMPANY File No. 70-1150 VIRGINIA ELECTRIC AND POWER COMPANY File No. 70-1419 (Public Utility Holding Company Act of 1935)	Notice of Filing of Amendment and Order For Argument and Hearing on Plan, as Amended, Pursuant To Section 11(e) of The Public Utility Holding Company Act of 1935, and Order Reopening Record.

Engineers having filed on September 10, 1945 an application for approval of a plan pursuant to Section 11(e) of the Act for the divestment of its interests in El Paso and Gulf States; and El Paso and Gulf States, for the purpose of facilitating the effectuation of such plan, having filed declarations pursuant to Section 7 of said Act regarding the reclassification of their respective shares of common stock; and

Engineers' Exhibit No. 82 (Cont'd)

The Commission, in its Notice of Filing and Order for Hearing issued October 15, ~~1945~~ (Holding Company Act Release No. 6131) having summarized therein the terms of such plan and declarations (which matters were consolidated) and ordered a hearing thereon; and having required Engineers to give notice of such hearing to all its stockholders of record by mailing a communication giving the date, hour and place of hearing to each of its stockholders at their last known address and also advising its stockholders that Engineers would, if requested, furnish copies of said Notice of Filing and Order for Hearing; and hearings having been held, extensive testimony having been taken and numerous exhibits having been introduced, the record having been closed, and briefs having been submitted and the Commission having heard oral argument; and

The Commission having on December 4, 1946 issued its Findings and Opinion (Holding Company Act Release No. 7041) stating that if within a period of thirty days from the date of said Opinion the plan were amended in accordance with the views expressed therein, an appropriate order approving said plan, as so amended, would be entered and the Commission would apply to an appropriate District Court for approval and enforcement of the plan; and

Engineers having filed an amendment to the plan on December 17, 1946, in which it is stated that the plan has been amended in accordance with the Commission's views expressed in its Findings and Opinion issued December 4, 1946; and El Paso and Gulf States, for the purpose of facilitating the effectuation of such plan, as amended, having filed amendments to their declarations pursuant to Section 7 of the Act; and Virginia, for the purpose of facilitating the effectuation of such plan, as amended, having filed a declaration pursuant to Section 7 of the Act, all as more particularly described hereafter;

All interested persons are referred to said documents which are on file in the offices of the Commission for a full

Engineers' Exhibit No. 82 (Cont'd)

statement of the transactions therein proposed, which are summarized as follows:

1. Engineers will mail warrants to its common stockholders, which warrants will be transferable on the books of the company and will evidence the right to acquire shares of Gulf States common stock from Engineers, on the basis of one share of Gulf States common stock (reclassified into 1,909,968 shares of common stock, which is the same number of shares as the outstanding Engineers common stock) for each share of Engineers common stock, either by purchasing from Engineers whole shares of Gulf States common stock at the rate of $11.50 per share, or in the alternative, by exchanging whole shares of Engineers preferred stock for shares of Gulf States common stock on the basis of equivalent amounts, assigning $11.50 per share for each share of Gulf States common stock and $105 plus accrued dividends to the expiration date of the warrants for each share of $5 preferred stock and $110 plus accrued dividends to the expiration date of the warrants for each share of $5.50 and $6 preferred stock. However, it is provided in the amended plan, that the Board of Directors of Engineers may withhold the mailing of such warrants in the event that, in its opinion, market conditions are such as to render it inadvisable to proceed with the issuance of the warrants. The warrants are to be exercised on or before a specified date to be approximately sixteen days after the date of mailing the warrants. Such warrants will be issued and distributed without the surrender by the common stockholders of Engineers of their common stock. In cases where the addresses of Engineers' common stockholders are unknown or outside continental United States and Canada, warrants will not be mailed to such stockholders but will be held by a transfer agent against instructions of the record owners until the opening of business on the second business day before the expiration date of the warrant period, at which time all warrants so held with respect to which no instruc-

Engineers' Exhibit No. 82 (Cont'd)

tions are received, shall, subject to the provisions of paragraph 8 below, be sold by the company and the pro rata share, if any, remitted to each stockholder, or in cases where such remittance is unlawful or the address unknown, held for the account of each such stockholder. In cases where the Engineers' common stockholder cannot be located within a period of 10 years from the effective date of the amended plan, such net proceeds shall be paid to Gulf States. It is stated in the amended plan that upon the mailing of such warrants the amended plan shall be deemed effective.

2. To the extenf that the warrants are not exercised, Engineers proposes to sell shares of Gulf States common stock represented thereby as promptly thereafter and in such manner as the Board of Directors of Engineers deems to be in the best interests of the company, subject to the provisions of paragraph 8 below.

3. Engineers will deposit in trust for the benefit of its preferred stockholders an amount equal to $105 per share plus accrued dividends to the date of deposit for each share of $5 preferred stock and $110 per share plus accrued dividends to the date of deposit for each share of $5.50 preferred and $6 preferred not surrendered in exchange pursuant to paragraph 1 above, and will give to all holders of such preferred stock five days prior notice of such deposit. From and after the date of such deposit, dividends on all three series of preferred stock will cease. It is stated that such deposit will be in cancellation of the whole of the outstanding preferred stock of Engineers.

4. Immediately after the filing of a certificate reflecting the elimination of the capital represented by the perferred stock of Engineers in the Office of the Secretary of State of the State of Delaware, Engineers is to be legally dissolved as a corporate entity.

5. Promptly after the dissolution of Engineers becomes effective, Engineers will distribute the common stock of El

Engineers' Exhibit No. 82 (Cont'd)

Paso pro rata to the Engineers common stockholders on the basis of ⅕ of a share of El Paso common stock (reclassified into 381,994 shares of common stock) for each share of Engineers common stock and also distribute approximately 94.4% of the Virginia common stock to the Engineers common stockholders on the basis of 1.45 shares of Virginia common stock for each share of Engineers common stock. Such distribution will be without the surrender by the common stockholders of Engineers of their common stock certificates. No fractional shares of common stock of either El Paso or Virginia will be issued or delivered, but in lieu thereof scrip will be issued and delivered. Such scrip will not be entitled to dividends, voting rights or any other stockholders' rights. When combined in lots aggregating one or more full shares of stock, scrip may, up to the date of sale of such shares of stock, be exchanged for such shares, together with any dividends which shall have been paid to stockholders of record on any date subsequent to the effective date of the amended plan and prior to the date of exchange. Engineers proposes to undertake to provide facilities whereby any holder of scrip certificates may dispose of such scrip, or acquire additional scrip so as to enable the holder to exchange such scrip for full shares of stock. All shares of stock reserved for issuance and delivery upon the exchange of scrip which shall not have been issued or delivered in connection with such exchange within two years after the effective date of the amended plan, shall, promptly after the expiration of such period and subject to the conditions of paragraph 8 below, be sold by the transfer agent and the transfer agent shall, as soon as possible thereafter, distribute to the holders of scrip certificates not theretofore surrendered their proportionate part of the proceeds of sale, plus their proportionate part of any dividends which shall have been declared to holders of record after the effective date of the amended plan and prior to the date of sale. If within a period of 10 years from the effective

Engineers' Exhibit No. 82 (Cont'd)

date of the amended plan, common stockholders of Engineers cannot be located, the proportionate part of the net proceeds and dividends attributable thereto shall be paid with respect to net proceeds of El Paso stock and dividends, to El Paso, and with respect to net proceeds of Virginia stock and dividends, to Virginia. Furthermore, it is also provided that if within a period of 10 years from the effective date of the amended plan certain Engineers common stockholders cannot be located, the whole shares of El Paso and Virginia common stocks not so claimed shall be returned to the respective issuing company for cancellation and the claims of dividends payable to holders of record of said shares after the effective date of the plan shall be cancelled.

6. It is further provided that after Engineers shall have become dissolved, Engineers is to be continued as a body corporate for the purposes and for the term specified in Section 42 of the General Corporation Law of the State of Delaware, and Engineers, acting under the direction of its Board of Directors, is to collect its assets and settle its debts and liabilities, with full power to sell and dispose of any or all of the assets of Engineers not distributed as aforesaid. After the final settlement of the affairs of Engineers and payment of or provision for its debts and liabilities, the Directors shall cause the distribution to the Engineers common stockholders of the remaining assets of the company either in kind or in cash in exchange for their certificates of Engineers common stock. It is further provided that the directors shall have power to authorize an agent to vote all shares of Virginia common stock held by the company at all meetings of stockholders at which such stock is entitled to vote except as to any matter which is being contested by any stockholder.

7. Within 60 days after the dissolution of Engineers shall have become effective, Epsco, Inc., the mutual service company, will cancel its service contracts with Engineers,

Engineers' Exhibit No. 82 (Cont'd)

Virginia, Gulf States and El Paso and thereupon be dissolved and liquidated.

8. Sales by Engineers of warrants in cases where the addresses of stockholders are unknown or are outside the continental United States or Canada provided to be made under the provisions of paragraph 1 above; by Engineers of shares of Gulf States' common stock represented by warrants not exercised provided to be made under the provisions of paragraph 2 above; by the transfer agent of shares of stock of El Paso and Virginia represented by scrip which shall not have been delivered in connection with the rights of combination of such scrip provided to be made under the provisions of paragraph 5; and by Engineers of any assets not distributed provided to be made under the provisions of paragraph 6 above, shall all be made subject to the following provisions: Engineers or the transfer agent may sell such warrants or shares of stock on the New York Stock Exchange without further action by the Commission, but neither Engineers nor the transfer agent shall sell any such warrants or shares of stock in any other manner unless the company, or the transfer agent, as the case may be, shall by telephone or telegram have given to the Commission at least 24 hours prior notice of its intentions so to do and of all the details in respect thereof, and upon the expiration of such 24-hour period, Engineers or the transfer agent may proceed with such sale in the manner specified in said notice unless during said period Engineers or the transfer agent shall have been informed by the Commission that the Commission intends to issue an order to show cause why the sale should be consummated, in which event such sale shall not be consummated without the approval of the Commission.

The following conditions, among others, are expressly established for the effectuation of the amended plan:

a. Reclassification of the common stocks of Gulf States and El Paso.

Engineers' Exhibit No. 82 (Cont'd)

b. Approval by the Commission of the amended plan.

c. Obtaining from the United States Treasury Department, unless Engineers waives this condition, a closing agreement or ruling as to tax consequences of the transactions necessary to carry out the amended plan, which agreement or ruling shall be satisfactory to counsel for Engineers.

d. The issuance of the Gulf States warrants.

It is also proposed that, in order to provide additional funds in excess of the proceeds from the sale of the Gulf States warrants and cash in Engineers' treasury to retire the Engineers preferred stock at their respective call prices, payment of special dividends on the common stocks of Virginia, Gulf States and El Paso are to be made as follows: in the case of Virginia, $2,932,000, with no further common stock dividends to be paid until June 15, 1948; in the case of Gulf States, $756,000, with no further common stock dividends to be paid until December 15, 1947; and in the case of El Paso, $105,000.

Engineers states that the approval of the amended plan is necessary for compliance with the orders issued by the Commission on September 16, 1942, and October 6, 1942, under Section 11 of the Act and to effectuate the provisions of Section 11(b) of the Act, and if the Commission shall find the plan necessary to effectuate the provisions of Section 11(b) of the Act and fair and equitable to the persons affected thereby, the Commission should issue an order approving such amended plan. Engineers also requests that the Commission's order approving the amended plan contain the recitation that the relevant transactions contained therein are necessary or appropriate to the integration or simplification of the holding company system of which Engineers is a member and necessary or appropriate to effectu-

Engineers' Exhibit No. 82 (Cont'd)

ate the provisions of subsection (b) of Section 11 of the Act, or in accordance with the meaning and requirements of the Internal Revenue Code, as amended, including Sections 371 and 1808(f) and Supplement R thereof. The amended plan provides for the payment by Engineers of all fees and expenses by whomsoever incurred in connection with said amended plan or the proceedings with respect thereto to the extent approved by the Commission.

In connection with the amended plan, Virginia has filed a declaration and El Paso and Gulf States have filed amended declarations pursuant to Section 7 of the Act proposing, among other things, that the respective charters of Virginia, El Paso and Gulf States will be amended to provide for cumulative voting for the election of the respective boards of directors for each company and for preemptive rights to the holders of common stock in respect to common stock of each company issued for cash, except in respect to any such stock issued in connection with a public offering.

The Commission being required by the provisions of Section 11(e) of said Act, before approving the plan, as amended, to find that such plan is necessary to effectuate the provisions of Section 11(b) and is fair and equitable to the persons affected thereby; and

It appearing to the Commission that the proceedings heretofore instituted with respect to the plan filed by Engineers (File No. 54-132) and the declarations filed by El Paso (File No. 70-1149) and Gulf States (File No. 70-1150) are related to and involve common questions of law and fact with the declaration filed by Virginia (File No. 70-1419) and therefore should be consolidated; and

The Commission deeming it appropriate to afford interested persons an opportunity for hearing and argument on the plan and declarations, as amended, and deeming it appropriate that any such hearing and argument should be held before the Commission and should be directed to

Engineers' Exhibit No. 82 (Cont'd)

whether the plan, as amended, conforms to the standards of Section 11(e) and whether the declarations, as amended, satisfy the requirements of Section 7;

IT IS HEREBY ORDERED that the declaration filed by Virginia be, and hereby is consolidated with these proceedings.

IT IS FURTHER ORDERED that any person desiring to present argument or to be heard on such plan, as amended, shall appear before the Commission at 10:30 A. M., E. S. T., on the 3rd day of January, 1947, at the offices of the Securities and Exchange Commission, 18th and Locust Streets, Philadelphia, Pennsylvania, in such room as may be designated at that time by the Hearing Room Clerk in Room 318; at which time the record herein will be reopened and the hearing herein will be reconvened. Any person desiring to present argument or to be heard shall, on or before the 2nd day of January, 1947, file a written request or application with the Secretary of the Commission in accordance with the provisions of Rule XVII of the Commission's Rules of Practice. Such request shall set forth the nature of such person's interest in the proceedings and the reasons for requesting to present argument or to be heard.

IT IS FURTHER ORDERED that notice of this argument and hearing be given to Engineers, El Paso, Gulf States and Virginia, and all other participants in the proceeding, by mailing to them copies of this order by registered mail, and to all other persons by general release of this Commission which shall be distributed to the press and mailed to the mailing list for releases issued under the Holding Company Act of 1935, and by publication in the Federal Register.

IT IS FURTHER ORDERED that Engineers give notice of this argument and hearing to all its stockholders of record by mailing a copy of this Notice and Order at least 10 days prior to the date of this argument and hearing.

Engineers' Exhibit No. 89.

IT IS FURTHER ORDERED that jurisdiction be and is hereby reserved to separate, in whole or in part, any of the issues, questions or matters in these proceedings or which may arise in these proceedings, or to consolidate with these proceedings other filings or matters pertaining to said consolidated proceedings or to take such other action as may appear conducive to an orderly, prompt and economical disposition of the matters involved.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

Engineers' Exhibit No. 89.

Opinion of William E. Tucker and T. Justin Moore addressed to the Board of Directors of Engineers Public Service Company dated December 12, 1946.

MUDGE, STERN, WILLIAMS & TUCKER
20 Pine Street
New York 5, N. Y.

TO THE BOARD OF DIRECTORS OF

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated):

Dear Sirs:

On December 4, 1946, the SEC filed its opinion in the Engineers Section 11(e) Plan case. Mr. Barnes has requested us to review that opinion and to advise you whether or not in view thereof it is worth while further to contest the payment to the preferred stockholders under the Plan of more than $100 per share, plus accrued dividends, which is the involuntary liquidation payment provided for in the certificate of incorporation of the Company.

Engineers' Exhibit No. 89 (Cont'd)

The section of the Act under which the Plan was filed, as you know, requires that the Plan in order to be approved shall be found by the Commission to be fair and equitable to the persons affected thereby. The Plan requested the Commission to find it fair and equitable to pay to the preferred stockholders only $100 per share, plus accrued dividends. That provision, among other, is found by the Commission to be unfair and as a condition to Commission approval of the Plan, the opinion requires, among other amendments, an amendment which will provide for the payment to the preferred stockholders, in addition to $100 per share and accrued dividends, of amounts equivalent to premiums payable in respect of each of the three series outstanding in the case of redemption thereof, namely, $5 in respect of the $5 dividend stock and $10 in respect of the $5.50 dividend and $6 dividend stocks.

At the outset we think we should briefly review the reasoning by which the Commission reached that conclusion. The opinion considers under separate headings "Fairness to the Preferred Stockholders" and "Fairness to the Common Stockholders".

Fairness to the Preferred Stockholders

Under this heading the Commission recognizes in substance the claim which Engineers made that the liquidation of Engineers proposed under the Plan is involuntary and in effect forced by the Act.

Notwithstanding, the Commission refused to conclude that that means that the involuntary liquidation preference should be applied, because, they say, the Supreme Court in the Otis case (323 U. S. 624) pointed out that "Congress did not intend that its exercise of power to simplify should mature rights created without regard to the possibility of simplification of system structures which otherwise would

Engineers' Exhibit No. 89 (Cont'd)

arise only by voluntary action of the stockholders, or involuntarily, through action of the creditors".

Then on the basis of earnings and assets, comparable yields and expert testimony in the record, the Commission finds that the preferred stock has an investment value "at least equal to the respective call prices" of the three series; and concludes "on full consideration of the record" that the payment of only $100 per share plus accrued dividends would not be fair and equitable to the preferred stockholders and that the fair and equitable standard requires that each of the series be paid its redemption price plus accrued dividends.

Fairness to the Common Stockholders

Under this heading, the opinion points out that the Plan, if amended so as to require the payment to the preferred stockholders of the respective call prices plus accrued dividends (and otherwise amended as required by the opinion) will also be fair to the common stockholders.

Engineers claimed that in view of the losses which the Company had incurred in the disposition heretofore, under compulsion of the Act, of various properties (Puget Sound, El Paso Natural Gas &c.) and the fact that the Act had prevented the refunding of the preferred stock under the lower dividend rates prevailing for comparable preferred stocks, these losses and burdens should not equitably be borne entirely by the common stockholders, but shared as well by the preferred stock; that if the preferred stockholders were to be paid their respective redemption prices, they would be receiving the most they could have received and be left "unscathed and scot-free, while the common stockholders alone are left to bear all the losses and dislocations caused by the impact of Section 11"; and that, accordingly, payment of more than $100 per share plus accrued

Engineers' Exhibit No. 89 (Cont'd)

dividends to the preferred stock would be unfair to the common stockholders and would give the preferred stockholders a "windfall", which the Supreme Court in the Otis case said should not be done.

This claim of Engineers the Commission rejects, saying that although novel "it is without substance"; that the alleged "windfall" claimed to result to the preferred stockholders if they are paid their respective redemption prices is not the kind of windfall which the Supreme Court said must not result; that what the Supreme Court meant in this connection was "that the Holding Company Act should not be permitted to mature claims and thereby transform the existing value of a security in a going concern into a matured claim which might be greater or less than such existing value"; that they have found that under the Plan "full compensation to the preferred requires they be paid an amount equal to their redemption prices in order to satisfy their prior claim to the assets and earnings of the Company"; and that the common stockholders cannot contend that is unfair to them. In addition to showing that the Plan with the suggested amendments would be fair to the common, the Commission pointed out it would give the Company the opportunity of using its $17,000,000 of accumulated cash toward retirement of the preferred, thus cutting off the prior preferred dividends and hasten the day when dividends would be paid to the common.

In connection with the losses which it was claimed would fall on the common if the preferred received its respective redemption prices, we should, because of the difference in effect under the Act of findings of fact and conclusions of law, call attention to the fact that the Commission says (see footnote 52):

> "In passing, we should point out that we do not accept counsel's hypothesis that the *Act* caused the asserted losses. In all of its divestments, Engineers

Engineers' Exhibit No. 89 (Cont'd)

has been free in its choice of methods, and, within limits, to choose the time for divestment. All sales have been negotiated by Engineers at arms-length. If, as in the case of Puget Sound, the sale brought less than the carrying value on the books of Engineers, the indication is that the carrying value was excessive and not that the sale's price was low. It is significant that the market price of Engineers' Common when the Plan was filed was the highest since 1932, and that the price has been rising steadily since 1942 when the program of simplification got under way. As shown in Footnote 42, *supra*, Engineers' common reached a low of 1⅛ in 1935. By 1945 when the Plan was filed it had reached a high of 37".

The findings or rulings which the Commission has made in the opinion that the payment to the preferred stockholders of their respective redemption prices would be "fair and equitable" to both the preferred and common should not, we think, be treated as a conclusive finding of fact. Those findings or rulings seem rather to be in the nature of a statement of mixed law and fact which on review should be broken down into findings of fact and rulings of law.

The principal findings of fact involved therein we think have to do with (1) the investment value of the preferred stock and (2) the losses which Engineers claimed were suffered from the impact of Section 11 of the Act.

As to (1) above, the above-mentioned finding that the investment value of the preferred stock apart from the Act is equivalent to the respective redemption prices is clear cut and finds substantial evidence in the record. Furthermore it is a fact which Engineers admitted at the hearing, in its brief and on the argument. It appears clear, therefore, that that fact finding must be accepted without question.

Engineers' Exhibit No. 89 (Cont'd)

As to (2) above, it will be recalled that Engineers claimed certain losses which should equitably be borne by the preferred as well as the common. These included, among others, losses resulting from the forced sale of Puget Sound and El Paso Natural Gas, and that resulting from the fact that the impact of the Act had prevented the Company from refunding the preferred stock with its present relatively high dividend rates on the basis of the lower dividend rates for comparable securities now prevailing (For details as to these claimed losses see pp. 12-15 of Engineers' brief): In order to sustain Engineers' claim respecting these losses, it is important that these losses be recognized and found to have been caused by the Act. Not only does the Commission not find that these losses were caused by the Act, but in footnote 52, above quoted, they say they do not "accept counsel's hypothesis that the *Act* that caused the asserted losses". It is not improbable that a reviewing court might say this was tantamount to a finding that the losses were not caused by the Act so directly, at least, as to be used as an offset to the payment of the premiums to the preferred stock.

We come now to a consideration of the law involved in the findings of the Commission that the payment of the respective redemption prices to the preferred stock would be fair alike to the preferred stock and the common stock.

First, the Commission holds, despite the fact that it agrees with us that the proposed liquidation of Engineers is involuntary, that the provisions of the certificate of Incorporation of Engineers to the effect that on involuntary liquidation the preferred stock shall be paid $100 and accrued dividends and no more, are not brought into operation by a liquidation under Section 11. This holding they base on the majority opinion of the Supreme Court in the Otis case, which expressly so found by holding that a

Engineers' Exhibit No. 89 (Cont'd)

Section 11 liquidation was not within the contemplation of the parties in adopting such a charter provision prior to the passage of the Act, and would, therefore, not be allowed to mature the liquidation rights. It held on the contrary, that securities should for Section 11 simplification purposes be valued on the basis of a going concern apart from the Act. Chief Justice Stone and Justices Roberts and Frankfurter dissented, the dissenting opinion being written by the Chief Justice. The gist of the dissent was that there was no more reason not to apply the contract provisions than there would be to hold that a life insurance policy would not cover a death from a cause unknown at the time the policy was issued.

Whatever may be the merits as between these two conflicting opinions, it seems to us that it is not much use attempting to attack frontally or distinguish the Otis case. While it has been contended that the Otis opinion should be limited to its facts and does not mean the claim of the preferred stockholder can be enlarged above his involuntary liquidation preference, it seems to us that the logic of the majority opinion permits the application of the "fair investment value" theory even in such a case. Illustrative of this are the following excerpts from the majority opinion where the Court says:

> "The exercise of legislative power by Congress through §11(b)(2) to accomplish simplification as a matter of public policy and the Commission's administration of the Act by dissolution of this particular company results in a type of liquidation which is entirely distinct from the 'liquidation of the corporation, whether voluntary or involuntary' envisaged by the charter provisions of Power for preferences to the senior stock.
>
> This conclusion permitted the Commission to examine the *investment* values of the common and

Engineers' Exhibit No. 89 (Cont'd)

preferred stocks of Power." (p. 631) (emphasis supplied)

* * * * * *

"We reach the conclusion that the Securities and Exchange Commission applied the correct rule of law as to the rights of the stockholders *inter sese*. That is to say, when the Commission proceeds in the simplification of a holding company system, the rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place." (p. 633)

Five of the justices who joined in the majority opinion are still on the bench, namely, Justices Black, Reed, Murphy, Jackson and Rutledge (Douglas did not participate), while two of the dissenters, Chief Justice Stone and Justice Roberts, have been succeeded on the bench by Chief Justice Vinson and Justice Burton. Thus we think that the present membership of the Court affords little hope for obtaining a different holding as to the governing principle on the different facts of our case. This was indicated as our belief by the fact that, in the Engineers brief, we did not argue for a strict construction of the contract although we asserted, for equitable consideration, that the liquidation was involuntary.

Second, on our analysis of the opinion we think it fair to say that the Commission found in substance (a) that the investment value of the preferred stock (apart from the Act) was equivalent to its respective redemption prices and (b) this being so, it was fair and equitable alike to the preferred and common stocks to pay the preferred the respective redemption prices.

Engineers' Exhibit No. 89 (Cont'd)

Assuming that we have satisfactorily proved that the losses arising from dispositions of properties above-mentioned and the loss resulting from the Company's inability under the Act to refund the preferred stock on the prevailing lower dividend basis were "caused" by the impact of Section 11 of the Act, it might be urged with considerable force that the Commission has made an error of law in saying that it follows from the fact alone that the investment value of the preferred stock is equivalent to the respective redemption prices, that the payment of such an amount to the preferred stock is fair and equitable to both classes.

In other words, on the assumption that those other losses were caused by the Act, it would seem to us that the better view would have been for the Commission to have looked at the investment value of the common stock apart from the Act, as well as that of the preferred stock, and then determined what effect the Act had on both and shared the burdens of its impact between the two classes; and that a fair division of all the burdens and dislocations of the Act would result in paying the preferred stocks something less than their respective redemption prices.

From this, however, we do not mean to say that under all the circumstances we think it advisable to contest further the payment of amounts in excess of $100 and accrued dividends to the preferred stock.

One of the writers (Mr. Tucker) has frequently told the Company management that he thought that if the Company were going to win the premium point it would probably have to do so before the Commission. That thought was based on the fact, apparent to one who follows the court decisions dealing with Commission cases, that the courts are reluctant to override the commissions; that the courts are required by the Act to accept the fact findings of the Commission if they are based on any substantial evidence, leaving only the legal approach open for review. Further-

Engineers' Exhibit No. 89 (Cont'd)

more, the courts, even if they find the Commission has applied the law erroneously, seldom, if ever, reverse the Commission but rather reverse and remand for further consideration in the light of the correct law as shown by the opinions of the courts. Accordingly, the mere existence of this adverse Commission opinion on the premium point, viewed practically, makes the problem of sustaining the Company's claim respecting the payment to the preferred stock much more difficult.

In addition, the sustaining of such claim made by Engineers depends upon the fact, which ultimately will, in our opinion, have to be found by the Commission, that the losses &c. involved in the claim were "caused" by the impact of the Act. At the outset we are likely to be met with the claim that the Commission has already found that fact against us in footnote 52, above quoted. Even, however, if the Courts should not agree with the contention that that is in substance a finding against us, they would, in our opinion, do no more than remand the case to the Commission for further findings in that regard. Personally, we are not hopeful that in such circumstances we could expect a finding of fact from the Commission to the effect that the losses were "caused" by the Act. Footnote 52 at least indicates that the Commission is now entertaining a contrary view. Again even if the Commission should find that the losses were caused by the Act, the effect of such a finding in dollars on the payment of premiums on the preferred stock, *i. e.* whether all of the premium would be absorbed or if not, what part thereof would be absorbed, would certainly be held to be a fact to be found, on consideration of all the circumstances, by the Commission and not by the Court. Thus, the law, if found by the Court in our favor on the point, would do no more than require further factual findings by the Commission as to the effect to be given on the premium payment. So even if we were successful in the Courts on the

Engineers' Exhibit No. 89 (Cont'd)

law and got a remand, the application of the law would involve a fact to be found by the Commission. Thus the successful overcoming of the present predilection of the Commission that payment of the respective redemption prices would be fair and equitable though possible does not seem to us to be probably. Furthermore, it must be borne in mind in this connection that the burden of further contest of the amount to be paid to the preferred stockholders does not involve solely the ordinary litigation expenses but would include, if the preferred stock sustained its contention that it is entitled to the respective redemption prices, payments in addition to the premiums equal to an amount "to be determined by ascertaining the yield for each series of preferred on the basis of its dividend rate and the price ultimately deemed payable." It is obvious that this in itself would be a substantial burden.

It is, therefore, our conclusion that it is not worth while to contest further the payment to the preferred stockholders of the respective redemption prices and we recommend the filing of an amendment which will provide for such payment.

One of the writers (Mr. Tucker) is not unmindful of the fact that the present Plan providing for payment to the preferred stockholders of only $100 and accrued dividends per share was filed by the directors on his recommendation made in his opinion of July 26, 1945. Even in that opinion that writer stated that he could not, in view of the uncertainties introduced by the Otis case, say with assurance that such a Plan would be approved. Now it seems to that writer, that the holding of the Commission after consideration of all the points made in favor of such a payment in that opinion, (and of other points not made in that opinion) throws such an additional burden on the Company to sustain that position as to make it not worth while further to contest the point.

We point out that other holding companies than Engineers are raising similar points and that it is at least possi-

Engineers' Exhibit No. 89 (Cont'd)

ble that some of those cases may be taken to the courts and the premium not found to be payable under the facts of such cases. We do not believe that such an eventuality should prove to be embarrassing to you. The chance of the *Otis* case being distinguished from a case similar in facts to the Engineers case is, in our opinion, slight. Aside from that contingency, these cases are peculiarly ones which turn on the facts involved therein. As we have above stated, in view of the facts involved in our case and the adverse findings contained in the opinion, the likelihood of success in our case seems too remote to justify any further contest.

Very truly yours,

WM. E. TUCKER
T. JUSTIN MOORE

PREFERRED STOCKHOLDERS EXHIBITS FILED WITH SECURITIES AND EXCHANGE COMMISSION.

Preferred Stockholders' Exhibit No. 12.

Letter of C. W. Kellogg to Donald C. Barnes, dated July 27, 1945.

EDISON ELECTRIC INSTITUTE
420 Lexington Avenue, New York 17.

July 27 1945

Mr Donald C Barnes, President
Engineers Public Service Company, Inc
90 Broad Street
New York 4, N.Y

Dear Don

On account of absence on vacation I did not receive before the last Board meeting Bill Tucker's opinion on the redemption basis for the preferred stock under the 11(e) plan, so was not prepared to discuss it at the meeting yesterday. I have since read it through carefully many times and have the following comments to offer.

I—To my mind the preferred stock matter is very simple:

1. The 11(e) plan outlined at the meeting seems to me clearly a dissolution of the Company, even though it may take some time to consummate.

2. Being contrary to the interests of the Company and therefore undertaken solely due to requirements of law, it seems to me clearly involuntary.

3. Hence, as the charter provides in such cases, the preferred stockholders in such a dissolution are entitled only to $100 and accrued dividends. (Courts and commissions may disregard or override charter provisions, but I don't see how the Company on its own initiative is authorized to do so.)

Preferred Stockholders' Exhibit No. 12 (Cont'd)

II—With some of the arguments Bill sets up to support the above simple proposition, I am in complete disagreement.

(a) The veiled threat of personal loss to Directors if they awarded more than $100 a share to the preferred stock seems to me entirely improper. The Board should honestly apply their best judgment to the case without fear that their good faith would be questioned.

(b) The threat that it may not be possible to pay preferred dividends after Gulf and El Paso are disposed of, and no other utility investment available, seems to me not only entirely beside the point but not supported by the facts. Using the price in the proposed 11(e) plan and net earnings as a yardstick, Gulf and El Paso should bring $27,000,000. This, plus available cash, would make about $40,000,000 which, even with Government 2% bonds, would yield $800,000 annually, leaving only $1,300,000 to be obtained from Virginia (with over $5,000,000 net for common) to pay all preferred dividend requirements.

(c) The detailed discussion of "windfalls" impresses me as a purely ad hominem argument, which has no place in any consideration by the Board of the equities between preferred and common, assuming that the charter provisions are to be disregarded. In my opinion the possible trading profits of individual stockholders in their dealings in either class of the Company's stock are not matters of which the Board can take any cognizance for they are acting for *all* the stockholders.

III—What does disturb me in Bill's letter to the Board is his suggestion that our appeal to the Supreme Court is a lost cause and that therefore the Board should proceed with all speed to go ahead with the 11(e) plan, which would make the appeal valueless even if we did win it.

Preferred Stockholders' Exhibit No. 12 (Cont'd)

You will recall that both when we appealed to the Circuit Court from the dissolution order of the SEC and subsequently when we asked the Supreme Court for certiorari on the Circuit Court's ruling, careful consideration was given to the question whether it was justifiable to spend the stockholders' money on this litigation, in view of the apparently slim hope of success. You will recall that the decision to go ahead was based on the belief that our cause was just, that it was a matter of life and death to the Company and that therefore the Board would be recreant to its duty not to pursue the litigation to a final determination.

The Board has heretofore, by not acting contrarywise, perhaps assented to the conversations you all have had with the SEC on an 11(e) plan; but I believe now, as a matter of consistency and duty to the stockholders, it should definitely instruct the officers to cease and desist from any further discussions with the SEC about dissolution, until the issues raised by our Supreme Court case are disposed of by that body.

It is certainly not our fault that the court cannot hear our case, but that is no reason why we should let the case go by default.

There is not only the judicial angle but also the legislative one. You are aware of the investigation recently started by a special subcommittee of the House Interstate and Foreign Commerce Committee on the Holding Company Act. You will recall that last Summer I brought before another subcommittee of that committee (on the Boren Resolution) the substance of Dr. Waterman's report indicating that the alleged bases for enactment of the Holding Company Act (as set forth in the Act itself) were not based on the facts about such companies as they now exist. You will remember that Chairman Lea and other members of the subcommittee expressed themselves at the time and later as very much impressed by this disclosure. The present investigation by Representative Boren is obviously the out come of the foregoing. With the change in Administration leader-

Preferred Stockholders' Exhibit No. 12 (Cont'd)

ship and the admitted partial eclipse of the New Deal, it is certainly within the realm of possibility that Section 11 of the Holding Company Act might be amended to eliminate its most glaring defects.

This is another reason for proceeding as slowly as possible with 11(e) or any other dissolution plans, since, once consummated, no legislative or court action could ever "put Humpty Dumpty together again."

It is ten years this Summer since the Holding Company Bill was signed by President Roosevelt. Surely no harm can come from one or two years more delay before going ahead with dissolution.

Is it not true that we have everything to gain and nothing to lose by putting off dissolution to the latest possible moment to which legal or any other kind of delay can possibly put it?

In case this letter may seem critical, I want to add in closing that all the Directors with whom I have discussed the Company's status from time to time agree with me that you have handled its affairs in a masterly manner. From the viewpoint of the stockholder, Engineers has made greater improvement in the last decade than any other holding company, all of which has been due to your skillful guidance, sound judgment, initiative and firmness. In fact, it is because I feel so deeply the irreparable damage that would result to the Company you have so successfully built up that I feel no stone should be left unturned to conserve it.

As this is written to set forth various ideas for Board consideration, I am sending a copy of it to each member of the Board.

Sincerely yours,

C. W. KELLOGG

C. W. Kellogg

Note: The foregoing was transcribed from longhand draft sent by Mr. Kellogg to his secretary.

AW

Preferred Stockholders' Exhibit No. 12-A.

Letter of D. C. Barnes to C. W. Kellogg, dated July 31, 1945.

ENGINEERS PUBLIC SERVICE COMPANY
(INCORPORATED)
90 Broad Street
New York 4

July 31, 1945

Mr. C. W. Kellogg,
Edison Electric Institute,
420 Lexington Avenue,
New York 17, N. Y.

Dear Bill:

I have your letter of July 27, 1945. Since kind words in these times are as rare as "a good deed in a wicked world" I want to acknowledge first the next to the last paragraph of your letter which I can turn to for comfort and happiness during the rest of my life. I don't feel that I deserve all of the credit which you have been kind enough to give me, as the performance of Engineers is an organization accomplished and not that of any individual.

I give below my reaction to the rest of the points in your very good letter, in the order in which they appear.

I. I am in complete accord with your three conclusions under this heading, which justify a decision not to provide for payment of any premium on the preferred stock under our 11 (e) plan.

II. In reference to your comment II (a) in regard to Bill Tucker's memorandum to the Directors of July 26 it seems to me that if, as you point out, in I (3) there is any doubt as to whether the preferred stockholders are entitled to a premium, the Directors would be guilty of wasting the assets if they voluntarily paid the premium, since once the preferred stockholders have been paid there would be no way in which the cash could be recovered for the common stockholders if it were later determined that the preferred

Preferred Stockholders' Exhibit No. 12-A (Cont'd)

stockholders were not legally entitled to such a payment. Under such circumstances I should think that a common stockholder might have proper grounds for suit against the Directors, particularly if the Company's counsel had advised the Directors before their action that he had grave doubts as to whether the premium was legally payable.

In reference to your point under II (b) I did not interpret Bill's statement at the bottom of Page 2, which is what I presume you are referring to, as a threat that Engineers would not be able to pay preferred dividends if it sold Gulf and El Paso and continued to own Virginia and say $40,000,000 or more of government 2% bonds, but that would create a situation which the Company could not afford "to let continue very long" because good business judgment would dictate that it retire the preferred stock, even if it had to pay a premium, rather than continue to pay approximately 5½% dividends for money invested in 2% securities, so that the forced sale of Gulf and El Paso and the inability to invest the proceeds in any business other than government bonds or similar low yield securities which might be permitted under the Act, forces an involuntary retirement of the preferred stock as a practical matter.

As to your comments under II (c), I am thoroughly in accord with your statement that the Board cannot take cognizance of profits of individual stockholders in their dealings in either class of the Company's stock, but it is not my understanding that Bill's reference to "windfalls" contemplated that. As I understand his point, he is comparing the situation of the preferred stockholders and the common stockholders each as a class and not as individuals. It is perfectly clear that as a class the common stockholders have suffered materially as a result of the impact of the Public Utility Holding Company Act and to take away from them $3,200,000 (the aggregate premium for voluntary redemption) in order to pay the preferred stockholders the maximum that they could ever hope to realize under any conditions on their preferred stock, would give to the pre-

Preferred Stockholders' Exhibit No. 12-A (Cont'd)

ferred stockholders a "windfall" which certainly violates my sense of equity and my lay interpretation of the following quotation from the Otis Case cited on Page 7 of Bill Tucker's letter:

> "Enforcement of an over-riding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders."

III. I am sorry I have not made clear to you, and I hope that the other Directors understood, that it was not my intention to consummate our proposed 11 (e) plan until we have had the decision of the Supreme Court on our appeal and had determined in the light of that, that the consummation of such a plan was in the interests of the stockholders. I have always felt and Bill Tucker and Justin Moore have both advised from the beginning that the chances of our securing relief from the Supreme Court were relatively small, but it has been my feeling that if there was any chance we owed it to our stockholders to secure a final determination of this issue.

I think it would be a great mistake for the Board to instruct the Officers to defer any further action on the 11 (e) plan until the decision of the Supreme Court is had for these reasons:

1. It would result in several months delay in putting $14,000,000 of idle cash to work. The saving in dividends on stock to be retired by the use of this money is approximately $2,100 per day.

2. We now have a good market for operating utility company common stocks and the success of our plan is dependent on a continuance of such a market for the reason that if stockholders have to sell some of their securities in order to secure the cash required of them under the Plan or in the event they are forced to sell their rights, they will be materially injured if at the time of such sale the market

Preferred Stockholders' Exhibit No. 12-A (Cont'd)

has receded materially. I am disturbed at the inescapable delay involved even if the Plan is filed in September.

3. I do not believe it will have an adverse effect on our Supreme Court case if we file now an 11 (e) plan which includes a reservation such as that in The North American Company Plan, namely, "In order to protect the constitutional and legal rights of all parties pending consideration of the Plan, the Company reserves the right to proceed with argument of its case before the Supreme Court of the United States at any time hereafter when a quorum of such Court may be available to participate in the decision of such case. The Plan is submitted, and all statements herein are made, with full reservation of all constitutional and other legal rights of the Company and its respective subsidiary companies and its and their respective security holders". If it is brought to the Court's attention at all that such a plan has been filed, it is readily explainable on the ground that the Company must put itself in a position where it can act promptly in the event of an adverse decision.

As to your reference to possible legislative relief, it is my personal opinion that we have no reasonable expectation of any favorable action by Congress before the Supreme Court will have acted and the Commission has had an opportunity to enforce its order. If the information which I have had through two independent sources is correct, we can expect no help from the present investigation by Representative Boren.

Since you sent copies of your letter to the other members of the Board, I am doing likewise in order that they may have an opportunity to consider these matters from both your viewpoint and mine before they come up for consideration at the next meeting of the Directors, now proposed to be held on September 5.

Yours very truly,

D. C. Barnes

DCB:MS

Preferred Stockholders' Exhibit No. 13.

Letter of W. E. Tucker to Board of Directors of Engineers, relative to Amendment No. 4 to the Plan.

December 11, 1945

To the Board of Directors of

ENGINEERS PUBLIC SERVICE COMPANY
(Incorporated)

Dear Sirs:

Amendment No. 4 to the Plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters, filed by your Company with the Securities and Exchange Commission on September 10, 1945, is to be presented to you for approval on December 14th.

This Amendment has been prepared and is presented for action by you principally on my recommendation and I write to advise you with respect to its purposes and my reasons for recommending its approval and filing.

The Plan as filed and as heretofore amended is divided into three parts. Briefly stated, these three parts cover the following subject matters:

> Part I—The disposition and sale through the issuance of warrants, to common stockholders of Engineers, of the reclassified common stock of Gulf States Utilities Company for the purpose of raising a major portion of the money necessary to pay to preferred stockholders of Engineers $100 per share plus accrued dividends, the borrowing of the balance of the money necessary to make such payment to the preferred stockholders on a bank loan, the distribution of the reclassified common stock of El Paso Electric Company to the common stockholders of Engineers as a dividend in partial liquidation, and the cancellation of the service contracts with Epsco, Inc.;

Preferred Stockholders' Exhibit No. 13 (Cont'd)

Part II—The determination by the Commission as to whether any amount in addition to $100 per share of preferred stock should be paid to the preferred stockholders of Engineers; and

Part III—Provides broadly and without specific details for the liquidation of the liabilities of Engineers, and, within one year thereafter, for the distribution of the common stock of Virginia Electric and Power Company to the common stockholders of Engineers, or for the merger of Engineers with Virginia.

The substantial changes which Amendment No. 4 is designed to accomplish are as follows:

(1) The elimination entirely of Part III of the Plan; and

(2) The insertion at the end and as a part of Part I of the Plan, of a new provision which will provide for the dissolution of Engineers within 60 days after Part I of the Plan shall have become effective and for its final liquidation within the period specified for dissolved corporations under the General Corporation Law of the State of Delaware, under arrangements whereby the directors of Engineers in office at the time of dissolution, with power to provide for their succession and borrow money, shall administer the liquidation in such a way as to pay off the liabilities to the extent possible from assets of Engineers other than the common stock of Virginia Electric and Power Company, and to accomplish the ultimate liquidation of Engineers by a distribution of as many as possible of the shares of Common Stock of Virginia Electric and Power Company, pro rata, among the Common Stockholders of Engineers.

Preferred Stockholders' Exhibit No. 13 (Cont'd)

I come now to a statement of the reasons which have led me to recommend to your Board the approval and filing of this Amendment.

As the Plan was originally set up, Part III dealt with the elimination of Engineers as a corporate entity in an alternative manner. It provided for either the liquidation of Engineers as a corporation or its merger into Virginia. It is obvious that if the ultimate disposition of Engineers as a corporation was thus left in the alternative, it was not possible at this time to give that ultimate disposition any definite direction. The terms of the merger, for example, obviously cannot be worked out until the liabilities of Engineers have been determined and liquidated and the assets to be involved in the merger definitely determined. The idea of a merger was originally included in Part III because, without having the opportunity at the time the Plan was filed fully to canvass the situation, it was believed that it was possible that following the merger procedure instead of the liquidation procedure might possibly lead to a substantial tax advantage. It is my understanding that this problem has been further analyzed since the date of the filing and that it now develops that only comparatively slight tax advantages will result from the merger *vis-a-vis* the liquidation. The staff of the Commission apparently had some fears that the proposed Plan might not result in the actual dissolution of Engineers within a satisfactory length of time, particularly in view of the fact that Part III of the Plan was separate and distinct from Part I of the Plan and could be and would have to be amended after Part I of the Plan had been fully carried out. The staff suggested that if Part III was to be left in its present form we should include therein a submission to the jurisdiction of the Commission whereby if Engineers were not eliminated within a specified time the Commission could itself step in and enforce liquidation. The staff also have expressed themselves in the past to the effect that the continuation of Engineers over Virginia alone would be illogical and unnecessary.

Preferred Stockholders' Exhibit No. 13 (Cont'd)

Furthermore, it would seem to me that the presentation of the considerations from which it will be determined whether the preferred stockholders of Engineers should be granted, in connection with the retirement of their preferred stock, any amount in addition to $100 per share, plus accrued dividends, will be more clearly brought into focus if the merger suggested should be abandoned entirely and the dissolution of Engineers as a corporate entity incorporated into Part I of the Plan.

The Certificate of Incorporation of Engineers contains a provision:

> "In the event of any liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, the holders of the preferred stock of each series shall be entitled to receive, for each share thereof, an amount equal to $100, together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premium for such series, if any, before any distribution of the assets shall be made to the holders of the common stock; * * *".

The fixed redemption premiums mentioned are for the $5 Dividend Preferred Stock $5 per share, and for the $5.50 and $6 Dividend Preferred Stock $10 per share.

While it may be true that the question before the Commission and the courts respecting the amount which, under the Plan, shall be paid to the preferred stockholders in connection with the retirement of their stock, is a broader question than the mere technical application of this clause, I have always felt that the clause was a factor to be considered in this connection and that substantively, the "liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock resulting in any distribution of its assets to its stockholders" involved in the Plan

Preferred Stockholders' Exhibit No. 13 (Cont'd)

were forced on the Company by the impact of the Act and could not fairly be considered voluntary in any proper sense.

Accordingly, I have been desirous of obtaining in as clean-cut and direct a manner as possible, whatever benefit there may be legally from presenting directly and as a part of the issue as to the amount to be payable to the preferred stockholders, this Charter provision and a liquidation which, if the Charter provision is to have any effect, would clearly fall within its terms.

The way to accomplish this result it seems to me is to follow the course which is included in Amendment No. 4 by abandoning entirely the alternative provision contained in Part III and incorporate the dissolution provision expressly in Part I where it will be related directly to the payment of $100, plus accrued dividends, proposed to be made to the preferred stockholders in Part I.

The question whether any amount in excess of $100 per share should be paid to the preferred stockholders is an involved one and I think it will, as I believe you will understand from what I wrote in my opinion of July 26, 1945 in connection with the approval of the original Plan, be determined on the basis of what is fair and equitable to the preferred stockholders as well as to the common stockholders. Under these circumstances, you will understand the reason why I cannot, with any assurance, tell you that if Amendment No. 4 is adopted, it will necessarily have a deciding effect on this issue. I do think, however, that the adoption and filing of the Amendment will bring the dissolution of Engineers into its proper relation with the question respecting the amount to be paid to the preferred stockholders for whatever effect a definite program of dissolution and liquidation of Engineers may have on that problem.

Accordingly, I am, as above stated, recommending its adoption and filing.

Very truly yours,

W. E. TUCKER

Preferred Stockholders' Exhibit No. 14.

Thomas W. Streeter
Morristown
New Jersey

July 26, 1945

Revised July 30, 1945

Re Engineers Public Service Co. directors' meeting
of July 26, 1945

Statement of Thomas W. Stfeeter.

I wish my vote recorded against any plan which proposes retiring the preferred stock at par instead of its call price as, in my opinion, an attempt to retire the preferred stock at par, while the equity in the properties remains with the common stock, would not, if carried out, be the "involuntary liquidation" referred to in the charter of the company. Such a partial retirement of the outstanding capital stock would, in my opinion, create a windfall for the common stockholders at the expense of the preferred stockholders.

I might also say that even if such partial retirement of the capital stock were the "involuntary liquidation" of the charter, it is highly inconsistent to rely on the Public Utility Holding Co. act as authority for the action, while we continue to assert in the Supreme Court of the United States that that act is unconstitutional.

Preferred Stockholders' Exhibit No. 16.

Excerpt from Fifth Supplemental Indenture of Virginia Electric and Power Company to The Chase National Bank of the City of New York, Trustee, dated May 1, 1945.

Pages 67-69:

ARTICLE 4.

Additional Covenants of the Company

§4.01. The Company covenants that, so long as any Bonds of Series E remain outstanding, the Company will not (a) declare or pay any dividend or make any other distribution to any holder of Common Stock (other than a dividend payable in shares of Common Stock) or (b) purchase or acquire or otherwise retire for a consideration (otherwise than from the proceeds of sale of shares of Common Stock) any share of Common Stock if the sum of (i) the aggregate amount so paid, distributed and or applied after September 30, 1944 (exclusive, however, of dividends paid on any class of stock before January 1, 1945), (ii) $55,000 a month in respect of such of the first 25 full calendar months after September, 1944 as shall have elapsed (but not in respect of any succeeding calendar month), and (iii) $75,000 a month in respect of such of the first 116 full calendar months after September, 1944, as shall have elapsed (but not in respect of any succeeding calendar month) would exceed the net income of the Company available for dividends on shares of Common Stock accumulated after September, 1944. Net income of the Company available for dividends on shares of Common Stock, for the purposes of this §4.01, shall mean the sum of operating revenues and non-operating income net of the Company, less (i) all proper deductions for operating expenses, depreciation [which, for the purposes of this §4.01, shall be not less than 15% of the total operating revenues (after deducting therefrom the sum of (a) the

Preferred Stockholders' Exhibit No. 16 (Cont'd)

cost of electricity and gas purchased for sale or resale (and of any other products so purchased if the revenues therefrom are included in such total operating revenues), or purchased for exchange for other products to be sold if the revenues therefrom are included in such total operating revenues and (b) all rentals paid by the Company for property used by it in the generation, transmission, distribution or sale of electric energy or gas and included or reflected in its operating expense accounts after September 30, 1944) of the Company from September 30, 1944 less the aggregate of all expenditures made by the Company from September 30, 1944 for maintenance and repairs], taxes, interest charges, and other income deductions (including amounts charged against income for amortization of utility plant acquisition adjustments), as shall be determined in accordance with such system of accounts as may be prescribed by governmental authorities having jurisdiction in the premises or in the absence thereof in accordance with recognized accounting practice applicable to companies engaged in a business similar to that of the Company and (ii) dividend accruals on all stock of the Company other than Common Stock; *provided*, that in computing the amount of such net income no deduction or adjustment shall be made for or on account of (a) any profits realized or losses sustained on the sale of any investment securities or capital assets or any change in the book value of, or any appreciation or depreciation in the value of, any assets owned by the Company for any reason whatsoever; (b) any earned surplus adjustment properly applicable to any period or periods prior to September 30, 1944; (c) premiums that shall be paid on the redemption or retirement of any shares of preferred stock of the Company; or (d) any costs, expenses, taxes or charges arising out of or incurred in connection with the consummation of the merger of Virginia Public Service Company into the Company, including in such costs, expenses, taxes and charges, but without limiting the generality of the fore-

Preferred Stockholders' Exhibit No. 16 (Cont'd)

going, all charges for redemption premiums, double interest, discount, and other costs and expenses incurred in connection with the redemption of the $26,000,000 principal amount of First Mortgage Bonds, 3¾% Series due 1972, and $10,500,000 principal amount of Sinking Fund Debentures of Virginia Public Service Company, the issuance and sale of $23,000,000 principal amount of Bonds of Series D of the Company, the issuance of $5 Dividend Preferred Stock of the Company in connection with said merger and the solicitation of proxies for stockholders' meetings held in connection with said merger; and *further provided* that the words in the foregoing enumeration are not intended to require or increase any deduction for or on account of any transactions or entries not so enumerated.

Preferred Stockholders' Exhibit No. 18.

(4 pages) →

ENGINEERS PUBLIC SERVICE COMPANY &
SUBSIDIARY COMPANIES
DIVERSIFIED FUND
(000 omitted)

Based on 1946 Estimates

	E. P. S. Vepco	Gulf States Utilities Co.	Electric Company
Gross revenues	$ 40,830	$ 17,599	$ 3,861
Balance for common	5,167	2,506	518
Additional expense from Independent Operation - Supervision & General	160	127	72
Transfer agents' fees	-	25	16
Less present cost of Engineers, Inc. services	104	38	9
	56	114	79
Less reduction in Federal taxes because of above additional expense	48	97	68
Net added cost	8	17	11
Balance for common Adjusted	5,159	2,489	507
Expense of continuing existence of Engineers Public Service Company	95		
Less reduction in Federal taxes 85.5% of $95,000	81		
Net	14		
Balance for common	5,145	2,489	507
Freeze	2,174 #	218	140 #
Available for common dividends	$ 2,971	$ 2,271	$ 367
Estimated common dividends	$ 2,938	$ 1,540	$ 375
Preferred and preference common divs.	849	393	98
Amount available to retire preferred and preference common stocks	$ 2,089	$ 1,147	$ 277
Par or capital value of preferred and preference common stocks	$ 15,720	$ 7,380	$ 1,962
Years required to retire preferred and preference common stocks	6 yrs. & 6 mos.	6 years	6 yrs. & 3 mos.
% of balance for common estimated to be retained in surplus	42.90	38.13	26.04
% amount available to retire preferred & preference common stocks of operating revenues	5.11	6.52	7.17

Terminates November 1, 1947.

$ Reduces to $1,624,000 November 1, 1946

PLAN OF LIQUIDATION

ENGINEERS PUBLIC SERVICE COMPANY

Reclassify Gulf Common from 280,000 shares to 763,998

" El Paso " " 150,000 " " 381,994

Offer to E.P.S. Common rights to subscribe for units consisting of 7 shares Gulf Common and 1 share El Paso Common for each 5 shares E.P.S. Common at price of $50 per unit.

Cash from subscriptions	$19,100
" " E.P.S. Treasury (estimated as of 12/31/45)	14,145
" " Bank Loan - 3-5 years	6,000 *
Involuntary redemption price E.P.S. Preferred	$39,245

	Est. 1945 Earnings	Adj. Earnings Excl. Tax Savgs. & Add'l Expense	Adj. Earnings Per Sh. E.P.S. Common	1945 Est. Divs.	Dividends Per Sh. E.P.S. Common
Gulf	2,506	1,910	1.00	1,528	.80
El Paso	518	500	.26	382	.20
Total	3,024	2,478	1.26	1,910	1.00
After Bank Loan retired 3-5 years					
Vepco	5,167	3,900	2.04	2,865	1.50
Total	8,191	6,378	3.30	4,775	2.50

Present Value E.P.S. Common	24
Cost of subscription	10
Total	34

Return on $34	9.7%	7.3%
" " probable market $45	7.3%	5.5%

* Bank Loan may be increased if plan is made effective before December 31, 1945, or if any premium is required to be paid on redemption.

ENGINEERS PUBLIC SERVICE COMPANY AND
SUBSIDIARY COMPANIES

Divestment Plan
(000 omitted)

	Engineers Vepco	Gulf States Utilities Company	El Paso Electric Company
Cash available for construction Based on 1945 Level			
Excess current assets 12/31/44	$2,042	$1,790	$2,442 (1)
Post war refund(2)	1,482	-0-	51
	$3,524	$1,790	$2,493
Average	$ 542 (3)	$ 298 1/6	$ 399 (4)
Depreciation and amortization of 100.5 - Plant acquisition adjustments	$3,546	$1,732	$ 292
Freeze	426 (5)	218	-
Undistributed earnings	408	731	8 (6)
Total - One year	$4,072	$2,979	$ 683

1780 - at per 20 years to war per cent for 7 plant

Cash Requirement for Construction

1945 Estimated	(7)	$ 2,025	$ 705
1944		1,408	115
1943		2,738	63
1942		1,771	128
1941		2,765	445
1940		1,934	410
1939		2,777	269
Total		$15,018	$2,135
Average of 7 years		$ 2,145	$ 305
Sinking fund requirements		410	98
Total for Construction and sinking fund		$ 2,555	$ 403

(1) As adjusted.

(2) At December 31, 1944.

(3) Based on 6 1/2 years.

(4) Based on 6 1/4 years.

(5) Difference between freeze of $2,174,000 and $2,600,000 average note maturity - Reduction in cash.

(6) Estimated excess distribution.

(7) Vepco common stock is available for financing construction if more equity is necessary.

ENGINEERS PUBLIC SERVICE COMPANY
AND SUBSIDIARY COMPANIES

Divestment Plan

Capital Structures - December 31, 1944
- 000 Omitted -

	Engineers Public Service Co. Virginia Elec. & Power Co. Pro Forma		Gulf States Utilities Company		El Paso Electric Company	
	Amount	%	Amount	%	Amount	%
Bonds	$ 59,000	47.9	$27,300	52.1	$ 6,500	48.5
Notes	13,850	11.2	-		350	2.6
Preferred	28,947	23.5	12,000	22.9	1,500	11.2
Preferred and preference common stocks	15,720	12.8	7,860	15.0	1,962	14.6
Common and surplus	5,678	4.6	5,286	10.0	3,101	23.1
Total	$123,195	100.0	$52,446	100.0	$13,413	100.0

Asset Value

Estimates of Independent Analysts	Virginia Elec. & Power Co.	Gulf States Utilities Co.	El Paso Elect.Co.	Total
Carl M. Loeb, Rhoades & Co.	$ 57,300	$26,000	$ 7,100	$ 90,400
Ira Haupt & Co.	70,600	25,000	6,000	101,600
Baer Stearns & Co.	68,000	30,000	10,000	108,000
Total	195,900	81,000	23,100	300,000
Average	65,300	27,000	7,700	100,000
% of total	65.3	27.0	7.7	100,000
Par or capital value of preferred and preference common stocks	$ 15,720	$ 7,860	$ 1,962	$ 25,542
Asset value of common stock	49,580	19,140	5,738	74,458
Asset value per share of common stock - 1,909,968	$25.96	$10.02	$ 3.00	$38.98
Coverage of preferred and preference common stocks - times	4.15	3.44	3.92	3.92

Preferred Stockholders' Exhibit No. 26-A.

ENGINEERS PUBLIC SERVICE COMPANY

Post-War Potentialities

IRA HAUPT & CO.

Members New York Stock Exchange
Members New York Cotton Exchange
Member New York Curb Exchange (Associate)
Members of Commodities Exchange, Inc.
Members Chicago Board of Trade

111 Broadway
New York 6, N. Y.

10 Post Office Square
Boston 9, Mass.

ENGINEERS PUBLIC SERVICE COMPANY

Postwar Potentialities

Based upon our estimate of earning power of Virginia Electric & Power Company, we believe the common stock of Engineers Public Service Company should work out to a value of between $24 and $38 a share.

In compliance with Securities and Exchange divestment orders (although still contested by the company) it is expected that Engineers Public Service Company will eventually wind up with Virginia Electric & Power Company as its sole underlying subsidiary.

For all practical purposes, the value of Engineers Public Service Company depends entirely upon the value of Virginia Electric & Power Company.

We estimate that the postwar earnings of Virginia Electric & Power Company will be in the neighborhood of $1.65 per share. In our opinion, these earnings justify a market value of between $16 and $24 a share. This results in a potential value of Engineers Public Service Company common of between 24-38.

Preferred Stockholders' Exhibit No. 26-A (Cont'd)

Elimination of Preferred

The chief subsidiaries of Engineers Public Service Company are the Gulf States Utilities Company, Virginia Electric & Power Company, El Paso Electric Company and Western Public Service Company. The Parent Company has been ordered by the Securities and Exchange Commission to divest itself of everything except Gulf States Utilities or Virginia Electric & Power Company. This order has been contested by the Company and carried to the Supreme Court where it is now awaiting a decision. In its preliminary annual report for 1944, Engineers Public Service stated as follows:

"If the outcome of the present litigation involving Section 11(b)(1) shall make it necessary or desirable to do so, it is hoped that it will be possible to develop a plan under Section 11(e) which will meet with the approval of the SEC under which Engineers' interest in Gulf States Utilities Company and El Paso Electric Company (Texas) would be distributed to its security holders through liquidating holding companies, the preferred stocks of which would be distributed to the preferred stockholders of Engineers and the common stocks of which would be distributed to the common stockholders of Engineers. The net income of such liquidating holding companies would be used exclusively for payment of preferred dividends and retirement of their preferred stock at $100 per share and accrued dividends. The two remaining smaller properties would be disposed of by sales when such sales could be made on an advantageous basis and the proceeds from such sales would be devoted to the retirement of the preferred stock of the liquidating holding companies. When the preferred stocks of such holding companies had been entirely retired, the common stock of their subsidiaries would be distributed pro rata in liquidation to their common stockholders. Upon establishment of such liquidating holding companies the mutual service

Preferred Stockholders' Exhibit No. 26-A (Cont'd)

company, located in New York, would be dissolved. Engineers, as the parent of Virginia Electric & Power Company alone, would also proceed to liquidate in the same manner as proposed for the liquidating holding companies over Gulf States Utilities Company and El Paso Electric Company when the tax advantages of retaining such relationship were deemed no longer of present or prospective value''.

There is no way of telling whether this plan will be allowed. However, since the SEC wants Engineers to dispose of all its assets except one subsidiary, let us assume that Engineers is forced to liquidate everything but Virginia Electric & Power Company and see what valuation emerges. An estimate of values to be expected in liquidation follows:

ESTIMATE OF PROBABLE PRICE

	Low	Medium	High
El Paso Electric	$ 5,000,000	$ 6,000,000	$ 7,000,000
Western Public Service	1,000,000	1,500,000	2,000,000
Net Current Assets	7,000,000	7,500,000	8,000,000
Gulf States Utilities Common	20,000,000	25,000,000	30,000,000
	$33,000,000	$40,000,000	$47,000,000

As of December 31, 1944, Engineers Public Service Company had $39,245,500 Par Value of Preferred stock outstanding. About $3,500,000 more would be required if the Company were compelled to pay the call prices for the preferreds. However, it seems unlikely that the company will have to pay the call prices, but even if it is required to do so, our estimate of a medium valuation of $40,000,000 for assets other than Virginia Electric & Power Company, plus the $3,387,000 received from sale of Savannah Electric & Power Company in February 1945, should cover the preferred stock.

On this basis, it is clear that the value of the common stock of Engineers Public Service Company assuming retirement of the preferreds through sale of other assets, depends entirely on the value of Virginia Electric & Power

common. Presented, therefore, is an analysis of the factors upon which we base our estimate of the probable value of Virginia Electric & Power Company.

VIRGINIA ELECTRIC & POWER COMPANY

This company, a merger of Virginia Electric & Power Company and Virginia Public Service Company, forms a well diversified integrated operating company. It services 990 communities and adjacent rural areas, primarily in Virginia, and also sections of North Carolina and West Virginia. Population served is estimated at 1,694,000. The metropolitan area outside of Washington, D. C. is served by the Company, also Richmond, Virginia, Newport News, Norfolk, Portsmouth and Petersburg, and numerous other cities and towns. Its lines connect with those of Appalachian Electric Power Company, Carolina Power & Light Company and Potomac Electric Power Company.

Traction Property Sales

In December 1944 and March 1945, Virginia Electric & Power Company disposed of all of its transportation properties for approximately $4,520,200. The balance sheets of Virginia Electric & Power Company and Virginia Public Service Company for 1943 indicated that the transportation properties sold had a book value of about $17,200,000, less substantial reserves. It is apparent, therefore, that a very considerable tax loss will be available to the Company, as a result of these sales.

Capitalization and Surplus

Capitalization of the merged Company consisted, on December 31, 1944, of $63,500,000 of bonds and $13,850,000 of notes payable 1945-54, a total debt of $77,350,000. However, the company expects to offer $59,000,000 1st and Refunding bonds due 3/1/75 to refund all of its bonds, now consisting

Preferred Stockholders' Exhibit No. 26-A (Cont'd)

of $37,500,000 1st and Refunding 3½s of 1968, $3,000,000 3⅛s due 1971, and $23,000,000 3s due 4/1/74. Debt will then consist of $59,000,000 of 1st and Refunding bonds and $12,715,000 Serial Notes or a total of $71,715,000 and debt reduction will total $5,635,000. Five Percent Preferred stock was outstanding at the close of 1944 at $28,949,100 and common stock $13,546,777. On a pro forma basis, earned surplus was $6,819,861, but dividends from this account are restricted to earnings subsequent to September 30, 1943, after deducting the sum of $55,000 per month for the first thirty-seven months after September 30, 1943, and $75,000 per month for ten years after the merger shall have been completed. Thus, until October 30, 1946, earnings of $1,560,000 per year are restricted and after October 30, 1946, this restriction is $900,000 per year until June 1954. However, these restrictions are not too serious, being $0.53 per share of Virginia Electric common until October 30, 1946, and then only $0.30 per share until May 1954.

The deductions from income to eliminate writeups to be charged off over a fifteen year period amount to $693,168 per year, and are being shown as a deduction on the income statement.

Plant and Property

The company carries its properties at $136,196,209, of which $11,237,468 are Utility Plant acquisition adjustments. Reserves for depreciation were $17,424,960, leaving a net plant figure of $118,771,249.

Rate Base and Rate of Return

Before the war, most electric utilities were permitted in most states to earn 6% on the rate base after all operating expenses, taxes and depreciation. The sudden sharp increase in income taxes and excess profits taxes has confused this whole formula and some utilities are earning less than 5% after taxes.

Preferred Stockholders' Exhibit No. 26-A (Cont'd)

To arrive at an estimated rate base net working capital equal to about $7,000,000 would seem a fair estimate for inclusion in the rate base, making the estimated net property value for rate making purposes approximately $125,000,000.

If the Commission uses the net property basis as a rate base, our estimate of postwar earnings of $8,600,000 after Income Taxes estimated at 40% would be 7.2%.

The difficulty in arriving at an appraisal of the earning power of the gas and electric properties only of Virginia Electric & Power Company and Virginia Public Service Company is due not only to the fact that both were operated separately until last May (1944) but also because each had transportation properties which have all been sold recently. Separate figures are still not available in detail for past years, but fortunately the company published a breakdown of revenues by classes of business and a segregation of operating expenses in the prospectus covering the preferred stock issued in May 1944; (pages 24 and 25). Taxes and depreciation were not segregated by departments. However, we have used the company's figures to arrive at an estimate of earning power.

We feel that a company has little reason to complain about taxes unless the Company is earning less than 6% on its property value after *all* taxes. The problem today is to try to arrive at some estimate of postwar earning power that seems reasonably realistic and then to appraise the effect of a 40% tax on net income as estimated.

Earnings After Traction Sales.

Income figures pertaining to 1944 earnings show gross revenues of $39,372,508, and operating expenses, maintenance and depreciation totaling $19,800,916, leaving a balance of $19,571,592 for taxes. After $11,108,938 for taxes, gross income was $8,417,293. After allowing $2,400,000 for fixed charges and $693,168 for amortization of plant acquisition adjustments, net income was $5,324,125. Deducting

Preferred Stockholders' Exhibit No. 26-A (Cont'd)

$1,447,455 for Preferred dividends, there remained $3,876,670 for the 2,938,455 shares of Common, equal to $1.30 per share. However, in its 1944 report, the company added back into net income $609,949 as a reduction in Excess Profits Taxes resulting from the amortization of emergency facilities. This increased net income to $4,486,619, equal to $1.52 per share.

In our estimate of electric and gas earnings for past years as shown in the tabulation, we have estimated depreciation at 10% of gross and local taxes at 8% of gross. Checks we have made have led us to believe that these percentages are not far out of line, although they are presented only as estimates. We have followed this table with a breakdown of electric sales by divisions so as to indicate where the greatest growth has occurred. We look for domestic sales in this area to hold up extremely well after the war—even better than commercial sales, which may decline 10 to 20% because in this particular company this classification has included many war industries. Wholesale power sales will show a substantial drop because of the presence in this area of a few large plants which are particularly active in wartime only, such as shipyards, etc. Accordingly, we expect this company's business to drop from the 1944 gross revenue level reported of $39,372,508 to around $32,500,000. However, this loss should be offset by reduced taxes. In 1944 Gross Income after all taxes was only $8,417,293, and we estimate that when income taxes are 40% and excess profits taxes are eliminated, this company should earn $9,350,000 after all taxes, but before $693,168 amortization of plant acquisition adjustments and $8,600,000 if such amortization is deducted as an operating expense.

If we assume that operating expenses and maintenance are about 41% of gross, as they were in recent years, they would be $13,325,000. Depreciation is estimated at $3,000,000 and taxes other than Income Taxes at $2,750,000. Income taxes at 40% would be $4,172,000 and amortization of Plant acquisition adjustments would be $693,168.

Pro Forma Statement of Income Eliminating Traction & Bus Earnings

	1944	1943	1942	1941	1940	1939
Total Electric Gross Revenues	$36,159,474	$33,360,345	$30,356,053	$27,323,897	$23,754,357	$21,751,707
Total Gas Gross Revenues	2,516,815	2,296,219	1,956,164	1,623,265	1,436,662	1,294,887
Total Estimated Gross Revenues	$38,676,289	$35,656,564	$32,312,217	$28,947,162	$25,191,019	$23,046,954
Total Operating Expenses & Maint.	$17,091,404	$15,114,612	$13,310,646	$11,473,496	$ 9,792,883	$ 9,086,493
Gross Income Before Depreciation and Taxes	21,584,885	20,541,952	19,001,571	17,473,666	15,398,136	13,960,101
Percent of Gross Revenues	56.0%	57.6%	59.0%	60.4%	61.1%	61.0%
*Depreciation	2,709,512	3,565,656	3,231,222	2,894,716	2,519,102	2,304,659
**Gross Income After Operating Expenses, Maintenance and Depreciation	18,875,373	16,976,296	15,770,349	14,578,950	12,879,034	11,655,442
Estimated Taxes other than Income and excess profits taxes	3,292,193	2,748,640	2,484,640	2,201,200	1,901,680	1,741,320
Gross Income Before Income & Excess Profits Taxes	$15,583,180	$14,227,656	$13,285,709	$12,377,750	$10,977,354	$ 9,914,122

* Depreciation is actual as reported for 1944. For prior years the depreciation figures are not available so we have arbitrarily assumed 10% of Gross.

** Our estimate of postwar gross income before income taxes is $15,481,000 the 1st year after excess profits are removed.

Combined Statement of Revenues
Electric & Gas Departments Only
Virginia Electric & Power Co. and Virginia Public Service Co.

Sales of Electric Energy

	1944	1943	1942	1941	1940	1939
Residential and rural	$13,418,484	$12,741,744	$11,876,364	$10,813,621	$ 9,740,473	$ 9,016,083
Commercial	11,737,683	10,431,366	9,217,272	8,236,958	7,163,762	6,515,776
Industrial	7,561,480	7,309,902	6,972,530	5,863,667	4,939,476	4,527,034
Other sales of electric energy	3,256,083	2,652,234	2,052,367	2,182,481	1,704,198	1,498,204
Total sales of electric energy	$35,973,730	$33,135,246	$30,118,533	$27,096,727	$23,547,909	$21,557,097
Other electric revenues	185,744	225,099	237,520	227,170	206,448	194,610
Total Electric	$36,159,474	$33,360,345	$30,356,053	$27,323,897	$23,754,357	$21,751,707

Sales of Gas

Residential	$ 1,923,599	$ 1,757,587	$ 1,507,396	$ 1,266,886	$ 1,150,672	$ 1,058,675
Commercial and industrial	590,887	535,277	446,329	354,329	284,063	235,352
Total	$ 2,514,486	$ 2,292,864	$ 1,953,725	$ 1,621,215	$ 1,434,735	$ 1,294,027
Other gas revenues	2,329	3,355	2,439	2,050	1,927	860
Total Gas Sales	$ 2,516,815	$ 2,296,219	$ 1,956,164	$ 1,623,265	$ 1,436,662	$ 1,294,887

Preferred Stockholders' Exhibit No. 26-A (Cont'd)

Earnings for Common

Gross income on this basis would be $8,600,000 or 7.15% on the $120,000,000 estimated rate base, even after 40% Income Taxes, while fixed charges of $2,300,000 would leave net income at $6,300,000. Preferred dividends of $1,447,455 are deducted, leaving $4,853,545 for the common, or $1.65 per share.

There are 1.533 shares of Virginia Electric & Power common for each common share of Engineers Public Service. Thus earnings of $1.65 would be equivalent to $2.53 per share on Engineers Public Service common. However, the above earnings make no allowances for expenses and taxes of Engineers Public Service Company. These are estimated at $500,000 per year which would reduce our estimate to $4,352,545 of earning power, or $1.48 per share of Virginia Electric and $2.27 per share for Engineers Public Service common.

Because of the huge amount of excess profits taxes being paid by this Company, some people emphasize the cushion this provides against a decline in earnings. This is true only as long as there are excess profits taxes. We expect these taxes to be repealed, at least for utilities, when the war with Japan ends. The "cushion" will then no longer exist.

Conclusion:

The equity of the common stock will be gradually improved through the elimination of $10,396,966 of intangibles being written off at the rate of $693,168 per year for fifteen years and the maturity of $11,684,979 of notes due 1945-54. The company does not face any maturity problems for many years, since its notes can be retired by use of depreciation cash from income. Therefore, the situation is one that should get stronger year by year.

Virginia Electric & Power Co. is a high grade operating company and its common stock is worth 15 times earnings. We estimate postwar earning power of $1.65 per share,

Preferred Stockholders' Exhibit No. 26-A (Cont'd)

which at 15 times earnings would give a value of $24.75 per share of common equivalent to $38.00 per share of Engineers Public Service common. Debt is being reduced almost six million dollars through sale of traction and bus properties and the consequent tax loss of about $15,000,000 on these properties will further add to cash through reduced tax payments.

Our estimate of $24.75 per share of common of Virginia Electric may seem high, but even if ten times earnings is used, the resulting $16.50 of Virginia Electric & Power earnings share, makes Engineers Public Service Company common worth $24.00 per share.

Until Engineers Public Service is able to eliminate its preferred stock, the position of its common stock will be somewhat uncertain. Nevertheless, the whole system is getting better year by year and the intrinsic value of its subsidiaries should be maintained and gradually improved. Therefore, even though dissolution of the system should be delayed until after the war, the true value of Engineers Common should hold and gradually improve.

All of this report is based on the assumption that Engineers Public Service Co. disposes of all properties except Virginia Electric & Power and is able to retire its preferred stock with the proceeds of the sale or exchange of the other subsidiaries. If the liquidating holding company plan described on the fourth page of this study should be adopted, an entirely different set of values for Engineers Public Service common would emerge.

April, 1945.

The information contained herein is obtained from sources considered reliable, but the accuracy thereof is not guaranteed by us. This information is not intended to, and should not be relied upon, as comprising a complete report or analysis.

Preferred Stockholders' Exhibit No. 26-B.

Office Memorandum

CARL M. LOEB, RHOADES & Co.
61 Broadway New York

May 14, 1945

An Appraisal of
ENGINEERS PUBLIC SERVICE

We have recommended Engineers Public Service repeatedly since early 1944. In connection with its sharp advance during the last few weeks we have received many inquiries as to the ultimate breakup value of the company's assets. The following memorandum has been prepared in response to these requests.

At the present price of 23, Engineer's common has lost much of its immediate speculative appeal but we still consider it an attractive long-term investment for gradual appreciation.

CARL M. LOEB, RHOADES & Co.
61 Broadway New York

Office Memorandum

May 1945

An Appraisal of

ENGINEERS PUBLIC SERVICE

Capitalization:

Preferred Stock, $100 par	392,450 shares
Common Stock	1,910,000 "

Conclusion

Engineers Public Service common, reporting consolidated net income of $2.50 per share, is currently selling at 23. While no dividends are being distributed, retention of

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

earnings is building up the equity of the common stockholder. During the past few years many steps have been taken to clean up the structure of the holding company and at the present time all subsidiaries appear to be in excellent financial position.

In the table below we assume sale or disposal of all holdings of the company except Virginia Electric & Power and retirement of all outstanding preferred shares of Engineers. According to our estimates, Engineers Public Service common stock is valued at $32.80 per share, of which $30 represents the investment in Virginia and $2.80 represents the excess value of the other holdings over and above the amount needed to retire the preferred issues.

	Estimated Breakup Value	Per Share Common
Parent Company working capital, Dec. 31, 1944	$ 3,748,000	
Proposed sale of Savannah Electric Power	3,387,000	
Proposed sale of Missouri Service & North Kansas Power	850,000	
Special dividend of El Paso Electric	900,000	
Adjusted Working Capital	$10,885,000	
Gulf States Utilities	$26,000,000	
El Paso Electric	7,100,000	
Western Public Service	650,000	
Total Properties except Virginia Elec. & Power	$44,635,000	
Less Preferred Stock at par	39,245,000	
	$ 5,390,000	$ 2.80
Virginia Electric Power	57,300,000	30.00
Total Value Engineers Public Service Common	$62,690,000	$32.80

General

Engineers Public Service Co. is one of the few utility holding companies with a relatively simple capitalization. No parent company debt, no intermediate holding companies and no system writeups complicate the structure.

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

Properties consist of three major utility operating companies and four minor utility enterprises. All of these subsidiaries are in good financial position and could be readily sold or distributed to the public without recourse to time-consuming intermediate steps.

Although dissolution proceedings should be a relatively simple process, Engineers Public Service has been fighting the order of divestment originally issued by the SEC on October 6, 1942. The SEC at that time ordered Engineers to divest itself within one year of all its properties except Virginia Electric & Power and to cause that company to dispose of its gas and transportation facilities. Engineers in reply filed an appeal with the U. S. Court of Appeals for the District of Columbia for a review of this order. On November 22, 1943, the court set aside the order and remanded the case to the SEC for further consideration. The court did not find that the divestment order of the SEC was unconstitutional, but it held that Engineers should have more time to determine whether it desires to retain Virginia Electric & Power or Gulf States Utilities as its single integrated property, and that there was no basis in the Public Utility Holding Company Act of 1935 for the order demanding divestment of the transportation properties of Virginia Electric & Power. The court at the same time upheld the constitutional validity of Section 11 (b)(1) of the Public Utility Holding Company Act (providing for a single integrated system). Both the SEC and Engineers appealed the decision of the court to the Supreme Court and writs of certiorari were granted on June 5, 1944. No date has yet been set for a hearing and it is understood that the self-disqualification of four Justices will make it impossible to decide this case because of the lack of a quorum.

It had been previously officially announced that the Supreme Court, for the same reason, would be unable to pass on the North American Co. case involving a test of the so-called "Death Sentence". The Justice Department has

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

urged Congress to reduce the quorum of the Supreme Court from 6 to 5 Justices in order to permit disposal of these cases, but Congress has shown favor towards a bill to make Circuit Court decisions final when the Supreme Court is unable to act for lack of a qualified quorum. In what manner the controversial matter of disintegration will finally be resolved cannot be foretold, but it is significant that Engineers, in its annual report for 1944, outlined a plan for future disintegration if the present litigation should make such action necessary or desirable.

The Management's Plan of Liquidation

According to this tentative proposal three liquidating holding companies would be formed around El Paso Electric Company, Gulf States Utilities Co. and Engineers Public Service Company proper, which at that time would own only the equity of Virginia Electric & Power Company. The preferred stock of Engineers would be exchanged for preferred stocks of the three liquidating companies, while the common stock of Engineers would receive the common stocks of the new companies. All net income of the liquidating companies would be used exclusively for payment of preferred dividends and for retirement of their preferred stock at $100 per share. The remaining smaller properties would be sold and proceeds used to retire preferred stock.

While the company has described its intention to comply, if necessary, with Section 11(b)(1) of the Utility Holding Company Act through the vehicle of these liquidating holding companies, the SEC has not yet passed on this very slow and protracted method of dissolution, and we believe that objections might well be raised against it by the SEC as well as by stockholders.

As shown in our detailed discussion below, the purchaser of Engineers Public Service common at its present price of 23 is in effect acquiring well-run public utility operating companies at a 30% discount from prices paid for similar

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

stocks owned directly by the public. We do not know how or when the litigation over disintegration will be settled, nor is it possible to estimate the time which will be required to formulate and carry through a reasonable plan of liquidation if and when the courts finally uphold the SEC. However, we feel that public utility stocks are basically attractive and are likely to advance over a period of time. A higher general valuation for the securities of the industry should be reflected in the price of Engineers common stock and should be magnified by the leverage factor introduced by the preferred issues of the system. In addition, as time passes and breakup prospects become more immediate, the 30% discount should be gradually reduced and ultimately eliminated.

The Operating Subsidiaries

In the appendix we have prepared a detailed comparison of Virginia Electric & Power and Gulf States Utilities with 6 operating utilities having a ready market. In this table we show most of the figures and ratios which are of importance in evaluating utility issues.

The comparison in the appendix was prepared with the intention of making the income reports of the various companies as uniform as possible in order to make valuation of Virginia Electric & Power and Gulf States Utilities more precise. Thus adjustments were made for all recent refinancing operations which substantially reduced fixed charges after making allowances for tax offsets. Earnings were stated before and after current charges for amortization of intangibles without regard to the fact that some companies reported them as a deduction from profit and loss while others made direct charges to surplus. Similarly we made adjustments for all non-recurring tax savings and other non-recurring items as explained in the footnotes to the appendix.

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

We believe that this comparison lends support to our appraisals, which are used in figuring breakup values.

Virginia Electric & Power Co. This company is engaged in the business of generating and distributing electricity in an area in Virginia, northeastern North Carolina and central West Virginia, comprising about 29,200 square miles. The population serviced is estimated at 1,694,000. The largest cities are Richmond, Norfolk, Portsmouth, Newport News and Alexandria, Virginia. Gas is sold in a smaller territory with a population of 356,000.

On May 26, 1944, the company acquired by merger the business and properties of Virginia Public Service, a subsidiary of General Gas & Electric in the Associated Gas & Electric system. Total consideration paid for this acquisition in bonds, preferred stock and cash was $59,554,000. In connection with this merger a general refunding operation of outstanding bonds and preferred stock of Virginia Electric & Power was undertaken. On December 29, 1944, the company sold all of its transportation properties in Richmond, Norfolk and South Norfolk, Virginia, for $3,228,000 in cash. The remaining transportation properties of the company were sold on March 31, 1945, for $1,292,000. The total effect of the sale of transportation properties is to reduce the pro-forma earnings of Virginia Electric & Power for the year 1944 by $319,000. A new refunding plan involving all of the outstanding mortgage bonds of Virginia Electric & Power has just been completed and a $59,000,000 2¾% 1st Mortgage issue has been placed on the market.

Classification of Revenues—The growth of the company's business over the past five years and the classification of revenues is shown in the table below:

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

	Residential and Rural.	Commercial	Industrial (—000 omitted)	Other	Total
1944					
Virginia Elec. & Pr.	$13,418	$11,738	$ 7,561	$ 3,256	$35,973
In % of Total:					
Virginia Elec. & Pr.	37.3%	32.6%	21.0%	9.1%	100%
All elec. util.	35.8%	24.9%	31.9%	7.4%	100%
1939					
Virginia Elec. & Pr.	$ 9,016	$ 6,516	$ 4,527	$ 1,498	$21,557
In % of Total:					
Virginia Elec. & Pr.	41.9%	30.2%	20.9%	7.0%	100%
All elec. util.	38.7%	28.7%	25.3%	7.3%	100%
1944 Increase over 1939:					
Virginia Elec. & Pr.	49%	80%	67%		66%
All elec. util.	31%	23%	80%		40%

Although the company is serving the shipbuilding centers of Norfolk and Newport News, industrial revenues have not increased disproportionately since 1939 if compared with the sharp rise in industrial revenues of all utilities. Overall revenues have increased more than those of the industry as a whole but the increase has been concentrated in domestic and commercial revenues, where the danger of declining sales after the war is usually regarded as minor.

Earnings—On the following page are shown the proforma earnings of Virginia Electric & Power for the year 1944, giving effect to the earnings of Virginia Public Service from January 1, 1944 to May 25, 1944, prior to the merger, sale of transportation properties and both refunding operations.

Operating Revenues		$39,372,508
Operating Expenses	$14,806,805	
Maintenance	2,284,599	
Depreciation	2,709,512	
Federal income and excess profits taxes, excluding reductions from refunding operations and other non-recurring charges	7,816,745	
Taxes—Other	3,292,193	
Net Operating Revenues		$ 8,462,654
Other income		45,361 (loss)
Balance		$ 8,417,293

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

Interest and amortization of debt discount	2,409,075
Amortization of plant adjustment	693,168
Net income	$ 5,315,050
Reduction in federal excess profits taxes resulting from the amortization of facilities allowable as emergency facilities under the Internal Revenue Code, which facilities are expected to be employed throughout their normal life and not to replace existing facilities	609,949
Balance	$ 5,924,999
Preferred dividend requirements	1,447,355
Balance for common stock and surplus	$ 4,477,644

We believe that reduction in federal excess profits taxes, amounting to $610,000, which results from the amortization of emergency facilities over five years is an item which should not be added back to earnings as was done above in line with the procedure followed by the company. While it is true that these facilities will be used over a period far longer than five years, it does not seem conservative to show the rate of depreciation at 2½% in the report to stockholders, while claiming a depreciation rate of 20% for tax purposes and showing the resulting tax savings of approximately 85% of the sum involved as accruing directly to earnings. Under these circumstances we feel that the pro-forma common stock earnings of the company are more properly stated at $3,868,000. At the same time, however, it must be realized that in addition to these earnings and depreciation the company derives the following cash inflow deducted directly from the profit and loss account:

Amortization of plant acquisition adjustments (Account 100.5)	$ 693,000
Reduction of federal taxes due to amortization of emergency facilities	610,000
Amortization of debt discount	400,000 (approx.)
Total	$1,703,000

It is also important to state that the company has to restrict $900,000 of earnings per year for five years begin-

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

ning May 1944 in surplus as not available for payment of dividends. This item, however, is in large part counterbalanced by the $610,000 of current tax savings which for this purpose are regarded as a part of net income.

Discussion of past earnings is made rather difficult by corporate developments such as the merger, sale of transportation properties, refinancing and the effect of these developments on taxes. The following table attempts to eliminate the distorting influence of these factors:

Combined Figures

VIRGINIA ELECTRIC & POWER AND VIRGINIA PUBLIC SERVICE

	1944 Pro-forma	1943	1942	1941	1940
		(—000 omitted)			
Net Income as reported		$5,764	$4,647	$5,231	$5,402
Less pfd. dividends at present rate		1,447	1,447	1,447	1,447
Net for Common		4,317	3,200	3,784	3,955
Less difference between present charge of $693,000 for amortization of Account 100.5 and actual charge under this heading in former years		352	693	693	693
		$3,965	$2,507	$3,091	$3,262
Add 20% to 75% of interest savings*		180	239	1,100	1,115
		$4,145	$2,746	$4,191	$4,377
Less $300,000 Transportation Profit		300	300	300	300
Net for Common after all adjustments	$3,868	$3,845	$2,446	$3,891	$4,077

* Interest savings resulting from refunding operations are assumed to have been absorbed by higher taxes to the extent of 80% in 1942 and 1943 and to the extent of 25% in 1940 and 1941.

Reading the adjusted earnings figures in conjunction with the previous table showing the sharp increase of gross revenues, it becomes immediately apparent that the rise in revenues has not directly benefited the earnings applicable

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

to the common stock but has been largely offset by higher taxes.

Capitalization and Plant Account—The pro-forma capital structure and the Plant Accounts of Virginia Electric & Power giving effect to the recent refunding operation are shown below:

Mortgage Bonds—2¾%		$59,000,000	50.4%
Serial Notes 1945-54		11,580,000	9.9%
4.4% Preferred Stock ($100 par)		28,491,000	24.4%
Common Stock		13,546,000	11.6%
Surplus	$7,851,000		
Less Debt Discount	3,620,000	4,231,000	3.7%

	Plant	Reserve (—000 omitted)	Net Plant	Depreciation and Reserve % of Gross Plant
Electric Utility Plant*	$113,832			
Other Utility Plant	9,397			
	$123,229	$17,425	$105,804	14.2%
Plant Acquisition Account	11,237	1,875	9,362	16.7%
	$134,466	$19,300	$115,166	

* Original cost.

The company is amortizing plant acquisition (Account 100.5) over 15 years at the rate of $693,168 per annum out of income. This deduction is regarded as an expense for rate making purposes but not for computing federal income taxes.

While the capitalization ratios are not favorable at present, payment of the serial bonds over a period of nine years is provided for. Moreover, it is interesting to note that by utilizing income at the 1944 pro-forma level, after paying dividends on the common stock (at the 1944 rate of $2,589,000) and by using cash inflow derived from amortization of intangibles, tax savings from depreciation of emergency facilities, and amortization of debt discount for the reduction of debt, the equity could be lifted from 15% to nearly 20% of total capitalization within two years.

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

No trouble has been encountered with state regulatory bodies in over 20 years and thus no capital base for rate making purposes has been established. However, the company has been voluntarily reducing rates over a long period of time and current average residential rates of 3.59¢ per kwh. and a return of 6.6% on capitalization have to be regarded as reasonable.

All factors considered and paying particular attention to the comparison in the appendix, we believe that we are conservative in capitalizing the revised earnings figure of $3,868,000 at 15 times to arrive at a valuation of $57,300,000 for Virginia Electric & Power. In this connection it is important to repeat that these earnings of $3,868,000 do not include deductions of $1,700,000 which are debits to the income account but are not cash expenditure.

Gulf States Utilities. This company is an electric utility and to a much smaller extent a gas, water and ice company, operating in an area of southeastern Texas and south central Louisiana. The area serviced has a population of 550,000 and extends over 27,500 square miles. The largest cities in this territory are Beaumont, Port Arthur and Orange, Texas, and Baton Rouge and Lake Charles, Louisiana. Production and refining of oil is the major industry in this section and approximately 19% of the company's operating revenues are derived from the sale of electricity to the oil industry.

In September 1944, Gulf States refunded $10,000,000 of 5½% and 6% preferred stock with a $12,000,000 4.4% preferred issue.

Earnings—The table below shows the reported earnings of the company for the last six years before and after certain adjustments:

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

	1944	1943	1942	1941	1940	1939
			(—000 omitted)			
Gross Revenues	$17,464	$15,398	$12,572	$11,836	$10,733	$10,369
Depreciation	1,520	1,460	1,602	1,552	1,457	1,411
Maintenance	900	753	n.a.	n.a.	n.a.	n.a.
Federal Income & E. P. Taxes	4,162	3,274	2,005	1,508	681	178
Amortization of Plant Acquisition Account	194	194	.....	.....	.....	.....
Net Operating Revenues	$ 3,403	$ 3,455	$ 3,065	$ 3,245	$ 3,689	$ 4,067
Interest	989	1,021	1,026	1,041	1,076	1,274
Amortiz. of Debt Discount	163	204	204	204	204	159
Net Income as reported	2,235*	2,124*	1,772	2,021	2,426	2,638
Current Preferred Dividend Requirements	528	528	528	528	528	528
Net for Common	1,707	1,596	1,244	1,493	1,898	2,110
Add Adjustments for Debt Discount	163	204	204	204	204	159
	$ 1,870	$ 1,800	$ 1,448	$ 1,697	$ 2,102	$ 2,269
Less Adjust. for Amortiz. of Plant Acquisition Acct. not charged prior to 1943	.....	.....	194	194	194	194
Net for Common, adjusted	$ 1,870	$ 1,800	$ 1,254	$ 1,503	$ 1,908	$ 2,075

* Excluding tax savings of $523,000 in 1944 and $85,000 in 1943 as discussed below.

In connection with the refinancing operation of last September, the debt discount was eliminated and for comparative purposes we thought it advisable to restate earnings for past years eliminating this change. At the same time we adjusted earnings prior to 1943 for the annual deduction of $194,000 for amortization of plant acquisition account, which will continue through 1957. The reported income statements for 1944 and 1943 show a reduction of federal excess profits tax resulting from amortization of defense facilities amounting to $523,000 and $85,000 respectively as a direct credit to income. For the same

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

reasons as outlined under Virginia Electric & Power we do not believe that this is a justifiable accounting treatment and have therefore not considered this item as income.

Distribution of Revenues—Distribution of electric revenues and their growth since 1939 is shown in the table below:

	1944		1939		1944 Increase over 1939
Residential	$ 4,156,000	25.9%	$2,929,000	31.2%	42%
Commercial	3,033,000	18.9%	2,314,000	24.6%	31%
Industrial & Other	8,846,000	55.2%	4,149,000	44.2%	112%
	$16,035,000		$9,392,000		71%

While the growth of electric revenues has been far greater than for the industry as a whole, we see that operating and net income have remained quite stationary, and taxes have risen very sharply preventing higher earnings. The extremely high taxes should be an important consideration in appraising the sharp rise in gross sales, and the heavy concentration on the industrial revenues.

Capitalization and Plant Account—The capitalization ratios of Gulf States correspond almost exactly to 50% for bonds, 25% for preferred stock, and 25% for common stock, which the SEC considers as standard for utility operating companies.

Bonds	$27,300,000	52.4%
Preferred stock	12,000,000	23.0%
Common stock	11,101,000	21.3%
Surplus	1,738,000	3.3%

Plant account and reserves at December 31, 1944:

	Plant	Dep. Reserve	Net Plant	Dep. Reserve % of Gross Plant
Electric Plant*	$56,037,000			
Other Utility Plant	4,357,000			
	$60,394,000	$11,126,000	$49,268,000	18.4%
Plant Acquisition Acct.	3,230,000	711,000	2,519,000	22.0%
	$63,624,000	$11,837,000	$51,787,000	18.6%

* Original cost.

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

Plant acquisition adjustments (Account 100.5) are being amortized over a period of 15 years at the annual rate of $193,810 out of current income. Under these conditions all capitalization ratios and book figures are in line with current demands of the regulatory bodies. No disagreements with the state commission in Louisiana or municipal authorities in Texas have been encounted and the average residential rate of 3.7¢ per kwh. and 6.6% return on capitalization are moderate.

In evaluating Gulf States Utilities we have to weigh the sharp wartime gain in revenues partly offset by the heavy tax burden against the sound capital structure. In capitalizing earnings of $1,870,000, it must be borne in mind that this figure is after sharp downward adjustments and a deduction of over $700,000 in debits to the income account which do not represent cash expenditures. Applying a price-earnings ratio of 14, which results in a valuation of Gulf States Utilities of $26,000,000, is therefore, in our opinion, a conservative appraisal.

El Paso Electric Company of Texas. El Paso Electric is engaged in generating and distributing electric power in El Paso and in an area of Texas extending 100 miles northwest of El Paso to New Mexico. The population of the area served is estimated at 168,000.

In December 1943 the transportation and bridge properties owned by the company were sold. In December 1944 El Paso Electric of Delaware, an intermediate holding company controlling El Paso Electric of Texas, was dissolved since it served no useful purpose. El Paso Electric therefore is now directly owned by Engineers.

At the end of 1944 the company's current assets of $3,902,000 compared with current liabilities of $1,360,000, leaving working capital of $2,542,000. This excessive working capital arose largely from sale of property, and early in 1945 permission was obtained to pay a special dividend of $900,000 to Engineers. It is contemplated to use

Preferred Stockholders' Exhibit No. 26-K (Cont'd)

$600,000 for the installation of new plant capacity thus reducing working capital to $1,000,000.

Capitalization of the company as of December 31, 1944, giving effect to the $900,000 dividend recently paid to Engineers, is shown in the table below:

Debt and Bank Loans	$6,710,000	54.4%
Preferred stock	1,500,000	12.1%
Common and Surplus	4,130,000	33.5%

Earnings during the war period have been quite stable although it should be stated that net profits before 1941 were substantially lower than they are currently. This is indicated in the following table:

	Operating Revenues	Income Taxes	Balance for Fixed Charges	Net for Common
1944	$3,849,000	$829,000	$931,000	$606,000
1943	3,708,000	752,000	814,000	486,000
1942	4,533,000	901,000	769,000	439,000
1941	4,012,000	460,000	965,000	599,000
1940	3,362,000	107,000	966,000	409,000
1939	3,140,000	59,000	900,000	323,000

It should be further noted that the years prior to 1943 include the profit of the railway and bridge subsidiaries which were sold in 1943. The 1943 and 1944 figures are adjusted to reflect this sale. It is not believed that these operations were very profitable prior to the outbreak of the war.

The distribution of the company's sales is well balanced. Rates are very low, averaging only 3.1¢ per kwh. for residential revenues. On the other hand, depreciation and maintenance at 12.5% of gross revenues seem low in relation to provisions of other utility companies and the return of nearly 7% on capital might cause rate troubles in spite of a rate structure which is well below the national average of 3.5¢ per kwh. for residential customers.

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

All factors considered, we are capitalizing last year's earnings of El Paso Electric at 11 times, arriving at a value of $6,600,000 for the property, and add $500,000 for excess working capital which should be utilized at some time in the future to benefit stockholders. We thus value El Paso at $7,100,000, after allowing for the $900,000 distributed to Engineers early this year.

Other Properties

The remaining properties of Engineers Public Service are quite small and scheduled for sale. A conditional sales contract to dispose of the holding of Savannah Electric & Power preferred and common stocks for $3,387,000 has already been signed by Engineers. Similarly, a contract to sell the investment in Missouri Service Co. and North Kansas Power Co. for a consideration of $850,000 after certain adjustments has been submitted to the SEC. The value of Western Public Service is rather arbitrarily assumed to be 10 times the estimated 1945 income of $65,000, or a total of $650,000.

A. S.

This memorandum is based on sources which we believe are reliable but is not guaranteed by us and is not to be considered all inclusive. It is not to be construed as an offer or the solicitation of an offer to sell or buy the securities herein mentioned.

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

Prices as of April 18, 1945

		Virginia † Elec. & Power	Houston Lighting	Consol. Gas & Elec. Balt. (i)	Central Ill. Elec. (z)	Commonwealth Edison	Public Service of Indiana
Current Market		30(assumed)	80	73	23	31	24
Gross Revenues	1944	$ 39,372,000	$20,041,000	$ 54,048,000	$ 7,866,000	$188,536,000	$ 30,595,000
Operating Profit before Taxes	1944	16,279,000	8,317,000	12,664,000	2,626,000	59,635,000	12,032,000
Operating Ratio		58.7%	58.5%	76.6%	66.6%	68.4%	60.7%
Net for Common	1944	$ 3,868,000(a)(r)	$ 2,568,000	$ 5,040,000(c)(e)	$ 672,000(j)	$ 21,851,000(k)(1)	$ 1,571,000(n)(o)
Excluding Amort. of Intang.	1943	3,845,000(a)	2,441,000	5,151,000(e)(f)	698,000(j)	21,592,000(k)	1,675,000(n)(o)
	1942	2,446,000(a)	2,451,000	4,899,000	655,000(j)	21,308,000(k)	1,528,000(n)(p)
	1941	3,891,000(a)	2,532,000	5,422,000	729,000(j)	25,948,000(k)	2,457,000(n)(o)
	1940	4,077,000(a)	2,537,000	4,976,000	827,000(j)	28,370,000(k)	1,950,000(n)(o)
		-A- -B-			-A- -B-	-A- -B-	-A- -B-
Earned per sh. (A) Excluding	1944	$2.02(a) $2.38	$4.96	$4.32	$1.68 $1.93	$1.72 $1.78	$1.42 $1.93
Amort. of Intangibles)	1943	2.01(a) 2.37	4.71	4.41	1.74 1.99	1.69 1.75	1.51 2.02
Acct. 100.5 (B) Including	1942	1.28(a) 1.64	4.73	4.19	1.64 1.89	1.68 1.74	1.38 1.89
Amort. of Intangibles)	1941	2.05(a) 2.39	4.88	4.64	1.82 2.07	2.04 2.10	2.22 2.73
)	1940	2.13(a) 2.49	4.89	4.26	2.06 2.51	2.23 2.29	1.76 2.27
5-year Average		1.89(a) 2.25(a)	4.83	4.36	1.79 2.04	1.87 1.93	1.66 2.17
Income & E.P.T.	1944	$ 7,817,000(r)	$ 4,209,000	$ 4,462,000(d)	$ 1,279,000	$ 24,990,000	$ 6,725,000
Per Share		$4.09	$8.13	$3.82	$3.19	$1.96	$6.07
% of Net for Common		202%	164%	89%	190%	114%	428%
Maintenance & Deprec. % of Gross Revenue		12.7%	16.1%	14.2%(h)	13.1%	16.4%	14.8%
Capitalization: Debt		$ 70,580,000	$30,000,000	$ 70,400,000	$14,000,000	$319,846,000	$ 67,709,000
Preferred		28,947,000	9,759,000	29,184,000	5,000,000	-	14,818,000
Equity less debt discount		17,777,000	14,573,000	51,648,000	5,724,000	346,017,000	27,865,000
Debt %		60%	55%	47%	62%	48%	62%
Preferred %		25%	18%	19%	13%	-	13%
Equity %		15%	27%	34%	25%	52%	25%
Number of Common Shares		1,910,000 shs.†	518,000 shs.	1,167,000 shs.	400,000 shs.	12,727,000 shs.	1,107,777 shs.
Equity per share		$9.51	$28.15	$44.23	$16.05	$27.25	$25.14
Market % of Equity		322%	284%	165%	143%	114%	96%
Plant Gross		$136,627,000	$64,305,000	$173,970,000	$27,825,000	$749,747,000	$123,356,000
Plant Net		117,526,000	48,731,000	138,420,000	21,256,000	564,631,000	112,716,000
Net Current Assets		2,045,000	6,225,000	11,420,000	702,000	94,944,000	3,495,000
Gas & Power Purchased % of Gross		1.2%	16%	N.A.	9%	5%	11%
Gas Transport, etc. % of Gross		6.5%	-	24.2%	40.1%	10.1%	13.6%
Return on Capital		6.6%(b)	7.6%	5.5%	5.9%	5.5%	4.8%
Average Residential Rates per kwh.		3.59¢	3.01¢	3.8¢(h)	3.63¢	3.77¢(h)	4.37¢
Residential + Farm Revenues %		37%	29%(h)	26% (h)	40%	51% (h)	31%
Commercial Revenues %		33%	16%(h)	24% (h)	21%	) 69% (h)	15%
Industrial and Other Revenues %		30%	55%(h)	50% (h)	39%	)	54%
Paid 1944		$1.36	$3.60	$3.60	$1.30	$1.40	$1.00
Yield		4.54%	4.50%	4.93%	5.65%	4.51%	4.16%
		-A- -B-			-A- -B-	-A- -B-	-A- -B-
Times 1944 Earnings		14.8 12.6	16.1	16.8	13.7 11.9	18.0 17.4	16.9 12.4
Times 5-year Average Earnings		15.8 13.3	16.6	16.7	12.8 11.3	16.6 16.2	14.5 11.1

hibit No. 26-B (Cont'd)

		Virginia † Elec. & Power	Houston Lighting	Consol. Gas & Elec. Balt. (i)	Central Ill. Elec. (z)	Commonwealth Edison	Public Service of Indiana	Indianapolis Pwr. & Lt.	Gulf States Utilities (p)
		30(assumed)	80	73	23	31	24	24	26(assumed)
	1944	$ 39,372,000	$20,041,000	$ 54,048,000	$ 7,866,000	$188,536,000	$ 30,595,000	$18,280,000	$17,484,000
	1944	16,279,000	8,317,000	12,664,000	2,626,000	59,635,000	12,032,000	7,966,000	7,565,000
		58.7%	58.5%	76.6%	66.6%	68.4%	60.7%	56.3%	56.7%
	1944	$ 3,868,000(a)(r)	$ 2,568,000	$ 5,040,000(c)(e)	$ 672,000(j)	$ 21,851,000(k)(1)	$ 1,571,000(n)(o)	$ 1,344,000	$ 1,870,000(s)
	1943	3,845,000(a)	2,441,000	5,151,000(e)(f)	698,000(j)	21,592,000(k)	1,675,000(n)(o)	1,339,000	1,800,000(s)
	1942	2,446,000(a)	2,451,000	4,899,000	655,000(j)	21,308,000(k)	1,528,000(n)(o)	849,000(u)	1,254,000(s)
	1941	3,891,000(a)	2,532,000	5,422,000	729,000(j)	25,948,000(k)	2,457,000(n)(o)	901,000(u)	1,503,000(s)
	1940	4,077,000(a)	2,537,000	4,976,000	827,000(j)	28,370,000(k)	1,950,000(n)(o)	1,557,000(u)	1,908,000(s)
		-A- -B-			-A- -B-	-A- -B-	-A- -B-	-A- -B-	-A- -B-
	1944	$2.02(a) $2.38	$4.96	$4.32	$1.68 $1.93	$1.72 $1.78	$1.42 $1.93	$1.88 $2.18	$1.87 $2.06
	1943	2.01(a) 2.37	4.71	4.41	1.74 1.99	1.69 1.75	1.51 2.02	1.87 2.17	1.80 1.99
	1942	1.28(a) 1.64	4.73	4.19	1.64 1.89	1.68 1.74	1.38 1.89	1.19 1.49	1.25 1.44
	1941	2.05(a) 2.39	4.88	4.64	1.82 2.07	2.04 2.10	2.22 2.73	1.26 1.56	1.50 1.69
	1940	2.13(a) 2.49	4.89	4.26	2.06 2.51	2.23 2.29	1.76 2.27	2.17 2.47	1.91 2.10
erage		1.89(a) 2.25(a)	4.83	4.36	1.79 2.04	1.87 1.93	1.66 2.17	1.67 1.97	1.67 1.86
	1944	$ 7,817,000(r)	$ 4,209,000	$ 4,462,000(d)	$ 1,279,000	$ 24,990,000	$ 6,725,000	$ 4,375,000	$ 4,162,000
		$4.09	$8.13	$3.82	$3.19	$1.96	$6.07	$6.12	$4.16
		202%	164%	89%	190%	114%	428%	326%	222%
oss Revenue		12.7%	16.1%	14.2%(h)	13.1%	16.4%	14.8%	15.4%(t)	13.8%
		$ 70,580,000	$30,000,000	$ 70,400,000	$14,000,000	$319,846,000	$ 67,709,000	$36,480,000	$27,300,000
		28,947,000	9,759,000	29,184,000	5,000,000	-	14,818,000	14,059,000	12,000,000
debt discount		17,777,000	14,573,000	51,648,000	5,724,000	346,017,000	27,865,000	5,237,000	12,859,000
		60%	55%	47%	62%	48%	62%	68%	52%
		25%	18%	19%	13%	-	13%	26%	25%
		15%	27%	34%	25%	52%	25%	6%	25%
		1,910,000 shs.†	518,000 shs.	1,167,000 shs.	400,000 shs.	12,727,000 shs.	1,107,777 shs.	714,835 shs.	1,000,000 shs.(p)
		$9.51	$28.15	$44.23	$16.05	$27.25	$25.14	$4.53	$12.84
		322%	284%	165%	143%	114%	96%	530%	202%
		$136,627,000	$64,305,000	$173,970,000	$27,825,000	$749,747,000	$123,356,000	$62,920,000	$65,743,000
		117,526,000	48,731,000	138,420,000	21,256,000	564,631,000	112,716,000	49,926,000	51,908,000
		2,045,000	6,225,000	11,420,000	702,000	94,944,000	3,495,000	5,242,000	1,791,000
oss		1.2%	16%	N.A.	9%	5%	11%	N.A.	2.1%(h)
s		6.5%	-	24.2%	40.1%	10.1%	13.6%	8.2%	8.3%
		6.6%(b)	7.6%	5.5%	5.9%	5.5%	4.8%	6.7%	6.5%
kwh.		3.59¢	3.01¢	3.8¢(h)	3.63¢	3.77¢(h)	4.37¢	3.39¢	3.7¢
		37%	29%(h)	26% (h)	40%	51% (h)	31%	33%	26%
		33%	16%(h)	24% (h)	21%	) 69% (h)	15%	22%	19%
%		30%	55%(h)	50% (h)	39%	)	54%	45%	55%
		$1.36	$3.60	$3.60	$1.30	$1.40	$1.00	$1.20	$1.20
		4.54%	4.50%	4.93%	5.65%	4.51%	4.16%	5.00%	4.61%
		-A- -B-			-A- -B-	-A- -B-	-A- -B-	-A- -B-	-A- -B-
		14.8 12.6	16.1	16.8	13.7 11.9	18.0 17.4	16.9 12.4	12.7 11.0	13.9 12.6
		15.8 13.3	16.6	16.7	12.8 11.3	16.6 16.2	14.5 11.1	14.4 12.2	15.5 14.0

Preferred Stockholders' Exhibit No. 26-B (Cont'd)

† Number of common shares assumed to be 1,910,000 equal to number of shares of Engineers outstanding. Dividends are equal to those distributed by Virginia to Engineers.

(a) 1944 taken from pro-forma figures. Earlier years taken to adjust for pro-forma fixed charges after deducting 80% of interest savings for taxes in 1943 and 1942, and deducting 25% for taxes in 1941 and 1940. Also, deducting $300,000 in all years for loss of traction earnings, and $693,000 for amortization of Account 100.5.

(b) Deducting $693,000 amortization of Acc. 100.5 from operating revenues.

(c) Reduced by $513,000—a tax reduction due to certain non-recurring items charged to surplus.

(d) Increased by $513,000, item (c) above, and $1,267,000 of tax savings on accelerated depreciation of defense facilities.

(e) Excluding contingency reserves.

(f) Reduced by $516,000, a tax reduction due to certain non-recurring items charged to surplus.

(h) 1943 figures.

(i) $15,894,000 of Account 100.5 not being amortized.

(j) Deducting only $100,000 annual minimum amortization of intangibles. Minimum amortization taken out of surplus is $100,000. 90% of net after div. to be used for amortization of account 100.5. Intangibles are $5,965,000. If intangibles were amortized over 15 years instead of a minimum of $100,000 per year, earnings would be cut in half.

(k) Replacing charge for write-down of intangibles actually taken by $800,000,000 to be charged in future.

(l) The charge of $4,504,000 for intangibles regarded as a tax item since it replaced taxes.

(m) Pro-forma figures on income for all years.

(n) Applying 1944 fixed charges to prior year after deducting 80% of savings in 1942 and 1943, and 25% in 1940 and 1941 as tax increases.

(o) The company now writes off $563,232 amortization of intangibles to surplus. The figures here deduct this figure from income.

(p) Number of common assumed at 1,000,000 shares. Dividends equal to those distributed by Gulf States to Engineers.

(r) Deducting $610,000 tax savings from amortization of defense facilities from income and adding it to taxes.

(s) Adding $204,000 of debt discount for all years and $163,000 for 1944 since debt discount is now written off. Deducting $193,000 for amortization of account 100.5 for 1942 and prior years, and deducting tax savings from amortization of defense facilities 1943 and 1944.

(t) Deducting $216,000 amortization of intangibles charged to depreciation by company since 1943.

(u) After deducting tax savings due to 1940 refunding, and also deducting $216,000 amortization of account 100.5 commenced in 1943.

Preferred Stockholders' Exhibit No. 26-C.

DUFF AND PHELPS

Date July 5, 1945.

Bulletin ENGINEERS PUBLIC SERVICE COMPANY

Refer to
Cross Reference

In view of the excellent progress made by Engineers Public Service Company in the sale or liquidation of a number of its subsidiary companies and the improvement in markets for utility operating company common stocks, a brief reappraisal of this holding company situation appears advisable at this time.

With respect to divestment orders and the disposition of properties, more recent transactions have been as follows:

1—Liquidation of El Paso Electric Company (Delaware) on December 16, 1944, thus bringing El Paso Electric Company's (Texas) common stock directly up to Engineers. A cash contribution of $1,000,000 by Engineers to the Delaware Company enabled that company to pay off its preferred stock.

2—Sales by Virginia Electric and Power Company of all its transportation properties, including the capital stock of Citizens Rapid Transit Corporation. These properties were sold in various pieces and transfer to the purchaser of the final property was completed on March 31, 1945.

3—Sale by Engineers of all securities which it owned of Savannah Electric and Power Company for a cash consideration of $3,387,500, transfer of the securities having been made on April 25, 1945.

4—On March 5, 1945, Engineers entered into a contract for the sale of its entire interest in Mis-

Preferred Stockholders' Exhibit No. 26-C (Cont'd)

souri Service Company and Northern Kansas Power Company for a base price of $750,000, subject to adjustment, with the total consideration not to exceed $850,000. S. E. C. approval of this transaction was obtained on June 4.

As the situation now stands, Engineers has liquidated its investments to the point where it owns only four companies, namely, Virginia Electric and Power Company, Gulf States Utilities Company, El Paso Electric Company (Texas) and The Western Public Service Company. In the case of Virginia, there is a very small minority interest, and in addition to Western's common stock, Engineers also owns practically all of its outstanding debt.

On numerous occasions in the past we have reviewed the status of Engineers with respect to the Holding Company Act, and a detailed discussion here would prove of no useful purpose. In brief, the S. E. C. in 1942 ordered Engineers to divest itself of all its investments, with the exception of that in Virginia Electric and Power Company, which, if retained, was to dispose of its gas and transportation operations. On appeal to the Court of Appeals, Engineers obtained a reversal of this order, and the Court opinion remanding the case to the S. E. C. for further proceedings was covered in detail in our bulletin of December 3, 1943. Grounds for reversal, in our opinion, were largely technical in nature and did not warrant the conclusion that Engineers could ultimately retain more than one single integrated system. In substance, the Court found that the Company was entitled to more time to determine whether Virginia or Gulf States should be retained and that the Commission's interpretation of the act relating to the divestment of the transportation and other incidental businesses was incorrect. Both Engineers and the S. E. C. have applied to the Supreme Court for a review of the lower Court's opinion and the case will be heard on October 8, 1945.

Preferred Stockholders' Exhibit No. 26-C (Cont'd)

Despite the existence of the litigation, Engineers, as noted, has moved along in the liquidation of its investments, including sale of the transportation properties of Virginia, and the most recent announcement of the Company relating to possible further disposition is contained in its 1944 Annual Report. Because the possible plan does indicate the present thought of the management, we are reproducing it here in full.

> "If the outcome of the present litigation involving Section 11(b)(1) shall make it necessary or desirable to do so, it is hoped that it will be possible to develop a plan under Section 11(2) which will meet with the approval of the SEC under which Engineers' interest in Gulf States Utilities Company and El Paso Electric Company (Texas) would be distributed to its security holders through liquidating holding companies, the preferred stocks of which would be distributed to the preferred stockholders of Engineers and the common stocks of which would be distributed to the common stockholders of Engineers. The net income of such liquidating holding companies would be used exclusively for payment of preferred dividends and retirement of their preferred stock at $100 per share and accrued dividends. Any remaining smaller properties not sold, if the plan is allowed to become effective, would be disposed of when sales could be made on an advantageous basis and the proceeds therefrom would be devoted to the retirement of the preferred stock of the liquidating holding companies. When the preferred stocks of such holding companies had been entirely retired, the common stock of their subsidiaries would be distributed pro rata in liquidation to their common stockholders. Upon establishment of such liquidating holding companies the mutual service company, located in New York, would be dissolved. Engineers, as the parent of Virginia Electric and Power Com-

Preferred Stockholders' Exhibit No. 26-C (Cont'd)

pany alone, would also proceed to liquidate in the same manner as proposed for the liquidating holding companies over Gulf States Utilities Company and El Paso Electric Company when the tax advantages of retaining such relationship were deemed no longer of present or prospective value."

It seems to us that if the above plan is proposed, it stands but little chance of meeting approval of the S. E. C. without modification. Common stockholders, of course, would be required to forego all hope of dividends until full liquidation of the preferred stocks was accomplished, a condition which we do not believe to be entirely warranted. A more realistic approach to the problem of liquidation, in our opinion, would be along the lines that both Gulf States and El Paso either be sold or distributed on an exchange offer to the preferred stocks of Engineers, and that Virginia Electric be retained or merged into the parent company so that the tax advantage of consolidated tax returns would be preserved, if such is possible. In any event, it seems to us that Engineers ultimately is heading for complete liquidation, although the steps looking in that direction are likely to be rather slow in developing.

Turning next to the question of possible values for the remaining assets of Engineers, each of these will be commented upon separately.

Virginia Electric and Power Company: The merger of Virginia Public Service into Virginia Electric now makes this subsidiary the most important investment still retained by Engineers. However, reported earnings of Virginia are of little value in an attempt to arrive at a possible market value for the common stock, as current statements do not as yet include a full year's operation of the merged Virginia Public Service properties and as the transportation properties were only recently sold. In connection with the recent sale of Virginia's First Mortgage 2¾'s, a pro forma statement for 1944 was included in the registration

Preferred Stockholders' Exhibit No. 26-C (Cont'd)

statement, and such earnings appear to us to be the most appropriate for an appraisal of the Company's common stock. The pro forma statement gives effect to the Virginia Public Service merger as of January 1, 1944, and to the sale of the transportation properties and complete refinancing of the outstanding mortgage debt. On this basis, common stock earnings were reported at $5,171,000 before amortization of acquisition adjustments and $4,478,000 after the amortization charge. However, such earnings include tax savings of about $610,000 resulting from amortization of emergency facilities constructed under necessity certificates and tax savings resulting from consolidation with Engineers for tax purposes.

Had charges in lieu of taxes included the accelerated amortization tax savings, common stock earnings would have amounted to $4,561,000 before the 100.5 amortization charge and $3,868,000 after such charge.

It seems to us that while the pro forma statement does include as earnings available for the support of capitalization the tax savings resulting from accelerated amortization, the additional earning power cannot be considered in the same light as normal earning power. We readily appreciate that a number of companies do carry such tax savings directly into net income, but, on the other hand, many other companies prefer to treat the item more or less as a charge in lieu of taxes or a reservation of net income. All subsidiaries remaining in the Engineers' system segregate the tax saving item in current statements by including the full tax liability in operating expenses and adding back an amount equal to the tax savings to net income available for preferred and common dividends. We have covered this question in several of our recent bulletins and it is perhaps sufficient to note here that we doubt very much if Virginia Electric would be pursuing a conservative policy by paying as common stock dividends the amount of the tax savings.

Preferred Stockholders' Exhibit No. 26-C (Cont'd)

With respect to tax benefits from consolidation with Engineers and other system companies, no information is published which would indicate the amount involved. However, we do believe that the consolidation benefit represented a fairly substantial item in 1944, and as an estimate we would place the amount at $300,000 to $400,000, with the lower figure possibly nearer the exact amount. Engineers, of course, intends to preserve this benefit as long as possible, but in this connection, certain important factors enter into the picture. Liquidation of El Paso of Delaware at the end of 1944 now necessitates consolidation of El Paso Electric of Texas, as that company's preferred stocks have no regular voting power, whereas the Delaware Company's preferred stock did vote. As a result, Engineers' tax umbrella must cover El Paso of Texas as well as Virginia Electric and Western Public Service. The new $4.40 stock of Gulf States has regular voting power and cannot be consolidated.

As Engineers sells off its properties, its tax base likewise declines, and we do not believe that future tax savings from consolidation will be anywhere near as important as they have been in the past. Our general impression is that the tax benefits to Virginia in 1945 will probably not be much, if any, above $100,000.

It may be well to raise the further question at this point relative to the consolidation benefits which Virginia Electric might derive in the event El Paso and Gulf States are cut loose from the system. As the situation now stands, we do not believe that Engineers will be in a position to provide much benefit to Virginia Electric, and we would not be surprised if the dollar amount were below $100,000 annually. If our views are at all correct, holding company expenses and taxes would probably be greater than the consolidation benefits, thus providing a strong incentive for the liquidation of Engineers. However, this is an involved question and other factors may be more important than the tax angle alone.

Preferred Stockholders' Exhibit No. 26-C (Cont'd)

It is obvious that even assuming no tax benefits from consolidation, and also that Virginia Electric's management would prefer to pursue a conservative dividend policy, the company would still be in a position to pay common stock dividends of $3,000,000 and possibly $3,500,000 annually. On this basis, and considering the excellent name of the Company, we believe that the market would appraise the common stock at an aggregate value of around $70,000,000. Such an amount would be substantially in excess of the stated value of Virginia's common stock and surplus, but in today's market dividend-paying ability and earnings are of far greater importance than what might be considered sound asset support or book values.

Based on the reported pro forma earnings, Virginia appears to be earning a comparatively high rate of return and this, together with the fact that mortgage debt is now down to a 2¾% basis and the preferred stock to 5%, provides an extreme leverage position for the common stock. It might be argued that Virginia's rates are higher than warranted, and further, that termination of the war will result in a sharp contraction of activity in the Newport News and Norfolk areas, thus having an effect on earnings. In this connection, however, there is a comparatively large excess profits tax cushion and the postwar outlook for a large part of the service area appears to be excellent.

For the purpose of this report, we believe that a figure of $70,000,000 would be entirely conservative as representing a market appraisal of Virginia's common stock on the assumption that the stock was outstanding in the hands of the public, and this is the figure we shall use.

Gulf States Utilities Company: For the twelve months ended April 30, 1945, Gulf States reported net income available for common stock at $2,624,000 before a charge of $194,000 for amortization of plant acquisition adjustments and $2,430,000 after such charge. However, such earnings include tax benefits to the extent of $530,000 re-

Preferred Stockholders' Exhibit No. 26-C (Cont'd)

sulting from accelerated amortization of war plant facilities. Based on the assumption that this amount would not be paid out in dividends, the balance available for common stock would amount to $2,094,000 before the 100.5 amortization charge and $1,900,000 after such charge. Common stock dividends in 1944 amounted to $1,190,000, which compares with $1,120,000 in each of 1943 and 1941 and $840,000 in 1942. However, the Company has been paying off bank notes at a comparatively rapid rate and as of April 30, 1945, all such debt had been liquidated, with the result that common dividends could probably be increased to a point more in line with reported earnings.

The effect of the war effort on business activity in a large part of the area served by the Company has been very substantial, as evidenced by the fact that revenues currently are more than 50% greater than the 1941 level. It would only be logical to expect a reduction in the Company's load following the end of the war, but, on the other hand, many new industries have moved to the Gulf Coast area, and it is entirely likely the Company's load will not recede to prewar levels. Excess profits taxes are comparatively large and provide an excellent cushion for any decline in earnings in the postwar period.

If it is assumed that the Company will pay a common dividend of $1,500,000 annually, we have no hesitation in believing that the present market would appraise the common stock at an aggregate value of about $30,000,000. We appreciate that this is substantially in excess of Gulf States' stated value of common stock and surplus. However, in view of the type of regulation in Texas and Louisiana, the Company probably will continue to report satisfactory earnings. For the purpose of this report, therefore, we believe that the $30,000,000 valuation is entirely appropriate.

El Paso Electric Company (Texas): For the twelve months ended April 30, 1945, El Paso Electric Company reported a balance available for common stock equal to

Preferred Stockholders' Exhibit No. 26-C (Cont'd)

$625,000. Apparently the Company obtains no tax benefit from accelerated amortization of war plant facilities, and as the plant account contains no acquisition adjustment account, there is no charge in the income account for 100.5 amortization. Beginning in 1945, the Company will consolidate with Engineers and other system companies for tax purposes, and therefore the foregoing earnings include such benefit for only four months. On a pro forma basis, however, we do not believe that the 1945 amount will be of great importance, perhaps amounting to no more than $75,000. Over a period of years the Company's common stock dividends were gradually increased to the point where $450,000 was paid in 1943. In 1944, however, the dividend was reduced to $93,750, probably occasioned by the need for building up surplus, as this account was reduced $695,000 in 1943 by a special appropriation to the depreciation reserve.

Considering the existence of a comparatively large excess profits tax accrual which will cushion any decline in the scale of operations in the postwar period, and also the existence of a deposit with the mortgage bond Trustee of about $1,000,000, which came from the sale of properties and evidently is available for postwar construction, we believe that the Company could very readily pay an annual dividend of $450,000, and possibly even increase this to $500,000 without difficulty. In view of this, we believe that a realistic present-day market value would be about $9,000,000, and this is the figure we will use for the purpose of this report.

The Western Public Service Company: This Company is so small as to have little importance in the over-all picture. It renders electric service in and near Laramie, Wyoming, serving an estimated population of only 12,500. One difficulty of appraising this situation results from the fact that effective October 17, 1944, Monolith Portland Midwest Company, one of the Company's old customers which

accounted for approximately one-half the total load, discontinued the Company's service and became a customer of the Reclamation Bureau. Engineers owns all of the common stock, stated at $600,000, and a 5% note in the amount of $508,800 at December 31, 1944. No important error will be introduced by assuming that this Company has a value of $1,000,000, and this is the figure we shall use for this report.

Net Working Capital of Engineers Public Service Company: Engineers' balance sheet as of April 30, 1945, showed current assets of about $11,080,000, including $10,476,000 of cash and U. S. Treasury securities. All sales transactions, with the exception of Missouri Service and Northern Kansas Power, were completed prior to April 30, 1945, and the only adjustment necessary is the addition of about $850,000, which is to be received from the sale of these two small properties. Current liabilities were reported at about $811,000, thus leaving the Company with a net working capital position of about $11,120,000.

Summary of Values: A summary of the foregoing estimated values is as follows:

Virginia Electric and Power Co.	$ 70,000,000
Gulf States Utilities Co.	30,000,000
El Paso Electric Co. (Texas)	9,000,000
Western Public Service Co.	1,000,000
Net current assets	11,120,000
Total	$121,000,000

At this point it is necessary to give some consideration to possible underwriting discounts which might be sustained if Gulf States and El Paso were to be sold rather than distributed. Currently, Engineers' three issues of preferred stocks are outstanding in the aggregate amount of $39,246,000, of which about $11,000,000, is covered by present net current assets. Only sufficient securities would need to be sold to satisfy the net balance, and our usual 10% dis-

Preferred Stockholders' Exhibit No. 26-C (Cont'd)

count would be approximately $3,000,000, which, if deducted from our total estimated value, would leave a balance of $118,120,000. Deduction of the par value of the preferred stock from this latter amount would leave a balance of $78,874,000. In terms of Engineers' 1,909,968 shares of outstanding common stock, this remaining estimated value is equivalent to about $41.30 per share. If it is assumed that the preferred stocks will eventually obtain their call prices rather than par, a total premium of about $3,205,000 is involved, and if this amount is deducted from the $78,874,000 estimated balance of value remaining for the common stock, a figure of about $75,669,000 would result, equivalent to about $39.60 per common share. Whether or not the preferred stocks will be liquidated at par, as now envisioned by the management, is a question which we do not believe may be answered in any satisfactory maner at the present time, but in order to be conservative, it is probably well to give some consideration to this possibility.

It is quite obvious that our estimated aggregate value for the assets of Engineers is substantially in excess of the value placed thereon by the present market of about $26 per share for Engineers' common stock. We feel, however, that steps looking in the direction of ultimate complete liquidation are likely to be rather slow in developing, and for this reason, some compensation in the form of a discount would probably be required in a very high leverage, non-dividend paying issue, such as this is. Nevertheless, the stock does look quite attractive in the strong market which currently prevails, and for those who prefer to forego current income for appreciation possibilities, the stock has advantages. It must be remembered that current reported earnings of the system are around $3 per common share, and if for no other reason, the stock should have some further appreciation possibilities approximately equal to the retained future earnings. The common occupies a high leverage position, however, and could decline quite sharply in a weak general market.

GPV:C

Preferred Stockholders' Exhibit No. 26-D.

Report on Engineers by Securities Supervisors, dated August 8, 1945.

ENGINEERS PUBLIC SERVICE COMPANY

Capitalization

	Outstanding May 31, 1945
$5 Cumulative Preferred	143,951 Shares
$5.50 Cumulative Preferred	183,406 Shares
$6 Cumulative Preferred	65,098 Shares
Common Stock	1,909,968 Shares

This is a simple capital structure—no funded debt and only preferred and common stock. No dividends are being paid on the common but the preferred has a good record. The preferred stocks paid dividends regularly from date of issue to July 1938, then no payments were made until August 1936, but by January 1938 all arrears had been paid and regular payments have been made since then. In voluntary liquidation or by call the $5 stock is entitled to 105, and the $5.50 and $6 stock to 110; all series are entitled to 100 and accrued dividends in involuntary liquidation; they rank equally as to security.

System

Engineers Public Service Company is a registered public utility holding company. It has appealed certain decisions of the Securities and Exchange Commission and these are yet to be decided by the Supreme Court. However, Engineers has been disposing of smaller subsidiaries, and refunding the debt and adjusting the capital structure of its larger subsidiaries that it wishes to retain. At present its most important assets are the common stocks of—

Virginia Electric & Power Company
Gulf States Utilities Company
El Paso Electric Company (Texas)

Preferred Stockholders' Exhibit No. 26-D (Cont'd)

In addition, Engineers owns the stock and most of the debt of Western Public Service Company. In 1945 Engineers has sold Savannah Electric & Power, Missouri Service and Northern Kansas Power. Virginia Electric & Power Company has sold its transportation properties.

If the Securities & Exchange Commission is sustained by the Supreme Court, Engineers can retain only Virginia as an integrated system and Virginia then must dispose of its gas properties.

Earnings

The historical earnings record has little value because of the sale in recent years of subsidiary properties. Also during 1944 Virginia Electric & Power acquired Virginia Public Service and then recently sold its transportation properties. In 1944 consolidated system earnings applicable to Engineers common stock were $4,776,464, equivalent to $2.50 per share. For the 12 months ended May 31, 1945 such earnings were $3.21 per share; this included $0.70 per share due to saving in Federal income tax from the amortization of emergency facilities.

Value of Subsidiaries

Virginia Electric & Power is the most important subsidiary. In connection with its recent sale of first mortgage 2¾% bonds it presented a pro forma earnings statement for 1944 including Virginia Public earnings from January 1, 1944 and eliminating the transportation properties. On this basis common stock earnings were reported at $5,171,000 before amortization of acquisition adjustments. This also included about $610,000 tax savings resulting from amortization of emergency facilities. Such earning power should permit of common stock dividends of $3,000,000 to $3,500,000 annually. Under present market conditions the common stock of a utility operating company with such earnings and dividend paying ability should be worth about $70,000,000.

Preferred Stockholders' Exhibit No. 26-D (Cont'd)

Gulf States Utilities for the 12 months ended May 31, 1945 reported net income available for common stock at $2,673,000 before amortization of acquisition adjustments. This also included about $532,000 tax savings resulting from amortization of emergency facilities. Common stock dividends were $1,190,000 in 1944 and $1,120,000 in 1943. However, the company has been paying off bank notes and these were all paid by May 31, 1945 so that future dividends could be materially higher. In the expectation of dividends of $1,500,000 we believe the common stock would have a present value of about $30,000,000.

El Paso Electric Company (Texas) for the 12 months ended May 31, 1945 reported net income available for common stock at $625,000 and there was no amortization of acquisition adjustments or emergency facilities. Dividends were gradually increased until in 1943 $450,000 was paid. However, in 1944 only $93,750 was paid probably due to the need of building up surplus for accounting adjustments. $450,000 would seem to be a reasonable estimate of future dividend paying ability and on that basis we believe the common stock would have a present value of about $9,000,000.

Western Public Service is relatively small. Engineers owns its stock and a note for $508,800. An estimated value of $1,000,000 for this company should not be much out of line.

Other Assets. Engineers Public Service (parent company) as of May 31, 1945 reported current assets of $11,580,321, including $10,520,000 of cash and U. S. Treasury securities. Current Liabilities were $839,004, thus showing Net Current Assets of $10,741,317. North Kansas Power and Missouri Service were carried as other investments at the sale price of $844,119.

Preferred Stockholders' Exhibit No. 26-D (Cont'd)

Recapitulation of Estimated Values:

Virginia Electric & Power	$ 70,000,000
Gulf States Utilities	30,000,000
El Paso Electric	9,000,000
Western Public Service	1,000,000
No. Kansas-Mo. Service	844,119
Net Current Assets	10,741,317
	$121,585,436

Preferred stocks are outstanding in the amount of $39,245,500 at their claim for 100 in involuntary liquidation but at call price their claim is $42,450,000. Deducting this latter amount would leave $79,135,000 estimated value for the common stock or equivalent to $41.43 per share. These figures are an estimate based on the present market for utility equities and in the future may be higher or lower. Holding company stocks may be expected to sell for less than the value of their subsidiary equities but the discount should narrow as progress is made in liquidation and integration to conform to the Holding Company Act.

Liquidation and Integration

Engineers has just about completed the liquidation of its smaller subsidiaries. Western Public Service alone remains to be sold. The matter of integration is still to be determined. If Engineers should win its case before the Supreme Court it could continue as a holding company owning its present three principal subsidiaries.

If the Securities & Exchange Commission is sustained by the Supreme Court, Engineers can retain only one subsidiary and it might eventually merge with that one. It may have a choice as to which one it will retain but Virginia would seem to be the logical choice. The other subsidiaries plus parent company net current assets have an estimated present value more than sufficient to pay off the preferred stock. Engineers common stock would then have Virginia

Preferred Stockholders' Exhibit No. 26-D (Cont'd)

common with some added value from current assets not required to pay off the preferred.

In the 1944 annual report Engineers outlined a different plan that it would propose if it lost the case before the Supreme Court. It would create two new liquidating holding companies for Gulf States and El Paso and would distribute the preferred stocks of such new companies to Engineers preferred stock and the common stock of the new companies to Engineers common. The net income of the new holding companies would be used entirely to pay preferred dividends and retire preferred. When the preferred stocks were paid off the operating company common stocks would be distributed pro rata to the new liquidating holding company common stockholders. Engineers would continue as the parent of Virginia and liquidate in the same manner as the new holding companies.

Under this plan no dividends could be paid to the common stock until the preferred was retired out of the income of the three subsidiaries. We doubt if this proposal involving two new holding companies would be approved by the Securities and Exchange Commission. In our opinion it would be more favorable to Engineers common to retire the preferred by the sale or distribution of assets and thus complete integration and place the common in a position to receive dividends at an earlier date.

Conclusion

Engineers Public Service Preferred stocks are well covered by assets and earnings. Continuity of dividends is to be expected and ultimate liquidation may be at 100 or at call price.

Engineers Public Service Common stock is a leverage speculation. Its price swings can be large with changes in the general market for utility equities. No early dividends should be expected.

At current market Engineers common is selling substantially below our estimate of the present value of the

Preferred Stockholders' Exhibit No. 26-D (Cont'd)

subsidiary stocks. In our opinion its principal subsidiaries are reasonably capitalized and their equities are of good quality.

The time required to complete liquidation and integration under the Holding Company Act is uncertain, but the Supreme Court may have a quorum for hearings this year. A detailed plan of integration can be developed after the Supreme Court decision. Such plan must be approved by the Securities and Exchange Commission as fair to both the preferred and common stockholders. The simple capitalization of Engineers makes it easier to develop a plan when the legal requirements are determined.

* * *

Factual and statistical data contained herein have been taken from the following sources which we regard as authoritative and reliable:

1. Standard Statistics Corporation Record.

2. Moody's Public Utilities Manual and Current Supplement.

3. Company's Annual Reports.

4. Independent Utility Consultants.

S. S.
DPB/et

August 8, 1945

This does not purport to be a complete description of the security under consideration, but merely reflects certain factors which, in our opinion, are pertinent and should be of interest to anyone considering the purchase of this security.

Preferred Stockholders' Exhibit No. 26-E.

SCHWABACHER & CO.
INVESTMENT SECURITIES

Suggested Purchase

Engineers Public Service $5.50 Cumulative Preferred
(No Par)

Call Price: 110

Engineers is a public utility holding company whose principal subsidiaries are the sound and well managed operating companies, Virginia Electric Power, Gulf States Utilities and El Paso Electric. These individual properties are, however, scattered geographically so that the company is faced with the necessity of simplifying its structure under the Holding Company Act.

Under a new plan recently proposed by the company to comply with the simplification order, Engineers will offer its own common stockholders rights to buy Gulf States Utilities common and will distribute the stock of El Paso Electric, retaining only Virginia Electric Power. The money received from the sale of Gulf States Utilities will be used to retire Engineer's entire outstanding preferred stock (consisting of three equally ranking series) at par. The company has, however, an action pending before the Supreme Court, in which it is attacking the validity of Section II of the Public Utility Holding Company Act and it is therefore not expected to act on the simplification plan before a decision has been rendered in that case, which could hardly happen before January or February of next year. In case of a favorable decision presumably the simplification plan would be abandoned. While this appears rather unlikely, it would be a very favorable development from the preferred stockholder's standpoint, since it would eliminate the possibility of retirement of the shares at par.

Preferred Stockholders' Exhibit No. 26-E. (Cont'd)

It is possible that preferred stockholders will ultimately receive the call price rather than par for their stock, even if the company is compelled to proceed with its simplification. On November 1, 1945, the SEC issued its "Findings and Opinion" in the American Power & Light case, where it required that company to pay off its debentures at the call price, rather than at par. Engineers Public Service's investment holdings and balance sheet position show a striking similarity to that of American Power & Light. We understand that certain preferred stockholders are planning to undertake legal action to compel payment of the call price. In view of this, it is quite possible that the plan will eventually be changed to the extent of providing for retirement of the preferred issues at their call prices.

Earnings on a consolidated basis have been holding up well. For the twelve months through September 30, 1945, total operating revenues amounted to $68,147,289, which were 1.12% above those for the same period a year ago. Net income on a combined basis on all series of preferred stocks outstanding was $21.29 a share, an improvement of 31.18% over the same twelve month period a year earlier.

The preferred stocks appear to be sound investment issues affording an exceptionally attractive yield, quality considered, at present prices. The $5.50 preferred is selling considerably below the call price of $110, so that the risk of loss is small in the event of retirement at par. If the stock should be called at $110, or if the simplification plan should be abandoned, the stock should prove a very satisfactory investment. On this basis purchase is recommended.

This information has been prepared for the use of our own organization and correspondent firms. Such information has been obtained from sources believed to be reliable but necessarily is not all inclusive. This memorandum is NOT to be construed either as an offer to sell or as a solicitation of an offer to buy.

Preferred Stockholders' Exhibit No. 26-F.

PAINE, WEBBER, JACKSON & CURTIS
25 Broad Street, New York 4, N. Y.
Telephone HAnover 2-5544

New York Research Bulletin

Vol. X, No. 1

December 3, 1945

Subject: ENGINEERS PUBLIC SERVICE COMMON

Time and Again Since Mid-1943 We Have Estimated the Liquidating Value of This Stock and In Each Instance the Figures Showed Measurable Increase *So It Is This Time—Indicated Value Is Now $52 Per Share, Which Compares With a Current Market Price of 35½.*

Engineers Public Service Co. is one of four holding companies directly concerned with the outcome of the "death sentence" hearings that are now underway before the Supreme Court. Notwithstanding this action, however, the company is going right ahead with integration plans and now proposes to offer Gulf States Utilities common stock to its own common stockholders share for share at $11.50 per share, after reclassifying the present 280,000 shares of Gulf States Utilities into 1,909,968 no par shares. The proceeds, together with treasury cash and bank borrowings of approximately $3,000,000 at 1½% interest, would be used to pay off the 392,455 shares of Engineers Public Service preferred stock at 100, the call price in involuntary liquidation.

Another step in the proposed plan provides for reclassification of the present 150,000 common shares of El Paso Electric common stock into 381,994 shares of new stock which would be distributed as a dividend in partial liquidation on the basis of one share of El Paso for each five shares of Engineers common.

Preferred Stockholders' Exhibit No. 26-F (Cont'd)

Finally, Western Public Service would be sold, leaving only Virginia Electric & Power to be merged with Engineers Public Service.

The computation hereunder is our estimate of liquidating value for Engineers Public Service common stock as of here and now:

	*Net Available For Common		Lower Estimate		Higher Estimate
El Paso Electric	$ 577,000	(x13)	$ 7,501,000	(x15)	$ 8,655,000
Gulf States Utilities	2,957,000	(x14)	41,398,000	(x16)	47,312,000
Virginia Electric & Power	5,201,000	(x15)	78,015,000	(x17)	88,417,000
Working Capital (adjusted for property sales in 1945)			12,042,000		12,042,000
Total			$138,956,000		$156,426,000
Less Preferred Stocks at 100			39,245,000		39,245,000
Balance Available for Engineers Common			$ 99,711,000		$117,181,000
Equal to Per Share			$52.20		$61.35

* 12 months ended September 30, 1945.

Consolidated earnings of Engineers Public Service for the 12 months ended September 30, 1945 were equal to $3.27 per common share. Tax savings in 1946 should lift the earnings level to at least $3.50 per share. Such earnings should command a market price appraisal of 15 times or $52.50 per share.

The stock has a two-way appeal. Considered in the light of either liquidating value or earning power the appreciation possibilities are crystal-clear.

John C. Feely

This Bulletin is to provide our customers with general information. It is compiled from company reports, standard reference manuals, publications and other sources which we believe to be reliable. It is not intended to be a complete description of the companies referred to or their securities and we do not guarantee its accuracy. Any opinions or recommendations expressed herein are based upon information available to us and upon our general experience and judgment of securities.

Preferred Stockholders' Exhibit No. 26-G.

DUFF AND PHELPS

Date January 16, 1946

Bulletin *Engineers Public Service Company*
Refer To
Cross Reference

The last Bulletin analyzing the possible break-up value of this system, and discussing developments up to that date, was written July 5, 1945, in the light of market conditions existing at that time and was predicated upon earnings statements for periods several months prior thereto. Since that time further sharp advances in Common Stock prices of good operating utility companies generally have occurred, and yields on such stocks have declined due to the pressure of investment funds as well as hopes, perhaps, of increases in dividend distributions in some cases. Western Public Service Company has been sold.

In the case of the Engineers system, reported earnings of Gulf States Utilities Company and Virginia Electric & Power Company available for Common Stocks have shown some increase through September 1945, and although earnings of El Paso Electric have declined slightly, most of the difference is accounted for by an increase in the Excess Profits Tax accrual so that the protective cushion of such taxes is wider even than before. Considered as a whole, however, the changes which have occurred in reported earnings for the operating company Common Stocks in this system are generally too small to be of great significance, and it becomes more a problem of estimating a reasonable price at which existing earning power would sell in the present higher market than of taking into consideration refinements which would be introduced by a repetitious analysis of the operating companies themselves. For such basic comments, reference is made to our Bulletin of July 5, mentioned above.

Preferred Stockholders' Exhibit No. 26-G (Cont'd)

Our present appraisal of the prices at which the Common Stocks of the three principal operating companies now remaining in the Engineers system might be expected to sell in the present market, are as follows. We again stress the point that these figures have no relation to underlying sound property or other asset values of these stocks, as the leverage factor is considerable in all cases and very large in the case of Virginia.

Virginia Electric & Power		$ 80,000,000
Gulf States Utilities Company		35,000,000
El Paso Electric Company		10,000,000
Western Public Service (Sold for est.)		1,500,000
Parent Net Working Capital 12/31/45 (est.)		13,000,000
Total		139,500,000
Less preferred stock 392,455 shares	$39,245,500	
Call Premiums	3,204,795	
Say		42,450,000
Balance for Common		$ 97,050,000
Equals per share on 1,909,968 shares		$50.75

It will be noted that our estimate of total value is now more than $18,000,000, or approximately 15% higher than the estimate arrived at last July, although the precentage variation is somewhat different for the different equities involved. The reason for this is that we have again carefully gone over the current earnings reports, balance sheets, and other available information, and have given consideration to other factors such as Excess Profits Tax cushion, which is very large in all cases, non-recurring tax savings, and other miscellaneous deductions, and have given considerable thought to postwar territorial prospects as they may be reflected in the income accounts of these Companies. In other words, we do not believe that an arbitrary application of a percentage figure representing general market advances is a proper analytical approach to the problem. Neither do

Preferred Stockholders' Exhibit No. 26-G (Cont'd)

we believe it necessary to explain in detail some of the processes by which we arrived at the above more or less rough estimate of present day value. Errors in individual figures might tend to offset each other.

It will be noted that instead of deducting the Preferred Stock at its liquidating value of $100 per share, we have made additional provision for payment of the call prices. The question as to whether these call prices will or will not be paid is now before the S.E.C. in the over-all plan for liquidation of the system, and ultimately will be decided. Our present feeling is that considering the individual circumstances of this case, and the undeniably strong position of the issue, the Commission is likely to require the premiums to be paid.

On the other side, in our July Bulletin we made a deduction of approximately $3,000,000 to represent the normal discounts on prospective sales of securities sufficient to provide the cash necessary to effect retirement of the Preferreds. Since that time Engineers has indicated its intention of raising these funds in part by borrowing, and in part through sale under rights to its old Common Stock holders of the Gulf State Utilities Company Common, thus eliminating any underwriting costs. The net results of these two adjustments is reflected above in our present estimate of approximately $50.75 per share as a liquidating value of the Engineers Common under present market conditions. Considering the extremely strong markets of the last few days and the relatively high prices at which recent utility Common Stock offerings have been made, particularly where competitive bidding conditions existed, we are not at all certain that the above figure is sufficiently optimistic. However, we continue to prefer to estimate on the conservative side in situations of this type, particularly where the estimate is considerably above present market on the stock involved. Incidentally, it will be observed that if the S.E.C. should not require call premiums to be paid on the Preferred Stock, the amount saved would be equivalent to approximately $1.68 per share on the Common Stock.

Preferred Stockholders' Exhibit No. 26-G (Cont'd)

Engineers Common closed at a price of $36.50 per share on the New York Stock Exchange on January 15. The difference between that market and our estimate of recovery value is approximately $14.25 per share, equivalent to 39% on the present market value. Such a potential percentage increase is exceptionally high in the present market, and is scarcely equalled by most of the Preferred and sound Common Stock situations which we recommend and follow closely. This is true even among the non-dividend paying issues which Engineers is likely to continue to be until final liquidation.

From the standpoint of timing, it might be pointed out that the proposed liquidation plan is contingent upon the Supreme Court's decision in the case regarding constitutionality of the Holding Company Act. This decision is expected perhaps sometime this month, and presumably, if the Act is upheld, Engineers will proceed to sell its Gulf States Common to its own stockholders under rights, which rights would not only have value, but which would produce the funds necessary to liquidate the Preferred Stock and leave the Company free to distribute its remaining assets, consisting of El Paso and Virginia Electric Common Stocks. Thus, the timing in liquidation could be quite favorable in comparison with a number of complicated cases where litigation is involved over treatment of various classes of senior securities.

There is no assurance, of course, that Engineers will distribute its Virginia Electric holdings, as it theoretically could continue to hold that system as its single integrated system under the Act, but now that Excess Profits Tax laws have been repealed, and the benefits of a consolidated tax return are of minor consequence to Virginia, it is quite conceivable that Engineers itself might dissolve and that distribution of all the assets might be made. Even if Virginia should be retained there would be no good reason for Engineers not to inaugurate and continue the payment of Common dividends, which of itself would undoubtedly justify some increase in market price.

Preferred Exhibit No. 26-H (Cont'd)

The thing that impresses us most favorably about the prospective timing of realization of underlying values in this situation is its relative simplicity and the absence of controversial issues of consequence sufficient to tie the situation in litigation.

ELA:AR

Preferred Stockholders Exhibit No. 26-H.

BEAR, STEARNS & CO.
ONE WALL STREET, NEW YORK 5, N. Y.

ENGINEERS PUBLIC SERVICE COMPANY COMMON STOCK
PROBABLE VALUE AS AN INTEGRATED SYSTEM
PRELIMINARY REPORT

Present Status of the System:

Engineers Public Service Company is generally regarded as one of the soundest and most ably managed of the public utility holding company systems. Since February 28, 1940 the Company has been under order of the Securities and Exchange Commission to simplify and integrate in compliance with the standards of the Holding Company Act. The System originally owned a number of widely scattered properties, many of which have already been sold. Furthermore, the Company is now under contract to sell its interests in Savannah Electric & Power, Missouri Service and Northern Kansas Power Companies and, as a consequence, will presently own only three important subsidiaries, namely, Virginia Electric & Power, Gulf States Utilities and El Paso Electric Companies.

The Commission has issued further orders directing the Company to divest itself of all its remaining investments with the exception of Virginia Electric & Power Company which, if retained, must dispose of its gas and transportation properties. An appeal from this order is

Preferred Exhibit No. 26-H (Cont'd)

pending before the Supreme Court. In the meantime, Virginia Electric & Power Company recently took advantage of what it considered as highly attractive prices to sell its transportation properties for $4,500,000 in cash and realized substantial tax savings in connection with this transaction. As a consequence, the retention of the transportation properties is no longer a matter of controversy and the principal question remaining for determination by the Supreme Court is whether or not Gulf States Utilities and El Paso Electric Company may be retained in addition to Virginia Electric & Power Company. It is the general opinion that the Supreme Court is likely to uphold the Securities and Exchange Commission in its order requiring the Company to dispose of all its subsidiaries with the exception of Virginia Electric & Power Company. In this event, the investments of the parent company in the properties to be sold or otherwise disposed of, would appear to have an approximate value, at the present price level for good utility equities, sufficient to redeem the parent company's preferred stocks now outstanding in the amount of $39,245,500, and leave something in the neighborhood of $10,000,000 of net working capital in cash and cash items available for investment in the remaining subsidiary.

Capitalization:

The parent company has a relatively simple capitalization inasmuch as there is no funded debt and the preferred stocks have no dividend arrears. The capitalization, consisting only of preferred and common stocks, is as follows:

	Shares	Call Price
$5 Preferred Stock	143,951	105
$5.50 Pref. Stock	183,406	110
$6 Preferred Stock	65,098	110
Common Stock	1,909,968	

Preferred Exhibit No. 26-H (Cont'd)

The preferred stocks have no par value but are entitled to $100 per share at involuntary liquidation. However, it still remains to be determined by the S.E.C. and the courts what price preferred stockholders are entitled to receive if the preferred stock is redeemed as a necessary step in the integration of the System and the eventual dissolution of the parent company. It is our opinion, based on other holding company integrations, that it is hardly likely that it will be necessary to pay the call prices, but in order to arrive at a conservative value for the parent company common stock, we have assumed, for purposes of calculation, that the higher or call prices will be paid.

Earnings:

The System reported consolidated net earnings of $5,151,522 for the 12 months ended January 31, 1945 available for the common stock, which is equivalent to $2.70 a share, as compared with $1.76 for the previous 12 months.

COMPARATIVE CONSOLIDATED INCOME STATEMENT OF ENGINEERS PUBLIC SERVICE COMPANY

PERIOD ENDED JANUARY 31, 1945

	12 Months Ending Jan. 31, 1945	Jan. 31, 1944	Increase
Balance of earnings applicable to Engineers Public Service Company as above	$7,654,131.27	$5,720,673.92	$1,933,457.35
Earnings from subsidiary companies, included as deductions above:			
Preferred dividends declared	44,332.67	49,999.00	5,666.33*
Interest	69,440.00	70,440.00	1,000.00*
Earnings from other sources	39,531.97	224,161.56	184,629.59*
Total	7,807,435.91	6,065,274.48	1,742,161.43
Expenses, taxes and interest	491,440.87	453,853.03	37,587.84
Balance applicable to stocks of Engineers Public Service Company	7,315,995.04	5,611,421.45	1,704,573.59
Dividends on preferred stock of Engineers Public Service Company	2,164,472.66	2,256,083.89	91,611.23*
Balance for common stock and surplus	$5,151,522.38	$3,355,337.56	$1,796,184.82
Earnings per share of common stock	$2.70	$1.76	$.94

* Decrease

Preferred Exhibit No. 26-H (Cont'd)

The pro forma consolidated earnings at the present time, giving effect to various savings and increases not yet fully reflected in the income statement, appear to be in the neighborhood of $3.10 to $3.15 per share and actual earnings are rapidly approaching the pro forma rate. This should have a favorable effect on the near term price of the stock.

Transactions Effecting System Earning Power:

During the past year consolidated earnings were increased by about $114,000 on an annual basis as a result of the refinancing of Gulf States Utilities; by approximately $110,000 annually through the use of $1,650,000 of idle cash for the retirement of the $6 and $7 preferred stocks of El Paso Electric Company of Delaware, an intermediate holding company which was dissolved, and about $80,000 annually as a result of the retirement of parent company preferred stocks. The Company is under contract to sell Savannah Electric & Power Company for approximately $3,780,000 in cash, including certain adjustments. The investment in this subsidiary has been relatively non-productive inasmuch as common stock dividends have not been paid to the parent company for many years and during 1944 Engineers Public Service realized only $44,000 as income. If this additional working capital is eventually applied to further retirement of the parent company preferred stocks, something over $200,000 a year before taxes could be saved on the basis of the average preferred dividend rate.

Virginia Electric & Power Company has filed an application with the S.E.C. to refund $63,500,000 of its first and refunding 3% and 3½% bonds. This will include debt reduction in the amount of $4,500,000 and the refinancing of the balance at a probable rate of 2¾%. Savings from debt reduction and lower interest rates would amount to about $485,000 per year, most of which will be absorbed

Preferred Exhibit No. 26-H (Cont'd)

by an increase in taxes under existing rates, but over the longer term the company is likely to benefit from this reduction in fixed charges.

Missouri Service Company and Northern Kansas Power Company are under contract for sale for about $850,000. When all present contracts for property sales are consummated, parent company net working capital in cash and cash items is likely to be increased to about $10,300,000 plus earnings that will have accrued since the first of the year. The management expects the proposed property sales to be completed at an early date at which time the parent company will have such a large proportion of its total assets in idle cash that the utilization of these funds might well increase pro forma earnings substantially over the present $3.11 indicated rate. If idle working capital in the amount of around $10,000,000 could then be applied to the further reduction of the parent company preferred stock, pro forma earnings might be increased by as much as $550,000 before taxes at present rates. We feel, therefore, that consolidated earnings of the System may well increase for some time to come, as idle cash is put to use and as earnings from the operating properties are improved by debt reduction and refinancing at lower interest rates.

Value of the Integrated System:

A calculation of the estimated break-up value of the System would be of little significance inasmuch as the two properties remaining to be disposed of account for only a little more than one-third of the System earning power. It is the general opinion that integration of the System will be accompanied by elimination of the parent company preferred stocks to simplify the capital structure to common stock only. Engineers Public Service common stock may then come to represent solely an interest in the common stock of Virginia Electric & Power Company. It is

Preferred Exhibit No. 26-H (Cont'd)

also proposed that the parent company will be dissolved when tax benefits no longer justify its continued existence. The common stockholders of the parent company should then be in a position to receive in exchange stock of a sound operating property, namely, Virginia Electric & Power Company.

The following calculation of the System assets, other than Virginia Electric & Power Company, indicates that it should be possible to eliminate all of the parent company preferred stock now outstanding at either $100 per share or at their respective call prices and leave upwards of $9,000,000 of working capital free for investment by the parent company in its remaining subsidiary. The estimated value of Gulf States Utilities and El Paso Electric Companies is necessarily a matter of judgment arrived at by a comparison with the prices of other utility properties that have recently been sold as well as the price-earnings ratios of a number of good grade publicly held and actively traded operating company stocks. At a recent date, sixteen such good grade operating company common stocks sold at approximately 18 times current earnings.

VALUE OF SYSTEM ASSETS OTHER THAN VIRGINIA ELECTRIC & POWER CO.

(Assuming consummation of existing contracts for the sale of properties)

Gulf States Utilities Company approximately	$30,000,000
El Paso Electric Company approximately	10,000,000
Minor property approximately	1,200,000
Working capital approximately	10,300,000
	$51,500,000
Less Parent Co. preferred stocks at their respective call prices	42,450,000
Balance approximately	$ 9,000,000

Preferred Exhibit No. 26-H (Cont'd)

El Paso Electric Company reported gross income of $3,836,000 and net income of $665,000, after excess profits taxes of $695,000. The balance available for the common stock was $597,000, equivalent to approximately 15½% of operating revenues, indicating a conservative capital structure. If this equity is valued at 16 times, it would appear to be worth in the neighborhood of $10,000,000, as indicated above. Recent sales of less attractive utility properties at 14 to 15 times earnings appear to bear out this ratio.

Gulf States Utilities Company recently reported gross revenues of $17,484,000 and net income of $2,758,000, after excess profits taxes of $2,809,000. The balance available for the common stock was $2,164,000, which is 12.4% of gross revenues, again indicating a conservative capitalization. This property has an outstandingly strong growth factor which is reflected by a high credit rating as evidenced by the recent refinancing and, as a consequence, the equity would appear to be conservatively worth about 15 times the balance available, or about $30,000,000.

As an integrated System, in accordance with the order handed down by the S.E.C., the common stock of Engineers Public Service would then derive its entire earning power from Virginia Electric & Power Company. The Virginia Company recently filed a pro forma statement of earnings giving effect to (1) merger with Virginia Public Service Company; (2) the sale of its transportation properties and (3) the proposed refinancing. The balance of earnings available for the common stock of the year ended December 31, 1944, giving effect to these transactions, was stated as $4,477,644. Such earnings from Virginia Electric & Power Company would be equivalent to $2.30 per share of Engineers Public Service Company common stock (assuming the preferred stock has been paid off) but do not take into consideration the profitable use of upwards of $9,000,000 of parent company working capital in cash and cash items that probably will be available, as indicated by the above calculations. If it is assumed that parent company work-

Preferred Exhibit No. 26-If (Cont'd)

ing capital is then invested as additional equity in Virginia Electric & Power Company either through the reduction of debt or preferred stocks, the earning power might well be increased to over $2.60 per share of Engineers Public Service Company common stock.

Virginia Electric & Power Company has a high credit rating which has been improved by the sale of the traction properties. As a consequence of this sale, a substantially greater proportion of gross revenues now come through to net income. Furthermore, the bonds of Virginia Electric & Power Company will now become legal for savings banks and trust funds in many states where formerly the high proportion of traction revenues prevented the bonds from qualifying as a legal investment. Debt reduction, large payments on serial obligations, together with a possible substantial investment by the parent company, should materially enhance the value of this equity. Under existing market conditions, earnings of $2.60 a share from an operating property of as good quality as Virginia Electric & Power Company might be considered worth from 14 to 17 times, indicating a value of $36 a share and upwards for Engineers Public Service common.

As a consequence, we continue to feel that the common stock of Engineers Public Service is an attractive commitment for capital gain on a long term basis and the price in the near term is likely to improve as reported earnings increase to approach the pro forma rate.

* * *

We have a position in the common stock of Engineers Public Service Company.

BEAR, STEARNS & Co.

ERIC ETHERINGTON
April 20, 1945.

NOTE: A more detailed report on Engineers Public Service Company will be put out at an early date, at which time we will be glad to furnish you with copies.

Preferred Stockholders' Exhibit No. 26-I.

Office Memorandum

CARL M. LOEB, RHODES & CO.
61 Broadway
New York 6

November 17, 1945.

ENGINEERS PUBLIC SERVICE CORPORATION

Common Stock

Current Price: 32
1945 Range: 33¼-16

In May of this year we published a long study of Engineers Public Service Corporation. During the intervening months two major changes have taken place which affect the valuation for this company, namely the company's plan of divestment filed with the S.E.C. on September 10th, and the sharp market rise in utility stocks. In the light of these developments we believe that Engineers Public Service is still one of the few remaining utility holding company common stocks selling substantially below indicated breakup value and we therefore believe that the common stock is attractive at the current price of 32.

Engineers Public Service is a public utility holding company which at the present time owns three major subsidiaries—Virginia Electric & Power, Gulf States Utilities and El Paso Electric Company as well as a small company—Western Public Service. In addition, the parent company has substantial working capital. Senior capitalization consists of $39,245,000 5%, 5½%, and 6% preferred stocks.

The recently-filed divestment plan of Engineers Public Service provides that rights be issued to common stockholders of Engineers to purchase one share of reclassified Gulf States Utilities stock for $11.50. Funds derived from this operation, together with working capital and a $3 mil-

Preferred Stockholders' Exhibit No. 26-I (Cont'd)

lion bank loan, would be used by the company to pay off the preferred issues at par. It is further contemplated to distribute ⅓ share of El Paso Electric for each share of Engineers and to sell Western Public Service, leaving Virginia Electric & Power as the only subsidiary which would be merged into the parent company. The plan of Engineers Public Service is tentative, dependent on a decision by the U. S. Supreme Court on the validity of Section 11 of the Holding Company Act (usually referred to as the "Death Sentence"). The Supreme Court is currently holding hearings and an early decision is expected. The outline of the proposals of Engineers seems to be in line with S.E.C. philosophy, so that early action can be expected. There is one point, however, which might raise some questions. In recent decisions the S.E.C. has held that call price as well as involuntary liquidation price has to be considered in plans for retiring senior securities. If the S.E.C. should hold that the preferred stocks of Engineers Public Service are entitled to their call prices, an additional $3,200,000 would have to be raised which would probably mean that El Paso Electric would have to be sold, presumably also through rights to Engineers' stockholders, instead of being distributed as a liquidating dividend.

We think that the general features of the plan are favorable to the stockholders of Engineers and it is now possible to look forward to a more rapid liquidation of the system than would have appeared possible only a short time ago.

The principle which has to underlie any appraisal of a holding company is to value its component parts in line with the current market appraisal for similar operating utility stocks. This was the principle followed in our analysis in May. It is interesting to note that the six issues with which Virginia Electric & Power and Gulf States Utilities were compared at that time have risen by 23% in the market. It therefore becomes immediately apparent that the potential market value of the subsidiaries of Engineers Public Service has advanced substantially during the last 6 months.

Preferred Stockholders' Exhibit No. 26-I (Cont'd)

The earning power of utilities has not altered radically but fears for a sharp cut in electric revenues after the war have been dispelled by the negligible reductions witnessed so far. Moreover, the public is placing a higher value on the potential savings in taxation which should be realized after the elimination of the excess profits tax becomes effective on January 1, 1946.

Virginia Electric & Power Company distributes electricity in Virginia and northeastern North Carolina. The area serviced has a population of 1,694,000 and comprises the cities of Richmond, Norfolk and Newport News, Virginia. Gas is sold in a smaller territory with a population of 356,000.

In May 1944 the company was merged with Virginia Public Service, a subsidiary of General Gas & Electric. For the 12 months ended September 1945, earnings of Virginia Electric & Power were $4,191,000 after preferred requirements, equivalent to $2.19 per common share of Engineers, compared with pro-forma earnings of $2.02 per share for the 1944 calendar year. These earnings were restated to eliminate a reduction of Federal Income Taxes resulting from amortization of defense facilities. These adjustments account for a reduction of 53 cents and 37 cents respectively from the reported earnings as shown by the corporation. For the purpose of proper analysis, it is believed that a reduction of a tax liability of this kind does not constitute proper earning power.

It should be noted that the company deducts $693,000 a year from income for amortization of intangible assets. This is purely a bookkeeping item and many other companies do not regard it as a proper deduction from earnings. Some weight ought to be given to this factor in appraising Virginia Electric & Power.

In the light of current market conditions and with due consideration to the fact that income and excess profits taxes amounted to 61% of reported available income before

Preferred Stockholders' Exhibit No. 26-I (Cont'd)

taxes, we believe that a valuation of 17 times current earnings is reasonable for Virginia Electric & Power.

Gulf States Utilities is an electric utility and to a much smaller extent a gas, water and ice company operating in the southeastern part of Texas and south central Louisiana. The area serviced has a population of 550,000 and extends over 27,000 square miles. The largest cities in this territory are Beaumont and Port Arthur, Texas, and Baton Rouge and Lake Charles, Louisiana. Gulf States reported earnings of $1,982,000 after preferred dividend requirements for the 12 months ended September 1945, equivalent to $1.04 per share of Engineers, which compares with earnings of $1,870,000, equal to 98 cents on a pro-forma basis for the 1944 calendar year. As in the case of Virginia Electric & Power a reduction in Federal Income Taxes resulting from amortization of defense facilities, amounting to 51 cents per share, was deducted by us from reported net income. We think it is reasonable to value Gulf States at 16 times earnings.

El Paso Electric is operating in El Paso, and in an area extending 100 miles northwest of El Paso. Reported earnings of the company for the 12 months ended September 1945 were $577,000. We believe that these earnings should be capitalized at 15 times.

The table below shows the estimated breakup value for Engineers Public Service:

	Earnings	Earnings Per Share of Engineers	Estimated times Earnings Ratio	Estimated Breakup Valu	Per Share Engineers Public Serv.
Net Working Capital, September 30, 1945				$11,800,000	
Estimated Sales Price Western Public Service				1,000,000	
				$12,800,000	$5.70
Virginia Elec. & Power	$4,191,000	$2.19	17	71,247,000	37.30
Gulf States Utilities	1,982,000	1.04	16	31,712,000	16.60
El Paso Electric	577,000	0.30	15	8,655,000	4.50
				$124,414,000	$65.10
Less Preferred Stock at par			$39,245,000		
Call Premium			3,205,000		
Preferred at call price				42,450,000	22.20
				$ 81,964,000	$42.90

Preferred Stockholders' Exhibit No. 27.

ENGINEERS PUBLIC SERVICE COMPANY

DATA FROM COMMERCIAL & FINANCIAL CHRONICLE

Listed on New York Stock Exchange
No Par

Low and High Sales Prices

	$5.00 Preferred	$5.50 Preferred	$6.00 Preferred
Issue of Sept.10.1945			
Sept. 1	- - - - -	- - - - -	- - - - -
3	- - - - -	- - - - -	- - - - -
4	*103-1/4 - 104-1/2	*105-1/4 - 105-1/2	106-1/2 - 106-1/2
5	*103-1/4 - 104-1/2	*105-1/4 - 105-1/2	105 - 105
6	*102 - - 104-1/2	105 - 105	105 - 105
7	102 - 102	102 - 102	104 - 105
Sales for Week (Shares)	110	30	150
Issue of Sept.14.1945			
Sept. 8	*102 - 103	*104-1/2 - 105-1/2	*103 - 104-1/2
10	103 - 103	*102 - 102-1/2	103 - 104-1/2
11	*102 - 103	*102 - 102-1/2	*103 - 104
12	102 - 102	102 - 102	103 - 103
13	*101 - 103	*100-5/8 - 102	x102 - 102
14	101 - 101	*105-5/8 - 101-3/4	*100-1/2 - 102-1/2
Sales for Week (Shares)	260	180	100
Issue of Sept.24.1945			
Sept.15	101 - 101	*100-5/8 - 101-3/4	*100-1/2 - 102-1/2
17	101 - 101	100-5/8 - 100-5/8	*100-5/8 - 101-7/8
18	101 - 101	101 - 101	101 - 101
19	101 - 101	101 - 101-1/4	101 - 101-7/8
20	101-1/2 - 101-1/2	101 - 101	*102 - 103
21	101 -101-1/2	101-1/2 - 101-1/2	*102 - 103
Sales for Week (Shares)	530	440	270
Issue of Oct. 1, 1945			
Sept.22	101 - 101	*101 - 102	*102 - 103
24	*101 - 101-1/2	101 - 101-1/2	102 - 102
25	101 - 101-1/2	*101 - 101-1/2	*102-1/4 - 103
26	101-1/4 - 101-1/4	101 - 101	102-1/4 - 102-1/4
27	101-1/2 - 101-1/2	101 - 101	*102-1/4 - 103
28	101 - 101-1/2	101 - 101-1/4	102-1/4 - 102-1/4
Sales for Week (Shares)	360	530	190

Preferred Stockholders' No. 27 (Cont'd)

	$5.00 Preferred	$5.50 Preferred	$6.00 Preferred
Issue of Oct. 8,1945			
Sept.29	101 - 101	101-1/4 - 101-1/4	103-1/2 - 103-1/2
Oct. 1	101 - 101	*101-1/4 - 101-1/2	103-1/2 - 103-1/2
2	100- 3/4 -101	101-1/4 - 101-1/2	103-1/2 - 103-5/8
3	101 - 101	101-1/4 - 101-1/2	104-1/2 - 104-1/2
4	100-3/4 - 100-3/4	101-1/4 - 101-1/2	104 - 104-1/2
5	101 - 101	101-3/4 - 101-3/4	104-1/4 - 104-1/2
Sales for Week (Shares)	780	680	260
Issue of Oct 15,1945			
Oct. 6	*101 - 101-1/2	*101-3/4 - 102-1/2	*104 - 104-1/2
8	*101-1/4 - 101-1/2	102-1/2 - 102-1/2	104-1/2 - 104-1/2
9	101-1/2 - 101-1/2	102-1/2 - 102-1/2	*104 - 104-1/2
10	*101-3/4 - 103	103-1/8 - 103-1/4	104 - 104
11	102 - 102	103-1/4 - 103-1/4	104-1/3 - 104-1/8
12	- - - - - - - - - -	- - - - - - - - - -	- - - - - - - - - -
Sales for Week (Shares)	250	250	170
Issue of Oct.22,1945			
Oct.13	- - - - - - - - - -	- - - - - - - - - -	- - - - - - - - - -
15	101-3/4 - 102	103-1/4 - 103-1/4	104-1/2 - 104-5/8
16	*101-1/2 - 103	*102-1/2 - 103	105-1/2 - 105-1/2
17	103 - 103	103 - 104	105 - 105-5/8
18	*101-1/2 - 103	103 - 104	104 - 104-1/2
19	*101-1/2 - 103	103 - 103	*104 - 107
Sales for Week (Shares)	70	400	340
Issue of Oct.29, 1945			
Oct.20	101-1/2 - 101-1/2	*103 - 103-1/2	104 - 104
22	101-1/2 - 101-3/4	103-1/8 - 103-1/8	103-1/2 - 103-1/2
23	101-1/2 - 102	103 - 103-1/8	104 - 104
24	*101-1/2 - 103	103-3/4 - 103-3/4	104 - 104
25	*101-1/2 - 103	*103 - 105	104 - 104
26	102 - 102	*103 - 105	*104 - 106
Sales for Week (Shares)	120	70	110

Preferred Stockholders' No. 27 (Cont'd)

	$5.00 Preferred	$5.50 Preferred	$6.00 Preferred
Issue of Nov. 5,1945			
Oct. 27	No Sales		
29	102 - 102-1/2	102-3/4 - 103	104 - 105-3/4
30	*102 - 102-1/2	102-3/4 - 102-3/4	*104 - 106
31	102 - 102	102-3/4 - 103-1/4	105-1/2 - 105-1/2
Nov. 1	101-1/4 - 102	103 - 103	*103-1/2 - 106
2	*101-1/4 - 102-1/4	103-1/2 - 103-1/2	105 - 105
Sales for Week(Shares)	180	210	180
Issue of Nov.12,1945			
Nov. 3	*102-102-1/4	*102-7/8 - 103-1/2	*104 - 106
5	102 - 102	102-7/8 - 102-7/8	105 - 105
6	- - - - -	- - - - - - - - -	- - - - -
7	102-1/4 - 102-1/4	103 - 103	105 - 105-1/2
8	102 - 102	103 - 103-3/4	103-3/4 - 104-7/8
9	102 - 102	103-3/4 - 105-1/2	*103-1/2 - 104-7/8
Sales for Week(Shares)	140	340	90
Issue of Nov.19,1945			
Nov.10	*102 - 102-1/4	*103 - 105-1/2	*103-1/2 - 105-1/2
12	- - - - -	- - - - - - - - -	- - - - - - - - -
13	102 - 102	105-1/2 - 105-1/2	103-1/2 - 105-1/2
14	102 - 102	*103 - 105-1/2	*104 - 106
15	*101-1/4 - 102	*103 - 105	*104 - 106
16	*101-1/4 - 102	104 - 104	104-1/2 - 104-1/2
Sales for Week(Shares)	100	100	90
Issue of Nov.26,1945			
Nov.17	102 - 102	*103-1/2 - 105	105-1/2 - 105-1/2
19	102 - 102	*103 - 105	*105-1/2 - 106
20	*101-1/2 - 102	103-1/2 - 103-1/2	*105-3/4 - 106
21	102 - 102-1/4	104 - 104	106 - 106
22	- - - - - -	- - - - - - - - -	- - - - - - - - -
23	101-1/4 - 101-1/4	104 - 104-1/8	*106-1/2 - 108
Sales for Week(Shares)	310	110	110
Issue of Dec. 3, 1945			
Nov.24	*101-1/4 - 102	104 - 104	*106-1/2 - 108-1/2
26	101-1/4 - 101-1/2	*104 - 105	*106-1/2 - 108-1/2
27	102-1/4 - 102-1/4	104-1/8 - 104-7/8	107-7/8 - 107-7/8
28	103 - 103	104-3/8 - 105	*107 - 110
29	102-3/4 - 103	105 - 105	107 - 107
30	*102-3/4 - 103	105-1/4 - 105-1/4	*106-1/2 - 107-1/2
Sales for Week(Shares)	450	300	30

Preferred Stockholders' No. 27 (Cont'd)

	$5.00 Preferred	$5.50 Preferred	$6.00 Preferred
Issue of Dec.10,1945			
Dec. 1	*102-3/4 - 103	*105-1/2 - 108	*106-1/2 - 109
3	103 - 103	*106 - 109	106-1/2 - 107
4	103 - 103	106-1/4 - 106-1/2	*107 - 110
5	104 - 104	106 - 106	*106 - 110
6	*103-1/8 - 104	106 - 106	*107-1/4 - 110
7	103-1/8 - 104	*106 - 107	*107-1/4 - 109
Sales for Week(Shares)	310	120	20
Issue of Dec.17,1945			
Dec. 8	104 - 104	*107 - 110	*107-1/4 - 110
10	*102-3/4 - 104	*107 - 110	*107-1/4 - 109
11	104 - 104	107 - 107	*107-1/4 - 109
12	*104 - 105-1/4	106 - 107	107 - 107-1/2
13	*104 - 105-1/4	x105 - 105	x106 - 106
14	104-1/2 - 105	105 - 105	*106-1/2 - 108-1/2
Sales for Week(Shares	560	240	110
Issue of Dec.24,1945			
Dec.15	105-105-1/4	105-5/8 - 105-5/8	*106-1/2 - 107-1/2
17	103-1/2 - 104	105 - 105	107-1/2 - 107-1/2
18	104-3/4 - 104-3/4	105 - 105	107 - 107-1/8
19	103-1/2 - 104-1/4	105-1/4 - 105-1/4	*107 - 108
20	104 - 104	105 - 105	*107 - 108
21	104 - 105-3/4	107 - 107	108 - 108
Sales for Week(Shares)	1,180	190	130
Issue of Dec.31,1945			
Dec.22	105-3/4-105-3/4	*105-1/4 - 109	*107 - 109
26	106 - 106	*105-1/4 - 108	*107 - 109
27	105-1/4 - 105-1/4	*105-1/4 - 109	*107 - 109
28	106 - 106	*105-1/4 - 109	*107 - 109
Sales for Week(Shares)	140	- - - - - - -	- - - - - - -

Preferred Stockholders' No. 27 (Cont'd)

	$5.00 Preferred	$5.50 Preferred	$6.00 Preferred
Issue of Jan.7, 1946			
Dec.29	*105 - 106	*105-1/4 - 107	*107 - 109
31	105 - 106	*105-1/4 - 107	*107 - 109
Jan. 1	- - - - - - - -	- - - - - - - -	- - - - - - - -
2	105-1/2 - 105-1/2	105-7/8 - 107	*107 - 108
3	*105 - 106	*105 - 106	108 - 108
4	105 - 106	*105 - 106	106-1/2 - 107
Sales for Week(Shares)	170	110	30
Issue of Jan.14,1946			
Jan. 5	105 - 105	105 - 105	105 - 108
7	104 - 105	*103-5/8 - 105-1/2	*106-1/2 - 109
8	*105 - 106	*104-3/8 - 105-1/2	*106-1/2 - 109
9	*105 - 106	105 - 105	106-3/4 - 106-3/4
10	105 - 105	104-3/4 - 104-3/4	107 - 107
11	*105-106	*104-3/4 - 106	105 - 108
Sales for Week(Shares	290	430	30

x Means Ex-dividends.

* Bid and Asked Prices - No Sales on this day.

Preferred Stockholders' Exhibit No. 28.

STATEMENT AND AFFIDAVIT

of

RALPH E. BADGER

I, Ralph E. Badger, on oath hereby depose and say that—

I. In 1913 I received the degree of Bachelor of Arts from Dartmouth College. In 1914 I received the degree of Master of Business Administration from the Amos Tuck School of Business Administration at Dartmouth. In 1921 I received the degree of Doctor of Philosophy in Economics from Yale University.

II. I was instructor in certain courses given in the Sheffield Scientific School at Yale from 1915 to 1921. In 1921 I was appointed Assistant Professor, later Associate Professor, and then Full Professor of Economics at Brown University, Providence, R. I., from which position I resigned in 1929 to come to Detroit. The courses in which I specialized were Corporation Finance and Investments.

III. In 1925 I wrote, and Prentice-Hall, Inc., of New York City, published, a book entitled "The Valuation of Industrial Securities". In 1928 I completed, and Prentice-Hall, Inc. published, a book entitled "Investment Principles and Practices". This book has been used as a text book in many universities and colleges, has been reprinted a number of times, and has been revised twice. It was recently revised in collaboration with Professor Guthmann of Northwestern University. In 1930 I completed a book entitled "Problems In Investments" in collaboration with Henry Murphy. I have written a number of articles for current publications and professional publications since that time.

Preferred Stockholders' Exhibit No. 28 (Cont'd)

IV. From 1926 to 1929 I was investment advisor to the Estate of Frank A. Sayles, Providence and Pawtucket, R. I. This Estate had assets in excess of $30,000,000. Prior to 1926 I had been employed in connection with the valuation of certain closely-held securities owned by the Estate. From 1929 until February, 1943, I was either Executive or Senior Vice President of the Union Guardian Trust Company of Detroit, and acted in that connection as Trust Investment Officer of the Company. In February, 1943, the Union Guardian Trust Company merged with the Detroit Trust Company, at which time my relations ceased. In 1933 I became President of Investment Counsel, Inc. This is a professional organization which acts in a consulting capacity regarding the investment policies of banks, insurance companies, charitable institutions, and individuals. In both connections I am constantly called upon to express opinions relative to the worth of various types of securities, including both bonds and stocks. The aggregate resources, directly or indirectly, under my supervision exceed $100,000,000.

V. Since about 1923, I have been employed more or less continuously on cases involving the valuation of securities and properties in connection with inheritance and gift taxes, income taxes, property taxes, mergers, and reorganization. The following are some of the matters in which I have been employed.

1923-1928—Various mill properties owned by Estate of Frank A. Sayles, estate taxes involved. No testimony.—

1925—B. B. and R. Knight Mill Properties. To establish a 1913 value for determination of income tax in connection with subsequent sale. No testimony.

1926—R. Hoe & Company—Sale of properties. No testimony.

Preferred Stockholders' Exhibit No. 28 (Cont'd)

1927—Ford Tax Case—involving valuation Ford Motor Company stock at March 1, 1913, for purpose of determining taxable gain resulting from sale by minority holders in 1919. United States Board of Tax Appeals.

1928—Coca-Cola Company—valuation as at 1913 re determination taxable gain resulting from sale in 1920 and 1921. No testimony.

1934—Girard Trust et al, Executor Estate Edward W. Bok vs. Commissioner Internal Revenue—valuation common stock Curtis Publishing Company re estate tax of Edward Bok. Uniten States Board of Tax Appeals.

1935—and various dates—valuation properties of Detroit & Canada Tunnel for assessment of local taxes. United States District Court.

1937—Central Railroad of New Jersey vs. Martin, Commissioner, New Jersey. Known as the New Jersey Railroad Cases. Valuation of Terminal Properties and Main Lines in New Jersey for local tax purposes.

1938—Valuation of Almours Corporation, re inheritance taxes, Estate of Alfred I. duPont. Settled prior to trial.

1938-1939—Grand Trunk Western Railroad—valuation properties re Michigan State taxes. United States District Court.

1939—Second National Bank & Trust Company, Saginaw, vs. Lila Eddy Doebler, et al. United States District Court. Testified regarding propriety holding of certain shares of stock in trust.

1940—Chicago Rawhide Company, valuation stock for inheritance tax purposes. Settled prior to trial.

Preferred Stockholders' Exhibit No. 28 (Cont'd)

1941—Motor Products Corporation vs. Commissioner of Internal Revenue, United States Board of Tax Appeals. Testified regarding taxable gain re City of Detroit Bonds received in refunding plan.

1941—Reynolds Investment Company—involving valuation of company re sale of majority of stock. United States District Court. Settled prior to trial.

1942—A. C. Bradley Corporation—re gift taxes. Tax Court of United States.

1942—Leobold et al vs. Inland Steel Company—valuation Inland Steamship Company for purposes of assessing damage re liquidation thereof. United States Circuit Court of Appeals, 7th Circuit.

1942—Stroh Brewery Company—valuation stock for estate tax purposes. Tax Court of United States.

1942-1943—Estate of Alexander J. Shamberg, Isidor Shamberg, Administrator, vs. Commissioner of Internal Revenue, Respondent, Port of New York Authority Case. Testified for Bureau of Internal Revenue in April, 1943. Tax Court of United States.

1943—Gelatin Products Co.—valuation equity for gift tax purposes. Tax Court of United States.

1944—I worked on a number of cases and completed reports thereon. In none of these cases, however, did the matters involved come to trial; all were settled prior to trial.

1945—Estate of Mark Munroe vs. Commissioner, —valuation stock of Coca-Cola Company and Coca-Cola International. Edmund H. Lunken vs. Commissioner—valuation common stock of Lunkenheimer Company. Testified in both above cases before United States Tax Court. Appeared as witness before Conference Section or Technical Staff re valu-

Preferred Stockholders' Exhibit No. 28 (Cont'd)

ation common stock J. L. Hudson Company, Detroit; S. E. Overton Company, South Haven, Michigan; and Papec Machine Company, Rochester, New York. Testified before The Securities & Exchange Commission in behalf of Allied Chemical & Dye re valuation of American Light & Traction Company Preferred stock. Testified before the Tax Court re valuation Andrew Jergens Company, in Cincinnati. Also worked on several cases and completed reports thereon, which cases were settled before trial.

VI. In connection with the preceding and other cases in which I have been employed, I have qualified as an expert on valuation and have testified, as indicated, before the former United States Board of Tax Appeals, the present Tax Court of the United States, and various State and Federal Courts.

VII. That the conclusions in the report attached hereto are my own conclusions, were arrived at in good faith, and are based on facts and figures which to the best of my knowledge and belief are correct.

RALPH E. BADGER
Ralph E. Badger

Ralph E. Badger, being duly sworn, deposes and says that the facts and statements set forth herein are true to the best of his knowledge and belief.

Subscribed and sworn to before me
this.....day of.....
A. D., 1946.

.....
Notary Public
My Commission Expires.....

Preferred Stockholders' Exhibit No. 29.

REPORT ON VALUATION OF
$5 DIVIDEND CONVERTIBLE PREFERRED STOCK,
$5.50 & $6 CUMULATIVE DIVIDEND
PREFERRED STOCKS

ENGINEERS PUBLIC SERVICE COMPANY, INC.
(A DELAWARE CORPORATION)

AS AT JANUARY 15, 1946

Prepared by

RALPH E. BADGER
DETROIT, MICHIGAN

January 24, 1946

Preferred Stockholders' Exhibit No. 29 (Cont'd)

REPORT ON VALUATION OF $5 DIVIDEND CONVERTIBLE PREFERRED STOCK, $5.50 & $6 CUMULATIVE DIVIDEND PREFERRED STOCKS

ENGINEERS PUBLIC SERVICE COMPANY, INC.

(A DELAWARE CORPORATION)

AS AT JANUARY 15, 1946

Purpose:

The purpose of this report is to determine the fair investment value of the $5 Dividend Convertible Preferred Stock, $5.50 and $6 Cumulative Dividend Preferred Stock of Engineers Public Service Company, Inc., a Delaware Corporation, as at January 15, 1946.

The three classes of preferred stock of Engineers Public Service Company, Inc. are equally secured in respect to earnings and assets. The conversion privilege in respect to the $5 Convertible Preferred Stock expired June 30, 1938. This feature, therefore, is no longer operative. All classes of preferred stocks are entitled to receive par and accrued dividends in the event of involuntary dissolution or liquidation of the Company. All classes of preferred stocks are callable—the $5 Preferred stock, presently at $105; the $5.50 and $6 Preferred stocks at $110 and accrued dividends. In the event of voluntary liquidation or dissolution of the Company, all three classes of stocks are entitled to receive amounts equivalent to their call prices, plus accrued dividends to the date of call.

Engineers Public Service Company, Inc. is a holding company, incorporated in the State of Delaware in 1925. The System, at the time the Public Utility Holding Company Act of 1935 was passed, comprised Virginia Electric

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& Power Company, Eastern Texas Electric Company, Gulf States Utilities Company, El Paso Electric Company (Delaware), El Paso Electric Company (Texas), El Paso & Juarez Traction Company, Mesilla Valley Electric Company, Baton Rouge Electric Company, Louisiana Steam Generating Corporation, Puget Sound Power & Light Company and Subsidiaries, Savannah Electric & Power Company, The Western Public Service Company, Missouri Service Company, The Northern Kansas Power Company, The Key West Electric Company, and Ponce Electric Company. Engineers also owned securities of El Paso Natural Gas Company and held an option to acquire common stock of that company, which option was later exercised. (See Testimony of R. N. Benjamin, page 20, of transcript of record.)

Since the passage of the Public Utility Holding Company Act, various properties formerly owned by Engineers Public Service Company were either sold or consolidated (Virginia Public Service Company was merged with Virginia Electric & Power Company in 1944), with the result that at January 15, 1945 the System consisted of three operating subsidiaries, to wit:

(1) Virginia Electric & Power Company, a Virginia corporation, engaged in the business of generating and purchasing electric energy and transmitting, distributing, and selling the same at retail and wholesale in parts of Virginia, northeastern North Carolina, and east central West Virginia, comprising approximately 29,700 square miles. The company conducts a manufactured gas business in Norfolk, South Norfolk, Newport News, Hampton, Virginia and vicinity. Its total gross revenue aggregates approximately $40,000,000 annually, 93% being derived from electric operations.

(2) Gulf States Utilities Company, which company is engaged in the business of generating and purchasing electric energy and transmitting, distributing, and selling the

same at retail and wholesale in an area in western Texas, and south central Louisiana, comprising approximately 27,500 square miles. Steam is supplied to certain large industrial customers in Baton Rouge and natural gas is purchased at wholesale and distributed at retail in Baton Rouge, Louisiana and vicinity. Company supplies water in six communities with an estimated populaton of 108,000, and manufactures and distributes ice in five communities. Total gross revenues approximate $18,000,000, of which 91.7% is derived from electric and steam operations, 4.9% from gas operations, the balance from water and ice operations.

(3) El Paso Electric Company. This company is engaged in the business of generating and purchasing electric energy, transmitting, distributing, and selling the same at retail and wholesale in El Paso, Texas and in an area in the Rio Grande Valley in Texas and New Mexico approximately 100 miles northwesterly from El Paso to the Caballo Dam in New Mexico and approximately the same distance southwesterly from El Paso to Van Horn, Texas. The company sells electric energy at retail in fourteen communities in Texas and twenty communities in New Mexico, together with the surrounding rural districts which have an estimated combined population of 170,400, of which 118,000 reside in El Paso. Energy is supplied at wholesale to Compania Productura DeLuze y Fuerza, S. A. for resale in the city of Juarez, Mexico. Total gross revenues are approximately $4,000,000 annually.

It is unnecessary, at this juncture, to discuss at length the history of the various relationships between the Securities & Exchange Commission and Engineers Public Service Company with reference to efforts of the Commission to bring about a compliance on the part of the Company with the requirements of the Public Utility Holding Company Act of 1935. It is sufficient at this point to state that Engineers Public Service Company had, prior to September 13, 1945, divested itself of a number of its properties,

Preferred Stockholders' Exhibit No. 29 (Cont'd)

had effected various mergers, and had simplified its corporate structure to the point of owning the three previously described systems.

The Company, at September 10, 1945, was under orders to determine whether it would elect to retain Virginia Electric & Power Company as its principal operating system and dispose of Gulf States Utilities Company and El Paso Electric Company, or to maintain Gulf States Utilities Company and possibly El Paso Electric Company, which choice would require divesting itself of Virginia Electric & Power Company. In the event that the Company chose to maintain Virginia Electric & Power Company, it might continue in existence as a holding company or merge with Virginia Electric & Power Company.

On September 10, 1945, the Company filed a plan pursuant to Section 11 (e) of the Public Utility Holding Company Act of 1935 for divestment of assets and related matters. At subsequent times, four Amendments were filed to said Plan.

In brief, the Plan and Amendments provide (1) for increasing the common stock of El Paso Electric Company from 150,000 authorized common shares to 381,994 common shares, and the distribution of said shares to holders of Engineers common stock on the basis of one share of El Paso Electric for each five shares of Engineers' held. Scrip is to be issued in lieu of fractional shares; (2) that the common shares of Gulf States be increased from 280,000 to 1,909,968 common shares without par value; (3) that the holders of Engineers' common be issued warrants entitling such holders to purchase one share of Gulf States common at $11.50 a share for each share of Engineers' common held (Provision was made in the case of the common stockholders owning both preferred and common stock for such holders to make payment for their subscription to Gulf States common by the use of Engineers' Preferred stock (any class) at $100 a share); (4) the cash received from the sale of Gulf States, plus cash presently available in the

Preferred Stockholders' Exhibit No. 29 (Cont'd)

treasury of Engineers, plus proposed bank borrowings of $3,000,000 would be used to pay off all classes of Engineers Public Service Co. pany Preferred stock at $100 a share; and (5) Engineers would then be liquidated and dissolved, its remaining liabilities disposed of, and the common stock of Virginia Electric & Power Company together with its remaining assets, distributed pro rata to Engineers' common stockholders.

The Plan, as set forth above, and as adopted by the Board of Directors, was subject to the dissent by one Mr. Thomas W. Streeter, who is a Director of Engineers Public Service Company. Mr. Streeter's objection involves, among other things, the legal question as to whether or not the Plan, as above described, constitutes, in respect to the liquidation of Engineers Public Service Company, a voluntary or an involuntary liquidation. In addition to the legal question as to whether or not the Plan constitutes a voluntary or involuntary dissolution, the question as to the fair investment value of the several classes of Preferred stock of Engineers Public Service Company arises.

It is my purpose, therefore, in the following report to appraise the fair investment value of the three classes of Preferred stock of Engineers Public Service Company without regard to its proposal to liquidate, either voluntarily or involuntarily, in order to meet the requirements of Section 11 of the Act.

"Fair investment value" may be defined as the price or value at which the shares of the several classes of stock would exchange hands between willing buyers and willing sellers, neither under compulsion to buy or to sell and both thoroughly informed of all of the various elements of values.

The fair investment value of the several classes of Preferred stock of Engineers Public Service Company, which I expect to arrive at, therefore, will be predicated upon the assumption that Engineers Public Service Company shall continue in operation as presently constituted.

Preferred Stockholders' Exhibit No. 29 (Cont'd)

BASIS OF VALUATION:

Although the several classes of Preferred stock of Engineers Public Service Company are bought and sold on the New York Stock Exchange, the reported prices at the present time can not be regarded as representative of fair investment value. The range on the three classes of Engineer's Preferred stock, for the week ended January 5, 1946, was as follows:

	High	Low	Average
$5.00 Series	$106.00	$105.00	$105.50
$5.50 "	$107.00	$105.00	$106.00
$6.00 "	$108.00	$106.50	$107.25

These prices, in addition to reflecting the ordinary market factors such as money rates and matters of investment risk, also reflect at the present time two collateral factors, namely, possible dissolution either voluntary or involuntary, under provisions of Section 11 of the Public Utility Holding Company Act, as well as the Plan with its several Amendments filed September 10, 1945, which provides for eventual dissolution of Engineers Public Service Company *and the payment of $100 per share and accrued dividends* for its several classes of Preferred stock.

Preferred stocks enjoy a claim in respect to the earnings of the corporation, prior to the claim of the common stockholder but a claim which is limited to the amount of the stated dividend. In the case of Cumulative Preferred stocks, any unpaid dividends remain as contingent charges against the corporation and must be paid before dividends may be paid on the common stock. Except insofar as a preferred stock may be callable at a specific price, preferred stocks are in the nature of perpetual annuities, and should be valued by capitalizing their dividend rates at rates of capitalization which give full weight to inherent investment risk and money rates at the date of valuation.

In the case of Callable Preferred stock, however, there is an upper limit placed upon values, since the issuing cor-

poration reserves the right to call such stocks at stated prices upon relatively short notice. Callable Preferred stocks, therefore, do not as a rule sell substantially in excess of their call prices and the amount by which market prices sometimes exceed call prices is represented by an estimate of the probability, or lack of probability, that the stock will be called in the immediate future.

In valuing the several classes of Preferred stock of Engineers Public Service Company, *as a going concern,* I propose to show that the fair investment value of these several classes of Preferred stock would be, under present conditions, substantially in excess of their call prices, were it not for the fact that each of these classes of stocks is callable at a stated price or premium, and that their present fair investment values are represented by their call prices plus a slight premium to account for the time required to effect a call.

ECONOMIC CONDITIONS AND MONEY RATES—JANUARY, 1946:

It is unnecessary, at this juncture, to go into a lengthy discussion of our banking structure nor to discuss the various repercussions which have followed the huge increases in our Federal debt and bank deposits, stemming from World War II. It is sufficient to state here that the effect of Government financing, as carried on during the past several years, has been (1) substantially to increase deposit currency in circulation, (2) substantially to increase actual money in circulation, and (3) to increase the dollar value of high-grade bonds and preferred stocks with a concomitant reduction in the yields thereon. These tendencies were prevalent in 1932 but have been greatly aggravated as a result of changes which took place from 1939 to date. The following table indicates clearly the history of interest rates during the period 1932 to date.

Preferred Stockholders' Exhibit No. 29 (Cont'd)

YIELDS ON U. S. GOVERNMENT BONDS, HIGH-GRADE CORPORATE BONDS, AND HIGH-GRADE PREFERRED STOCKS

1932 TO NOVEMBER, 1945

Year	U. S. Governments(1)	High-Grade Corporate Bonds(2)	High-Grade Preferred Stocks(3)
1932	3.68	5.28	6.13
1933	3.31	4.69	5.75
1934	3.12	4.14	4.29
1935	2.79	3.61	4.63
1936	2.65	3.34	4.33
1937	2.68	3.30	4.45
1938	2.56	3.20	4.34
1939	2.36	3.02	4.17
1940	2.21	2.92	4.14
1941	1.95	2.84	4.08
1942	2.02	2.85	4.31
1943	1.87	2.80	4.06
1944	1.74	2.77	3.98
1945	1.46 (Nov.)	2.67 (Nov.)	3.65 (Nov.)

(1) Data through 1942 taken from U. S. Statistical Abstract, 1943, pp. 374; thereafter, Standard Statistics Average.
(2) Standard Statistics Average, High-Grade Corporate Bonds.
(3) Standard Statistics Average.

An examination of the preceding tabulation indicates clearly the low levels to which the interest rates and, correspondingly, the low level to which the rates on preferred stocks have gone during the past several years. The yields on high-grade preferred stocks, which in the early 'Thirties ranged from 4½% to 6%, have dropped to a current level of 3.65%. High-grade corporate bond yields have dropped from a level of over 5% to 2.67%. The yields on high-grade public utility preferred stocks have closely followed this trend. I refer to Pacific Gas & Electric, Non-Callable, 6% Preferred stock having a Par Value of $25.00. This stock averaged to sell in the month of December, 1945, at $43.00, which would give it a yield of 3.49%. Buffalo Niagara Electric Corporation recently brought out a 3.6% Preferred stock for sale to the public at approximately $102.8, or at a yield of 3.50%. Many other examples of similar nature

Preferred Stockholders' Exhibit No. 29 (Cont'd)

might be given. In other words, high-grade public utility preferred stocks have closely followed the general average of all high-grade preferred stocks.

It does not require an exhaustive presentation of statistics to show that the yields on preferred stocks are, at the present time, the lowest which they have ever been in the history of our country, or, conversely, that the prices of such stocks are at the highest levels ever experienced. The permanency of this situation will depend on the permancy of low interest rates. In this connection I would like to quote from the Federal Reserve Bulletin of November, 1945, page 1099, as follows: "In view of the existing sources of demand for Government securities and the reduced supply of new securities, prospects are for a continued strong market for these securities. Under the circumstances, demands are particularly strong for the intermediate and long-term issues bearing the higher yields. Such of these issues as can be held by banks will be in demand by banks, while non-bank investors may be expected to buy principally the issues that are not eligible for purchase by banks." This statement appeared in an unsigned article which indicates, in accordance with the stated policy of the Editorial Committee, that said Committee, representing the Board of Governors of the Federal Reserve System, are responsible for interpretations and opinions expressed therein.

The Honorable Secretary of the Treasury, Mr. Vinson, has, on numerous occasions, expressed his confidence in the permanency of present low rates of interest. The Federal Government, with its present huge debt, a substantial portion of which comes due in less than five years, is vitally interested in the maintenance of low interest rates. There are few people today who are of the opinion that any substantial rise in interest rates is likely to take place in the reasonably near future. High-grade preferred stock prices may, therefore, be anticipated to remain at high levels and the yields on high-grade preferred stocks at current low levels for a considerable period of time to come. It may,

Preferred Stockholders' Exhibit No. 29 (Cont'd)

therefore, be stated that the present level of preferred stock prices is, as far as one can humanly predict, a permanent level.

The market action of high-grade bonds or preferred stocks does not fluctuate as widely or as erratically as does the market for common stocks; nor do we find, in respect to preferred stocks, prices fluctuating widely because of temporary and speculative conditions. The prices of preferred stocks today are predicated on fundamental conditions prevailing in the money markets, conditions which are of a permanent nature.

The values which I propose to place on the several classes of Preferred stock of Engineers Public Service Company are, therefore, values of a permanent nature and are not values of a temporary or speculative nature.

I have examined at some length the history of Engineers Public Service Company as set forth in various exhibits already received in this case, as set forth in various releases of the Securities and Exchange Commission, and as discussed in the testimony of the officials of the Company in the present matter. I have also examined the records in respect to the Company's properties, the Company's business, the management of the Company, the asset position of the Company (as disclosed by its various statements), the earnings and dividend record of the Company, and other pertinent data having a bearing on the value of Engineers Public Service Company Preferred stock.

Earnings Analysis:

I present herewith an Income Account analysis on a Consolidated Basis for Engineers Public Service Company for the period 1940 through 1945, inclusive.

INCOME ACCOUNT ANALYSIS—CONSOLIDATED BASIS
ENGINEERS PUBLIC SERVICE COMPANY, INC. & SUBSIDIARIES
1940 THROUGH 1945, INCLUSIVE

	1940	1941	1942	1943	1944	(Nov. & Dec. Estimated) 1945
Operating Revenues	$57,093,653.36	$64,739,517.85	$73,836,543.41	$59,570,893.29	$72,031,422.83	$62,551,800.
Operating Expenses	37,150,112.61	41,270,220.80	45,999,623.28	35,696,623.37	44,729,384.34	37,730.535.
Net Operating Revenues	$19,943,540.75	$23,469,297.05	$27,836,920.13	$23,874,269.92	$27,302,038.49	$24,821.265.
Add or Deduct Other Income—Net	(d)168,996.85	(d) 28,539.41	(d)252,923.52	141,627.02	40,300.42	(d) 14,159.
Total Income Before Taxes	$19,774,543.90	$23,440,757.64	$27,583,996.61	$24,015,896.94	$27,342,338.91	$24,807,106.
Deduct Federal Income & E. P. T.—Net	2,590,241.07	6,312,319.86	10,641,147.11	12,282,111.84	13,420,185.77	12,142,267.(1)
Balance	$17,184,302.83	$17,128,437.78	$16,942,849.50	$11,733,785.10	$13,922,153.14	$12,664,839.
Add Holding Co. Income less Expense	34,028.85	(d)122,193.29	(d)187,723.17	(d)107,249.40	(d)320,881.25	(d)893,800.(2)
Available for Debt, Preferred Div. & Minority Interest	$17,218,331.68	$17,006,244.49	$16,755,126.33	$11,626,535.70	$13,601,271.89	$11,771,039.
Total Debt, Pfd. Div. & Minority, Int.	14,149,364.85	14,117,295.80	13,733,442.48	8,287,496.20	8,824,808.02	8,014,343.
Balance	$ 3,068,966.83	$ 2,888,948.69	$ 3,021,683.85	$ 3,339,039.50	$ 4,776,463.87	$ 3,756,696.
x Charges & Preferred Dividends Earned	1.22	1.20	1.22	1.40	1.54	1.47
Operating Ratio	65.07%	63.75%	62.30%	59.92%	62.10%	60.32%
% Depreciation: Total Operating Revenue	11.1	10.5	9.2	9.1	7.8	7.47
% Maintenance: " " "	6.7	6.5	6.8	6.4	7.0	6.35
% Comb. Mtce. & Deprec.: Total Oper. Rev.	17.8	17.0	16.0	15.5	14.8	13.82

(1) Does not give effect to reduction in Federal Income & Excess Profits Taxes resulting from extraordinary non-recurring deductions. If such items were used to reduce taxes accordingly, (as set forth in Applicant's Exhibits 53 and 66) over-all coverage would be 2.12.

(2) Holding Company expenses not segregated. $893,800 represents amortization of plant acquisition adjustments.

Preferred Stockholders' Exhibit No. 29 (Cont'd)

Data for years 1940-1944, inclusive, taken from Applicant's Exhibits 37-P through 37-T. 1945 data from Exhibit 63, page 2.

An examination of this data indicates that, during the period under consideration, there was a continuous improvement in the Times Charges and Preferred Dividends Earned (i.e., over-all charges), with the exception of the year 1945. In the year 1940, all Charges and Preferred Dividends, on a Consolidated Basis, were earned 1.22 times. This figure increased gradually until all Charges and Preferred Dividends were earned in the year 1944, 1.54 times. In the year 1945, all Charges and Preferred Dividends were earned 1.47 times, provided no effect is given to the reduction in Federal Income and Excess Profits Taxes in that year, resulting from extraordinary non-recurring deductions. If such items were used to reduce taxes accordingly, over-all coverage would have been 2.12 times.

Operating ratios, on a Consolidated Basis, amounted to 65.07% in 1940, dropped to 62.30% in 1942, gradually dropped to 59.93% in 1943, increased to 62.10% in 1944, and dropped to 60.32% in 1945. The Company's appropriation for Depreciation and Maintenance averaged between 17.8% of Gross in the year 1940 to 13.8% in 1945.

I present herewith an Analysis of Income Data relative to Engineers Public Service Company, for the years 1940 through 1945, inclusive, showing the Times Parent Company Preferred Dividends were earned.

Data for the years 1940-1944, inclusive, taken from Applicant's Exhibits 37-P through 37-T. Data for 1945 was taken from Page 2 of Applicant's Exhibit 63.

An examination of the preceding tabulation indicates that Preferred Dividend requirements of the Parent Company, based on balance of earnings available for Engineers Public Service Company, were covered between 1.81 times and 3.2 times for the period studied. For the year 1945, Parent Company Preferred Dividend requirements were covered 2.77 times, if no effect is given to reduction in Federal Income and Excess Profits Taxes resulting from extraordinary or non-recurring deduction. If such items were used to reduce taxes accordingly, the Parent Company's Preferred Dividends would have been earned 4.75 times.

ANALYSIS INCOME DATA
ENGINEERS PUBLIC SERVICE COMPANY, INC.
1940-1945, INCLUSIVE

	1940	1941	1942	1943	1944	1945
Bal. Subs. Applic. to Parent Co.	$5,320,129.97	$5,274,503.56	$4,281,694.59	$5,702,372.79	$7,273,333.62	(Nov.
Earnings From Other Sources—Net	354,919.04	351,722.22	250,206.89	344,583.86	157,349.86	&
Total	$5,675,049.01	$5,626,225.78	$4,531,861.48	$6,046,956.65	$7,430,583.48	Dec.
Less Expenses, Taxes, & Interest	320,890.19	473,915.51	437,930.06	451,833.26	478,231.11	Est.)
Balance—Stocks of Engineers	$5,354,158.82	$4,692,858.73*	$4,093,931.42	$5,595,123.39	$6,952,352.37	$5,875,772.
Preferred Dividend Requirements	2,285,191.99	2,263,361.58	2,256,084.33	2,256,083.89	2,175,888.50	2,119,076.
Available for Common	$3,068,966.83	$2,429,497.15	$1,837,847.09	$3,339,039.50	$4,776,463.87	$3,756,696.
x Preferred Dividends Earned	2.34	2.07	1.81	2.48	3.20	2.77(1)

* Less earnings of a subsidiary in excess of preferred dividend requirements, (less minority interest) credited to Reserve for Depreciation in value investment ($459,451.54).

(1) Does not give effect to reduction in Federal Income and Excess Profits Taxes resulting from extraordinary and non-recurring deductions. If such items were used to reduce taxes, accordingly, (using data in Applicant's Exhibits 53 and 66) Parent Company Preferred dividends would have been earned 4.75 times.

The following tabulation shows Estimated Earnings of Engineers Public Service Company and Subsidiaries for the year 1946, on the assumption that no change is made in respect to properties operated during the year 1946.

ESTIMATED EARNINGS—1946

ENGINEERS PUBLIC SERVICE COMPANY, INC. & SUBSIDIARIES

(Data Taken From Applicant's Exhibit 63, Page 5)

	Virginia	Gulf States	El Paso	Combined	Engineers Public Service	Inter-Company Eliminations	Consolidated
Operating Revenues	$38,375,000	$15,344,000	$3,655,800	$57,374,800	$4,819,065	$(d)4,819,065	$57,374,800
Operating Expenses							
Operation	$16,607,500	$ 5,755,000	$1,540,000	$23,902,500	$ 250,000	—	$24,152,500
Maintenance	2,742,500	996,000	210,000	3,948,500	—	—	3,948,500
Depreciation	2,950,000	1,600,000	300,000	4,850,000	—	—	4,850,000
Taxes—General	3,500,000	1,274,200	377,400	5,151,600	14,918	—	5,166,518
Total	$25,800,000	$ 9,625,200	$2,427,400	$37,852,600	$ 264,918	$ —	$38,117,518
Operating Income	$12,575,000	$ 5,718,800	$1,228,400	$19,522,200	$4,554,147	$(d)4,819,065	$19,257,282
Add Other Income	(d)100,000	(d)16,500	5,000	(d)111,500	—	—	(d)111,500
Balance	$12,475,000	$ 5,702,300	$1,233,400	$19,410,700	$4,554,147	$(d)4,819,065	$19,145,782
Deduct Income Taxes	3,470,000	1,654,200	316,600	5,440,800	259,586	—	5,700,386
Plant Amortization	700,000	193,800	—	893,800	—	—	893,800
Avail. for Charges	$ 8,305,000	$ 3,854,300	$ 916,800	$13,076,100	$4,294,561	$(d)4,819,065	$12,551,596
Charges & Pfd. Dividends	3,638,121	1,454,300	283,400	5,375,821	2,119,076	—	7,494,897
Available for Common	$ 4,666,879	$ 2,400,000	$ 633,400	$ 7,700,279	$2,176,485	$(d)4,819,065	$ 5,056,699
x Charges & Pfd. Div. Earned							1.67
x Parent Company Pfd. Div. Earned							3.39
CHARGE ANALYSIS							
Interest & Amortization	$ 2,180,000	$ 926,300	$ 215,900	$ 3,322,200	$ —	$ —	$ 3,322,200
Subsidiary Pfd. Dividend	1,448,000	528,000	67,500	2,043,500	—	—	2,043,500
Minority Interest	10,121	—	—	10,121	—	—	10,121
Parent Co. Pfd. Div. Req.	—	—	—	—	2,119,076	—	2,119,076
	$ 3,638,121	$ 1,454,300	$ 283,400	$ 5,375,821	$2,119,076	$ —	$ 7,494,897

Preferred Stockholders' Exhibit No. 29 (Cont'd)

It will be seen from this study that Over-all Charges in the year 1946 will be earned 1.67 times, and that Parent Company Preferred Dividends alone will be earned 3.39 times.

This estimate of 1946 earnings indicates a continuation of the improvement in earnings shown for the 1940-1945 period, as coverage, both in respect to over-all charges and Parent Company preferred dividends, is estimated to be higher in the year 1946 than in any of the years 1940 through 1945.

The public utility industry has for many years been characterized by stability and by a strong growth trend. There are no peculiar economic characteristics in respect to the territories served by the present subsidiaries of Engineers Public Service Company which would indicate that the earnings trend of these companies would go counter to that of the industry. It is a reasonable assumption, therefore, that this Company should continue in future years to register progress along with other units in the industry.

Balance Sheet Data:

I present herewith Consolidated Balance Sheet Data for Engineers Public Service Company and Subsidiaries, for the years 1942 through 1944, inclusive.

Preferred Stockholders' Exhibit No. 29 (Cont'd)

CONSOLIDATED BALANCE SHEET—SUMMARY ANALYSIS
ENGINEERS PUBLIC SERVICE COMPANY, INC.
1942 - 1944, INCLUSIVE

	1942	1943	1944
Subs. Debt & Notes	$148,981,500.00	$ 87,755,000.00	$117,224,471.19
Subs. Pfd. Stock, Premium & Accrued Dividends	88,751,368.66	34,672,337.97	45,175,063.00
Minority Interests	291,644.31	72,835.54	50,917.24
Total Preceding Claims	$238,024,512.97	$122,500,173.51	$162,450,451.43
Engineers' Preferred	$ 41,801,500.00	$ 41,801,500.00	$ 39,245,500.00
Common Stock	$ 1,909,968.00	$ 1,909,968.00	$ 1,909,968.00
Reserves	14,352,830.17	4,350,470.62	4,394,705.20
Capital Surplus	24,877,635.14	19,661,145.94	18,843,978.80
Earned Surplus	11,382,848.41	12,701,846.14	11,157,691.09
Total Common & Surplus	$ 52,523,281.72	$ 38,623,430.70	$ 36,306,343.09
Total Investment	$332,349,294.69	$202,925,104.21	$238,002,294.52
Book Value Equity Per Sh. Pfd.	$225.65	$192.40	$192.50
Net Quick Assets	$ 14,491,331.	$ 14,579,270.	$ 17,146,619.
% Net Quick: Prior Obligations	6.09	11.90	10.55
% Prior Oblig.: Total Capital	71.62	60.37	68.26
% Pfd. & Subord. Items: Total Cap.	28.38	39.63	31.74

At December 31, 1944, Engineers Public Service Company showed a book value of equity in the amount of $192.50 for each share of preferred stock. Net Quick Assets amounted to $17,147,000, or the equivalent of 10.55% of Obligations prior to aggregate Preferred stock. Obligations prior to Parent Company's Preferred stock amounted to 68.26% of total capitalization, whereas preferred stock of the Parent Company and subordinate capital items represented 31.74% of total capitalization.

I made another calculation in respect to the Corporate Balance Sheet of Engineers Public Service Company in which study I determined the values of Engineers' investments in the common stocks of subsidiaries by capitalizing 2 year average earnings of the major subsidiaries held by Engineers' at December 31, 1944 on the assumption that the equities in these companies were worth 15 times 2 year average earnings.

Applicant's Exhibit 14 presents a study of the Price: Earnings Ratios of the common stocks of four companies,

Preferred Stockholders' Exhibit No. 29 (Cont'd)

to wit: Houston Lighting and Power, Idaho Power, Indianapolis Power & Light Company, and Tampa Electric Company. At October 6, 1945, these stocks averaged to sell at 14.44 times average per share earnings for the period 1938-1941, inclusive; 16.04 times yearly average earnings for the period 1942-1944, inclusive, plus 12 months ended June 30, 1945; 15.20 times yearly average earnings for the period 1938-1944, inclusive, plus 12 months ended June 30, 1945; 15.58 times per share earnings for the year 1944; and 14.90 times 12 month's earnings ended June 30, 1945.

In this connection I would also like to refer to Appendix "A" of a report which I prepared in connection with the Valuation of the Preferred Stock of American Light & Traction Company, which report is on file with the Securities & Exchange Commission. At May, 1945, the study contained in the Appendix referred to indicated that 13 electric and gas companies' common stocks averaged to sell at 15.85 times 5 year average earnings, for the period 1940-1944, inclusive.

A reconstruction of the Comparative Balance Sheet of Engineers Public Service Company (Parent Company only), appearing on page 17, Applicant's Exhibit 37-T, using reconstructed value of subsidiary common stocks by the use of a multiple of 15 times applied to 2 year average earnings, eliminating Reserve for Depreciation in the value of investments and taking other items at Book Values, indicates Net Assets Available for Preferred stock of Engineers Public Service Company in the amount of $99,267,911, or at the rate of $252.94 per $100 of Preferred stock. It should be further stated, in respect to this item, that this figure represents in substance the readily marketable value of assets available as security for the Preferred stock of Engineers Public Service Company, since the common stocks of any or all of the subsidiaries held could, at the date covered by the statement, have been sold at prices approximating the figures set forth in this study. Subsequent to December 31, 1944, certain of the properties have been sold.

Preferred Stockholders' Exhibit No. 29 (Cont'd)

RECONSTRUCTED CORPORATE BALANCE SHEET
ENGINEERS PUBLIC SERVICE COMPANY, INC.
SUBSIDIARY COMMON STOCKS VALUED AT 15 X 2 YEAR AVERAGE EARNINGS AT DECEMBER 31, 1944

	Earnings for Common Less Minority Interest			Valued at 15 Times
	1943	1944	Average	
El Paso Electric & Subs	$ 431,493.53	$ 502,494.44	$ 466,994	$ 7,004,910.
Gulf States Utilities	1,624,132.45	2,168,462.29	1,896,297	28,444,455.
Savannah Electric & Power	203,075.82	182,062.31	192,569	2,888,535.
Virginia Electric & Power	3,367,246.01	4,337,575.31	3,852,411	57,786,165.
Western Pub. Serv. Group	76,424.98	82,639.27	79,532	1,192,980.
Reconstructed Value Subsidiary Common Stocks				$97,317,045.
Preferred Stocks				612,361.
Bonds				635,000.
Notes				508,800.
Advances				8,000.
Total				$99,081,206.00
Add Excess Profits Tax Refund Bonds				6,079.30
Special Funds				92,000.00
Net Quick Assets				5,748,357.59
Total Assets				$104,927,642.89
Less Long-Term Contracts & Tax Reserve				659,731.79
Net Assets Available for Preferred				$104,267,911.10
Par Value Preferred Stock				39,245,500.00
Balance				$65,022,411.10
Assets Per $100 Par Preferred At Estimated Market Values				$266.00

NOTE: Release #5499, page 6, Engineers' investment in El Paso set up originally $6,598,539.

In respect to the value set forth in the preceding study, I would like to call attention that on Page 6 of the Securities & Exchange Commission's Release, #5499, is stated Engineers' investment in El Paso was set up at $6,598,539.

I would like further to refer to Page 163 of R. N. Benjamin's Testimony, Tr. of Record, 163, in which he states that on December 3; 1945 Engineers had received five bids for either the purchase of the capital stock or the assets of Western Public Service Company, and that the Board of Directors, at a meeting held that day, authorized the acceptance of a bid which would produce $843,000 for the capital stock of Western Public Service Company, plus $508,800 in payment of a Demand Note owing to Engineers Public Service Company from Western Public Service Company, and certain additional adjustments for net current

Preferred Stockholders' Exhibit No. 29 (Cont'd)

assets, bringing the aggregate amount of cash to be received up to approximately $1,500,000. If the Demand Note is eliminated from the above figure, the amount applicable to the common stock from this sale would be approximately $1,000,000.

Applicant's Exhibit 14 shows the current valuation of Gulf States Utilities Company, on the basis of comparative studies, to be $29,981,000.

On Page 6 of Applicant's Exhibit 37-T, it is stated that on April 25, 1945 Engineers Public Service Company sold to Donner Estates, Inc. all of the securities of the Savannah Electric and Power Company for $3,387,500, as against the Company's carried value for said securities of $3,165,965.

Dividend Record:

The dividend record of Engineers Public Service Company, in respect to its several classes of Preferred stock, has been as follows:

(1) $5 Cumulative Preferred, No Par: Initial dividend of $1.25 per share paid October 1, 1928. Regular dividends paid quarterly, January 1, etc. to July 1, 1933, inclusive; none thereafter to August 1, 1936, when $4 was paid on account of arrears; November 2, 1946, $6.00; 1937, $8.75; January 3, 1938, $1.25 regular and $2.50 on arrears, clearing all arrears. Regular dividends paid thereafter, quarterly January 1, etc. to stock of record about December 14, etc.

(2) $5.50 Cumulative Preferred, No Par: Initial dividend of $1.375 per share paid January 2, 1929. Regular dividends paid quarterly, January 1, etc. to stock of record about December 17, etc., to July 1, 1933, inclusive; none thereafter to August 1, 1936, when $4.40 was paid on account of arrears; November 2, 1936, $6.60; 1937, $9.625; January 3, 1938, $1.375

Preferred Stockholders' Exhibit No. 29 (Cont'd)

regular and $2.75 on arrears, clearing up all arrears. Regular dividends paid quarterly thereafter, January 1, etc., to stock of record about December 14, etc.

(3) $6 Cumulative Preferred, No Par: Initial dividend of $1.50 per share paid January 2, 1931. Regular quarterly dividends paid January 1, etc. to stock of record about December 17, etc. to July 1, 1933, inclusive; none thereafter to August 1, 1936, when $4.80 was paid on account of arrears, clearing up arrears. Regular dividends paid quarterly thereafter, January 1, etc., to stock of record about December 14, etc.

The Company maintained regular dividend payments on its several classes of Preferred stock from date of issuance until July, 1933, at which time dividends on all classes of stock were temporarily discontinued. Dividend payments were resumed on August of 1937 and by January of 1938 all arrearages had been cleared. Since that time, dividends have been paid with regularity and the present financial condition of the Company indicates continued ability of the Company promptly to meet dividend requirements on all classes of preferred stock.

Comparative Study—Five Public Utility Holding Companies:

I present herewith a comparative study showing the preferred dividend coverages and certain balance sheet ratios, as well as current prices and dividend yields in respect to the preferred stocks of five public utility holding companies which are similar in many respects to Engineers Public Service Company.

COMPARATIVE STUDY—EARNINGS, RATIOS, & BALANCE SHEET ITEMS—FIVE PUBLIC UTILITY HOLDING COMPANIES WITH ENGINEERS PUBLIC SERVICE COMPANY, INC.
COMPARISON OF PREFERRED STOCK PRICES

		Columbia Gas & Electric(1)	Niagara Hudson Power(2)	Pacific Public Service(3)	Public Service of N. J.(4)	Wisconsin Electric Power Co.(5)	Engineers Public Service Company—Including Puget Sound	Engineers Public Service Company—Excluding Puget Sound
EARNINGS COMPARISON:								
x All Charges & Pfd. Div. Earned	1940	1.35	1.36	1.52	1.66	1.39	1.22	1.38
	1941	1.22	1.35	1.50	1.48	1.35	1.20	1.28
	1942	1.25	1.17	1.51	1.28	1.48	1.22	1.22
	1943	1.47	1.13	1.59	1.24	1.51	1.40	----
	1944	1.46	1.34	1.60	1.25	1.45	1.54	----
BALANCE SHEET COMPARISON:								
% Prior Oblig.: Total Capital	1942	44.97%	65.73%	62.15%	46.67%	58.58%	71.62%	
	1943	42.77%	67.11%	50.71%	46.38%	57.12%	60.37%	
	1944	43.11%	66.46%	57.89%	45.85%	55.37%	68.27%	
Book Value Equity Per Share Pfd.	1942	$268.95	$500.15	$132.06	$185.64	$226.92	$225.65	
	1943	$267.99	$473.66	$135.70	$185.49	$233.14	$192.40	
	1944	$260.84	$458.88	$141.98	$185.22	$235.41	$192.50	
% Net Quick: Prior Obligations	1942	10.45%	5.72%	9.21%	13.52%	8.06%	6.09%	
	1943	13.24%	9.79%	14.09%	14.11%	6.75%	11.90%	
	1944	20.81%	10.24%	15.78%	14.09%	8.88%	10.55%	
x Preferred Dividends Earned	1942	1.85	2.77	1.85	1.68	2.91	1.80	
	1943	2.42	2.95	2.02	1.61	3.08	2.48	
	1944	2.35	2.84	2.15	1.59	2.85	3.20	
Preferred Stock:								
Par Value		$100.00	$100.00	No Par	$100.00	$100.00		
Stated Dividend		$5.00	$5.00	$1.30	$5.00	$4.75		
Call Price		$105.00	$107.50	$27.50	N. C.	$105.00		
Current Market (week January 4)		$105.50	$102.75*	$26.50	$114.38	$107.63		
Yield		4.74%	4.87%	4.91%	4.37%	4.41%		

*Present price: H—$119, L—$116.75, Avg. $117.83. Includes $16.25 in accumulated dividends. 90% of this amount deducted to arrive at basis price for preferred.

Notes: (1) Moody's Public Utilities, 1945 Volume, pages 1620f.
(2) " " " " " " 703f.
(3) " " " " " " 251f.
(4) " " " " " " 569f.
(5) " " " " " " 1067f.

Preferred Stockholders' Exhibit No. 29 (Cont'd)

CORRESPONDING PRICE FOR
ENGINEERS PUBLIC SERVICE COMPANY, INC.
PREFERRED STOCKS

Based on Ratio of	$5 Pfd.	$5.50 Pfd.	$6 Pfd.
Columbia Gas & Electric	$105.49	$116.03	$126.58
Niagara Hudson Power	102.75	112.94	123.20
Pacific Public Service	101.83	112.02	122.20
Public Service of N. J.	114.00	125.86	137.30
Wisconsin Electric Power	113.37	124.71	136.05
Average	$107.49	$118.31	$129.07

A reference to the preceding study indicates that for the period studied Engineers Public Service Company, in respect to Times All Charges & Preferred Dividends Earned, was inferior to all five comparative companies for the years 1940 and 1941. In 1942, Engineers was inferior to four of the companies studied. In 1943, Engineers, in respect to Times All Charges & Preferred Dividends Earned, was superior to two of the comparative companies and inferior to three. In 1944, however, Engineers Public Service Company was superior to all companies studied, with the exception of Pacific Public Service, and closely approximated the record of that company. It may be said that for the years 1943 and 1944, years which fully reflected divestment of the Company's interest in its non-productive subsidiary, Puget Sound Power & Light, the Company's record (on average) exceeded that of the five comparative companies studied.

On the basis of its capital structure, Engineers Public Service Company shows a somewhat heavier proportion of Prior Obligations to Total Capitalization than do the five companies studied for comparative purposes.

In respect to the Book Value of Equity Per Share of Preferred, Engineers Public Service Company in 1942 showed a higher coverage than two of the companies, approximately the same coverage as Wisconsin Electric

Preferred Stockholders' Exhibit No. 29 (Cont'd)

Power, and coverage below that of Columbia Gas & Electric and Niagara Hudson Power. In the years 1943 and 1944, Engineers' Book Value of Equity Per Share of Preferred exceeded that of two of the companies studied and was inferior to that of three of the companies.

In respect to the per cent of Net Quick to Prior Obligations, Engineers was superior to only one of the companies in the years 1942 and 1944, whereas in 1943 Engineers was superior to two of the companies.

In respect to Times Parent Company Dividends were Earned, Engineers Public Service Company, in the year 1942, was superior to only one of the five comparatives; in the year 1943 Engineers was superior to three of the Companies; whereas in the year 1944 Engineers was superior to all five companies studied for comparative purposes. On a combined basis, it may be said that Engineers Public Service Company, particularly in the years 1943 and 1944, ranged, as far as investment risk is concerned, in a medium or average position as compared to the five companies studied.

The preferred stocks of the five companies studied averaged to yield between a 4.37 basis and a 4.91 basis. These yields, it will be noted, are substantially in excess of the yields previously referred to in respect to high-grade preferred stocks. The Preferred stock of Engineers Public Service Company, as well as the preferred stocks of the five public utility holding companies, studied for comparative purposes, must be classed as medium-grade preferred stocks, and should, therefore, sell at yields higher than the yields registered by the high-grade preferred stocks.

If the current yields at which the preferred stocks of the five public utility holding companies are selling are used for the purpose of capitalizing the stated dividend rates on Engineers Public Service Company Preferred stocks and if the values so obtained were to be averaged, the average value of the $5 Cumulative Preferred would be $107.49 a

Preferred Stockholders' Exhibit No. 29 (Cont'd)

share, the average value of the $5.50 Cumulative Preferred stock would be $118.31 a share, and the $6 Cumulative Preferred stock would have an average per share value of $129.07. These prices, of course, are without reference to the call prices at which these stocks can be called. This study indicates that if Engineers Public Service Company were to continue in business its several classes of preferred stock would have a current fair investment value equal to or in excess of the call prices of these stocks.

I made a further study in which I selected from a wide list of electric and power company preferred stocks those stocks having charge coverage on an over-all basis between approximately 1.25 to a 1.75 basis, and excluded stocks whose stated dividend rate, in conjunction with call prices, would make such stocks improper for comparative purposes, with the following results.

Preferred Stockholders' Exhibit No. 29 (Cont'd)

STUDY—DIVIDEND: PRICE RELATIONSHIPS
MEDIUM-GRADE SELECTED UTILITY PREFERRED STOCKS
CURRENT VALUES—DIVIDEND & EARNINGS FACTORS
AT JANUARY, 1946

	Callable at	Type Co. and Affiliation	Times' Preferred & Charges Covered 1943	1944	Preferred Div. Coverage 1943	1944	(1) Current Price	% Yield	Reference
Bangor Hydro-Electric Co. 7% Cumulative Preferred	N.C.	OPERATING—	1.33	1.37	1.57	1.57	$1.57.00	4.5	1945 Vol. Moody's—Public Utilities—Page 2;
California Oregon Power Co. 6% Cumulative Preferred	N.C.	" — Std. G. & E.	1.60	1.57	2.46	2.40	$110.50*	5.4	" " " " 1260
Central Illinois Light Co. 4½% Cumulative Preferred	$110	" — Com. & South.	1.78	1.78	2.87	2.81	$113.13	4.0	" " " " 622,
Consumers Power Co. 4½% Cumulative Preferred	$110	" — Com. & South.	1.55	1.44	2.36	2.12	$113.13	4.0	" " " " 626,
Georgia Power Co. $5 Cumulative Preferred	$110	" — Com. & South.	1.54	1.35	2.31	1.82	$110.00*	4.5	" " " " 630,
Kansas Power & Light Co. 4½% Cumulative Preferred	$110	" — No. Amer. Lt.	1.60	1.66	2.72	2.84	$110.00*	4.1	" " " " 1040,
New Orleans Public Service 4¾% Cumulative Preferred	$111½	" — El. Pwr. & Lt.	1.45	1.46	3.23	3.31	$113.50*	4.2	" " " " 1525,
Pennsylvania Power & Light $5 Cumulative Preferred	$110	" — Nat'l Pwr. & Lt.	1.21	1.19	1.52	1.47	$114.25*	4.4	" " " " 1595,
Public Service Co. of Indiana 5% Cumulative, Ser. "A"	$105	" — Midland Realty	1.57	1.65	3.89	3.88	$105.75*	4.7	" " " " 696;
West Penn Electric Co. 6% Cumulative Preferred	$110	HOLDING — Amer. W/W & El.	1.27	1.31	2.23	2.41	$110.50*	5.4	" " " " 460.
Average			1.49	1.48	2.52	2.46			
ENGINEERS PUBLIC SERVICE COMPANY—ALL CLASSES			1.40	1.54	2.48	3.20			

RECONSTRUCTED VALUES
ENGINEERS PUBLIC SERVICE COMPANY PREFERRED STOCK
ADJUSTED TO 4.5% DIVIDEND YIELD

Series	Value at 4.5% Yield Basis (2)
$5.00	$111.11
$5.50	$122.22
$6.00	$133.33

(2) Ex Call Features & Holding Company Act.

(1) Unless otherwise marked, prices are average sale for week ended January 4, 1946, as per Commercial & Financial Chronicle.

* Average December, 1945, prices.

Preferred Stockholders' Exhibit No. 29 (Cont'd)

The ten preferred stocks referred to in the preceding study averaged to earn All Charges & Preferred Dividends 1.49 times in the year 1943, as against a coverage of 1.40 times for Engineers Public Service Company. In the year 1944 the ten stocks averaged to earn Over-All Charges 1.48 times, as against similar coverage for Engineers Public Service Company of 1.65 times. The ten companies whose stocks are included in this study embrace both holding companies and operating companies.

The ten preferred stocks, above referred to, showed coverage in respect to preferred dividends only of 2.52 times in 1943, as against a similar figure of 2.48 for Engineers Public Service Company. In the year 1944, however, the ten stocks showed an average coverage in respect to preferred dividends alone of 2.46, as against a similar coverage of 3.20 for Engineers Public Service Company.

The various preferred stocks embodied in this study averaged to sell at prices to yield between a 4.1 basis and a 5.4 basis, the average yield for the ten preferred stocks being 4.5%. If this yield is applied to the several classes of Preferred Stock of Engineers Public Service Company, we have corresponding values of $111.11 for the $5 Cumulative Preferred series, $122.22 for the $5.50 Cumulative Preferred series, and $133.33 for the $6 Cumulative Preferred series.

Special Analysis Re Virginia Electric & Power Company:

The following table shows the Gross Income of Virginia Electric & Power Company on the basis of combined operations of Virginia Electric Power Company and Virginia Public Service Company (merged into Virginia Electric & Power Company on May 25, 1944) and their subsidiaries, after intercompany eliminations, together with earnings for the year 1945 (with the last two months estimated), and earnings for the year 1946 estimated.

GROSS INCOME, CHARGES AVAILABLE FOR PREFERRED DIVIDENDS,
PREFERRED DIVIDEND REQUIREMENTS, AND FREEZE REQUIREMENTS RE
1ST & REFUNDING SERIES "E", 2¼% BONDS DUE 3/1/75
VIRGINIA ELECTRIC & POWER COMPANY (1)
1939-1946, INCLUSIVE

	1939(2)	1940(2)	1941(2)	1942(2)	1943(2)	1944(2)	Last 2 Mos. Estimated 1945(3)	Estimated 1946(3)
Gross Income	$8,728,867.	$9,298,715.	$9,107,818.	$8,250,616.	$9,060,379.	$8,693,644.	$8,852,000.	$9,005,000.
Charges & Amortization Plant	3,827,634.	3,896,363.	3,876,498.	3,603,446.	3,309,936.	3,026,359.	3,381,000.	2,980,000.
	$4,901,233.	$5,402,352.	$5,231,320.	$4,647,170.	$5,750,443.	$5,667,285.	$5,471,000.	$6,125,000.
Reduc. in Fed. Taxes resulting from Amort. Emerg. Facil.	.....	.....	.....	.....	13,391.	537,496.	3,939,677 (4)	.....
Balance for Preferreds	$4,901,233.	$5,402,352.	$5,231,320.	$4,647,170.	$5,763,834.	$6,204,781.	$9,410,677.	$6,125,000.
Preferred Dividend Requirements	1,448,000 (5)	1,448,000 (5)	1,448,000 (5)	1,448,000 (5)	1,448,000 (5)	1,448,000 (5)	1,448,000.	1,448,000.
Balance for Common	$3,453,233.	$3,954,352.	$3,783,320.	$3,199,170.	$4,315,834.	$4,756,781.	$7,962,677.	$4,677,000.
Freeze Requirements					$ 165,000.	$1,620,000.	$1,560,000.	$1,450,000.

(1) Data represents combined operations of Virginia Electric & Power Company and Virginia Public Service Company (merged into Virginia Electric & Power Company on May 25, 1944) and their subsidiaries, after intercompany eliminations but without further adjustments.
(2) From Applicant's Exhibit 47, Page 18, except as otherwise noted.
(3) " " " 67.
(4) " " " 53, Page 1.
(5) Using 1946 Requirements, as per Exhibit 67.

Preferred Stockholders' Exhibit No. 29 (Cont'd)

In respect to the preceding table, attention should be called to the fact that the terms of the Indenture under which Series "E" 2¾% Bonds of 1975 were issued, limitations are placed in respect to dividend payments as follows:

> The Company covenants not to pay any cash dividends on its common stock, or retire any such stock except from proceeds of sale of other shares, if total amount so applied after September 30, 1942 (exclusive of dividends paid prior to January 1, 1944), plus $55,000 a month for first 37 months after September 30, 1943, and $75,000 a month for first 120 months after May, 1944, would exceed net income available for common dividends (as defined), accumulated after September 30, 1943.

I have reduced this covenant to dollar amounts and have inserted these amounts to the years 1943, 1944, 1945 and 1946, above. These freeze requirements in no way divert earnings to the detriment of the Preferred stockholders of Engineers Public Service Company, but, rather, provide that specific earnings shall be retained or used for retirement of underlying debt. Retention of earnings through the operation of the freeze covenant, therefore, results in a constant improving in the investment status of Engineers' Preferred stocks. Furthermore, an examination of the relationship between balance available for common and freeze requirements indicates that the freeze requirments do not impinge on Virginia's dividend-paying capacity to a point which seriously threatens Preferred dividend payments on the several classes of Preferred stock of Engineers Public Service Company.

I made a further study to determine the investment status of the Preferred stock of Engineers Public Service Company, on the assumption that El Paso stock was distributed as contemplated in the present Plan and Amendments; on the further assumption that Gulf States stock was to be reclassified and sold in accordance with the

Preferred Stockholders' Exhibit No. 29 (Cont'd)

present provision and Plan and Amendments; and on the further assumption that proceeds from the sale of Gulf States, together with $10,000,000 of presently available cash, is to be used to call outstanding Preferred stock of Engineers Public Service Company to the extent that such cash would enable the calling of this stock at call prices.

ENGINEERS PUBLIC SERVICE COMPANY, INC.
OUTSTANDING PREFERRED STOCKS

	Par Outstanding	Callable @	Total Cash Req. to Call	Total Div. Requirements
$5.00 Cum. Conv. Pfd. Stock	143,951(1)	$105(1)	$15,114,855	$ 719,755
$5.50 Cumulative " "	183,406(1)	110(1)	20,174,660	1,008,733
$6.00 " " "	65,098(1)	110(1)	7,160,780	390,588

(1) Plan 9/10/45, Page 4.

Proceeds from sale of 1,909,968 shs. Gulf States @ $11.50 per sh.		$21,964,632
Plus $10,000,000 Available Cash		10,000,000
Total		$31,964,632
Used to Call All $6.00 Pfd. Total Requirements	$ 7,160,780	
" " " $5.50 " " "	20,174,660	
		$27,335,440
Amount $5.00 stock to be called		$ 4,629,192
Balance		$10,485,663
# Shares @ $105 Per Share—Uncalled		99,863
Annual Requirements thereon		$ 499,315

On the basis of the preceding assumptions, it will be seen that Preferred dividend requirements on Engineers Public Service Company stock would be reduced from a present figure of $2,119,076 to $499,315 annually, an amount which would be well within the capacity of Engineers Public Service Company to pay (1) if it were to continue as a holding company owning only Virginia Electric & Power Company, or (2) if Engineers Public Service Company and Virginia Electric & Power Company were merged. Adequate funds would be available from Virginia Electric & Power Company to meet these requirements whether or not the freeze requirements previously mentioned were to be deducted from the balance available from common.

Preferred Stockholders' Exhibit No. 29 (Cont'd)

Conclusions:

It is my conclusion that the several classes of Preferred stock of Engineers Public Service Company have fair investment values, on the assumption that Engineers Public Service Company is to continue in business, as follows:

$5.00 Convertible Dividend Preferred—$106.25,
$5.50 Cumulative Dividend Preferred—$111.38,
$6.00 Cumulative Dividend Preferred—$111.50.

These values are equivalent to the full call price for the stocks plus three month's cumulative dividends. The values so arrived at are predicated on the assumption that in the event no call features were present, the stocks would have fair investment values substantially in excess of the values here set forth. In fact, absent the right to call said stocks, it is my opinion that the $5 series would be worth $108.70, the $5.50 series would be worth $119.57, and the $6.00 series would be worth $130.33. These figures are predicated on my belief that a rate of 4.6% should be used to capitalize the dividends to which these stocks are entitled, in view of the investment characteristics of the Company on the one hand, and in view of conditions in the money market on the other hand.

It is my further opinion that these several classes of Preferred stocks would have the same values whether Engineers Public Service Company continues in its present form, whether Engineers Public Service Company divests itself of El Paso and Gulf States (under Plan of September 10, 1945) and either continues with Virginia Electric & Power Company as it sole subsidiary, or whether Engineers and Virginia are merged.

RALPH E. BADGER
Ralph E. Badger
Detroit, Michigan
January 24, 1946

Preferred Stockholders' Exhibit No. 29-A.

REPORT ON VALUATION OF $5 DIVIDEND CONVERTIBLE PREFERRED STOCK, $5.50 & $6 CUMULATIVE DIVIDEND PREFERRED STOCKS

ENGINEERS PUBLIC SERVICE COMPANY, INC.
(A DELAWARE CORPORATION)

AS AT JANUARY 15, 1946

(As Corrected in Accordance with Examiner's Directions—Transcript—pages 1785-1787)

Prepared by

RALPH E. BADGER
DETROIT, MICHIGAN

January 24, 1946

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

REPORT ON VALUATION OF $5 DIVIDEND CONVERTIBLE PREFERRED STOCK, $5.50 & $6 CUMULATIVE DIVIDEND PREFERRED STOCKS

ENGINEERS PUBLIC SERVICE COMPANY, INC. (A DELAWARE CORPORATION)

AS AT JANUARY 15, 1946

Purpose:

The purpose of this report is to determine the fair investment value of the $5 Dividend Convertible Preferred Stock, $5.50 and $6 Cumulative Dividend Preferred Stock of Engineers Public Service Company, Inc., a Delaware Corporation, as at January 15, 1946.

The three classes of preferred stock of Engineers Public Service Company, Inc. are equally secured in respect to earnings and assets. The conversion privilege in respect to the $5 Convertible Preferred Stock expired June 30, 1938. This feature, therefore, is no longer operative. All classes of preferred stock are entitled to receive par and accrued dividends in the event of involuntary dissolution or liquidation of the Company. All classes of preferred stock are callable—the $5 Preferred stock, presently at $105; the $5.50 and $6 Preferred stock at $110 and accrued dividends. In the event of voluntary liquidation or dissolution of the Company, all three classes of stock are entitled to receive amounts equivalent to their call prices, plus accrued dividends to the date of call.

Engineers Public Service Company, Inc. is a holding company, incorporated in the State of Delaware in 1925. The System, at the time the Public Utility Holding Company Act of 1935 was passed, comprised Virginia Electric &

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

Power Company, Eastern Texas Electric Company, Gulf States Utilities Company, El Paso Electric Company (Delaware), El Paso Electric Company (Texas), El Paso & Juarez Traction Company, Mesilla Valley Electric Company, Baton Rouge Electric Company, Louisiana Steam Generating Corporation, Puget Sound Power & Light Company and Subsidiaries, Savannah Electric & Power Company, The Western Public Service Company, Missouri Service Company, The Northern Kansas Power Company, The Key West Electric Company, and Ponce Electric Company. Engineers also owned securities of El Paso Natural Gas Company and held an option to acquire common stock of that company, which option was later exercised. (See Testimony of R. N. Benjamin, page 20, Transcript of Record.)

Corrected, Transcript p. 1404

Since the passage of the Public Utility Holding Company Act, various properties formerly owned by Engineers Public Service Company were either sold or consolidated (Virginia Public Service Company was merged with Virginia Electric & Power Company in 1944), with the result that at January 15, 1945 the System consisted of three operating subsidiaries, to wit:

(1) Virginia Electric & Power Company, a Virginia corporation, engaged in the business of generating and purchasing electric energy and transmitting, distributing, and selling the same at retail and wholesale in parts of Virginia, northeastern North Carolina, and east central West Virginia, comprising approximately 29,700 square miles. The company conducts a manufactured gas business in Norfolk, South Norfolk, Newport News, Hampton, Virginia and vicinity. Its total gross revenue aggregates approximately $40,000,000 annually, 93% being derived from electric operations.

(2) Gulf States Utilities Company, which company is engaged in the business of generating and purchasing electric energy and transmitting, distributing, and selling the

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

same at retail and wholesale in an area in western Texas, and south central Louisiana, comprising approximately 27,500 square miles. Steam is supplied to certain large industrial customers in Baton Rouge and natural gas is purchased at wholesale and distributed at retail in Baton Rouge, Louisiana and vicinity. Company supplies water in six communities with an estimated population of 108,000, and manufactures and distributes ice in five communities. Total gross revenues approximate $18,000,000, of which 91.7% is derived from electric and steam operations, 4.9% from gas operations, the balance from water and ice operations.

(3) El Paso Electric Company. This company is engaged in the business of generating and purchasing electric energy, transmitting, distributing, and selling the same at retail and wholesale in El Paso, Texas and in an area in the Rio Grande Valley in Texas and New Mexico approximately 100 miles northwesterly from El Paso to the Caballo Dam in New Mexico and approximately the same distance southwesterly from El Paso to Van Horn, Texas. The company sells electric energy at retail in fourteen communities in Texas and twenty communities in New Mexico, together with the surrounding rural districts which have an estimated combined population of 170,400, of which 118,000 reside in El Paso. Energy is supplied at wholesale to Compania Productura DeLuze y Fuerza, S. A. for resale in the city of Juarez, Mexico. Total gross revenues are approximately $4,000,000 annually.

It is unnecessary, at this juncture, to discuss at length the history of the various relationships between the Securities & Exchange Commission and Engineers Public Service Company with reference to efforts of the Commission to bring about a compliance on the part of the Company with the requirements of the Public Utility Holding Company Act of 1935. It is sufficient at this point to state that Engineers Public Service Company had, prior to September 13, 1945, divested itself of a number of its properties, had effected various mergers, and had simplified its corporate

Corrected, Tr. p. 1404

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

structure to the point of owning the three previously described systems.

The Company, at September 10, 1945, was under orders to determine whether it would elect to retain Virginia Electric & Power Company as its principal operating system and dispose of Gulf States Utilities Company and El Paso Electric Company, or to maintain Gulf States Utilities Company and possibly El Paso Electric Company, which choice would require divesting itself of Virginia Electric & Power Company. In the event that the Company chose to maintain Virginia Electric & Power Company, it might continue in existence as a holding company or merge with Virginia Electric & Power Company.

On September 10, 1945, the Company filed a plan pursuant to Section 11 (e) of the Public Utility Holding Company Act of 1935 for divestment of assets and related matters. At subsequent times, four Amendments were filed to said Plan.

In brief, the Plan and Amendments provide (1) for increasing the common stock of El Paso Electric Company from 150,000 authorized common shares to 381,994 common shares, and the distribution of said shares to holders of Engineers common stock on the basis of one share of El Paso Electric for each five shares of Engineers' held. Scrip is to be issued in lieu of fractional shares; (2) that the common shares of Gulf States be increased from 280,000 to 1,909,968 common shares without par value; (3) that the holders of Engineers' common be issued warrants entitling such holders to purchase one share of Gulf States common at $11.50 a share for each share of Engineers' common held (Provision was made in the case of the common stockholders owning both preferred and common stock for such holders to make payment for their subscription to Gulf States common by the use of Engineers' Preferred stock, any class, at $100 a share); (4) the cash received from the sale of Gulf States, plus cash presently available in the treasury of Engineers, plus proposed bank borrowings of

$3,000,000 would be used to pay off all classes of Engineers Public Service Company Preferred stock at $100 a share; and (5) Engineers would then be liquidated and dissolved, its remaining liabilities disposed of, and the common stock of Virginia Electric & Power Company, together with its remaining assets, distributed pro rata to Engineers' common stockholders.

The Plan, as set forth above, and as adopted by the Board of Directors, was subject to the dissent by one Mr. Thomas W. Streeter, who is a Director of Engineers Public Service Company. Mr. Streeter's objection involves, among other things, the legal question as to whether or not the Plan, as above described, constitutes, in respect to the liquidation of Engineers Public Service Company, a voluntary or an involuntary liquidation. In addition to the legal question as to whether or not the Plan constitutes a voluntary or involuntary dissolution, the question as to the fair investment value of the several classes of Preferred stock of Engineers Public Service Company arises.

Deletion, Tr. pp. 1404, 1727, 1728

It is my purpose, therefore, in the following report to appraise the fair investment value of the three classes of Preferred stock of Engineers Public Service Company without regard to its proposal to liquidate, either voluntarily or involuntarily, in order to meet the requirements of Section 11 of the Act.

"Fair investment value" may be defined as the price or value at which the shares of the several classes of stock would exchange hands between willing buyers and willing sellers, neither under compulsion to buy or to sell and both thoroughly informed of all of the various elements of values.

The fair investment value of the several classes of Preferred stock of Engineers Public Service Company, which I expect to arrive at, therefore, will be predicated upon the assumption that Engineers Public Service Company shall continue in operation as presently constituted.

Deletion, pp. 1404, 1405, 1727, 1728

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

Basis of Valuation

Although the several classes of Preferred stock of Engineers Public Service Company are bought and sold on the New York Stock Exchange, the reported prices at the present time can not be regarded as representative of fair investment value. The range on the three classes of Engineers' Preferred stock, for the week ended January 5, 1946, was as follows:

	High	Low	Average
$5.00 Series	$106.00	$105.00	$105.50
$5.50 "	107.00	105.00	106.00
$6.00 "	108.00	106.50	107.25

These prices, in addition to reflecting the ordinary market factors such as money rates and matters of investment risk, also reflect at the present time two collateral factors, namely, possible dissolution either voluntary or involuntary, under provisions of Section 11 of the Public Utility Holding Company Act, as well as the Plan with its several Amendments filed September 10, 1945, which provides for eventual dissolution of Engineers Public Service Company *and the payment of $100 per share and accrued dividends* for its several classes of Preferred stock.

Preferred stocks enjoy a claim in respect to the earnings of the corporation, prior to the claim of the common stockholder but a claim which is limited to the amount of the stated dividend. In the case of Cumulative Preferred stocks, any unpaid dividends remain as contingent charges against the corporation and must be paid before dividends may be paid on the common stock. Except insofar as a preferred stock may be callable at a specific price, preferred stocks are in the nature of perpetual annuities, and should be valued by capitalizing their dividend rates at rates of capitalization which give full weight to inherent investment risk and money rates at the date of valuation.

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

In the case of Callable Preferred stock, however, there is an upper limit placed upon values, since the issuing corporation reserves the right to call such stocks at stated prices upon relatively short notice. Callable Preferred stocks, therefore, do not as a rule sell substantially in excess of their call prices and the amount by which market prices sometimes exceed call prices is represented by an estimate of the probability, or lack of probability, that the stock will be called in the immediate future.

In valuing the several classes of Preferred stock of Engineers Public Service Company, *as a going concern*, I propose to show that the fair investment value of these several classes of Preferred stock would be, under present conditions, substantially in excess of their call prices, were it not for the fact that each of these classes of stocks is callable at a stated price or premium, and that their present fair investment values are represented by their call prices plus a slight premium to account for the time required to effect a call.

Economic conditions and money rates—January, 1946:

It is unnecessary, at this juncture, to go into a lengthy discussion of our banking structure nor to discuss the various repercussions which have followed the huge increases in our Federal debt and bank deposits, stemming from World War II. It is sufficient to state here that the effect of Government financing, as carried on during the past several years, has been (1) substantially to increase deposit currency in circulation, (2) substantially to increase actual money in circulation, and (3) to increase the dollar value of high-grade bonds and preferred stocks with a concomitant reduction in the yields thereon. These tendencies were prevalent in 1932 but have been greatly aggravated as a result of changes which took place from 1939 to date. The following table indicates clearly the history of interest rates during the period 1932 to date.

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

YIELDS ON U. S. GOVERNMENT BONDS, HIGH-GRADE CORPORATE BONDS, AND HIGH-GRADE PREFERRED STOCKS 1932 TO NOVEMBER, 1945

Year	U. S. Governments (1)	High-Grade Corporate Bonds (2)	High-Grade Preferred Stocks (3)
1932	3.68	5.28	6.13
1933	3.31	4.69	5.75
1934	3.12	4.14	5.29
1935	2.79	3.61	4.63
1936	2.65	3.34	4.33
1937	2.68	3.30	4.45
1938	2.56	3.20	4.34
1939	2.36	3.02	4.17
1940	2.21	2.92	4.14
1941	1.95	2.84	4.08
1942	2.02	2.85	4.31
1943	1.87	2.80	4.06
1944	1.74	2.77	3.98
1945	1.46 (Nov.)	2.67 (Nov.)	3.65 (Nov.)

Correction Tr. p. 1535

(1) Data through 1942 taken from U. S. Statistical Abstract, 1943, pp. 374; thereafter, Standard Statistics Average.
(2) Standard Statistics Average, High-Grade Corporate Bonds.
(3) Standard Statistics Average.

An examination of the preceding tabulation indicates clearly the low levels to which interest rates and, correspondingly, the low level to which the rates on preferred stocks have gone during the past several years. The yields on high-grade preferred stocks, which in the early 'Thirties ranged from 4½% to 6%, have dropped to a current level of 3.65%. High-grade corporate bond yields have dropped from a level of over 5% to 2.67%. The yields on high-grade public utility preferred stocks have closely followed this trend. I refer to Pacific Gas & Electric, Non-Callable, 6% Preferred stock having a Par Value of $25.00. This stock averaged to sell in the month of December, 1945, at $43.00, which would give it a yield of 3.49%. Buffalo Niagara Electric Corporation recently brought out a 3.6% Preferred stock for sale to the public at approximately $102.8, or at a yield of 3.50%. Many other examples of similar nature might be given. In other words, high-grade public utility preferred stocks have closely followed the general average of all high-grade preferred stocks.

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

It does not require an exhaustive presentation of statistics to show that the yields on preferred stocks are, at the present time, the lowest which they have ever been in the history of our country, or, conversely, that the prices of such stocks are at the highest levels ever experienced. The permanency of this situation will depend on the permanency of low interest rates. In this connection I would like to quote from the Federal Reserve Bulletin of November, 1945, page 1099, as follows: "In view of the existing sources of demand for Government securities and the reduced supply of new securities, prospects are for a continued strong market for these securities. Under the circumstances, demands are particularly strong for the intermediate and long-term issues bearing the higher yields. Such of these issues as can be held by banks will be in demand by banks, while non-bank investors may be expected to buy principally the issues that are not eligible for purchase by banks." This statement appeared in an unsigned article which indicates, in accordance with the stated policy of the Editorial Committee, that said Committee, representing the Board of Governors of the Federal Reserve System, are responsible for interpretations and opinions expressed therein.

The Honorable Secretary of the Treasury, Mr. Vinson, has, on numerous occasions, expressed his confidence in the permanency of present low rates of interest. The Federal Government, with its present huge debt, a substantial portion of which comes due in less than five years, is vitally interested in the maintenance of low interest rates. There are few people today who are of the opinion that any substantial rise in interest rates is likely to take place in the reasonably near future. High-grade preferred stock prices may, therefore, be anticipated to remain at high levels and the yields on high-grade preferred stocks at current low levels for a considerable period of time to come. It may, therefore, be stated that the present level of preferred stock

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

prices is, as far as one can humanly predict, a permanent level.

The market action of high-grade bonds or preferred stocks does not fluctuate as widely or as erratically as does the market for common stocks; nor do we find, in respect to preferred stocks, prices fluctuating widely because of temporary and speculative conditions. The prices of preferred stocks today are predicated on fundamental conditions prevailing in the money markets, conditions which are of a permanent nature.

The values which I propose to place on the several classes of Preferred stock of Engineers Public Service Company are, therefore, values of a permanent nature and are not values of a temporary or speculative nature, as far as one can reasonably predict at the present time.

Addition, Tr. p. 1436

I have examined at some length the history of Engineers Public Service Company as set forth in various exhibits already received in this case, as set forth in various releases of the Securities & Exchange Commission, and as discussed in the testimony of the officials of the Company in the present matter. I have also examined the records in respect to the Company's properties, the Company's business, the management of the Company, the asset position of the Company (as disclosed by its various statements), the earnings and dividend record of the Company, and other pertinent data having a bearing on the value of Engineers Public Service Company Preferred stock.

Earnings Analysis:

I present herewith an Income Account analysis on a Consolidated Basis for Engineers Public Service Company for the period 1940 through 1945, inclusive.

INCOME ACCOUNT ANALYSIS—CONSOLIDATED BASIS
ENGINEERS PUBLIC SERVICE COMPANY, INC. & SUBSIDIARIES
1940 THROUGH 1945, INCLUSIVE

	1940	1941	1942	1943	1944	(Nov. & Dec. Estimated) 1945
Operating Revenues	$57,093,653.36	$64,739,517.85	$73,836,543.41	$59,570,893.29	$72,031,422.83	$62,551,800.00
Operating Expenses	37,150,412.61	41,270,220.80	45,999,623.28	35,696,623.37	44,729,384.34	37,730,535.00
Net Operating Revenues	$19,943,540.75	$23,469,297.05	$27,836,920.13	$23,874,269.92	$27,302,038.49	$24,821,265.00
Add or Deduct Other Income—Net	(d) 168,996.85	(d) 28,539.41	(d) 252,923.52	141,627.02	40,300.42	(d) 14,159.00
Total Income Before Taxes	$19,774,543.90	$23,440,757.64	$27,583,996.61	$24,015,896.94	$27,342,338.91	$24,807,106.00
Deduct Federal Income & E. P. T.—Net	2,590,241.07	6,312,319.86	10,641,147.11	12,282,111.84	13,420,185.77	12,142,267.00(1)
Balance	$17,184,302.83	$17,128,437.78	$16,942,849.50	$11,733,785.10	$13,922,153.14	$12,664,839.00
Add Holding Co. Income less Expense	34,028.85	(d) 122,193.29	(d) 187,723.17	(d) 107,249.40	(d) 320,881.25	(d) 893,800.00(2)
Available for Debt, Preferred Div. & Minority Interest	$17,218,331.68	$17,006,244.49	$16,755,126.33	$11,626,535.70	$13,601,271.89	$11,771,039.00
Total Debt, Pfd. Div. & Minority Int.	14,149,364.85	14,117,295.80	13,733,442.48	8,287,496.20	8,824,808.02	8,014,343.00
Balance	$ 3,068,966.83	$ 2,888,948.69	$ 3,021,683.85	$ 3,339,039.50	$ 4,776,463.87	$ 3,756,696.00
x Charges & Preferred Dividends Earned	1.22	1.20	1.22	1.40	1.54	1.47
Operating Ratio	65.07%	63.75%	62.30%	59.92%	62.10%	60.32%
% Depreciation: Total Operating Rev.	11.1	10.5	9.2	9.1	7.8	7.47
% Maintenance: Total Operating Rev.	6.7	6.5	6.8	6.4	7.0	6.35
% Comb. Mtce. & Deprec.: Total Oper. Rev.	17.8	17.0	16.0	15.5	14.8	13.82

(1) Does not give effect to reduction in Federal Income and Excess Profits Taxes resulting from extraordinary non-recurring deductions. If such items were used to reduce taxes accordingly, (as set forth in Applicant's Exhibits 53 and 66) over-all coverage would be 2.12.

(2) Holding Company expenses not segregated. $893,800 represents amortization of plant acquisition adjustments.

Data for years 1940—1944, inclusive, taken from Applicant's Exhibits 37-P through 37-T. 1945 data from Exhibit 63, page 2.

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

An Examination of this data indicates that, during the period under consideration, there was a continuous improvement in the Times Charges and Preferred Dividends Earned (i.e., over-all charges), with the exception of the year 1945. In the year 1940, all Charges and Preferred Dividends, on a Consolidated Basis, were earned 1.22 times. This figure increased gradually until all Charges and Preferred Dividends were earned, in the year 1944, 1.54 times. In the year 1945, all Charges and Preferred Dividends were earned 1.47 times, provided no effect is given to the reduction in Federal Income and Excess Profits Taxes in that year, resulting from extraordinary non-recurring deductions. If such items were used to reduce taxes accordingly, over-all coverage would have been 2.12 times.

Operating ratios, on a Consolidated Basis, amounted to 65.07% in 1940, dropped to 62.30% in 1942, gradually dropped to 59.93% in 1943, increased to 62.10% in 1944, and dropped to 60.32% in 1945. The Company's appropriation for Depreciation and Maintenance averaged between 17.8% of Gross in the year 1940 to 13.8% in 1945.

I present herewith an Analysis of Income Data relative to Engineers Public Service Company, for the years 1940 through 1945, inclusive, showing the Times Parent Company Preferred Dividends were earned.

ANALYSIS INCOME DATA
ENGINEERS PUBLIC SERVICE COMPANY, INC.
1940-1945, INCLUSIVE

	1940	1941	1942	1943	1944	1945 (Nov. & Dec. Est.)
Bal. Subs. Applic. to Parent Co.	$5,320,129.97	$5,274,503.56	$4,281,654.59	$5,702,372.79	$7,273,233.62	
Earnings from Other Sources—Net	354,919.04	351,722.22	250,206.89	344,583.86	157,349.86	
Total	$5,675,049.01	$5,626,225.78	$4,531,861.48	$6,046,956.65	$7,430,583.48	
Less Expenses, Taxes and Interest	320,890.19	473,915.51	437,930.06	451,833.26	478,231.11	
Balance—Stocks of Engineers	$5,354,158.82	$4,692,858.73*	$4,093,931.42	$5,595,123.39	$6,952,352.37	$5,875,772.00
Preferred Dividend Requirements	2,285,191.99	2,263,361.58	2,256,084.33	2,256,083.89	2,175,888.50	2,119,076.00
Available for Common	$3,068,966.83	$2,429,497.15	$1,837,847.09	$3,339,039.50	$4,776,463.87	$3,756,696.00
x Preferred Dividends Earned	2.34	2.07	1.81	2.48	3.20	2.77(1)

*Less earnings of a subsidiary in excess of preferred dividend requirements, (less minority interest) credited to Reserve for Depreciation in value investment ($459,451.54).

(1) Does not give effect to reduction in Federal Income and Excess Profits Taxes resulting from extraordinary and non-recurring deductions. If such items were used to reduce taxes accordingly, (using data in Applicant's Exhiibts 53 and 66) Parent Company Preferred dividends would have been earned 4.75 times.

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

Data for the years 1940-1944, inclusive, taken from Applicant's Exhibits 37-P through 37-T. Data for 1945 was taken from Page 2 of Applicant's Exhibit 63.

An examination of the preceding tabulation indicates that Preferred Dividend requirements of the Parent Company, based on balance of earnings available for Engineers Public Service Company, were covered between 1.81 times and 3.2 times for the period studied. For the year 1945, Parent Company Preferred Dividend requirements were covered 2.77 times, if no effect is given to reduction in Federal Income and Excess Profits Taxes resulting from extraordinary or non-recurring deduction. If such items were used to reduce taxes accordingly, the Parent Company's Preferred Dividends would have been earned 4.75 times.

The following tabulation shows Estimated Earnings of Engineers Public Service Company and Subsidiaries for the year 1946, on the assumption that no change is made in respect to properties operated during the year 1946.

ESTIMATED EARNINGS—1946

ENGINEERS PUBLIC SERVICE COMPANY, INC. & SUBSIDIARIES

(Data Taken from Applicant's Exhibit 63, Page 5)

	Virginia	Gulf States	El Paso	Combined	Engineers Public Service	Inter-Company Eliminations	Consolidated
Operating Revenues	$38,375,000	$15,344,000	$ 3,665,800	$57,374,800	$ 4,819,065	$(d) 4,819,065	$57,374,800
Operating Expenses							
Operation	16,607,500	5,755,000	1,540,000	23,902,500	250,000	—	24,152,500
Maintenance	2,742,500	996,000	210,000	3,948,500	—	—	3,948,500
Depreciation	2,950,000	1,600,000	300,000	4,850,000	—	—	4,850,000
Taxes—General	3,500,000	1,274,200	377,400	5,151,600	14,918	—	5,166,518
Total	$25,800,000	$ 9,625,200	$ 2,427,400	$37,852,600	$ 264,918	$ —	$38,117,518
Operating Income	$12,575,000	$ 5,718,800	$ 1,228,400	$19,522,200	$ 4,554,147	(d) 4,819,065	$19,257,282
Add Other Income	(d) 100,000	(d) 16,500	5,000	(d) 111,500	—	—	(d) 111,500
Balance	$12,475,000	$ 5,702,300	$ 1,233,400	$19,410,700	$ 4,554,147	$(d) 4,819,065	$19,145,782
Deduct Income Taxes	3,470,000	1,654,200	316,600	5,440,800	259,586		5,700,386
Plant Amortization	700,000	193,800	—	893,800	—		893,800
Avail. for Charges	$ 8,305,000	$ 3,854,300	$ 916,800	$13,076,100	$ 4,294,561	$(d) 4,819,065	$12,351,596
Charges & Pfd. Dividends	3,658,121	1,454,300	283,400	5,375,821	2,119,076		7,494,897
Available for Common	$ 4,666,879	$ 2,400,000	$ 633,400	$ 7,700,279	$ 2,176,485	$(d) 4,819,065	$ 5,056,699
x Charges & Pfd. Div. Earned							1.67
x Parent Company Pfd. Div. Earned							3.39

CHARGES ANALYSIS

Interest & Amortization	$ 2,180,000	$ 926,300	$ 215,900	$ 3,322,200	$ —	$ —	$ 3,322,200
Subsidiary Pfd. Dividend	1,448,000	528,000	67,500	2,043,500	—	—	2,043,500
Minority Interest	10,121	—	—	10,121	—	—	10,121
Parent Co. Pfd. Div. Req.	—	—	—	—	2,119,076	—	2,119,076
	$ 3,638,121	$ 1,454,300	$ 283,400	$ 5,375,821	$ 2,119,076	$ —	$ 7,494,897

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

It will be seen from this study that Over-all Charges in the year 1946 will be earned 1.67 times and that Parent Company Preferred Dividends alone will be earned 3.39 times.

This estimate of 1946 earnings indicates a continuation of the improvement in earnings shown for the 1940-1945 period, as coverage, both in respect to over-all charges and Parent Company preferred dividends, is estimated to be higher in the year 1946 than in any of the years 1940 through 1945.

The public utility industry has for many years been characterized by stability and by a strong growth trend. There are no peculiar economic characteristics in respect to the territories served by the present subsidiaries of Engineers Public Service Company which would indicate that the earnings trend of these companies would go counter to that of the industry. It is a reasonable assumption, therefore, that this Company should continue in future years to register progress along with other units in the industry.

Balance Sheet Data

I present herewith consolidated Balance Sheet Data for Engineers Public Service Company and Subsidiaries, for the years 1942 through 1944, inclusive.

CONSOLIDATED BALANCE SHEET—SUMMARY ANALYSIS
ENGINEERS PUBLIC SERVICE COMPANY, INC.
1942-1944, INCLUSIVE

	1942	1943	1944
Subs. Debt & Notes	$148,981,500.00	$ 87,755,000.00	$117,224,471.19
Subs. Pfd. Stock, Premium & Accrued Dividends	88,751,368.66	34,672,337.97	45,175,063.00
Minority Interests	291,644.31	72,835.54	50,917.24
Total Preceding Claims	$238,024,512.97	$122,500,173.51	$162,450,451.43
Engineers' Preferred	$ 41,801,500.00	$ 41,801,500.00	$ 39,245,500.00
Common Stock	$ 1,909,968.00	$ 1,909,968.00	$ 1,909,968.00
Reserves	14,352,830.17	4,350,470.62	4,394,705.20
Capital Surplus	24,877,635.14	19,661,145.94	18,843,978.80
Earned Surplus	11,382,848.41	12,701,846.14	11,157,691.09
Total Common & Surplus	$ 52,523,281.72	$ 38,623,430.70	$ 36,306,343.09
Total Investment	$332,349,294.69	$202,925,104.21	$238,002,294.52
Book Value Equity Per Sh. Pfd.	$225.65	$192.40	$192.50
Net Quick Assets	$ 14,491,331.00	$ 14,579,270.00	$ 17,146,619.00
% Net Quick: Prior Obligations	6.09	11.90	10.55
% Prior Oblig.: Total Capital	71.62	60.37	68.26
% Pfd. & Subord. Items: Total Cap.	28.38	39.63	31.74

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

At December 31, 1944, Engineers Public Service Company showed a book value of equity in the amount of $192.50 for each share of preferred stock. Net Quick Assets amounted to $17,147,000, or the equivalent of 10.55% of Obligations prior to aggregate Preferred Stock. Obligations prior to Parent Company's Preferred stock amounted to 68.26% of total capitalization, whereas preferred stock of the Parent Company and subordinate capital items represented 31.74% of total capitalization.

I made another calculation in respect to the Corporate Balance Sheet of Engineers Public Service Company in which study I determined the values of Engineers' investments in the common stocks of subsidiaries by capitalizing 2 year average earnings of the major subsidiaries held by Engineers, at December 31, 1944, on the assumption that the equities in these companies were worth 15 times 2 year average earnings.

Applicant's Exhibit 14 presents a study of the Price: Earnings Ratios of the common stocks of four companies, to wit: Houston Lighting and Power, Idaho Power, Indianapolis Power & Light Company, and Tampa Electric Company. At October 6, 1945, these stocks averaged to sell at 14.44 times average per share earnings for the period 1938-1941, inclusive; 16.04 times yearly average earnings for the period 1942-1944, inclusive, plus 12 months ended June 30, 1945; 15.20 times yearly average earnings for the period 1938-1944, inclusive, plus 12 months ended June 30, 1945; 15.58 times per share earnings for the year 1944; and 14.90 times 12 month's earnings ended June 30, 1945.

Pfd. Stockholders' Ex. 30 in evidence, Tr. p. 1721

In this connection I would also like to refer to Appendix "A" of a report which I prepared in connection with the Valuation of the Preferred Stock of American Light & Traction Company, which report is on file with the Securities & Exchange Commission. At May, 1945, the study contained in the Appendix referred to indicated that 13 electric and gas companies' common stocks averaged to sell

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

at 15.85 times 5 year average earnings, for the period 1940-44, inclusive.

A reconstruction of the Comparative Balance Sheet of Engineers Public Service Company (Parent Company only), appearing on page 17, Applicant's Exhibit 37-T, using reconstructed value of subsidiary common stocks by the use of a multiple of 15 times applied to 2 year average earnings, eliminating Reserve for Depreciation in the value of investments and taking other items at Book Values, indicates Net Assets Available for Preferred stock of Engineers Public Service Company in the amount of $104,267,911, or at the rate of $265.68 per $100 of Preferred stock. It should be further stated, in respect to this item, that this figure represents in substance the readily marketable value of assets available as security for the Preferred stock of Engineers Public Service Company, since the common stocks of any or all of the subsidiaries held could, at the date covered by the statement, have been sold at prices approximating the figures set forth in this study. Subsequent to December 31, 1944, certain of the properties have been sold.

Correction, Tr. pp. 1532, 151 1535

RECONSTRUCTED CORPORATE BALANCE SHEET
ENGINEERS PUBLIC SERVICE COMPANY, INC.
SUBSIDIARY COMMON STOCKS VALUED AT
15 x 2 YEAR AVERAGE EARNINGS AT DECEMBER 31, 1944

	Earnings for Common Less Minority Interest 1943	1944	Average	Valued at 15 Times
El Paso Electric & Subs	$ 431,493.53	$ 502,494.44	$ 466,994	$ 7,004,910.
Gulf States Utilities	1,624,132.45	2,168,462.29	1,896,297	28,444,455.
Savannah Electric & Power	203,075.82	182,062.31	192,569	2,888,535.
Virginia Electric & Power	3,367,246.01	4,337,575.31	3,852,411	57,786,165.
Western Public Serv. Group	76,424.96	82,639.27	79,532	1,192,980.
Reconstructed Value Subsidiary Common Stocks				$ 97,317,045.
Preferred Stocks				612,361.
Bonds				635,000.
Notes				508,800.
Advances				8,000.
Total				$ 99,081,206.00

Correction, Tr. pp. 1532, 1728, 1729

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

Add Excess Profits Tax Refund Bonds	6,079.30
Special Funds	92,000.00
Net Quick Assets	5,748,357.59
Total Assets	$104,927,642.89
Less Long-Term Contracts & Tax Reserve	659,731.79
Net Assets Available for Preferred	$104,267,911.10
Par Value Preferred Stock	39,245,500.00
Balance	$ 65,022,411.10
Assets Per $100 Par Preferred at Estimated Market Values	$265.68

Note: Release No. 5499, page 6, Engineers' investment in El Paso set up originally $6,598,539.

Correction, Tr. pp. 1533, 1535, 1728, 1729

In respect to the value set forth in the preceding study, I would like to call attention that on Page 6 of the Securities & Exchange Commission's Release, #5499, is stated Engineers' investment in El Paso was set up at $6,598,539.

I would like further to refer to Page 163 of R. N. Benjamin's Testimony, Transcript of Record, 163, in which he states that on December 3, 1945 Engineers had received five bids for either the purchase of the capital stock or the assets of Western Public Service Company, and that the Board of Directors, at a meeting held that day, authorized the acceptance of a bid which would produce $843,000 for the capital stock of Western Public Service Company, plus $508,800 in payment of a Demand Note owing to Engineers Public Service Company from Western Public Service Company, and certain additional adjustments for net current assets, bringing the aggregate amount of cash to be received up to approximately $1,500,000. If the Demand Note is eliminated from the above figure, the amount applicable to the common stock from this sale would be approximately $1,000,000.

Correction, Tr. p. 1405

Applicant's Exhibit 14 shows the current valuation of Gulf States Utilities Company, on the basis of comparative studies, to be $29,981,000.

On page 6 of Applicant's Exhibit 37-T, it is stated that on April 25, 1945 Engineers Public Service Company sold to Donner Estates, Inc. all of the securities of the Savannah Electric and Power Company for $3,387,500, as against the Company's Carried value for said securities of $3,165,965.

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

Dividend Record:

The dividend record of Engineers Public Service Company, in respect to its several classes of Preferred stock, has been as follows:

(1) $5 Cumulative Preferred, No Par: Initial dividend of $1.25 per share paid October 1, 1928. Regular dividends paid quarterly, January 1, etc. to July 1, 1933, inclusive; none thereafter to August 1, 1936, when $4 was paid on account of arrears; November 2, 1946, $6.00; 1937, $8.75; January 3, 1938, $1.25 regular and $2.50 on arrears, clearing all arrears. Regular dividends paid thereafter, quarterly January 1, etc. to stock of record about December 14, etc.

(2) $5.50 Cumulative Preferred, No Par: Initial dividend of $1.375 per share paid January 2, 1929. Regular dividends paid quarterly, January 1, etc. to stock of record about December 17, etc., to July 1, 1933, inclusive; none thereafter to August 1, 1936, when $4.40 was paid on account of arrears; November 2, 1936, $6.60; 1937, $9.625; January 3, 1938, $1.375 regular and $2.75 on arrears, clearing up all arrears. Regular dividends paid quarterly thereafter, January 1, etc., to stock of record about December 14, etc.

(3) $6 Cumulative Preferred, No Par: Initial dividend of $1.50 per share paid January 2, 1931. Regular quarterly dividends paid January 1, etc. to stock of record about December 17, etc. to July 1, 1933, inclusive; none thereafter to August 1, 1936, when $4.80 was paid on account of arrears, clearing up arrears. Regular dividends paid quarterly thereafter, January 1, etc., to stock of record about December 14, etc.

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

The Company maintained regular dividend payments on its several classes of Preferred stock from date of issuance until July, 1933, at which time dividends on all classes of stock were temporarily discontinued. Dividend payments were resumed on August of 1937 and by January of 1938 all arrearages had been cleared. Since that time, dividends have been paid with regularity and the present financial condition of the Company indicates continued ability of the Company promptly to meet dividend requirements on all classes of preferred stock.

Comparative Study—Five Public Utility Holding Companies:

I present herewith a comparative study showing the preferred dividend coverages and certain balance sheet ratios, as well as current prices and dividend yields in respect to the preferred stocks of five public utility holding companies which are similar in many respects to Engineers Public Service Company.

(Study on following page.)

COMPARATIVE STUDY—EARNINGS, RATIOS, & BALANCE SHEET ITEMS
FIVE PUBLIC UTILITY HOLDING COMPANIES WITH
ENGINEERS PUBLIC SERVICE COMPANY, INC.
COMPARISON OF PREFERRED STOCK PRICES

		Columbia Gas & Electric(1)	Niagara Hudson Power(2)	Pacific Public Service(3)	Public Service of N. J.(4)	Wisconsin Electric Power Co.(5)	Engineers Public Service Company Including Puget Sound	Engineers Public Service Company Excluding Puget Sound
Earnings Comparison:								
X All Charges & Pfd. Div. Earned	1940	1.35	1.36	1.52	1.66	1.39	1.22	1.38
	1941	1.22	1.35	1.50	1.48	1.35	1.20	1.28
	1942	1.25	1.17	1.51	1.28	1.48	1.22	1.22
	1943	1.47	1.13	1.59	1.24	1.51	1.40	—
	1944	1.46	1.34	1.60	1.25	1.45	1.54	—
Balance Sheet Comparison:								
% Prior Oblig.: Total Capital.	1942	44.97%	65.73%	62.15%	46.67%	58.58%	71.62%	
	1943	42.77%	67.11%	50.71%	46.38%	57.12%	60.37%	
	1944	43.11%	66.46%	57.89%	45.85%	55.37%	68.27%	
Book Value Equity Per Share Pfd.	1942	$268.95	$500.15	$132.06	$185.64	$226.92	$225.65	
	1943	267.99	473.66	135.70	$185.49	$233.14	$192.40	
	1944	260.84	458.88	141.98	$185.22	$235.41	$192.50	
% Net Quick: Prior Obligations	1942	10.45%	5.72%	9.21%	13.52%	8.06%	6.09%	
	1943	13.24%	9.79%	14.09%	14.11%	6.75%	11.90%	
	1944	20.81%	10.24%	15.78%	14.09%	8.88%	10.55%	
X Preferred Dividends Earned	1942	1.85	2.77	1.85	1.68	2.91	1.80	
	1943	2.42	2.95	2.02	1.61	3.08	2.48	
	1944	2.35	2.84	2.15	1.59	2.85	3.20	
Preferred Stock:								
Par Value		$100.00	$100.00	No Par	$100.00	$100.00		
Stated Dividend		$5.00	$5.00	$1.30	$5.00	$4.75		
Call Price		$105.00	$107.50	$27.50	N. C.	$105.00		
Current Market (week January 4)		$105.50	$102.75*	$26.50	$114.38	$107.63		
Yield		4.74%	4.87%	4.91%	4.37%	4.41%		

* Present price: H—$119, L—$116.75, Avg. $117.83. Includes $16.25 in accumulated dividends. 90% of this amount deducted to arrive at basis price for preferred.

Notes: (1) Moody's Public Utilities, 1945 Volume, pages 1620f.
(2) " " " " " " 703f.
(3) " " " " " " 251f.
(4) " " " " " " 569f.
(5) " " " " " " 1067f.

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

CORRESPONDING PRICE FOR

ENGINEERS PUBLIC SERVICE COMPANY, INC.

PREFERRED STOCKS

Based on ratio of	$5 Pfd.	$5.50 Pfd.	$6 Pfd.
Columbia Gas & Electric	$105.49	$116.03	$126.58
Niagara Hudson Power	102.75	112.94	123.20
Pacific Public Service	101.83	112.02	122.20
Public Service of N. J.	114.00	125.86	137.30
Wisconsin Electric Power	113.37	124.71	136.05
Average	$107.49	$118.31	$129.07

A reference to the preceding study indicates that for the period studied Engineers Public Service Company, in respect to Times All Charges & Preferred Dividends Earned, was inferior to all five comparative companies for the years 1940 and 1941. In 1942, Engineers was inferior to four of the companies studied. In 1943, Engineers, in respect to Times All Charges & Preferred Dividends Earned, was superior to two of the comparative companies and inferior to three. In 1944, however, Engineers Public Service Company was superior to all companies studied, with the exception of Pacific Public Service, and closely approximated the record of that company. It may be said that for the years 1943 and 1944, years which fully reflected divestment of the Company's interest in its non-productive subsidiary, Puget Sound Power & Light, the Company's record (on average) exceeded that of the five comparative companies studied.

On the basis of its capital structure, Engineers Public Service Company shows a somewhat heavier proportion of Prior Obligations to Total Capitalization than do the five companies studied for comparative purposes.

In respect to the Book Value of Equity Per Share of Preferred, Engineers Public Service Company in 1942 showed a higher coverage than two of the companies, ap-

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

proximately the same coverage as Wisconsin Electric Power, and coverage below that of Columbia Gas & Electric and Niagara Hudson Power. In the years 1943 and 1944, Engineers' Book Value of Equity Per Share of Preferred exceeded that of two of the companies studied and was inferior to that of three of the companies.

In respect to the per cent of Net Quick to Prior Obligations, Engineers was superior to only one of the companies in the years 1942 and 1944, whereas in 1943 Engineers was superior to two of the companies.

In respect to Times Parent Company Dividends were Earned, Engineers Public Service Company, in the year 1942, was superior to only one of the five comparatives; in the year 1943 Engineers was superior to three of the companies; whereas in the year 1944 Engineers was superior to all five companies studied for comparative purposes. On a combined basis, it may be said that Engineers Public Service Company, particularly in the years 1943 and 1944, ranged, as far as investment risk is concerned, in a medium or average position as compared to the five companies studied.

The preferred stocks of the five companies studied averaged to yield between a 4.37 basis and a 4.91 basis. These yields, it will be noted, are substantially in excess of the yields previously referred to in respect to high-grade preferred stocks. The Preferred stock of Engineers Public Service Company, as well as the preferred stocks of the five public utility holding companies, studied for comparative purposes, must be classed as medium-grade preferred stocks, and should, therefore, sell at yields higher than the yields registered by the high-grade preferred stocks.

If the current yields at which the preferred stocks of the five public utility holding companies are selling are used for the purpose of capitalizing the stated dividend rates on Engineers Public Service Company Preferred stocks and if the values so obtained were to be averaged,

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

the average value of the $5 Cumulative Preferred would be $107.49 a share, the average value of the $5.50 Cumulative Preferred stock would be $118.31 a share, and the $6 Cumulative Preferred stock would have an average per share value of $129.07. These prices, of course, are without reference to the call prices at which these stocks can be called. This study indicates that if Engineers Public Service Company were to continue in business its several classes of preferred stock would have a current fair investment value equal to or in excess of the call prices of these stocks.

I made a further study in which I selected from a wide list of electric and power company preferred stocks those stocks having charge coverage on an over-all basis between approximately 1.25 to a 1.75 basis, and excluded stocks whose stated dividend rate, in conjunction with call prices, would make such stocks improper for comparative purposes, with the following results.

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

STUDY—DIVIDEND: PRICE RELATIONSHIPS
MEDIUM-GRADE SELECTED UTILITY PREFERRED STOCKS
CURRENT VALUES—DIVIDEND AND EARNINGS FACTORS
AT JANUARY, 1946

	Callable at	Type Co. and Affiliation	Times Preferred & Charges Covered 1943	Times Preferred & Charges Covered 1944	Preferred Div. Coverage 1943	Preferred Div. Coverage 1944	Current Price(1)	% Yield	Reference
Bangor Hydro-Electric Co.									
7% Cumulative Preferred	N. C.	Operating—	1.33	1.37	1.57	1.57	$157.00	4.5	Moody's—1945 Public Utilities—p. 2
California Oregon Power Co.									
6% Cumulative Preferred	N. C.	Operating—Std. G. & E.	1.60	1.57	2.46	2.40	$110.50*	5.4	" " " " p. 1260
Central Illinois Light Co.									
4½% Cumulative Preferred	$100	Operating—Com. & South.	1.78	1.78	2.87	2.81	$113.13	4.0	" " " " p. 622
Consumers Power Co.									
4½% Cumulative Preferred	$110	Operating—Com. & South.	1.55	1.44	2.36	2.12	$113.13	4.0	" " " " p. 626
Georgia Power Co.									
5% Cumulative Preferred	$110	Operating—Com. & South.	1.54	1.35	2.31	1.82	$110.00*	4.5	" " " " p. 630
Kansas Power & Light Co.									
4½% Cumulative Preferred	$110	Operating—No. Amer. Lt.	1.60	1.66	2.72	2.84	$110.00*	4.1	" " " " p. 1040
New Orleans Public Service									
4¾% Cumulative Preferred	$111½	Operating—El. Pwr. & Lt.	1.45	1.46	3.23	3.31	$113.50*	4.2	" " " " p. 1525
Pennsylvania Power & Light									
4½% Cumulative Preferred	$112½	Operating—Natl. Pwr. & Lt.	1.52(2)	1.47(2)	2.93(2)	2.85(2)	$114.25*	3.9	" " " " p. 1595
(Correction, Tr. pp. 1537, 1538, 1583-1585)			1.21(3)	1.19(3)	1.52(3)	1.47(3)			
Public Service Co. of Indiana									
5% Cumulative, Ser. "A"	$105	Operating—Midland Realty	1.57	1.65	3.89	3.88	$105.75*	4.7	" " " " p. 696
West Penn Electric Co.									
6% Cumulative Preferred	$110	Holding—Amer. W/W & El.	1.27	1.31	2.23	2.41	$110.50*	5.4	" " " " p. 460
Average			1.49	1.48	2.52	2.46		4.5	
Engineers Public Service Company—									
All Classes Preferreds			1.40	1.54	2.48	3.20			

RECONSTRUCTED VALUES
ENGINEERS PUBLIC SERVICE COMPANY PREFERRED STOCK
ADJUSTED TO 4.5% DIVIDEND YIELD

Series of Pfd.	Value at 4.5% Yield Basis (4)
$5.00	$111.11
$5.50	$122.22
$6.00	$133.33

(4) Ex Call Features & Holding Company Act.

(1) Unless otherwise marked, prices are average sale for week ended January 4, 1946, as per Commercial & Financial Chronicle.
* Average December, 1945, prices.
(2) Actual.
(3) On basis presently outstanding preferred without any tax adjustments.

Additions
Tr. pp.1583-1585

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

The ten preferred stocks referred to in the preceding study averaged to earn All Charges & Preferred Dividends 1.49 times in the year 1943, as against a coverage of 1.40 times for Engineers Public Service Company. In the year 1944 the ten stocks averaged to earn Over-all Charges 1.48 times, as against similar coverage for Engineers Public Service Company of 1.54 times. The ten companies whose stocks are included in this study embrace both holding companies and operating companies.

The ten preferred stocks, above referred to, showed coverage in respect to preferred dividends only of 2.52 times in 1943, as against a similar figure of 2.48 for Engineers Public Service Company. In the year 1944, however, the ten stocks showed an average coverage in respect to preferred dividends alone of 2.46, as against a similar coverage of 3.20 for Engineers Public Service Company.

The various preferred stocks embodied in this study averaged to sell at prices to yield between a 3.9 basis and a 5.4 basis, the average yield for the ten preferred stocks being 4.5%. If this yield is applied to the several classes of Preferred stock of Engineers Public Service Company, we have corresponding values of $111.11 for the $5 Cumulative Preferred series, $122.22 for the $5.50 Cumulative Preferred series, and $133.33 for the $6 Cumulative Preferred series.

Special analysis Re Virginia Electric & Power Company:

The following table shows the Gross Income of Virginia Electric & Power Company on the basis of combined operations of Virginia Electric Power Company and Virginia Public Service Company (merged into Virginia Electric & Power Company on May 25, 1944) and their subsidiaries, after intercompany eliminations, together with earnings for the year 1945 (with last 2 months estimated), and earnings for the year 1946 estimated.

GROSS INCOME, CHARGES AVAILABLE FOR PREFERRED DIVIDENDS, PREFERRED DIVIDEND REQUIREMENTS, AND FREEZE REQUIREMENTS RE 1st & REFUNDING SERIES "E", 2¾% BONDS DUE 3/1/75 VIRGINIA ELECTRIC & POWER COMPANY (1) 1939-1946, INCLUSIVE

	1939(2)	1940(2)	1941(2)	1942(2)	1943(2)	1944(2)	Last 2 Mos. Estimated 1945(3)	Estimated 1946(3)
Gross Income	$8,728,867	$9,298,715	$9,107,818	$8,250,616	$9,060,379	$8,693,644	$8,852,000	$9,005,000
Charges and Amortization Plant	3,827,634	3,896,363	3,876,498	3,603,446	3,309,936	3,026,359	3,381,000	2,980,000
	$4,901,233	$5,402,352	$5,231,320	$4,647,170	$5,750,443	$5,667,285	$5,471,000	$6,125,000
Reduc. in Fed. Taxes resulting from Amort. Emergency Facil	—	—	—	—	13,391	537,496	3,939,677(4)	—
Balance for Preferreds	$4,901,233	$5,402,352	$5,231,320	$4,647,170	$5,763,834	$6,204,781	$9,410,677	$6,125,000
Preferred Dividend Requirements	1,448,000(5)	1,448,000(5)	1,448,000(5)	1,448,000(5)	1,448,000(5)	1,448,000(5)	1,448,000	1,448,000
Balance for Common	$3,453,233	$3,954,352	$3,783,320	$3,199,710	$4,315,834	$4,756,781	$7,962,677	$4,677,000
Freeze Requirements					$ 165,000	$1,620,000	$1,560,000	$1,450,000

(1) Data represents combined operations of Virginia Electric & Power Company and Virginia Public Service Company (merged into Virginia Electric & Power Company on May 25, 1944) and their subsidiaries, after intercompany eliminations but without further adjustments.
(2) From Applicant's Exhibit 47, Page 18, except as otherwise noted.
(3) From Applicant's Exhibit 67.
(4) From Applicant's Exhibit 53, Page 1.
(5) Using 1946 Requirements, as per Exhibit 67.

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

In respect to the preceding table, attention should be called to the fact that the terms of the indenture under which Series "E" 2¾% Bonds of 1975 were issued, limitations are placed in respect to dividend payments as follows:

> The Company covenants not to pay any cash dividends on its common stock, or retire any such stock except from proceeds of sale of other shares, if total amount so applied after Sept. 30, 1943 (exclusive of dividends paid prior to Jan. 1, 1944), plus $55,000 a month for first 37 months after Sept. 30, 1943, and $75,000 a month for first 120 months after May, 1944, would exceed net income available for common dividends (as defined), accumulated after Sept. 30, 1943.

I have reduced this covenant to dollar amounts and have inserted these amounts to the years 1943, 1944, 1945 and 1946, above. These freeze requirements in no way divert earnings to the detriment of the Preferred stockholders of Engineers Public Service Company, but, rather, provide that specific earnings shall be retained or used for retirement of underlying debt. Retention of earnings through the operation of the freeze covenant, therefore, results in a constant improving in the investment status of Engineers' Preferred stocks. Furthermore, an examination of the relationship between balance available for common and freeze requirements indicates that the freeze requirements do not impinge on Virginia's dividend-paying capacity to a point which seriously threatens Preferred dividend payments on the several classes of Preferred stock of Engineers Public Service Company.

I made a further study to determine the investment status of the Preferred stock of Engineers Public Service Company, on the assumption that El Paso stock was distributed as contemplated in the present Plan and Amendments; on the further assumption that Gulf States stock was to be reclassified and sold in accordance with the pres-

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

ent provision and Plan and Amendments; and on the further assumption that proceeds from the sale of Gulf States, together with $10,000,000 of presently available cash, is to be used to call outstanding Preferred stock of Engineers Public Service Company to the extent that such cash would enable the calling of this stock at call prices.

ENGINEERS PUBLIC SERVICE COMPANY, INC.

OUTSTANDING PREFERRED STOCK

	Par Outstanding	Callable at	Total cash Req. to Call	Total Div. Requirements
$5.00 Cum. Conv. Pfd. Stock	143,951(1)	$105(1)	$15,114,855	$ 719,755
$5.50 Cumulative " "	183,406(1)	110(1)	20,174,660	1,008,733
$6.00 " " "	65,098(1)	110(1)	7,160,780	390,588

(1) Plan 9/10/45, p. 4

Proceeds from sale of 1,909,968 shs. Gulf States at $11.50 per sh.			$21,964,632
Plus $10,000,000 Available Cash			10,000,000
Total			$31,964,632
Used to Call All $6.00 Pfd. Total Requirements	$ 7,160,780		
" " " " $5.50 " " " "	20,174,660		
			$27,335,440
Amount $5.00 stock to be called			$ 4,629,192
Balance			$10,485,663
# Shares at $105 Per Share—Uncalled			99,863
Annual Requirements thereon			$ 499,315

On the basis of the preceding assumptions, it will be seen that Preferred dividend requirements on Engineers Public Service Company stock would be reduced from a present figure of $2,119,076 to $499,315 annually, an amount which would be well within the capacity of Engineers Public Service Company to pay (1) if it were to continue as a holding company owning only Virginia Electric & Power Company, or (2) if Engineers Public Service Company and Virginia Electric & Power Company were merged. Adequate funds would be available from Virginia Electric & Power Company to meet these requirements whether or not the freeze requirements previously mentioned were to be deducted from the balance available from common.

Preferred Stockholders' Exhibit No. 29-A (Cont'd)

Conclusions:

It is my conclusion that the several classes of Preferred stock of Engineers Public Service Company have fair investment values, on the assumption that Engineers Public Service Company is to continue in business, as follows:

$5.00 Convertible Dividend Preferred.....	$106.25
$5.50 Cumulative Dividend Preferred.....	$111.38
$6.00 Cumulative Dividend Preferred.....	$111.50

These values are equivalent to the full call price for the stocks plus three month's cumulative dividends. The values so arrived at are predicated on the assumption that in the event no call features were present, the stocks would have fair investment values substantially in excess of the values here set forth. In fact, absent the right to call said stocks, it is my opinion that the $5 series would be worth $108.70, the $5.50 series would be worth $119.57, and the $6.00 series would be worth $130.33. These figures are predicated on my belief that a rate of 4.6% should be used to capitalize the dividends to which these stocks are entitled, in view of the investment characteristics of the Company on the one hand, and in view of conditions in the money market on the other hand.

It is my further opinion that these several classes of Preferred stocks would have the same values whether Engineers Public Service Company continues in its present form, whether Engineers Public Service Company divests itself of El Paso and Gulf States (under Plan of September 10, 1945) and either continues with Virginia Electric & Power Company as its sole subsidiary, or whether Engineers and Virginia are merged.

RALPH E. BADGER
Detroit, Michigan

January 24, 1946

Preferred Stockholders' Exhibit No. 30.

PRICE : EARNINGS MULTIPLES
SELECTED ELECTRIC AND GAS COMPANIES
MAY 1945 PRICE : 1940-44 AVERAGE EARNINGS

	Year	*Central Hudson Gas & Electric Co.*	*Connecticut Power Co.*	*Connecticut Lt. & Pwr. Company*	*Fitchburg Gas & Elec. Co.*	*Lawrence Gas & Elec. Co.*	*Lynn (Mass.) Gas & Elec. Company*	*Missouri Public Service*	*Public Service Co. of Indiana*
Per Share Earnings —	1940	$ 0.87	$ 2.71	$ 3.21	$ 2.91	$ 3.12	$ 5.21	$ 0.81	N.A.
	1941	.76	2.68	2.94	2.84	2.93	5.13	1.13	$ 2.18
	1942	.72	2.21	2.50	2.43	2.12	4.57	1.12	1.77
	1943	.68	2.29	2.56	2.53	2.09	4.58	1.43	1.93
	1944	.62	2.33	2.69(1)	2.44	N.A.	4.92	1.83	1.93
Total		$ 3.65	$12.22	$13.90	$13.15	$10.26	$21.11	$ 6.32	$ 7.81
5 Yr. Average		$ .73	$ 2.44	$ 2.78	$ 2.63	$ 2.57(2)	$ 1.88	$ 1.26	$ 1.95(2)
Representative May 1945 Price		$ 9.50	$45.50	$52.50	$45.00	$36.00	$90.50	$21.00	$26.00
Price:Earnings Multiple		13.01	19.65	18.88	17.11	14.01	18.55	16.67	13.33

(1) *Moody's 1944 earnings.*
(2) *4 Yr. Average.*

PRICE : EARNINGS MULTIPLES
SELECTED ELECTRIC AND GAS COMPANIES
MAY 1945 PRICE : 1940-44 AVERAGE EARNINGS

Laurence Gas & Elec. Co.	*Lynn (Mass.) Gas & Elec. Company*	*Missouri Public Service*	*Public Service Co. of Indiana*	*Rockland Light & Power Co.*	*San Diego Gas & Elec. Company*	*Sioux City Gas & Elec. Co.*	*Sierra Pacific Pwr. Co.*	*New Bedford Gas & Edison Light Co.*	*Average 13 Companies*
$ 3.12	$ 5.21	$ 0.81	N.A.	$ 0.74	$ 1.73	$ 1.79	$ 2.18	$ 3.95	
2.93	5.13	1.13	$ 2.18	.56	.91	1.08	2.25	4.00	
2.12	4.57	1.12	1.77	.57	.90	2.38	1.57	4.29	
2.09	4.58	1.43	1.93	.59	.96	2.68	1.55	4.61	
N.A.	4.92	1.83	1.93	.56	.91	2.51	1.61	5.06	
$10.26	$21.11	$ 6.32	$ 7.81	$ 3.02	$ 5.41	$10.11	$ 9.16	$21.91	
$ 2.57(2)	$ 1.88	$ 1.26	$ 1.95(2)	$ .60	$ 1.08	$ 2.09	$ 1.83	$ 4.38	
$36.00	$90.50	$21.00	$26.00	$ 9.00	$14.50	$37.25	$22.75	$71.00	
14.01	18.55	16.67	13.33	15.00	13.43	17.82	12.43	16.21	15.85

Preferred Stockholders' Exhibit No. 35.

Bulletin of Information

Date, April 25, 1945

From the Home Office of Standard & Poor's Corp., for inter-office use

SOME PEOPLE ARE NEVER SATISFIED—AND THAT GOES DOUBLE FOR US

A Few Remarks on the New S&P Super-Bond Guide

Whenever we change a service in any way, we always expect and get some squawks because there are always some people who want everything left exactly as it is.

We expected some squawks when we put out the new Bond Guide. We were not disappointed. But *the absolutely amazing thing—on the basis of past experience—IS HOW FEW SQUAWKS THERE WERE.*

A couple regretted that we had not added market ratings. Most commentators didn't seem to care. But a few passionate laments on a couple of points seem to cover all the protests of any importance. These, I'd like to review for you briefly because you'll be running into them.

PREFERRED STOCKS, ALSO QUALITY RATINGS ON PREFERREDS.

We've wanted to drop preferred stock quality ratings for years. A quality rating on a preferred doesn't mean very much, as in the case of a bond, for the simple reason that the two are entirely different types of investments.

We had an A rating on National Lead Preferred while it fluctuated all the way between 60 and 170. That doesn't make sense. A *market* rating there was of highest importance. But for anybody foolish enough to disregard market prospects, the one important thing was dividend coverage.

Preferred Stockholders' Exhibit No. 35 (Cont'd)

Well, the dividend was adequately covered during that tremendous fluctuation. And in a variable security, with no maturity date, that's the only quality feature that matters, while market performance and prospects are often of highest importance.

That paragraph explains why we moved preferreds over into the Stock Guide where they belong, and where we cover over 1,000 issues, and cover them properly, and why we abandoned meaningless quality ratings to induce investors to use safer tests with more meaning in judging the investment quality of preferreds.

Municipal Section. Why drop it?

It simply wasn't realistic to keep it. There are 125,000 or more taxing bodies with bond issuing power. Simply impossible to cover all of them! Simply impossible even to do a representative job. A better job for investors or banks or dealers is done in the Bond Outlook—newsy, intelligent, acute analysis.

Meanwhile, we had to choose: Should we cover municipals badly for a handful, or should we give *the biggest, best coverage of corporate bonds anywhere available,* as the big majority of our customers wanted us to do? We choose the latter. It was a wise choice.

Meanwhile, to show that our claim of a SUPER-Bond Guide is no empty boast, see the attached sheet with a list of features that prove our claim.

TOM KENNEDY

Preferred Stockholders' Exhibit No. 36.

List of holders of Preferred Stock of Engineers Public Service Company represented by Lawrence R. Condon

	$5	$5.50	$6
Thomas W. Streeter		50	150
Frank Streeter		100	100
Henry Streeter		200	100
Thomas W. Streeter, Jr.		200	100
Lilian C. Streeter	200		
Mrs. Ruth C. Streeter		300	
Atlas Assurance, Ltd.		400	
U. S. Fidelity & Guarantee Co., Baltimore, Maryland		1,000	
Columbian National Life Ins. Co., Boston, Massachusetts	450	200	100
Chemical Bank & Trust Company	*3,733	*1,970	*941
Francis P. Sears		200	
	4,383	4,620	1,491

* See attached schedules listing schedule of accounts making up these totals.

Schedule of Accounts

$5 Cumulative Preferred

No.	Short Title	No. Shares
T 265	Helen K. Hedges Trust	70
T 804	John H. Barr Trust	50
T 998	Stiger Est.-F. A. Stiger Trust	35
T1106	Julia B. Hilder Trust	55
T1223	Carola De Stroumillo Trust	50
T1253	Mabel R. Barr Trust	30
T1306	Kenneth Macpherson Trust	100
T1325	Charlotte M. Crouch Trust	50
T1788	Kimball Est.—Anne R. Kimball Trust	50
T1814	Charles Albert Thomas Trust	30
T1881	Dole Est.—Emma Dole et al Trust	100***
T1889	Stanley J. Seeger, Jr. Trust	100
T1890	Hannah Seeger Trust	100
T1891	Mary Seeger O'Boyle Trust	100
T 779	Florence R. White Trust	200
T 916	Robert C. Barclay Trust	100
T1632	Vinton Smith Trust	75
T 379	Ann Lee Scott Trust #1	100
T 425	Ward Est.—George Gray Ward et al Tr.	100
T 609	Olyphant Est.—Helen T. O. Strong Tr.	45

Preferred Stockholders' Exhibit No. 36 (Cont'd)

No.	Short Title	No. Shares
T 610	Olyphant Est.—A. M. Olyphant Tr.	25
T 777	Eleanor Iselin Trust	50
T1135	Lilian J. Westaway Trust	100
T1192	Arthur B. Poole Trust	100
T1262	Stephen H. Hartshorn Trust	30
T1278	Wuppermann Est.—Josephine W. Langdon et al Tr.	100
T1381	Alfred L. Malabre Trust	100
T1601	Delia Kelly Trust	100
T1758	Joan Kaplan Trust	50
T1782	Natalie Rogers Froehlich Trust	100
T1961	Olyphant Est.—Murray Olyphant Tr.	95
T1323	Walter D. Appleyard Agency	100
T1433	Lesley C. Forster Agency	70
T1450	Gilbert M. England Agency	65
T1522	Trinity Church Assoc. Agency	75
T1794	George Abbott Agency	200
T1825	Samuel B. Howard Agency	50
T1853	Anna H. Myers Agency	50
T1915	Dorothy Borg Agency	50
T1141	Anna M. Whittington Agency	100
T1359	Elizabeth C. Hoyt Agency	30
T1366	Clara C. Streat Agency	50
T1411	Emilie S. Lewis Agency	50
T1441	Lilian M. Dee Agency	100
T1522	Trinity Church Assoc. Agency	75
T1566	Sarah Lee Phillips Agency	100
T1604	Marguerite N. Humphrey Agency	78
T1658	Aline H. Rhonie Agency	100
	Total	3,733 shares

*** 50 shares being delivered out in the near future.

Schedule of Accounts

$5.50 Cumulative Preferred

T 93	Lucia M. Barnum Trust	50
T 108	Isabel MacRae Duncan Trust	50
T 476	American Cancer Society Inc. Trust	100
T 926	Hazel E. Freund Trust	30
T1244	Edith W. Este Trust	100
T1779	Louise V. Kimball Trust #2	55
T1940	Hendricks H. Whitman Trust	100
T1876	James G. Switzer Estate Agency	70
T 80	Margaret H. Campbell et al Trust	100
T 378	Thomas B. Scott, Jr. Tr.	40

Preferred Stockholders' Exhibit No. 36 (Cont'd)

No.	Short Title	No. Shares
T1088	Arthur Turnbull Trust	100
T1294	Bernadette H. Forbes Trust	100
T1432	Gretchen C. Trommald Agency	35
T1961	Olyphant Estate—M. Olyphant Trust	40
T 782	Frances Barclay Tilney Trust	100
T1191	Blanche Lowenstein Agency	50
T1589	Edna S. Fuerst Trust Agency	100
T1760	Melanie Goldman Agency	100
T1830	Frederica Stevens Auerbach Agency	200
T1862	Madeleine Borg Agency	100
T1883	Leon S. Hartman Agency	200
T1917	Maud R. Hartman Agency	100
	Total	1,970 shares

Schedule of Accounts

$6 Cumulative Preferred

T1479	Mary A. M. Fuller Trust	70
T1480	Esther R. Fuller Trust	70
T1828	P. E. Storey & A. F. Frederick Trust	30
T1410	Ruth S. Green Agency	50
T1724	Camilla Haag Agency	100
T1740	Miriam B. Eschenbach Agency	65
T1763	Edward Klein Agency	50
T 434	Carl G. Rasmus Trust #2	32
T1502	Gibb Est.—Marjorie Clare Gibb Trust	50
T1571	Hinckley Est.—Julian Hinckley Trust	100
T1606	Hilda F. Stroock Trust	50
T1646	Louise B. Kemper Trust	100
T1679	Lois C. Feinier Trust	44
T1726	Stearns Est.—Elsie Kirkland Stearns et al Trust	30
T1606	Hilda F. Stroock Trust	50
T1948	Pettibone Est.—Louise T. Wagner Tr.	25
T1949	Pettibone Est.—Fannie Wagner Tr.	25
T1436	Laura M. Isham Agency	50
	Total	941 shares

THE HOME INSURANCE COMPANY, *ET AL.*, EXHIBIT FILED WITH SECURITIES AND EXCHANGE COMMISSION.

Home, *et al.*, Exhibit No. 1.

UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

IN THE MATTER OF
ENGINEERS PUBLIC SERVICE COMPANY
File No. 43-132

List of Holders of Preferred Stock of Engineers Public Service Company represented by Francis H. Scheetz of Evans, Bayard & Frick

References to Tradesmens means Tradesmens National Bank and Trust Company of Philadelphia, Pennsylvania. The asterisk indicates that the shares are registered in the name of Smith & Sanford, a nominee partnership used by Tradesmens.

Home, et al., Exhibit No. 1 (Cont'd)

	Preferred		
	$5.	$5.50	$6
The Home Insurance Company		2,000	2,000
City of New York Insurance Company		500	
National Liberty Insurance Company of America			1,000
The New Brunswick Fire Insurance Company		1,000	
The Homestead Fire Insurance Company		500	
The Georgia Home Insurance Company			300
Tradesmens, Trustee under Insurance Agreement of Ralph B. Evans, deceased	100		
Tradesmens, Trustee under Will of Joseph S. Miller, deceased	30		
Tradesmens and William S. Reyburn, Jr., Trustees under Will of William S. Reyburn, deceased		200*	
Tradesmens, Trustee under Will of Myer Kolb, deceased		30*	
Tradesmens, Substitute Trustee under Will of Daniel Bray, deceased		50*	
Tradesmens and Frank M. Quay, Trustees under Will of Nancy Lamberton Wilbur, deceased		50*	
Tradesmens, Trustee under Will of John A. Leslie, deceased		20*	
Tradesmens and A. G. B. Steel, Trustees under Will of Herbert M. Howe, deceased		100	
Susanna M. Kirk, A. G. B. Steel and Tradesmens, Trustees under Will of Louis E. Kirk, deceased		50	
Tradesmens, Trustee under Deed of Trust of Elizabeth S. Hunter, et al		30	
Tradesmens Discretionary Common Trust Fund		100	
Tradesmens, Trustee under Will of Hannah G. Brautigam, deceased			20*
Tradesmens, Trustee under Will of W. Godey Ellis, deceased			30*
Christ Church of Philadelphia		100*	
Evelyn C. MacLean		50	50
Christ Church Hospital		100*	
Moore Institute of Art, Science & Industry		300	
Pennsylvania Academy of Fine Arts		200	
Amy Howe Steel		100	
Blanche M. Buttrick			60
TOTAL	130	5,480	3,460

SECURITIES AND EXCHANGE COMMISSION'S EXHIBITS.

[Commission's Exhibit No. 3, H. C. A. Rel. 1453, reported at 4 S. E. C. 615 (1938).]

[Commission's Exhibit No. 4, H. C. A. Rel. 2699, reported at 9 S. E. C. 84 (1941).]

Commission's Exhibit No. 6.

Findings and Opinion

For IMMEDIATE Release Saturday, April 15, 1944

SECURITIES AND EXCHANGE COMMISSION

Philadelphia

HOLDING COMPANY ACT OF 1935
Release No. 4997

IN THE MATTER
of
ENGINEERS PUBLIC SERVICE COMPANY
File No. 70-867
(Public Utility Holding Company Act of 1935—Section 12 (c)

Findings and Opinion of the Commission.

REPURCHASE AND RETIREMENT OF SECURITIES BY REGISTERED HOLDING COMPANY

Holding company's declaration under Section 12 (c) of the Act and Rule U-42 promulgated thereunder requesting authority to spend not in excess of $4,000,000 in open market purchases of its own preferred stocks permitted to become effective subject to conditions.

APPEARANCES:

Carl H. Conley of New York; New York for Engineers Public Service Company.

Harlow B. Lester and *Bernard S. Kanton* for the Public Utilities Division of the Commission.

Commission's Exhibit No. 6 (Cont'd)

Engineers Public Service Company (Engineers), a registered holding company, has filed a declaration and amendments thereto pursuant to Section 12 (c) of the Public Utility Holding Company Act of 1935 and Rule U-42 promulgated thereunder regarding the expenditure of not more than $4,000,000 for the reacquisition of its presently outstanding preferred stocks by open market purchases or private purchase.[1] All preferred stock acquired is to be cancelled and retired.

A hearing has been held after appropriate notice. Briefs and oral argument have been waived. Having considered the record, the Commission makes the following findings:

CAPITALIZATION

Condensed corporate and consolidated balance sheets, actual and pro forma, of Engineers as at December 31, 1943, are annexed hereto as appendices A and B, respectively. Its corporate capitalization and surplus, per books, as at December 31, 1943, were as follows:

	Corporate	
	Amount	%
Preferred stock (no par value):[2]		
$5 dividend series	$ 15,600,100	25.0
$5.50 dividend series	19,204,600	30.8
$6 dividend series	6,996,800	11.2
Total preferred stock	$ 41,801,500	67.0
Common Stock and surplus:		
Common stock ($1 par)	$ 1,909,968	3.1
Capital surplus	15,161,140	24.3
Earned surplus (since 5/31/38)[3]	3,480,525	5.6
Total common stock and surplus	$ 20,551,633	33.0
Total capitalization and surplus	$ 62,353,133	100.0

[1] For prior cases concerning reacquisition of Engineers' preferred stocks see *Engineers Public Service Company*, 4 SEC 615 (1939); *Engineers Public Service Company*, 9 SEC 84 (1941); *Engineers Public Service Company*, SEC (1943), Holding Company Act Release No. 4114; and *Engineers Public Service Company*, SEC (1943), Holding Company Act Release No. 4559.

[2] Stated at involuntary liquidating value of $100 per share.

[3] After adjusting for the loss on the sale of Engineers' holdings of Puget Sound Power & Light Company common stock and the profit on the sale of Engineers' holdings of El Paso Natural Gas Company common stock.

Commission's Exhibit No. 6 (Cont'd)

As shown in the above table, Engineers has no funded debt outstanding. The preferred stock was issued in three series *pari passu* as to assets and earnings, and is entitled to $100 per share plus accrued dividends on involuntary liquidation. Upon redemption or voluntary liquidation the $5 dividend series is entitled to $105 per share plus accrued dividends; the $5.50 and $6 dividend series are entitled to $110 plus accrued dividends. There are no dividends in arrears on the preferred stock.

The capitalization and surplus of Engineers and its subsidiaries as reported on a consolidated basis as at December 31, 1943, were as follows:

	Consolidated	
	Amount	%
Funded debt of subsidiary companies	$ 89,676,000	44.7
Preferred stock:		
Subsidiary companies	$ 34,609,958	17.3
Engineers Public Service Company	41,801,500	20.9
Total preferred stock	$ 76,411,458	38.2
Minority interests	$ 72,835	–
Common stock and surplus:		
Common stock	$ 1,909,968	1.0
Premium and discount on preferred stocks of subsidiaries	62,380	–
Capital surplus	19,661,146	9.8
Consolidated earned surplus (since 5/31/38)[4]	12,701,846	6.3
Total common stock and surplus	$ 34,335,340	17.1
Total consolidated capitalization and surplus	$200,495,633	100.0

ASSETS

The corporate assets as reported by Engineers at December 31, 1943, aggregated $67,047,637, including $54,371,548 of investments in subsidiary companies. On a consolidated basis the total assets as reported by Engineers at December 31, 1943 were $257,111,107 of which utility plant, including transportation, water and ice plant, aggregated $196,340,045. Original cost studies have been completed by the subsidiary

[4] See footnote 3, *supra*.

companies with respect to $151,617,089 of utility plant[5] showing that at least $11,067,098 of adjustments and acquisition adjustments are included therein.[6]

EARNINGS

Corporate and consolidated income statements of Engineers, actual and pro forma, for the year ended December 31, 1943, are annexed hereto as appendices C and D, respectively.

The corporate and consolidated gross income of Engineers for the year ended December 31, 1943, and the relation of such income to preferred dividend requirements are shown below:

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[5] Original cost studies are in process with respect to utility plant amounting to $22,066,080 and such studies are not required for utility plant in the remaining amount of $22,656,876.

[6] This amount consists of the following:

Virginia Electric and Power Company:		
Electric Plant Adjustments (Acct. 107)	$3,417,919	
Electric Plant Acquisition Adjustments (Acct. 100.5)	4,419,002	
Total Virginia Electric and Power Company		$ 7,836,921
Gulf States Utilities Company:		
Electric Plant Acquisition Adjustments (Acct. 100.5)	$ 750,989	
Common Utility Plant Acquisition Adjustments (Acct. 108.15)	2,479,188	
Total Gulf States Utilities Company		3,230,177
Total		$11,067,098

The original cost study of Virginia Electric and Power Company is still subject to review by the Federal Power Commission, and the major items therein will receive consideration in connection with the proceeding referred to in footnote 8 below. The original cost study of Gulf States Utilities Company has been reviewed by the Federal Power Commission which ordered the amortization of the amounts in Accounts 100.5 and 108.15 over a 15-year period ending in 1957, through equal monthly charges to miscellaneous amortization with concurrent credits to reserve for amortization.

Commission's Exhibit No. 6 (Cont'd)

	Corporated	Consolidated
Gross income[7]	$3,403,385	$11,782,105
Interest and other charges:		
Interest and amortization on funded debt of subsidiaries	$ —	$ 3,800,824
Preferred stock dividend requirements of subsidiaries	—	2,094,612
Minority interests	—	15,598
Total interest and other charges	$ —	$ 5,911,034
Net income	$3,403,385	$ 5,871,071
Engineers' preferred stock dividend requirements	2,256,084	2,256,084
Balance for Engineers' common stock	$1,147,301	$ 3,614,987
Ratio of gross income to interest and other charges and Engineers' preferred stock dividend requirements	1.51	1.44
Ratio of net income to Engineers' preferred stock dividend requirements	1.51	2.60

Cash and Current Position

The current position of Engineers, actual and pro forma on a corporate and consolidated basis, as at December 31, 1943, was as follows:

	Corporate		Consolidated	
	Actual	Pro Forma	Actual	Pro Forma
Current Assets:				
Cash and temporary cash investments[8]	$12,541,631	$ 8,541,631	$25,537,132	$25,537,132
Other current assets	17,201	17,201	7,096,062	7,096,062
Total current assets	$12,558,832	$ 8,558,832	$32,633,194	$32,633,194
Current Liabilities:				
Accrued taxes	$ 225,611	$ 225,611	$14,004,965	$14,004,965
Other current liabilities	115,625	115,625	5,760,894	5,760,894
Total current liabilities	$ 341,236	$ 341,236	$19,765,859	$19,765,859
Net current assets	$12,217,596	$ 8,217,596	$16,867,335	$12,867,335
Current ratio	36.80	25.08	1.85	1.65

[7] After adjustments for the sale of Puget Sound Power & Light Company and El Paso Natural Gas Company common stock, and elimination of dividends on other investments disposed of in 1943.

[8] Includes $764,765 of cash received by Engineers as proceeds from the sale on February 9, 1944 of 64,266 shares of Puget Sound Power & Light Company common stock and $1,823,300 of cash from the sale on March 1, 1944 of 51,357 shares of El Paso Natural Gas Company common stock. Cash and temporary cash investments include amounts proposed to be used in connection with the application of Engineers (File No. 70-846) presently pending before this Com-

Commission's Exhibit No. 6 (Cont'd)

PRICE RANGE AND VOLUME OF TRADING.

All three series of preferred stocks are listed on the New York Stock Exchange. The reported volume of sales and the high and low prices on the Exchange are shown below by years for the period 1940-1943 inclusive and by weeks during January, February and March 1944:

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mission. This application provides for the purchase of Virginia Public Service Company common stock by Engineers for $1,000,000 in cash immediately, and an additional $1,500,000 payable in installments and contingent upon future earnings of the proposed merged company. Subsequent to the above common stock purchase, Virginia Public Service Company would be merged into Virginia Electric Power Company, a subsidiary of Engineers. Concurrently, with the proposed merger Engineers would make a capital contribution of $2,500,000 to the merged company. Thus, Engineers would have an immediate cash outlay of $3,500,000 and additional contingent payments of $1,500,000 over a period of not more than five years.

	$5 Preferred			$5.50 Preferred			$6 Preferred		
	Volume	High	Low	Volume	High	Low	Volume	High	Low
1940	22,700	83	63	14,900	89	66	5,900	97	77
1941	18,500	80¾	64¾	14,110	83½	69	7,880	89½	77¼
1942	10,200	66	40	8,850	73	46	4,380	83	47½
1943	31,150	92	54	29,020	92½	57¾	10,160	96	62½
Week Ended 1944									
January 8th	520	89	87	560	91	89	120	95	94¾
January 15th	470	90	87½	770	93	91	270	95½	92¾
January 22nd	830	90	88½	450	91	90	110	96	94½
January 29th	690	90½	89	1,330	92	90	360	96½	95
February 5th	1,510	93¼	90½	3,360	94	90½	630	96¼	95¾
February 12th	1,050	95½	92½	1,100	96	92½	670	97	94¾
February 19th	810	95½	94	680	97	96	860	98½	97
February 26th	1,310	96	94	630	98	95	370	99	97
March 4th	710	98¾	96	1,530	99	98	640	102	99½
March 11th	900	98	96½	1,380	99¼	98¼	430	102	101
March 18th	760	97¾	95¼	990	99¾	97⅛	400	101½	100

Commission's Exhibit No. 6 (Cont'd)

The closing prices on the New York Stock Exchange on March 21, 1944, the day prior to the hearing, were 96½ for the $5 preferred, 98 bid and 99½ asked for the $5.50 preferred, and 101 for the $6 preferred.

COMPLIANCE WITH STATUTORY STANDARDS—CONCLUSIONS

In our denial of effectiveness to the declaration by Engineers regarding the reacquisition of 35,000 shares of its preferred stock,[11] we emphasized the fact that we were unable to determine that there was a reasonable relationship between the prices at which the preferreds were to be acquired[12] and their treatment under a comprehensive plan. However, in our order of September 10, 1943, wherein we approved a proposal by Engineers to reacquire 25,678 shares of its preferred stocks in exchange for cash and shares of common stock of El Paso Natural Gas Company,[13] we pointed out in relation to the earlier case that as the amount to be received by the preferred stockholders tends to approach the maximum claim of the stock, the likelihood of any unfairness would be diminished. As noted above, the curent market prices of the three series of preferred stocks which Engineers now proposes to reacquire are close to the involuntary liquidating prices and under the circumstances we are satisfied that the proposed reacquisition is not unfair to the security holders of Engineers.

The working capital, earnings and current cash position appear adequate to justify the proposed expenditure by

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[11] *Engineers Public Service Company,* S.E.C. (1943); Holding Company Act Release No. 4559.

[12] From March 1, 1942, to January 30, 1943, all of the three series of preferred stocks were selling at heavy discounts. Market prices ranged from a low of 40 to a high of 64¼ for the $5 preferred stock; a low of 46⅛ to a high of 66 for the $5.50 preferred stock; and a low of 47½ to a high of 74 for the $6 preferred stock.

[13] No shares of preferred stock were acquired under this order, and, as noted in footnote 3, Engineers has sold its entire interest in El Paso Natural Gas Company for cash pursuant to a public offering.

Commission's Exhibit No. 6 (Cont'd)

Engineers, and refusal to permit the declaration, as amended, to become effective does not appear necessary or appropriate to protect the financial integrity of Engineers or its subsidiaries, or to prevent the circumvention of any provisions of the Act or of any rules, regulations or orders thereunder. We therefore find that the standards of Section 12 (c) and Rule U-42 are met.

As to the period of time proposed to acquire the preferred stocks, we feel that the said proposal should be approved for not more than four months from the effective date of our order herein without prejudice to the right of Engineers to apply for an extension thereof.

In permitting Engineers to purchase its preferred stocks, we do not expressly or by implication take any position on the question of whether or not it would be relatively advantageous or disadvantageous for a preferred stockholder to sell. That is a matter that each stockholder must determine for himself.

Our order will permit the declaration and amendments thereto to become effective subject to the terms and conditions prescribed in Rule U-24 and subject to the following terms and conditions:

(1) At least ten days before purchases are commenced, Engineers shall cause to be mailed to each holder of record of its preferred stocks a notice of its intention to make such purchases and the method to be employed together with a copy of the Findings and Opinion in this matter, and also publish, not less than five days before beginning such purchases, a similar notice in daily newspapers of general circulation in New York, New York, and Boston, Massachusetts;

(2) Engineers shall not solicit or cause to be solicited the sale to it or for its account of any of its preferred stocks;

Commission's Exhibit No. 6 (Cont'd)

(3) Engineers shall not purchase its preferred stock knowingly, directly or indirectly, from any associate company or from any officer or director of Engineers or of any associate company;

(4) Engineers shall furnish to the Commission promptly after each week a schedule showing the number of shares of each series of preferred stock purchased during that week, the prices at which they were purchased and the names of the brokers through whom purchased;

(5) Engineers, promptly upon completion of the proposed purchase program, shall notify all of its preferred stockholders that such program has been completed, and such notification shall be given in the same manner as is provided in (1) above for notification of the commencement of the program;

(6) All purchases shall be effected on the New York Stock Exchange except that the Company may purchase large blocks of stock otherwise than on said Exchange provided that notice of intention to effect each such purchase together with a statement of the identity of the seller, the price proposed to be paid and any fees or commissions to be incurred in connection therewith shall have been given to the Commission and the Company shall not have been informed by the Commission that it intends to issue an order to show cause why such purchase should not be consummated;

(7) No purchases shall be made after four months from the date of the order herein subject, however, to the right of Engineers to apply for an extension or extensions of said period; and

Commission's Exhibit No. 6 (Cont'd)

(8) The Commission reserves the right to rescind or modify this order upon motion of Engineers or upon its own motion after notice to Engineers at any time prior to the expiration of said four months period, such rescission or modification to be applicable only to such portion of the $4,000,000 as shall not have been previously expended.

An appropriate order will issue.

By the Commission (Commissioners Pike, O'Brien and McConnaughey), Commissioner Healy concurring in result and Chairman Purcell being absent and not participating.

ORVAL L. DUBOIS,
Secretary.

(SEAL)

Commission's Exhibit No. 6 (Cont'd)

Appendix A

ENGINEERS PUBLIC SERVICE COMPANY

Condensed Corporate Balance Sheet

Actual and Pro Forma Showing Estimated Effect of Proposed Transaction

As at December 31, 1943

ASSETS AND OTHER DEBITS	Actual [1]	Estimated Effect of Purchase of Preferred Stock	Pro Forma
Investments in sub-companies	$54,371,548	$ —	$54,371,548
Miscellaneous special funds	$ 92,000	$ —	$ 92,000
Current assets:			
Cash	$10,378,631	$(4,000,000)	$ 6,378,631
Temporary cash investments	2,163,000	—	2,163,000
Dividends receivable	12,500	—	12,500
Interest receivable	4,701	—	4,701
Total current assets	$12,558,832	$(4,000,000)	$ 8,558,832
Other deferred charges	$ 25,257	$ —	$ 25,257
Total assets and other debits	$67,047,637	$(4,000,000)	$63,047,637
LIABILITIES AND OTHER CREDITS			
Current liabilities:			
Accounts payable	$ 6,307	$ —	$ 6,307
Taxes accrued	225,611	—	225,611
Other current liabilities	109,318	—	109,318
Total current liabilities	$ 341,236	$ —	$ 341,236
Reserves:			
Reserve for depreciation in investments in subsidiaries	$ 4,350,471	$ —	$ 4,350,471
Reserve for prior years' taxes	2,797	—	2,797
Total reserves	$ 4,353,268	$ —	$ 4,353,268
Preferred stock:			
$5 dividend	$15,600,100	$(1,396,100)	$14,204,000
$5.50 dividend	19,204,600	(1,374,500)	17,830,100
$6 dividend	6,996,800	(1,371,000)	5,625,800
Total preferred stock	$41,801,500	$(4,141,600)	$37,659,900
Common stock	$ 1,909,968	$ —	$ 1,909,968
Capital surplus	15,161,140	141,600	15,302,740
Earned surplus (since 5/31/38)	3,480,525	—	3,480,525
Total liabilities and other credits	$67,047,637	$(4,000,000)	$63,047,637

( ) Denotes decrease.

[1] Actual after adjusting for the sales on February 9, 1944 of 64,266 shares of Puget Sound Power & Light Company common stock and on March 1, 1944 of 51,357 shares of El Paso Natural Gas Company common stock.

Commission's Exhibit No. 6 (Cont'd)

Appendix B

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARIES

Condensed Consolidated Balance Sheet

Actual and Pro Forma Showing Estimated Effect of Proposed Transaction

As at December 31, 1943

ASSETS AND OTHER DEBITS	Actual [1]	Estimated Effect of Purchase of Preferred Stock	Pro Forma
Plant and other investments:			
Utility plant:			
Properties for which original cost studies have been completed:			
Original cost of properties	$140,549,991		$140,549,991
Electric plant acquisition adjustments	5,169,991		5,169,991
Electric plant adjustments	3,417,919		3,417,919
Common utility plant acquisition adjustments	2,479,188		2,479,188
	$151,617,089		$151,617,089
Properties for which original cost studies have not been completed	22,066,080		22,066,080
Properties for which original cost studies are not required	22,656,876		22,656,876
Total utility plant	$196,340,045		$196,340,045
Excess of investments in shares of subsidiary companies over adjusted net assets applicable to such shares at dates of acquisition	14,549,882		14,549,882
Other physical property	1,501,371		1,501,371
Investments in associated company	69,150		69,150
Total plant and other investments	$212,460,448		$212,460,448
Special funds	$ 94,663		$ 94,663
Current assets:			
Cash	$ 19,477,132	$(4,000,000)	$ 15,477,132
U. S. Treasury securities	10,060,000		10,060,000
Other current assets (net of reserves)	7,096,062		7,096,062
Total current assets	$ 36,633,194	$(4,000,000)	$ 32,633,194
Deferred debits:			
Unamortized debt discount and expense	$ 6,538,717		$ 6,538,717
Other deferred debits	1,384,085		1,384,085
Total deferred debits	$ 7,922,802		$ 7,922,802
Total assets and other debits	$257,111,107	$(4,000,000)	$253,111,107

Commission's Exhibit No. 6 (Cont'd)

LIABILITIES AND OTHER CREDITS	Actual [1]	Estimated Effect of Purchase of Preferred Stock	Pro Forma
Long term debt of subsidiary companies	$ 87,755,000		$ 87,755,000
Current liabilities:			
Bonds and notes due within one year	$ 1,921,000		$ 1,921,000
Taxes accrued	14,004,965		14,004,965
Other current liabilities	3,839,894		3,839,894
Total current liabilities	$ 19,765,859		$ 19,765,859
Deferred credits:			
Unamortized premium less expense on bonds	$ 1,644,276		$ 1,644,276
Other deferred credits	1,004,933		1,004,933
Total deferred credits	$ 2,649,209		$ 2,649,209
Reserves:			
Reserve for depreciation	$ 30,234,268		$ 30,234,268
Other reserves	1,536,667		1,536,667
Total reserves	$ 31,770,935		$ 31,770,935
Shares of subsidiaries held by public:			
Preferred stock	$ 34,609,958		$ 34,609,958
Premium and discount on preferred stock	62,380		62,380
Minority interest in common stock and earned surplus	72,835		72,835
Total shares of subsidiaries held by public	$ 34,745,173		$ 34,745,173
Parent Company's reserve for depreciation in value of investments in subsidiaries	$ 4,350,471		$ 4,350,471
Capital stock and surplus of parent company:			
Preferred stock:			
$5 dividend	$ 15,600,100	$(1,396,100)	$ 14,204,000
$5.50 dividend	19,204,600	(1,374,500)	17,830,100
$6 dividend	6,996,800	(1,371,000)	5,625,800
Total preferred stock	$ 41,801,500	$(4,141,600)	$ 37,659,900
Common stock	1,909,968		1,909,968
Capital surplus	19,661,146	141,600	19,802,746
Consolidated earned surplus (since 5/31/38)	12,701,846		12,701,846
Total capital stock and surplus of parent company	$ 76,074,460	$(4,000,000)	$ 72,074,460
Total liabilities and other credits	$257,111,107	$(4,000,000)	$253,111,107

( ) Denotes decrease.

[1] Actual after adjusting for the sales on February 9, 1944 of 64,266 shares of Puget Sound Power & Light Company common stock and on March 1, 1944 of 51,357 shares of El Paso Natural Gas Company common stock.

Commission's Exhibit No. 6 (Cont'd)

35-4997

Appendix C

ENGINEERS PUBLIC SERVICE COMPANY

Condensed Corporate Income Statement

Actual and Pro Forma Showing Estimated Effect of Proposed Transaction

For Twelve Months Ended December 31, 1943

	Actual [1]	Estimated Effect of Purchase of Preferred Stock	Pro Forma
Revenue from subsidiary companies:			
Dividends—common stock	$3,681,357	$ —	$3,681,357
Dividends—preferred stock	49,999	—	49,999
Interest—bonds	45,000	—	45,000
Interest—note	25,440	—	25,440
Miscellaneous revenue	29,422	—	29,422
Total revenues	$3,831,218	$ —	$3,831,218
Deductions:			
Expenses	$ 236,870	$ —	$ 236,870
Taxes (other than income taxes)	14,902	—	14,902
Interest	61	—	61
Total deductions	$ 251,833	$ —	$ 251,833
Income before Federal taxes	$3,579,385	$ —	$3,579,385
Income taxes (Federal)	176,000	2,700	178,700
Balance	$3,403,385	$ (2,700)	$3,400,685
Preferred dividend requirements	2,256,084	(227,662)	2,028,422
Balance for common stock and surplus	$1,147,301	$ 224,962	$1,372,263

( ) Denotes decrease.

[1] Actual after adjusting for the sales on February 9, 1944 of 64,266 shares of Puget Sound Power & Light Company common stock and on March 11, 1944, of 51,357 shares of El Paso Natural Gas Company common stock, and elimination of dividends on other investments disposed of in 1943.

Commission's Exhibit No. 6 (Cont'd)

35-4997

Appendix D

ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARIES

Condensed Consolidated Income Statement

Actual and Pro Forma Showing Estimated Effect of Proposed Transaction For Twelve Months Ended December 31, 1943

	Actual [1]	Estimated Effect of Purchase of Preferred Stock	Pro Forma
Operating revenues	$59,570,893	$ —	$59,570,893
Operating expenses:			
Operation	$22,016,148	$ —	$22,016,148
Maintenance	3,788,586	—	3,788,586
Depreciation	5,404,858	—	5,404,858
Taxes—Federal income	12,011,441	86,321	12,097,762
Taxes—Other	4,738,803	—	4,738,803
Total operating expenses	$47,959,836	$ 86,321	$48,046,157
Net operating revenue	$11,611,057	$ (86,321)	$11,524,736
Other income—net	171,048	—	171,048
Gross income	$11,782,105	$ (86,321)	$11,695,784
Interest and other charges:			
Interest and amortization	$ 3,800,824	$ —	$ 3,800,824
Pfd. dividend requirements of subsidiaries	2,094,612	—	2,094,612
Minority interests	15,598	—	15,598
Total interests and other charges	$ 5,911,034	$ —	$ 5,911,034
Consolidated net income	$ 5,871,071	$ (86,321)	$ 5,784,750
Preferred dividend requirements	2,256,084	(227,662)	2,028,422
Balance applicable to common shares and surplus	$ 3,614,987	$ 141,341	$ 3,756,328

( ) Denotes decrease.

[1] Actual after adjusting for the sale on February 9, 1944 of 64,266 shares of Puget Sound Power & Light Company common stock and on March 1, 1944 of 51,357 shares of El Paso Natural Gas Company common stock, and elimination of dividends on other investments disposed of in 1943.

Commission's Exhibit No. 6 (Cont'd)

UNITED STATES OF AMERICA

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pa., on the 14th day of April, A. D., 1944.

IN THE MATTER *of* ENGINEERS PUBLIC SERVICE COMPANY File No. 70-867 (Public Utility Holding Company Act of 1935—Section 12 (c))	Order Permitting Declaration to Become Effective

A declaration and amendments thereto having been filed by Engineers Public Service Company under Section 12 (c) of the Public Utility Holding Company Act of 1935 and Rule U-42 promulgated thereunder, a hearing having been held after appropriate notice, and the Commission being fully advised and having this day made and filed its findings and opinion herein:

IT IS ORDERED that said declaration, as amended, be and it hereby is permitted to become effective subject to the terms and conditions prescribed in Rule U-24, and subject to the conditions enumerated below:

(1) At least ten days before purchases are commenced, Engineers shall cause to be mailed to each holder of record of its preferred stocks a notice of its intention to make such purchases and the method to be employed, together with a copy of the Findings and Opinion in this matter, and also publish, not less than five days before beginning

Commission's Exhibit No. 6 (Cont'd)

such purchases, a similar notice in daily newspapers of general circulation in New York, New York, and Boston, Massachusetts;

(2) Engineers shall not solicit or cause to be solicited the sale to it or for its account of any of its preferred stocks;

(3) Engineers shall not purchase its preferred stock knowingly, directly, or indirectly, from any associate company or from any officer or director of Engineers or of any associate company;

(4) Engineers shall furnish to the Commission promptly after each week a schedule showing the number of shares of each series of preferred stock purchased during that week, the prices at which they were purchased and the names of the brokers through whom purchased;

(5) Engineers, promptly upon completion of the proposed purchase program, shall notify all of its preferred stockholders that such program has been completed, and such notification shall be given in the same manner as is provided in (1) above for notification of the commencement of the program;

(6) All purchases shall be effected on the New York Stock Exchange except that the Company may purchase large blocks of stock otherwise than on said Exchange provided that notice of intention to effect each such purchase together with a statement of the identity of the seller, the price proposed to be paid and any fees or commissions to be incurred in connection therewith shall have been given to the Commission and the Company shall not have been informed by the Commission that it intends to issue an order to show cause why such purchase should not be consummated;

Commission's Exhibit No. 6 (Cont'd)

(7). No purchases shall be made after four months from the date of the order herein subject, however, to the right of Engineers to apply for an extension or extensions of said period; and

(8) The Commission reserves the right to rescind or modify this order upon motion of Engineers or upon its own motion after notice to Engineers at any time prior to the expiration of said four month period, such rescission or modification to be applicable only to such portion of the $4,000,000 as shall not have been previously expended.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(SEAL)

Commission's Exhibit No. 9.

74 TRINITY PLACE
Room 1111
NEW YORK 6, N. Y.

Digby 4-2956-2682

January 7, 1947

Mr. B. S. Kanton
Staff of the Public Utilities Division
Securities and Exchange Commission
Philadelphia, Pennsylvania

Dear Mr. Kanton:

In connection with our telephone conversation of last Friday on the Engineers Public Service Company case, I have been doing some additional work and have about concluded to participate in the formation of a common stockholders' committee. Presumably such a committee would be formed under the rules of U-62 which require a disclosure of the holdings by the members of the committee.

Accordingly it seems unnecessary to avail myself of your suggestion to file an exhibit, and, for your information only, I will confine myself at this time to the following recitation of facts:

My first investment in Engineers Public Service common stock was purchased early in 1944 and was added to within the same year, and subsequently reduced in 1946 on balance. The Central-Illinois Securities Corporation made its first purchase in 1945 and additional shares were acquired at several times during 1946.

Very truly yours,

C. A. JOHNSON
C. A. Johnson

Letter of C. A. Johnson to Securities and Exchange Commission Stating Objections to Amended Plan (referred to at oral argument of January 3, 1947, rec. 857a).

December 30, 1946.

Securities and Exchange Commission
18th and Locust Streets
Philadelphia, Pennsylvania

Re: Engineers Public Service Company et al
Files Nos. 54-132, 70-1149, 70-1150,
70-1419

Gentlemen:

I am President and a Director of Central-Illinois Securities Corporation, an investment company registered with the Commission under the Investment Company Act of 1940. Central-Illinois Securities Corporation is the owner of 5,000 shares of common stock of Engineers Public Service Company. I am also personally the owner of 1,000 shares of common stock of Engineers Public Service Company, and can speak for other investors owning additional substantial amounts.

I received on December 24, 1946 a copy of the Commission's notice of filing of amendment and order for argument and hearing issued in the above-entitled proceeedings under date of December 19, 1946 (H. C. A. R. No. 7077). I note that a hearing and argument will be held before the Commission January 3, 1947 at 10:30 a. m. Unfortunately, the short notice provides me with insufficient time to adjust previous commitments necessary for that day at the specified time, and since I cannot be personally present, I am obliged to take this means of placing my views before the Commission.

Accordingly, I respectfully request that the Commission direct that this letter be read into and made part of the record of the proceedings with the same force and effect as though it had been made personally by me as an oral statement delivered at the hearing to be held January 3, 1947.

In the Commission's Findings and Opinion issued December 5, 1946 in these proceedings (H. C. A. R. No. 7041)

the Commission stated that it could not approve various provisions of the Section 11(e) plan filed by Engineers, including the provision for payment to preferred stockholders of $100. per share. Further, the Commission indicated its disapproval of the formulation by Engineers of its plan into two parts, and separate consideration of each of said parts. The Commission indicated that such provision was not necessary in order to permit Engineers to obtain judicial review of the Commission's decision requiring additional amounts in excess of $100 per share to be paid to the preferred stockholders, stating:

> "* * * We think the objectives can easily be achieved with fairness to both the common and the preferred, by the method which we have followed in other similar cases.
>
> "We have approved plans whereby immediate payment was made of the amount conceded to be due and the question of any additional amounts payable was reserved for further litigation. There would seem to be no reason why, upon the District Court's approval of this plan, a similar payment could not be made to the preferred here, thereby ending any claim to dividends while their rights to any additional payment are being litigated and are secured in an escrow. This of course assumes that the escrow would cover not only the amount in dispute but also compensation for the withholding, during the period of litigation, of any additional amount found payable.
>
> "Engineers has also indicated that the proposed severance was designed to preserve its right to challenge before the Commission or the courts any additional payment which we find due the preferred. We agree that Engineers should have this right, and we see nothing incongruous in the company's challenging before the courts this portion of the plan which

Letter of C. A. Johnson (Cont'd)

has been inserted at our insistence and with which it finds itself in disagreement."

I am in entire agreement with the foregoing statement of the Commission, and would not find it necessary to appear at this time *if* the management of Engineers had acted in accordance with the Commission's suggestion. However, it appears from the Commission's notice with respect to the filing of amendments (H. C. A. R. 7077) that the management of Engineers does not propose to follow the procedure suggested by the Commission with respect to the establishment of an escrow fund pending judicial review, but proposes instead to pay to the preferred stockholders the full call premiums. Nor does it seem from the statement of conditions set forth on page 5 of the Commission's notice that the amended plan of Engineers is expressly conditioned upon and subject to enforcement by a United States District Court pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. There would therefore seem to be danger that the payment of the premiums to the preferred stockholders might be carried out without judicial review of the Commission's determination as to the fairness and equity of such payment.

I respectfully suggest that the Commission should not permit that portion of the amended plan which provides for the payment of premiums to the preferred stockholders to become effective unless and until it has been approved by order of a District Court in proceedings under Sections 11(e) and 18(f) of the Act, and any appeals from such District Court order have been finally determined. I have not previously appeared in these proceedings because I have been of the view that the position taken by the management of Engineers in its original 11(e) plan was correct and adequately protected the interests of the common stockholders. It now appears, however, that the management in filing its amendments has completely abandoned the provision for court review and does not intend to seek final judicial deter-

mination with respect to the payment of premiums to the preferred stockholders. Although I am most reluctant to become involved in this case, I adhere to the view that it is not fair and equitable to the common stockholders of Engineers for such extra payments to be made to the preferred stockholders. Even if I were willing to acquiesce in this decision so far as concerns my own personal interests, there is considerable question in my mind whether I have the right to do so as president and director of an investment company having many public security holders and owning a substantial amount of Engineers common stock as well as other public utility holding company common stocks that may be adversely affected by the blanket adoption of the indicated principle with reference to the retirement of preferred stocks.

For these reasons I may be regretfully impelled to seek judicial review of this phase of the company's amended plan, or to join with other representatives of common stockholders who may feel similarly aggrieved in the event the company does not itself proceed to test this question. Since the question has never to my knowledge been definitely passed upon by the courts, I feel sure that the Commission would welcome such judicial review and would not desire to foreclose the possibility thereof, or permit the management to do so.

In order that there may be no misunderstanding, I summarize below my position:

(1) The provision of the amended Engineers, plan providing for the payment to the preferred stockholders of sums in excess of $100 per share is not fair and equitable to the common stockholders of the company, for all the reasons heretofore advanced by the management of Engineers in these proceedings; and for the further reasons advanced by former Commissioner Healy in his dissenting opinion in matter of American Power & Light Company, Files Nos. 70-618, 54-100 (H.C.A.R. No. 6176), and for other

reasons. The charter of Engineers expressly states *affirmatively* that in the event of liquidation, dissolution or winding up of the corporation, the holders of the preferred stock shall be entitled to receive only $100 per share plus accrued dividends; and that additional amounts in the form of premiums shall not be payable unless such dissolution is voluntary. Engineers has contended, and the Commission has found, that the dissolution contemplated in Engineers' plan is *not* voluntary. It is further to be noted that the preferred stock of Engineers cannot be regarded as having an investment caliber comparable with that of the debentures of American Power & Light, concerning which Judge Healy wrote his dissenting opinion, in view of the fact that dividends were in arrears on Engineers' preferred stocks for the three-year period July 1, 1933 to July 31, 1936, and that such preferred stocks have sold throughout the entire period of their issuance at an over-all average of between $62.77 and $67.16 per share (see Commission's opinion, H.C.A.R. No. 7041, p. 27, note 45). Further, even assuming the application of the investment theory in this case, it follows that the investment value should be based upon a so-called "normal" investment value over a period of years rather than upon circumstances only presently existing.

(2) In any event, the provision of Engineers' amended plan which provides for payment of amounts in excess of $100 per share to the preferred stockholders should not be approved unless amended to provide (a) that such provision shall not become effective unless and until approved by order of a United States District Court under and pursuant to Sections 11(e) and 18(f) of the Holding Company Act, and final disposition of any appeals from such order of the District Court; (b) that pending review by the District Court, and of any appeals from the order of the District Court, Engineers will deposit in escrow the amounts in dispute plus an amount sufficient to provide compensation for

Letter of C. A. Johnson (Cont'd)

the withholding during the period of litigation of any additional amounts found payable.

The Commission's courtesy in making this letter a part of the record in the proceedings, as requested above, will be greatly appreciated.

Very truly yours,

C. A. JOHNSON

LIBRARY
SUPREME COURT, U. S.

Vol. VI

TRANSCRIPT OF RECORD

(Pages 1 to 143)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 226

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 227

THOMAS W. STREETER, ET AL., PETITIONERS,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 243

THE HOME INSURANCE COMPANY AND TRADESMENS NATIONAL BANK AND TRUST COMPANY, PETITIONERS,

vs.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCES BOEHM

No. 266

CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, PETITIONERS,

vs.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR CERTIORARI FILED { AUGUST 16, 1948 (Nos. 226 and 227). AUGUST 24, 1948 (No. 243). SEPTEMBER 8, 1948 (No. 266).

CERTIORARI GRANTED OCTOBER 25, 1948.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 9, 1948.

—7752

[fols. 1-2]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9428

In the Matter of Engineers Public Service Company, Thomas W. Streeter, Appellant

Notice of Petition for Stay—June 2, 1947

Sirs:

Please take notice that on the 2nd day of June, 1947, at 10:30 o'clock in the forenoon (E.D.S.T.), or as soon thereafter as counsel can be heard, the annexed petition of Thomas W. Streeter will be presented to the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit at the United States Court House, Philadelphia, Pennsylvania.

Dated: New York, New York, June 2, 1947.

Yours, etc., (S.) Lawrence R. Condon, Attorney for petitioner and preferred stockholders of Engineers Public Service Company, 165 Broadway, New York 6, New York.

Five days' notice of the Motion for Stay Pending Appeal is hereby waived:

(S.) Harry G. Slater, Esq., Chief Counsel, Public Utilities Division, Securities and Exchange Commission, 18th and Locust Streets, Philadelphia 3, Pennsylvania.

Louis Boehm, Esq., 60 Broad Street, New York 4, New York.

(S.) William E. Tucker, Esq., Mudge, Stern, Williams & Tucker, Esqs., 40 Wall Street, New York 5, New York.

(S.) Alfred Berman, Esq., Guggenheimer & Untermyer, 30 Pine Street. New York 5, New York.

(S.) Francis H. Scheetz, Esq., Evans, Bayard & Frick, Land Title Building, Philadelphia, Pa.

Endorsements: Notice of Petition for Stay. Received & Filed June 2, 1947. William P. Rowland, Clerk.

[fol. 3] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

In the Matter of ENGINEERS PUBLIC SERVICE COMPANY,
Thomas W. Streeter, Appellant

PETITION FOR STAY—Filed May 31, 1947

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Third Circuit:

The petition of Thomas W. Streeter respectfully represents:

1. On May 29, 1947, Hon. Paul Leahy, one of the Judges of the District Court granted an order, upon the application, dated January 9, 1947, of the Securities and Exchange Commission ("the Commission") for enforcement of a Plan Pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 for Divestment of Assets and Related Matters, approved by the Securities and Exchange Commission by its order, dated January 8, 1947.

2. A copy of the order of the District Court is annexed hereto and marked Exhibit "A".

3. On May 29, 1947, your petitioner duly appealed from the said order and said appeal is now pending, undisposed of.

4. Your petitioner is a director and preferred stockholder of Engineers Public Service Company ("Engineers") and was authorized by the Board of Directors to retain counsel for the purpose of assuring that the interests of the preferred stockholders are represented in these proceedings.

[fol. 4] 5. Upon information and belief, Engineers is a corporation organized under the laws of Delaware and is a holding company within the meaning of Section 2(a)(7) of the Public Utility Holding Company Act of 1935 ("the Act"). Engineers has filed notification of registration under Section 5(a) of the Act and is a registered holding company thereunder.

6. Upon information and belief, the Commission is an agency and instrumentality of the United States created by and organized pursuant to Section 4 of the Securities Ex-

change Act of 1934, being Title I of the Act approved June 6, 1934, 48 Stat. 885, 15 U. S. C. Sec. 78 (d).

7. Upon information and belief, on September 16, 1942 and October 6, 1942 the Commission, in a proceeding instituted by it, pursuant to the provisions of Section 11(b)(1) of the Act, directed in substance, that Engineers sever its relationship with certain of its subsidiary companies by disposing of its direct and indirect ownership, control, and holding of securities issued and properties owned, controlled or operated by certain of its subsidiary companies. A petition to review the Commission's orders of September 16, 1942 and October 6, 1942 was filed by Engineers with the United States Court of Appeals for the District of Columbia, which court reversing, in part, the determination of the Commission, *set aside the orders* and remanded the case to the Commission for further proceedings in accordance with its opinion. *Engineers Public Service Company v. S. E. C.*, 138 F. (2d) 936. Both the Commission and Engineers applied to the Supreme Court of the United States for writs of certiorari which were granted, 322 U. S. 723. The matter is awaiting reargument. In the meantime Engineers has disposed of certain of the investments ordered divested by the Commission. At the present time, Engi- [fol. 5] neers' assets consist, in the main, of investments in three operating utility companies and cash. Engineers' capitalization consists solely of preferred and common stock.

8. On September 10, 1945, Engineers filed an application with the Commission, pursuant to Section 11(e) of the Act, for approval of a plan allegedly designed to effectuate compliance with the orders of the Commission and for the purpose of retiring the preferred stock at $100 per share. The plan was divided into two parts. The purpose of part I was stated to be to provide for the disposition of the assets and the possible dissolution of Engineers. Part II was intended to permit a separate determination as to the proper treatment to be accorded the preferred stockholders.

9. Public hearings were duly held from time to time during which the company's plan was subsequently amended in various respects. On January 30, 1946, Engineers made a motion requesting the Commission to separate Parts I

and II of the plan and to enter a separate order with respect to the retirement of the preferred stock. On February 13, 1946 the record before the Commission was closed. Briefs were filed and the Commission heard oral argument on the plan. On December 4, 1946 the Commission issued its Findings and Opinion in which it found that the divestment features of the plan and the dissolution of Engineers were necessary to effectuate the provisions of Section 11(b) of the Act, but that various aspects of the transactions proposed to accomplish these results were unnecessary, and unfair and inequitable. The Commission also found that the proposal to retire the preferred stock at $100 per share was unfair. In addition, the Commission denied the Company's motion to separate the issue as to the treatment to be ac- [fol. 6] corded the preferred stock from the balance of the plan. The Commission found that fairness to the preferred stockholders required the payment of at least the call prices of their securities and further found that if the company desired to litigate the question of whether any amounts in excess of $100 per share should be paid the preferred stockholders, the plan should be amended to provide for an escrow of the difference between the call prices and $100 per share. The Commission stated that if the plan were amended within 30 days, in accordance with the Commission's views, an appropriate order would be entered approving the plan as thus amended; otherwise, an order of disapproval would be entered. Said Findings and Opinion of the Commission was published as Holding Company Act Release No. 7041, a copy of which is attached hereto and marked "Exhibit B".

10. On December 17, 1946, Engineers filed an amended plan which was incidentally amended on December 31, 1946. This plan eliminated the provisions for separating the issue dealing with the treatment to be accorded the preferred stockholders and provided for the retirement of the preferred stocks at their respective call prices. There was no provision for an escrow of any kind. A copy of such amended plan is attached hereto as "Exhibit C" and will be referred to as "the plan". Upon information and belief, the Company by letter, dated December 20, 1946, notified all the stockholders as to the provisions in the plan regarding the treatment proposed to be accorded the preferred stockholders and informed the stockholders that the

Company did not propose to contest the findings of the Commission in that regard.

[fol. 7] 11. On December 19, 1946 the Commission entered its Notice and Order reopening the record and setting the matter down for hearing and argument. Upon information and belief, a copy of the Commission's Notice, which fully described the plan, was sent to all stockholders at least 10 days before said hearing and argument; said Notice was published as Holding Company Act Release No. 7077 and is attached hereto as "Exhibit D". The reconvened hearing and argument was held and completed and the record was closed on January 3, 1947.

12. On January 8, 1947 the Commission entered its Supplemental Findings and Opinion and Order, finding the plan necessary to effectuate the provisions of Section 11(b) and fair and equitable to the persons affected thereby and approving the plan. The Supplemental Findings, etc. was published as Holding Company Act Release No. 7119, and is attached as "Exhibit E".

13. Pursuant to Engineers' request in accordance with Section 11(e) of the Act, on January 9, 1947 the Commission applied to the District Court to enforce and carry out the provisions of the amended plan.

14. On January 9, 1947, the District Court ordered that a hearing be held on February 17, 1947 for the purpose of determining whether the Court should enforce and carry out the terms and provisions of the plan and whether the plan is fair and equitable and appropriate to effectuate the provisions of Section 11(b) of the Act. The Court also ordered Engineers to give notice of such hearing to all its stockholders and to attach a copy of the Commission's Findings, etc. of January 8, 1947. In addition, the Court directed [fol. 8] that any person objecting to the Commission's application or to its various Findings, etc. or to the plan should file such objections in writing by February 10, 1947.

15. On February 8, 1947 your petitioner filed a statement of objections with the Court in which objection was made to the finding, in the Commission's Supplemental Findings, etc. of January 8, 1947, to the effect that in the event any common stockholder should secure a stay from the District Court preventing the payment of the full amount to which

the Commission found the preferred stockholders were entitled, it would be appropriate for Engineers to make a part payment on the preferred stocks of $100 per share and stop the accrual of further dividends.

16. Upon information and belief, on February 13, 1947, without prior notice from the Company or the Commission of any application or proceeding in respect thereto, your petitioner's attorney was served by mail with a copy of an alleged "Order of Amendment" purportedly entered by the Commission on February 11, 1947 at the request of Engineers for "tax purposes". Such alleged "Order of Amendment" purported to approve an "alternative" method of consummating the plan, at the discretion of Engineers' counsel, whereby the company proposed to make certain "incidental changes" such as to retire the preferred stock at $100 per share, terminate the accrual of dividends and create an escrow for the difference between $100 per share and the call prices. The "Order of Amendment" was published as Holding Company Act Release No. 7190 and is attached hereto as "Exhibit F".

[fol. 9] 17. Upon information and belief, counsel for the Commission on February 13, 1947 filed a motion in the District Court for leave to supplement its application of January 9, 1947 by including therein reference to, and a copy of the Commission's alleged "Order of Amendment". Notice of such motion was served on the attorney for your petitioner on February 13, 1947.

18. Upon information and belief, on February 17, 1947, at the hearing before the District Court, counsel for your petitioner objected to the granting of the Commission's motion to supplement its application because of the failure of the Commission to give notice and an opportunity for hearing before entering its alleged "Order of Amendment". The District Court neither granted nor denied said motion but reserved its ruling on the same. At such hearing, counsel for Engineers stated that it was the company's intention to consummate the plan in accordance with the "alternative" method allegedly approved by the Commission's so-called "Order of Amendment".

19. Upon information and belief, on February 17, 1947 counsel for your petitioner secured leave from the District

Court and filed a Supplemental Statement of Objections, to the Commission's application and to its alleged "Order of Amendment". A copy of such Supplemental Statement is attached hereto as "Exhibit G".

20. Upon information and belief, without prior notice or an opportunity to be heard with respect to the provisions thereof, counsel for Engineers by letter, dated February 28, 1947, submitted to the District Court and to counsel for your petitioner a form of escrow agreement which is attached hereto as Exhibit I to the Court's order attached hereto as "Exhibit A".

[fol. 10] 21. Upon information and belief, after the hearing on February 17, 1947, briefs were filed and the District Court took the matter under advisement. On May 15, 1947, the Court issued its Opinion in which it found the plan appropriate to effectuate the provisions of section 11(b) of the Act, but also found that the plan was unfair and inequitable because of the provision to pay the call prices. Without ruling on the Commission's motion to amend its application, the Court approved the escrow agreement which had been submitted after the hearing and also approved the plan "with the exception of the payment of redemption premiums". A copy of the Court's Opinion is attached hereto as "Exhibit H".

22. Upon information and belief, counsel for your petitioner objected to the granting of the Court's order of May 29, 1947 and your petitioner requested a stay, pending appeal, of such order which request was denied by the District Court on May 29, 1947.

23. Upon information and belief, no proceedings have been instituted by the Commission under Section 11(b)(2) of the Act directed against Engineers and there is no order of the Commission requiring the dissolution of the company.

24. Upon information and belief, the Board of Directors of Engineers, on May 22, 1947, authorized and directed the officers of the company to proceed immediately with the consummation of the plan after the granting by the District Court of an order of enforcement.

25. Upon information and belief, the District Court's order of May 29, 1947 approved the plan *except for the*

treatment proposed to be accorded the preferred stockholders; approved and adopted the escrow agreement submitted by counsel for Engineers and "suggested" by Coun-
[fol. 11] sel for the Commission; authorized, ordered and directed the company to take and to cause to be taken as soon as practicable all action necessary to carry into effect and fully to consummate the steps and transactions provided in the plan except the allowance or payment to the preferred stockholders of any amounts in excess of $100 per share; terminated the rights of Engineers' preferred stockholders except as specified in said order; and enjoined all persons from interfering with the consummation of the plan.

26. Upon information and belief, the Company, through its officers, proposes to terminate dividend payments to the preferred stockholders in accordance with the terms of the escrow agreement and contemplates, in accordance with the provisions of the plan, the distribution of substantially all its assets to its many common stockholders.

27. Your petitioner intends to promptly prosecute his appeal from the order of May 29, 1947.

28. The escrow approved and adopted by the Court without notice or an opportunity to be heard is inadequate to protect the interests of the preferred stockholders.

29. If a stay of the order of May 29, 1947 and of the consummation of the plan is not granted, your petitioner and the other preferred stockholders will be irreparably injured through the distribution of substantially all the company's assets and your petitioner's right of appeal from the order directing and permitting the consummation of the plan and adopting an inadequate escrow may be defeated, in effect, by a consummation of the plan before the hearing and decision on appeal.

[fol. 12] 30. Upon information and belief, your petitioner's appeal herein has merit. See the affidavit of your petitioner's attorney, which is attached hereto as "Exhibit I".

31. No previous application, except as above stated, has been made for the relief herein sought or for similar relief.

Wherefore, your petitioner respectfully prays that, pending the determination of an appeal herein, consummation of the plan and creation of the escrow authorized, approved, and directed by the District Court's order of May 29, 1947, be stayed, that all persons be enjoined from taking any further steps in accordance with said order or in connection with said plan until further order of this Honorable Court, and that your petitioner have such other and further relief as is just and proper.

Dated: Morristown, New Jersey, May 29, 1947.

Thomas W. Streeter, Petitioner.

Lawrence R. Condon, Attorney for petitioner and preferred stockholders of Engineers Public Service Company, 165 Broadway, New York 6, New York.

[fol. 13] *Duly sworn to by Thomas W. Streeter. Jurat omitted in printing.*

[fol. 14] NOTE RE EXHIBITS "A" TO "H" TO PETITION FOR STAY

The following exhibits (A to H, inclusive) annexed to the foregoing Petition for Stay of Thomas W. Streeter, dated May 29, 1947, have been omitted, as they appear in the record previously printed as follows:

Exhibit A. Order of District Court approving and enforcing Plan, dated May 29, 1947 (R. 318a-330a).

Exhibit B. Findings and Opinion of the Commission, HCAR No. 7041, dated December 5, 1946 (R. 25a-101a).

Exhibit C. Engineers Public Service Company Plan dated September 10, 1945, as amended by Amendment No. 6 dated December 30, 1946 (R. 102a-116a).

Exhibit D. Securities and Exchange Commission Notice of Filing of Amendment and Order for Argument and Hearing on Plan as amended, HCAR #7077, dated December 19, 1946 (R. 117a-127a).

Exhibit E. Supplemental Findings and Opinion and Order of Securities and Exchange Commission, HCAR No. 7119, dated January 9, 1947 (R. 128a-150a).

Exhibit F. Order of Amendment of the Securities and Exchange Commission, HCAR No. 7190, dated February 11, 1947 (R. 165a-174a)

Exhibit G. Supplemental Statement of Objections of Thomas W. Streeter, et al., to Application filed by the Securities and Exchange Commission (R. 177a-180a).

Exhibit H. Opinion of District Court re Plan dated May 15, 1947 (R. 283a-292a).

[fol. 15] EXHIBIT "I" TO PETITION FOR STAY

STATE OF NEW YORK,
County of New York, ss:

Lawrence R. Condon, being duly sworn, deposes and says:

That he is the attorney for the petitioner, Thomas W. Streeter, that he has read the foregoing petition, that he is familiar with the contents thereof, the proceedings herein and the appeal heretofore taken by the petitioner from the order, dated May 29, 1947, entered in the District Court in this proceeding, and that in his opinion said appeal has merit for the following reasons among others:

1. The District Court erroneously substituted its judgment for that of the Securities and Exchange Commission in finding that the treatment proposed by the plan to be accorded the preferred stockholders was not fair and equitable.

2. The District Court erred in granting an order of enforcement without approving the plan, in toto.

3. The District Court erred in rewriting the plan.

4. The District Court erred in approving and adopting an escrow making substantial changes to the plan, which changes the Commission approved without notice to the preferred stockholders and without an opportunity to be heard.

5. The District Court erred in adopting an escrow without notice to the preferred stockholders and without an opportunity to be heard as to its adequacy.

6. The District Court erred in approving the alternative method of consummation of the plan after the rights of the parties had become fixed thereunder.

7. The District Court erred in granting an order which is inconsistent with its opinion.

[fols. 16-17] 8. The District Court erred in approving and adopting an escrow which does not adequately protect the interests of the preferred stockholders.

Lawrence R. Condon.

Sworn to before me this 29th day of May, 1947. Ellen E. O'Neil, Attorney and Counsellor at Law, State of New York, Off. & P. O. Address, 165 Broadway. Residing in Nassau County. No. 57-A. N. Y. Co. Clk's No. 183, Reg. No. A-99-0-9. Certificate filed in Westchester Co. Commission Expires March 30, 1949.

[fol. 18] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER DENYING APPELLANT'S PETITION FOR STAY—June 2, 1947

Present: Biggs, Maris and O'Connell, Circuit Judges.

Upon consideration of Appellant's Petition for stay and after hearing all counsel concerned,

It is Ordered that the said Petition for stay be, and the same is, hereby denied.

By the Court, Biggs, Circuit Judge.

June 2, 1947.

[File endorsement omitted.]

[fol. 19] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9428 October Term 1947

In the Matter of ENGINEERS PUBLIC SERVICE COMPANY

THOMAS W. STREETER, Appellant

No. 9435 October Term 1947

In the Matter of ENGINEERS PUBLIC SERVICE COMPANY

HOME INSURANCE COMPANY OF NEW YORK, NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA, New Brunswick Fire Insurance Company, Homestead Fire Insurance Company, Georgia Home Insurance Company, Tradesmens National Bank & Trust Company, etc., Appellants

[fol 20] No. 9440 October Term 1947

In the Matter of ENGINEERS PUBLIC SERVICE COMPANY

SECURITIES AND EXCHANGE COMMISSION, Appellant

Appeal from the United States District Court for the District of Delaware

Argued October 10, 1947

Before Biggs, Albert Lee Stephens and Maris, Circuit Judges

OPINION OF THE COURT—Filed March 19, 1948

By BIGGS, Circuit Judge:

The pertinent facts relating to these three appeals are clearly and succinctly set out in the opinion and findings of fact of the court below. See 71 F. Supp. 797. In addition thereto more complete descriptions of Engineers Public Service Company and its holding company system will be found in In the Matter of Engineers Public Service Co., 9 S. E. C. 764, 10 S. E. C. 904, and 12 S. E. C. 41 and 268. In view of these reports, no extended recapitulation of facts will be necessary.

The questions presented may be put as follows: (a) Did the Commission properly approve as "fair and equitable" within the meaning of Section 11(e) of the Public Utility

Holding Company Act of 1935, 15 U. S. C. A. §79k(e), cash [fol. 21] payments in certain amounts to be made to the preferred stockholders of Engineers Public Service Company; and (b) did the court below err in refusing to approve the plan proposed by the Commission as "fair and equitable", deciding that the cash payments should be in lesser amounts than those set up by the Commission? These questions, albeit put as two, are in fact one and one answer will suffice for both.

Preliminarily it may be stated that after extended hearings the Commission issued a series of orders designed to effect the integration of the Engineers system pursuant to Section 11(b)(1) of the Act. It is unnecessary to deal with these orders and with their disposition in detail.[1] It is enough to state here that Engineers has no funded debt; that its capital structure consists of preferred and common stock. The preferred stock is divided into three series. There are presently outstanding 143,951 shares of $5 cumulative dividend convertible preferred stock; 183,406 shares of $5.50 cumulative dividend preferred stock, and 65,098 shares of $6 cumulative dividend preferred stock. Each share of the three series has a stated value of $100 and under the applicable charter provisions each share is entitled to receive $100 plus accrued dividends in the event of involuntary liquidation; but on redemption or voluntary liquidation each share of the $5 series is entitled to receive $105 and each share of the $5.50 and each share of the $6 stock is entitled to receive $110 per share, plus accrued divi-

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[1] Engineers filed a petition for review of certain of the orders of divestiture and integration in the United States Court of Appeals for the District of Columbia which reversed the Commission's orders in part. See Engineers Public S. Co. v. Securities and Exchange Co., 138 F. 2d 936. Both Engineers and the Commission filed petitions for writs of certiorari to the Supreme Court. Writs were granted. See Engineers Public Service Company v. S. E. C., 322 U. S. 723. Disposition was not had because of the lack of a quorum. In the meantime Engineers disposed of the properties which were the subject of the Commission's orders. On October 20, 1947, the Supreme Court dismissed the appeals as moot. See — U. S. —.

[fol. 22] dends.[2] The $5 series was sold with a convertible feature which need not be described here since it expired some time ago. The $5.50 series was sold with warrants, presently inoperative, entitling the holder thereof to purchase common stock. Engineers was given the right, to be exercised at its option, to redeem or call the whole or any part of the preferred stock at $100 per share, plus the fixed redemption premium therefor, together with the amount of any dividends accrued, or to repurchase its preferred stock from time to time at a price not exceeding that at which the stock might be redeemed.[3]

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[2] As follows:

"III. *Preference on Liquidation, etc.* In the event of liquidation, dissolution or winding up of this Corporation or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, the holders of the preferred stock of each series shall be entitled to receive, for each share thereof, an amount equal to $100, together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premiums for such series, if any, before any distribution of its assets shall be made to the holders of the common stock: but the holders of the preferred stock shall be entitled to no further participation in such distribution . . . A consolidation or merger of this Corporation with any other corporation or corporations shall not be regarded as a liquidation, dissolution or winding up of this Corporation within the meaning of this Paragraph III, provided such consolidation or merger does not substantially impair the rights and the preferences of the preferred stock. . . ."

[3] The applicable charter provisions are as follows:

"IV. *Redemption and Repurchase.* The Corporation may, at its option, at any time or from time to time, redeem the whole or any part of the preferred stock or of any series thereof, at a price for each share thereof equal to $100, plus the fixed redemption premium therefor, if any, together with the amount of any dividends accrued or in arrears, thereon. . . . This Corporation may also from time to time repurchase shares of its preferred stock at not exceeding the price or prices at which the same may be redeemed.

Reduced to its simplest terms the plan approved by the Commission provides that Engineers shall dissolve[4] and that its preferred stockholders shall receive for each share of preferred stock an amount equivalent to its stated value, plus the redemption premium as if on *voluntary* liquidation, with accrued dividends to the date of the deposit of each [fol. 23] share with a designated depository.[5] In other words, the three series of preferreds would be paid off at $105, $110 and $110 a share plus dividends. The court below took a different view, concluding that the plan approved by the Commission was not fair and equitable to the common stockholders of Engineers. Exercising its independent judgment it held that the plan would be fair and equitable if each share of preferred stock of Engineers received as payment only its stated value, viz. $100, plus an amount equal to the accrued dividends to the date of deposit. These payments would be the equivalents of those received by the preferred stockholders if Engineers had been subjected to *involuntary* liquidation, the common stockholders profiting, of course, to the extent of the difference. The common stockholders also give up their stock in Engineers and receive in lieu thereof stocks of subsidiary operating companies and other considerations. What has been stated represents the difference *in money* between the views of the Commission and that of the District Court, but the methods whereby the respective monetary results of the Commission and the court were arrived at represent the substantial question in the appeal at bar.

The Commission asserts that it arrived at the amount to be paid in cash for the preferred stocks by the application of the doctrine of equitable equivalents as enunciated by the Supreme Court in Otis & Co. v. Securities and Exchange Commission (The United Light and Power Co.), 323 U. S. 624. It takes the position that it has obeyed the clear mandate of the Act in that it has measured the rights to be surrendered by the preferred stockholders in terms of invest-

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[4] The dissolution has in fact taken place and the directors are constituted trustees pursuant to the provisions of Section 43 of the Delaware Corporation Law. Rev. Code of Delaware, 1935, Section 2075.

[5] See "The Plan", Exhibit C attached to the application of the Commission.

ment value; that is to say *ex* the Act which itself necessitated the dissolution of Engineers. Relying on its interpretation of the Otis & Co. case the Commission has disregarded the liquidation provisions of the charter. The Commission in arriving at a value for the preferred stocks [fol. 24] relied in large part on the testimony of two experts, Dr. R. A. Badger and Mr. D. C. Barnes, president of Engineers. Dr. Badger prepared a report in which he analyzed the value of the three series of preferred stock comparing them as to fair investment, going concern and intrinsic value with stock of five other public utility holding companies like Engineers. He testified that he made his studies without regard to the plan of divestiture of Engineers required by Section 11 of the Public Utility Holding Company Act. He concluded that the three series of preferreds were worth respectively $107.49, $118.31 and $129.07 per share. He also compared the preferred stocks of Engineers with those of ten operating and holding companies selected on the basis of similarity of earnings' history with Engineers and found that these stocks had sold during the period examined at an average yield of 4.5%. Applying this yield to the three Engineers' preferreds he arrived at values for the three series of $111.11, $122.22 and $133.33. He reached the conclusion nonetheless that the "investment characteristics of the Company" and the conditions of the money market placed a proper yield for the three series of Engineers preferreds, absent a call price, of 4.6%. In view of the foregoing he expressed the opinion that the investment values of the three series were respectively $108.70, $119.57 and $130.33. Dr. Badger's evidence as to values also included a number of other elements, the principal items of which are referred to in the opinion of the court below. See 71 F. Supp. at pp. 801-802. These included the charges and preferred dividends earned, the proportion of obligations to total capitalization, the book value of equity per share of preferred, the percent of quick net assets to prior obligations and the times the parent company dividends were earned. Dr. Badger also commented on the "possible permanency of the [general] interest rate" and based his opinion, to a considerable extent, on this factor. These estimates of value were based as will have been observed on the continued existence of Engineers [fol. 25] as a "going concern." Dr. Badger really was testifying as we have indicated as to the *investment values*

of the preferreds; in short what they were worth to the present stockholders without the impact of the Act. Next, employing the call or voluntary redemption prices of the preferred as "stoppers", he cut the values down to the respective amounts, as we have stated, of $105, $110 and $110 a share. Mr. Barnes testified that the United States was in a "boom period." While conceding that the investment value of the preferreds might be as high as indicated by Dr. Badger his attitude was a more cautious one. We think that it is apparent on a careful examination of the testimony of the two men that each was testifying to values as of May, 1946, *ex* the Act.

The District Court expressly stated that it accepted Dr. Badger's values and that in the absence of a showing of changed circumstances it would deem them to be applicable at the time of the hearing. The District Judge went on to say, however, that "It must be conceded . . . . that these values are not controlling because the plan itself does not propose to give these amounts to the preferreds." The court considered a number of other elements which it designated as "colloquial" equities. It pointed out that "A significant reason why the present preferreds are able to be evaluated at more than their redemption prices is because of retained earnings over a period of years not paid as dividends to the common stockholders.", and that "The past sacrifices and contributions of the common contributed significantly to the present value of the preferreds. . . ." The court also concluded that the issuing prices and market histories of the preferreds looked toward non-payment of any premium, that none of the series of preferreds was initially sold to the public at prices in excess of $100 per share and that in order to sell the preferreds even at these prices it was deemed necessary to attach a convertible feature to the $5 series and warrants to the $5.50 series; that there was "no showing" that Engineers in fact received the amounts which the public paid for the various issues; that underwriting fees and "underwriting spreads [fol. 26] in vogue at the time" were large. "The important consideration", said the court, "is not what the preferred security holders paid, but how much the company received for their stock." The court concluded that Engineers did not receive as much as $98 a share and states that as a matter of "colloquial equity" the preferred stocks should not be

paid a premium. The trial court stated that market history *ex* the conversion and warrant privileges showed an average price "much below $100 per share" and that the importance of the conversion and warrant features is demonstrated by the lower average price of the $6 preferred in comparison with the other two series. The District Judge laid emphasis on the fact that dividends were not paid on the preferreds from July 1, 1933 to July 31, 1936, the accumulated arrearages being paid off in 1936 and 1937. He said: "The market history accordingly not only fails to support the preferreds' claim to a premium, but affords affirmative support to the non-payment of the premium." The court pointed also to the charter provisions of Engineers, concluding that the liquidation of the company was an involuntary liquidation brought about by the operation of the Holding Company Act, and, while not holding this fact to be determinative in respect to values, nonetheless referred to decisions where, the provisions of the Act having worked a dissolution, courts had treated the charter provisions of the holding companies involved as dispositive of the issue of whether premiums should be paid.[6] [7] In this finding of fact the court below laid particular emphasis on the losses sustained by Engineers in making the divestitures required by the Commission.[8]

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[6] The court cited: In re Consolidated Electric & Gas Co., D.C. Del., 55 F. Supp. 211; In re North Continent Utilities Corp., D.C. Del., 54 F. Supp. 527; City National Bank & Trust Co. of Chicago v. S.E.C. and North American Light & Power Co., 7 Cir., 134 F. 2d 65; New York Trust Co. et al. v. S.E.C., 2 Cir., 131 F. 2d 274 and In re Standard Gas & Electric Co., D.C. Del., 59 F. Supp. 274.

[7] For references contained in this paragraph, see 71 F. Supp. pp. 801-2.

[8] As follows:

"37. Engineers sustained substantial losses on many of the properties sold by it in compliance with the requirements of Section 11(b)(1) of the Act and the Commission's divestment Orders thereunder. The largest of such losses was with respect to its investment in Puget Sound Power & Light Company which, after being drastically reduced in a Section 11(e) reorganization under the Holding Company Act, was disposed of in compliance with the Commission's divestment Or-

[Vol. 27] The trial judge also made a cogent finding respecting Dr. Badger's use of interest rates as an aid in fixing values for the preferred deeming the interest rate used by the latter to be too low. This finding also is set out in the margin.[9] The court below, as has been said, reached the

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ders, for a total consideration of $774,475, as compared with a cost to Engineers of $34,000,000. The book loss on this investment was thus more than $33,000,000. A formal offer of proof was made during the proceedings before the Court to establish that the equity owned by Engineers in Puget Sound prior to the recapitalization would presently have a cash value of $10,000,000. It is not necessary for present purposes to determine this amount with exactitude. The subsequent increases in the earnings of Puget Sound, concerning which the Court takes judicial notice (Moody's Public Utility Manual [1946] p. 1081), over the amount estimated by the Commission for reorganization purposes (13 S. E. C. 226, 243), and the increase in market prices for utility common stocks which occurred subsequent to 1944 (to which the Securities and Exchange Commission makes reference in its Twelfth Annual Report to Congress, at p. 46) make plain that Engineers' investment in Puget Sound came to have a realizable cash value substantially higher than the amount realized by Engineers under the circumstances referred to above. Substantial book losses were also sustained by Engineers on the sale of its investments in Western Public Service Company of Maryland, of Missouri Service Company and Northern Kansas Power Company, of Savannah Electric & Power Company, and others.

"In the case of El Paso Natural Gas Company, with which Engineers also was ordered by the Commission to sever its relationship, Engineers held a valuable option on which it managed to realize a book profit; but subsequent to compliance with the Commission's divestment Order the market price of the El Paso Natural Gas Stock divested by Engineers rose by more than $4,000,000."

[9] As follows:

"51.6 The record establishes that the values attributed by Badger to the Engineers preferred stocks, largely

[fol. 28] conclusion that the amounts which should be paid to the preferreds should not exceed the cash payments which would have been received by them under a strict construction of Engineers' charter in an involuntary liquidation.

The court also said, and this represents the greatest difference between the respective approaches of court and Commission to the problem of valuation, "I do not consider the argument advanced [by the Commission] as to what these series of preferreds would be worth if there were no Public Utility Holding Company Act. I do not think it profitable to consider an argument based on unreality *for there is a Public Utility Holding Company Act.* Unless one subscribes completely to the doctrine of foreordination things might always be different from what they are." While recognizing that there might be more than one road to a fair and equitable plan of reorganization under the Act the court concluded that because the Commission had failed to weigh the factors of divestiture and dissolution as well as the other elements referred to in the court's opinion the plan did not meet the test of the Act since it was not fair and equitable.

At this point arises a question of law which, we think, goes to the heart of the instant controversy. What is the power conferred on the district courts of the United States by the Act? Section 11(e) provides that if the Commission finds a proposed plan of devestiture and integration necessary to effectuate the provisions of Section 11(b) and to be fair and equitable to the persons affected by it, the Com-

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depend not only on market and economic conditions, but also on continuance of current money rates which were at the time of Badger's study concededly the lowest in the country's history; that such money rates in turn largely depend on continuance of governmental financial policies including "pegging" of the market on government securities; and that there is and can be no assurance that such policies will not be modified; nor can it be foretold how soon such modifications may take place. The extremely low money rates which resulted in Badger's finding that the preferred stocks of Engineers have an "investment value" greater than $100 per share, largely reflect artificial factors which are clearly subject to changes at any time and may well be of purely transitory character."

mission shall make an order approving the plan and may then apply to a district court of the United States to carry out its terms. Subsection (e) states also that: "If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of Section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdic-
[fol. 29] tion and possession of the company or companies and the assets thereof, wherever located. . . ."

The Commission takes the position before us that "Unless the conclusions of the Commission lack 'any rational and statutory foundation' they should not have been disturbed by the court below for the " 'fair and equitable' " rule of Section 11(e) . . . [was] inserted by the framers of the act in order to protect the various interests at stake. . . . The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters.",[10] citing, among other authorities, Securities Comm'n v. Chenery Corp., (the second Chenery case) 332 U.S. 195, at pp. 207, 208. The court below takes a very different view, asserting that a "Section 11(e) court has the affirmative and independent duty to consider and find whether a proposed plan which has been approved by the Securities and Exchange Commission is fair and equitable.", citing its decision In the Matter of Interstate Power Company, D.C. Del., 71 F. Supp. 164.

The legislative history of the Public Utility Holding Company Act of 1935 throws some light on this vital question. The report of the Senate Committee which reported out the original bill states, "Section 11 provides that plans for the voluntary readjustment of the affairs of holding companies to conform with the section may be presented to the federal courts at any time and that in such cases those courts may exercise in the furtherance of such voluntary plans *all the extraordinary powers such courts have been accustomed to exercise when called upon under the Sherman and Hepburn act*[s] *to effect compulsory corpo-*

[10] Brief for the Securities and Exchange Commission, p. 17.

rate readjustments required by the public policy expressed in those acts. . . . " . . . "The title provides that *during all court processes the SEC will act as the impartial expert economic adviser and administrative assistant to the* [fol. 30] *courts.*[11] That expert assistance will enable the courts to save time and expense in the solution of essentially economic and administrative problems for which in the Sherman Act cases it had no assistance except that of opposing counsel." See Senate Report No. 621, accompanying S. 2796, 74th Cong., 1st Sess.[12] We think that it will not be contended that a district court of the United States adjudging a controversy arising under the Sherman Act would function other than as in an original equity proceeding, exercising all the powers and duties inherent in a court of equity under such circumstances.

The Congressional debates which attended the passage of the Act disclose that again and again members of Congress demanded and received assurances that the plenary jurisdiction and powers of the district courts of the United States would not be diminished or encroached upon by the functions allotted to the Commission under the law. S. 2796 as originally cast provided in regard to reorganizations under Section 11(d), (e) or (f), that if a trustee was to be appointed the court should appoint the Commission. The bill provided originally that "it shall be the duty of the court, to constitute and appoint the Commission as sole trustee." The Senate insisted, however, that the language should be changed so that the duty of the court to appoint the Commission as trustee was clearly permissive and not mandatory. This change was effected to the end that the powers of district courts of the United States would not be curtailed. Senator Wheeler stated that the jurisdiction of the courts would not be ousted "because the court has to approve the plan even though the Commission approves it." He went on to say: "In other words, there is really a *double-*

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[11] Emphasis has been added at this and all later points of the opinion.

[12] The original bill suffered many changes and vicissitudes during its course through Congress but it should be noted that the provisions of Section 11(e) remained substantially unchanged. See S. 2796, 74th Cong. 1st Sess. introduced by Senator Wheeler on May 7 (Calendar day May 9), 1935.

check upon the plan, and final determination rests *as in the* [fol. 31] *past* in the courts." See 79 Cong. Rec. 8845, 74th Cong., 1st Sess. We think that by the words quoted Senator Wheeler conveyed the thought that the "check" to be made on a plan by the court was to be as full and complete as the "check" made by the Commission on the plan. We conclude also that by using the phrase "*as in the past*" the Senator made clear the concept that the court should fulfill the traditional function of a court of equity. See also the remarks of Senator Clark and Senator McKellar during the course of the debate. Senator Barkley also spoke to this point. Replying to a statement by Senator McKellar that the latter preferred to put the function of decision in respect to the appointment of receivers in the courts rather than in the Commission, Senator Barkley said that it was not the intent of the Act to tell ". . . the court how to decide the law, or as to equities among investors or *how a reorganization shall be brought about*. The appointment of receivers is an administrative matter which is to be performed by the court." While the Senate in the specific instances referred to was debating the function of appointing receivers, the intent of the debating Senators in respect to the power and duty of the district courts in regard to the approval or disapproval of plans of reorganization certainly was made manifest. For the debate see Cong. Rec. *supra* pp. 8937-9.

The interpretation of the Act by the Commission seems also to bear out the ruling of the court below that the district court's function in respect to the approval or disapproval of plans of reorganization is full, plenary and independent. A former chairman of the SEC, Mr. Ganson Purcell, testifying before the Securities Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, on "Study of Operations Pursuant to the Public Utility Holding Company Act of 1935", p. 873, Part 3, 79th Cong., 2d Sess., 1946, said that the stockholder's ". . . new interest [in reorganization] is gaged by his claim under the old security and his treatment must be found by the courts and the Commission to be fair and [fol. 32] equitable." Mr. Purcell also stated in respect to the enforcement of a plan in a district court of the United States that "That district court is . . . required to find under section 11(e) that the plan is fair and equitable, and

proper to carry out the provisions of section 11(e) [sic].[13] That decision of the district court is in turn appealable, and it can be taken to the court of appeals and to the Supreme Court of the United States." The testimony of Mr. Milton H. Cohen, a former Director of the Public Utilities Division of the SEC, at the same hearings is peculiarly telling on the point at issue. He stated that a federal district court, when called upon to enforce a plan pursuant to the provisions of Section 11(e), "on the basis of the record made before the Commission, holds full hearings on the plan, including briefs and oral argument, and then such court has the *independent duty* of determining whether the plan is fair and equitable and appropriate to effectuate the provisions of section 11(b)." *Ibid.* at p. 962.

The 10th Annual Report to Congress of the SEC, April 21, 1945, at pp. 91, 92 and 93, states, after making reference to the respective functions of the Commission and the district courts, "Thus security holders have the protection of findings as to the fairness and equity of plans by both the Commission and a United States district court", and "As has been said, security holders are not required to accept Section 11(e) plans unless they are found fair and equitable by both the Commission and a United States district court."

Turning now to the internal evidence contained in the Act itself as to the intent of Congress respecting the functions of a district court of the United States in an 11(e) proceeding, we find that subsection (e) lays upon the Commission in the first instance the duty of finding a plan, as submitted or as modified, "necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan. . . ." The same subsection provides that the court ". . . shall approve such plan as [fol. 33] fair and equitable and as appropriate to effectuate the provisions of Section 11. . . ." The words employed respecting the respective duties of Commission and court are so alike that we must conclude that Congress intended to lay substantially the same duty on the court in the second instance as it imposed on the Commission in the first. Surely, had Congress intended that the district courts of the United States should exercise only the function of

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[13] It is probable that the "(e)" is a typographical error and the reference was to subsection (b).

review, other and more appropriate language would have been employed. The duty of determining whether the plan is fair and equitable imposed on the district courts in its field apparently is very similar to that which devolves on the Commission itself within the latter's own province. We use the word "field" advisedly for of course limitations on the functions of the court in the exercise of its equity powers are imposed by the Act. These will be discussed at a later point herein. But one may not presume that the same words employed in a single subsection of a statute have dissonant meanings. It is conceded that the Commission must exercise an independent and plenary judgment in passing on the fairness and equity of the plan. Why then must it not be concluded that it was the Congressional intention that the district courts of the United States should do the same *in their own field?*

Subsection (e) goes on to employ the phrase that "the court *as a court of equity* may . . . take exclusive jurisdiction of the holding company's assets . . . . for the purpose of effectuating the plan . . ." We do not believe that it was the intention of Congress to cause a district court of the United States to function as a court of equity after it had approved a plan and not to function as a court of equity for the approval or disapproval of the plan. We think that Congress employed the phrase "as a court of equity" classically, intending to require the district courts in Section 11(e) proceedings to exercise in connection with the approval or disapproval of a plan the traditional powers of a court of equity in deciding that justiciable issue; [fol. 34] that is to say, to administer justice in the traditional manner of a court of equity. The history of the law of reorganizations supports this view as will be demonstrated hereinafter.

It is also interesting to observe that the last sentence of subsection (b) of Section 11 provides: "Any order made under this subsection shall be subject to judicial review as provided in section 24." The words are apt for creating a review function in the circuit courts of appeals. Contrast the language employed in subsection (e) which we have quoted above. Section 24(a) of the Act which, as indicated, sets up a means of reviewing the orders of the Commission by the circuit courts of appeals, provides that "The findings of the Commission as to the facts, if supported by substan-

tial evidence, shall be conclusive." This sentence or its equivalent is notably absent from Section 11(e).

It must be pointed out also that the Section 11(e) court may hear the application for approval of the plan only "after notice and opportunity for hearing" to those who may be affected by it. It is necessary therefore that notice be given in the proceeding to all security holders who may be affected in order that they may have the opportunity to be heard. Many, if not most, of these persons will not have appeared before the Commission. It was the manifest intention of Congress to give all persons who might be affected by the plan a day in court in an equity proceeding. If it should appear during the course of a proceeding in the Section 11(e) court that the record furnished by the Commission has grown "stale" for any reason, the court may "remand" the record to the Commission for the taking of further testimony and for reconsideration of the pertinent issues. This course was suggested in In re Midland United Co., 58 F. Supp. 667, 683. If during the hearing before the district court proof is submitted that cogent evidence has not been submitted to the SEC, the Section 11(e) tribunal may send the record back to the Commission to the end that the latter may take such further testimony as may be re-
[fol. 35] quired and for reconsideration of the pertinent issues and for new recommendations respecting the plan of reorganization. The proceedings before the equity reorganization court are not strictly *de novo* since the district court can only approve a plan when it has been approved by the Commission. See Application of Securities and Exchange Commission, D. C. Del., 50 F. Supp. 965, 966. This does not mean, however, that the Section 11(e) court may not receive evidence *aliunde* the Commission's record respecting the fairness and equity of a plan. It may decide upon the new evidence and that contained in the Commission's record that the plan is unfair and inequitable and remand the proceeding to the Commission for further consideration; or it may remand without taking new evidence, pursuing the course outlined at an earlier point in this paragraph.

It seems improbable to us that Congress intended that the district courts of the United States should be limited to the function of mere review under the Public Utility Holding Company Act, the only federal reorganization statute by the terms of which security holders are not per-

mitted to vote their approval or disapproval of a proposed plan of reorganization and to prevent its operation if the holders of the requisite amounts of the securities affected are not in favor of it.

The history of the law of reorganizations tends to support the view that a Section 11(e) court must function as an equity reorganization tribunal. Equity receiverships first were employed to effect corporate reorganizations. The powers of the courts of chancery were exercised to make certain that creditors and security holders were treated fairly and equitably. The powers of the court were in nowise circumscribed.[14] While corporate insolvency, sometimes technical, was made the usual touchstone of jurisdiction, when jurisdiction had been secured the court func- [fol. 36] tioned with the plenary powers of a court of equity. Later, the reorganization of insolvent corporations was effected under Section 77B of the Bankruptcy Act, 11 U. S. C. A. § 207 et seq. The district courts of the United States then had to determine as courts of equity whether the plan was "fair and equitable and does not discriminate unfairly in favor of any class of creditors and stockholders; and is feasible". When Chapter X, 11 U. S. C. A. § 501 et seq., supplanted Section 77B the district courts were required to find, if approval was to be given to a plan of reorganization, that it was "fair and equitable, and feasible". There can be no question but that district courts of the United States in approving or disapproving a plan of reorganization for a company not within the purview of the Public Utility Holding Company Act submitted in a 77B or a Chapter X proceeding are required to exercise their full and independent equity powers in the classic pattern of reorganization courts. This was recognized by the Supreme Court in Vanston Committee v. Green, 329 U. S. 156, 165, wherein Mr. Justice Black stated: "A Chapter X or § 77B reorganization court is just as much a court of equity as were its statutory and chancery antecedents."

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[14] For classic examples of the application of tests by a court of equity see the decisions of the Court of Chancery of Delaware in Hauer v. Appalachian Gas Corp., 19 Del. Ch. 283, 167 A. 839, and in Eastern States Public Service Corp. v. Atlantic Public Utilities, Inc., 17 Del. Ch. 338, 156 A. 214.

If the company to be reorganized pursuant to the provisions of Chapter X is a public utility holding company within the purview of the Public Utility Holding Company Act the proposed plan of reorganization must be submitted first to the SEC under Section 172 of the Bankruptcy Act, 11 U. S. C. A. § 572, and the Commission must first find it to be fair and equitable before it may be submitted to a district court for the latter's approval. When the Commission has found the plan to be fair and equitable and it is then submitted to a district court, that tribunal, if it is to find the plan to be fair and equitable, must exercise its independent judgment pursuant to Section 174 of the Bankruptcy Act, 11 U. S. C. A. § 574 in arriving at such a conclusion. The District Court of Delaware so held, by the present writer, in In re Midland United Company, *supra* [fol. 37] at p. 683. In the cited case it was pointed out, however, that Section 172 of the Bankruptcy Act provides that the report of the Commission on the plan "shall be advisory only". The section cited was added to the Bankruptcy Act by Congress on June 28, 1938, c. 575, Section 1, 52 Stat. 840, almost three years after the effective date of the Public Utility Holding Company Act. The inference is possible in view of the proviso of the later statute that Congress had intended in respect to a proceeding arising under Section 11(e) of the Public Utility Holding Company Act that a report on the plan by the SEC should be more than "advisory" to a district court passing on the fairness and equity of the plan. It is very clear both from the express language of Section 172 and from its legislative history what Congress intended the functions respectively of the Commission and the court to be in the bankruptcy proceeding. See the Senate Report accompanying the bill.[15]

[15] S. R. 1916, 75th Cong. 3d sess. p. 30, states that "Section 172 provides the courts with the administrative assistance of the Securities and Exchange Commission in the complex and difficult task of examining plans of reorganization. It contemplates that after the hearings provided in 169 or 170 the number of practicable plans will be reduced to one or two in number. At this stage it is required that the court shall in cases where the debtor's scheduled indebtedness exceeds $3,000,000 refer the plan or plans which it regards as worthy of consideration to the Securities and Exchange Commission for examination and report. In

In providing means for the reorganization of railroads Congress in enacting Sections 77(d) and (e), 11 U. S. C. A. §§ 205(d) and (e) provided that the Interstate Commerce Commission should certify the plan of reorganization with a transcript of the proceedings before it and its order, to the appropriate district court which, after notice to the parties in interest, and hearing, shall approve the plan if, *inter alia*, the court is satisfied that the plan is "fair and equitable. . . . ." Subsection (d) provides that the plan shall not be approved by the court unless it has first been [fol. 38] approved by the Commission. We are of the opinion that Congress intended the district courts of the United States, within the limitations of the statute, to function as equity reorganization courts. Though the Commission must make the primary determinations respecting the plan, including in particular those relating to valuations of railroad securities, the court must exercise its own independent judgment in approving or disapproving the plan whether the court's rulings relate to value or to some other pertinent subject. See In re Erie R. Co., 37 F. Supp. 237, 243-5, aff'd, 6 Cir. 133 F. 2d 730, cert. den. 320 U. S. 748. In Palmer v. Massachusetts, 308 U. S. 79, 87, the Supreme Court, by Mr. Justice Douglas, said that the judicial process in bankruptcy proceedings under Section 77 is brigaded with the administrative process of the Commission. The Court also stated that ". . . . . the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates." We think that the limitations imposed by the statute are largely procedural, operative in the respective fields specified by Congress to Commission and court, and do not substantially circumscribe the general equity jurisdiction of the reorganization tribunal.

Whether the reorganization is to be consummated by way of equity receivership, by action under Section 77B, by suit under Chapter X, by a proceeding under Section 77 or by petition to a district court under Section 11 (e)

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cases involving a scheduled indebtedness which is less than $3,000,000 such plans may be referred to the Commission. In either case the Commission's reports are advisory only. There is no division of jurisdiction. Ultimate approval or disapproval of plans is left solely with the judge."

of the Public Utility Holding Company Act, the critical phrase employed alike by courts of equity and by Congress in framing the test under which a plan shall be approved or disapproved, has always embraced the phrase "fair and equitable" or its substantial equivalent. In the light of this very pertinent circumstance we cannot think that the power and functions imposed on the district courts of the United States vary much from statute to statute and from case to case. If the proceedings be any one of those enumerated in the foregoing sentence a district court must [fol. 39] function as an equity reorganization tribunal with the powers and functions of such a court, and not as a mere review court.

Insofar as we are aware the Commission in this circuit prior to the instant case has not taken the position that a Section 11 (e) court (any proceeding under Section 77B or Chapter X aside) is not an equity reorganization tribunal but serves only as a court of review. The instant case aside the learned District Judge has passed on twenty-seven reorganization plans brought to the District Court of Delaware by the Commission pursuant to Section 11 (e).[16]

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[16] S.E.C. cases decided by opinion by Judge Leahy, sitting in Section 11 (e) proceedings:

American Gas & Power Co., 55 F. Supp. 756
Homewood v. Standard Power, 55 F. Supp. 100
Illinois Iowa v. North American Co., 49 F. Supp. 277
Standard Power & Light, 48 F. Supp. 716
United Public Utilities, 52 F. Supp. 975
North Continent Utilities, 54 F. Supp. 527
Consolidated Electric, 55 F. Supp. 211
United Gas Corporation, 58 F. Supp. 501
United Light & Power, 51 F. Supp. 217, Aff'd 142 F. 2d 411, Aff'd 323 U. S. 624
Standard Gas and Electric, 59 F. Supp. 274, Rev'd 151 F. 2d 326
Standard Gas and Electric, 63 F. Supp. 876. On remand Central States Power & Light, 58 F. Supp. 877
North Continent, 61 F. Supp. 419
Central and South West Utilities Co. and American Public Service, 66 F. Supp. 690
Interstate Power Co. and Ogden Power Corporation, 71 F. Supp. 164

[fol. 40] The former position of the Commission as demonstrated in this circuit and that which the court below has always taken is set out accurately in the opinion in In re Interstate Power Co., *supra*, at p. 168, as follows: "Since one of the earliest cases for federal district court enforcement under the Act was brought to me for consideration and approval, it has been consistently conceded by all parties including the various sets of attorneys for the SEC in this and in all other cases brought to the enforcement court, that a Section 11 (e) court has the affirmative and independent duty to consider and find whether a proposed plan is fair and equitable . . ."

There are decided cases which look the other way and these are entitled to great consideration. See Lahti v. New England Power Ass'n., 1 Cir., 160 F. 2d 845, 858; and Massachusetts Mutual Life Ins. Co. v. S.E.C., 8 Cir., 151 F. 2d 424, 430, affirming In re Laclede Gas Light Co., D.C.E.D.Mo. E.D., 57 F. Supp. 997, 1004. In the Laclede

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Community Gas and Power Co. and American Gas and Power Co., 71 F. Supp. 171

Cities Service Company, 71 F. Supp. 1003

Illinois Power Co., North American Light & Power, The North American Co., 74 F. Supp. 317

Central States Power & Light Corp., Central States Utilities Corp., Ogden Corp., 74 F. Supp. 360

S.E.C. cases decided without opinion by Judge Leahy:

In the Matter of The United Corporation, et al.

In the Matter of Columbia Oil & Gasoline Corp. and Columbia Gas & Electric Corp. (C. A. 288)

In the Matter of Columbia Oil & Gasoline Corp. (C. A. 280)

In the Matter of Republic Service Corporation and subsidiary companies

In the Matter of American Utilities Service Corporation

In the Matter of Peoples Light & Power Company and Texas Public Service Company

In the Matter of Crescent Public Service Company, Central Ohio Light & Power Co., Colorado Central Power Co., and Empire Southern Service Co.

In the Matter of East Coast Public Service Co., Virginia East Coast Utilities, Inc., Tidewater Electric Service Company

In the Matter of North American Gas & Electric Co.

case Judge Huhen said, "The Commission found that the plan was 'entirely appropriate' to comply with its orders. These are matters peculiarly within the discretion and power of the Commission and if based on evidence, we deem this court bound by the finding." But in Commonwealth and Southern Corp. v. Securities and Exch. Com'n, 3 Cir., 134 F. 2d 747, 753, this court took the position that stockholders, whose rights were affected by an order of the Commission directing a public utility holding company to change its corporate structure, had a right to a full hearing in the district court of the United States in which the Commission was seeking approval of the reorganization plan. In our decision in In re Securities and Exchange Commission,[17] 142 F. 2d 411, 422, citing Southern Corp. v. Securities and Exch. Com'n, *supra*, respecting the necessity for full hearing before the district court, we stated that: [fol. 41] ". . . . stockholders whose rights were affected by an order of the Commission directing a public utility holding company to change its corporate structure had a right to be heard in that District Court of the United States in which the Commission was seeking to effect its order; that otherwise those stockholders would be deprived of property without due process of law." It follows that the proceeding before the District Court cannot be deemed to be a summary one. Moreover, the fact that notice is to be given to persons affected by the plan shows that the theory of submission to the district court is substantially similar to that required in respect to a plan made pursuant to the provisions of Section 77B or Chapter X of the Bankruptcy Act." We conclude that the issues which may be presented to the district court are limited only by the terms of the statute. Any question which goes to the issue of what is fair and equitable may be raised and must be passed upon. Reference also is made to the concurring opinion in Lownsbury v. S.E.C., 3 Cir., 151 F. 2nd at p. 219. Cf. In re Standard Gas & Electric Co., 3 Cir., 151 F. 2d 226, 331, in which, however, the question here presented was not in focus. See the decision in Okin v. S.E.C., 2 Cir., 145 F. 2d 206, 207, wherein it was stated, "The provisions of Section 11 compel

[17] The United Light & Power Company case. Decided by the Supreme Court *sub. nom.* Otis & Co. v. S.E.C., 323 U. S. 624

full review of an order . . . [of the Commission approving a plan of reorganization] in a district court for all parties in interest. . . ." The Court of Appeals for the Second Circuit was of the opinion in the Okin case that an order of the Commission approving a plan of reorganization was purely interlocutory in nature while that of the district court approving the plan was the effective or final order.

The decision of the Supreme Court in the second Chenery case, *supra*, as has been indicated, is heavily relied on by the Commission. But that decision must be read in the light of the circumstances of the cited case. The proceeding was under Section 24(a) of the Public Utility Holding Company Act. While reference was made to Section 11(e) in the course of Mr. Justice Murphy's opinion, [fol. 42] *Ibid.* at p. 208, it was not held that the proviso of Section 24(a), "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.", should be read into Section 11(e). The Supreme Court was not passing in any way on the powers and duties of a Section 11(e) court. In the Chenery case the Court had before it questions relating to a rule of conduct prescribed by the Commission in the course of "[its] ordinary administrative action". The Court stated that its duty of examination is at an end ". . . when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress . . ." *Ibid.* at p. 207. The Chenery decision in our opinion cannot be deemed to be controlling in the case at bar.

We are of the opinion that a Section 11(e) court must exercise its full and independent judgment as to the fairness and equity of the plan. In stating this we do not mean to imply that Congress intended to grant a Section 11(e) court the same full and untrammeled scope that a court of bankruptcy would have in a Chapter X proceeding. For analogy see Palmer v. Massachusetts, *supra*. The SEC must first make sure that the plan of reorganization fulfills the purposes of the Act, must value the securities involved in the plan and must decide in the first instance whether the plan is fair and equitable. The court may not pass on a plan until it has been approved by the Commission and cannot approve a plan which has not been approved by the Commission. The court may not

substitute its valuations for those of the Commission, but it may reject valuations made by the Commission in fulfilling its, the court's statutory function in determining whether the plan is fair and equitable. The court of course may not act capriciously in rejecting valuations made by the Commission nor may the Commission act with caprice in valuing securities. The judicial process is brigaded with the administrative process of the Commission but this does [fol. 43] not mean that the court in the field allocated to it by Congress is not to exercise its independent, plenary judgment as an equity reorganization tribunal upon every matter relating to the fairness and equity of the reorganization.

In the light of the foregoing we cannot hold, as the Commission contends we must, that unless the conclusions of the Commission lack rational or statutory foundation they may not be disturbed by the Section 11 (e) court, or that a reversal of the Commission's judgment by the court may not be effected save where the Commission has plainly abused its discretion. We conclude that it was the duty of the court below to function as an equity reorganization tribunal within the limitations prescribed by the Act. The findings and conclusions of the Commission were not binding upon the learned District Judge though, as was proper, he treated them with respect. He weighed the numerous elements involved in the case, albeit on his own scales, and in the exercise of his independent judgment, arrived at the conclusion that the plan was not fair and equitable. The examination made by the District Court of the relevant factors was careful and far-reaching. The District Judge attached substantial weight to elements or factors which the Commission apparently did not deem to be of importance. For example, he laid emphasis on the market and dividend histories of all the securities and the losses which were indubitably occasioned to the holding company enterprise by the sale of securities from Engineers' portfolio because of the divestitures required by the Act. Neither the Commission nor the court, in what we consider to have been a proper application of one of the principles enunciated by the Supreme Court in Otis & Co. v. S.E.C., (The United Light & Power Company case) 323 U. S. 624, 637, treated the charter provisions of Engineers as dispositive of the issues presented. While the court deemed the liquidation of Engineers to be an involuntary one and pointed to deci-

sions [18] where, under charter provisions similar to those of [fol. 44] Engineers no premium was allowed, he treated the involuntary liquidation provision of Engineers' charter as but one factor to be employed in determining the values of the preferreds. The Commission for its part treated the "call" provisions of Engineers' charter only as "stoppers" to prevent the "investment values" of the preferreds from exceeding the premium or call prices. But the weight and emphasis applied by the court and the Commission to the various factors in the case go, we think, to the two respective primary considerations which brought the Commission to a conclusion that the plan was fair and equitable and the court to a finding that it was not.

The reasoning which moved the Commission is not as plain as it might be. But we think it is clear that it did not give any substantial consideration to the future earning power of Engineers and its subsidiaries which the Supreme Court has held is one of the fundamental tests for reorganization valuation. See Consolidated Rock Products Co. v. Dubois, 312 U. S. 510, 526, and Group of Investors v. Milwaukee R. Co., 318 U. S. 523, 565-6. In the instant case the Commission made no attempt to ascertain the future earning power of the system nor to apportion earning power between the preferreds and common based on their respective claims to income as it did in The United Light & Power Company case. But if values for the securities are to be determined *ex* the Act it is clear that the Commission should have done so. What the Commission has done is to consider the investment values of the preferred *ex* the Public Utility Holding Company Act, i.e., as if the Act had never been passed. But it considered only the preferreds on this basis. It seems to have omitted consideration of the common by a similar standard. It made no finding as to the "value" of the common stock. The Commission's action may not be upheld merely because such a finding possibly could have [fol. 45] been made. "The grounds upon which an administrative order must be judged are those upon which the

[18] See the cases cited in note 6 supra. See also City National Bank & Trust Co. v. S.E.C., 7 Cir., 134 F. 2d 65; Massachusetts Mutual Life Insurance Co. v. S.E.C., 8 Cir., 151 F. 2d 424, cert. den. 327 U. S. 795; In re Standard Gas & Electric Co., 3 Cir., 151 F. 2d 326; and New York Trust Co. v. S.E.C., 2 Cir., 131 F. 2d 274, cert. den. 318 U. S. 786.

record discloses that its action was based.'" See Securities Comm'n v. Chenery Corp. (the first Chenery case), 318 U. S. 80, 87. "There is no such finding here." *Ibid.* at p. 94. Under the plan the common stock is excluded from the holding company enterprise as effectively as are the preferred for the common under the plan will receive participation only in operating companies. The fact is that the holding company enterprise is at an end, both for preferreds and common. The Commission apparently has disregarded this fact which supplies the substantial difference between the instant case and The United Light & Power Company reorganizations. In the latter case the security holder participation in the enterprise was shifted from the top holding company to a subsidiary holding company but the holding company enterprise as such continued. In the instant case the Commission ascribed "investment value" to the preferreds but failed to make a similar approach to the common. The result is that the Commission has attempted to value the securities of Engineers both *ex* the Act and *intra* the Act. We have used the phrase "attempted to value" advisedly for we think that in the employment of the formula of "investment value" the Commission erred in the light of the decision of the Supreme Court in the Otis & Co. case for the reasons set forth at a later point in this opinion. The court refused to approve the Commission's action deeming it to embrace an improper exercise of the Commission's administrative discretion. In determining whether the plan was fair and equitable the court valued the securities *ex* the Act, considering the holding company enterprise to be at an end as it is in fact.

The anomaly of the Commission's general position is made all the more apparent, we think, by its failure to consider the substantial losses which occurred to Engineers by virtue of divestitures compelled by the Act. The loss in Puget Sound Power & Light Co. stock will serve as an [fol. 46] example. The Commission allowed to Engineers only 3% of Puget Sound's new common stock in exchange for 99.3% of the old common stock. The allocation was based on the Commission's determination that the future earning power of Puget Sound available for the stocks would lie somewhere between $2,657,000 and $3,083,000. See Puget Sound Light & Power Co., 13 S.E.C. 226, 243-244. The net profits from the stock of Puget Sound in 1946 were $5,325,320 and for the twelve months ending June 30, 1947,

were $5,067,419.[19] Another instance of loss to Engineers by reason of divestiture compelled by the Act lies in Engineers' disposition of its interest in El Paso Natural Gas Company. Under this divestiture Engineers lost a profit of at least $4,000,000. We desire to make it clear that we do not criticize, or even suggest criticism of, the Commission because of its orders compelling these divestitures which were required by the Act. Hindsight demonstrates facts which foresight, however apt or well-informed, may not be able to foretell. But if the Commission is to make valuations *ex* the Act in respect to the preferreds, it must do likewise in respect to the common. The difficulty with the Commission's position in this connection, the formula of "investment value" aside, lies in the fact that while it has attempted to appraise the preferreds (as distinguished from the common) *ex* the Act its basis of valuation, insofar as it has composed one, lies in factors which have come to existence because of the impact of the Act. Paradoxically, though the paradox is more apparent than real, if the equitable equivalents for relinquished securities are to be arrived at by the Commission under the doctrine of the Otis & Co. case, *ex* the Act, losses of the sort referred to in this paragraph must be weighed into the calculation, i.e., such losses should be returned to the credit side of the enterprise's balance sheet as a matter of bookkeeping.

The selection of possible though varying techniques is for the Commission in the exercise of its expert adminis- [fol. 47] trative judgment. But whatever technique is chosen it must be employed consistently throughout the entire operation of valuation. We do not say the Commission must approach the problem *intra* the Act or *ex* the Act as the Commission purports to have done in the instant case. Either course consistently followed could, we think, lead to just and appropriate valuations. No particular, specific approach is to be nailed to the Commission's head. The Commission must, however, approach the problem of valuation with a full view of all the pertinent factors employing the same scales and the same measure throughout.

In conclusion upon this point we state that in our opinion the Commission in attempting to apply the "invest-

[19] See Moody's Public Utility Manual (1947) at p. 53 and Suppl. Vol. 19, at p. 1914.

ment value" test to the Engineer's preferreds, even to the limited extent hereinbefore indicated, has misunderstood the principle of "equitable equivalents" enunciated by the Supreme Court in the Otis & Co. case. We can perceive no reason why the doctrine of equitable equivalents cannot include within its ambit cash for securities as well as securities for securities. Perhaps, strictly speaking, cash is not an equitable equivalent for securities. But cash certainly may be an adequate recompense for the security relinquished and if it be a just recompense, the exchange will be equitable. In the Otis & Co. case the Supreme Court held that a distribution of assets might be made between different classes of securities without dollar valuation if each security holder received the equitable equivalent of what he had surrendered. 323 U. S. at pp. 639-640. We do not understand, however, that the principle of the Otis & Co. case would preclude giving the security holder money in lieu of his security if the cash which he would receive would be just recompense for the security which he would give up. We conclude, therefore, that the doctrine of equitable equivalents may properly be applied where money is to be given for securities and where securities are to be allocated for securities as in the instant case. The difficulty in sustaining the Commission's position in respect to "in-[fol. 48] vestment value", even insofar as the Commission has applied that value, lies in the fact that investment value is and can be only *one* of a series of factors to be used in arriving at equitable equivalents. We conceive that the Commission could make a finding under certain circumstances that investment value was the equitable equivalent to the security holder. The Commission in the instant case, however, has not made such a finding and we do not believe that such a finding could be supported on the present record. In determining equitable equivalents the Commission must weigh all pertinent factors to the end that the security holder may receive as nearly as may be the equivalent of that which he is giving up. All pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached by the approach *ex* the Act or the approach *intra* the Act. The new doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equitable equivalents enunciated in the Otis & Co. decision.

For the reasons stated we concluded that the District Judge did not err when he found that the plan as submitted by the Commission was unfair and inequitable. Certainly we cannot say that this conclusion was clearly erroneous.[20]

Though a district court of the United States sitting pursuant to the provisions of Section 11 (e) may reject a plan, it cannot value the securities, find equitable equiva- [fol. 49] lents therefor and substitute its own estimates for those of the Commission requiring the plan as amended by it to be carried out. To put the matter briefly, a district court may reject but not amend the plan. The court below, therefore, erred in one particular. It entered an order approving and enforcing the plan as amended by it. It was without power to do this. The provisions of Section 11 (e) make it clear that the Commission in the first instance must approve the plan and find it to be fair and equitable. If, as here, the district court disagrees with the conclusion of the Commission that the plan is fair and equitable, it must refuse to approve the plan and "remand" the record to the Commission for further and appropriate action by it.

The action which the Commission may take will, of course, be limited by the fact that with its approval, evidenced by its opposition to the appellant Streeter's motion

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[20] Judge Leahy's opinion is entitled to especial weight by virtue of his familiarity and experience with Section 11 (e) proceedings and plans of reorganization under the Act. See R.F.C. v. Denver & R.G.W.R. Co., 328 U. S. 495, 533, and Rule 52, R.F.C.P., 28 U. S. C. A. foll. § 723c.

We are informed by the Chief of the Bureau of Procedural Studies and Statistics of the Administrative Office, United States Courts, that up to February 11, 1948 the Securities and Exchange Commission had filed 63 petitions in the District Courts of the United States seeking approval of plans of reorganization pursuant to Section 11 (e) of the Public Utility Holding Company Act and that 27 of these had been filed in the District Court of the United States for the District of Delaware. See also note 16 *supra*. Approximately forty-two percent of all plans of reorganization submitted by the Commission under Section 11 (e) to the District Courts of the United States, therefore, have been submitted to Judge Leahy in the court below.

to stay which this court denied, the plan has been carried into effect, with the exception of the payment of the premiums which the district court disapproved. Under the escrow agreement which the Commission approved funds which are sufficient to pay all or any part of these premiums have been withheld from distribution, however, and the escrow agreement accordingly delimits the area in which the plan to be approved by the Commission and district court must fall. The problem is and will remain, until its disposition by the Commission, one of valuation of the securities of Engineers, viz., the preferreds and the common.

The escrow provisions of the plan are proper in our opinion. The objections asserted thereto need not be discussed in this opinion.

[fol. 50] The decree of the court below is vacated and the cause is remanded with the direction to enter an order disapproving the plan as not being fair and equitable within the purview of Section 11 (e) of the Public Utility Holding Company Act, and to return the record to the Commission to the end that it may take such action as the facts and the law may require.

[fols. 51-52] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9428

In the Matter of ENGINEERS PUBLIC SERVICE COMPANY

THOMAS W. STREETER, Appellant

OCTOBER TERM, 1947

No. 9435

In the Matter of ENGINEERS PUBLIC SERVICE COMPANY

HOME INSURANCE COMPANY OF NEW YORK, et al., Appellants

OCTOBER TERM, 1947

No. 9940

In the Matter of ENGINEERS PUBLIC SERVICE COMPANY

SECURITIES AND EXCHANGE COMMISSION, Appellant

JUDGMENT—March 19, 1948

Present. Biggs, Albert Lee Stephens and Maris, Circuit Judges.

Appeal from the District Court of the United States, for the District of Delaware

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby vacated with the direction to enter an order disapproving the plan as not being fair and equitable within the purview of Section 11 (e) of the Public Utility Holding Company Act of 1935 and to return the record to the Commission to the end that it may take such action as the facts and the law may require.

Biggs, U. S. Circuit Judge.

March 19, 1948.

[File endorsement omitted.]

[fol. 53] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REHEARING OF SECURITIES AND EXCHANGE COMMISSION—Filed April 3, 1948

The Securities and Exchange Commission, appellant, respectfully requests rehearing in this cause. The grounds for this petition are as follows:

1. This Court's opinion appears to rest upon a resolution of issues which the Commission has not heretofore had an opportunity to meet and the resolution involves a misconception of the Commission's reasons for approval of the plan.

2. The opinion contains the seeds of future controversies as to what the Commission is expected to do upon remand and is susceptible of the construction that it imposes upon the Commission both a legally irrelevant and an administratively impractical task.

A. The Court, after agreeing with the Commission and the district court, that under the Otis case Engineers' [fol. 54] liquidation preference is not dispositive, states that the Commission has a choice of valuation techniques and may value either "*intra* the Act" or "*ex* the Act." If in upholding the Commission's power to value "*intra* the Act" the court means that the Commission may treat the liquidation preferences as dispositive and no other interpretation of the phrase "*intra* the Act" has occurred to us, this would seem to be in conflict with the court's ruling as to the impact of the Otis case.

B. It is not clear whether the Commission is required upon remand to value the preferred and common stock of Engineers, with reference to the assets of Engineers as actually constituted at the time of the plan or after a hypothetical reconstitution of the Engineers system as it would have existed at that time if the Act had not been passed.

C. If the Commission is free to value the stocks of Engineers with reference to Engineers' assets as constituted at the date of the plan, then the mandate would merely lead

to a statement in different terms of what is implicit, if not explicit, in the findings which the Commission has already made. Since neither the District Court, nor this Court, has disagreed with the Commission's appraisal of the situation existing as of the date of the plan, such a restatement of the Commission's findings without more would neither require nor permit the Commission to approve a different allocation of cash to preferred stockholders than that which the Commission has already approved and which the District Court has disapproved.

[fol. 55] D. Intimations in the Court's opinion that the Commission should determine the value of Engineers' assets, as if the Act had not been passed, rest upon the assumption that losses have been caused by the operation of the Act. But if such losses were both demonstrable and measureable it would not be fair or equitable to require Engineers' preferred stockholders to compensate its common stockholders in whole or in part for such losses. To impose such a requirement would violate the principle of strict priority by shifting the primary incidence of the risk of losses from junior to senior security holders, and would constitute collateral attack upon transactions which have been consummated pursuant to Commission and court orders no longer open to review or appeal.

E. Any requirement that the Commission determine as a fact on the basis of evidence whether there have been losses to Engineers as an entity, or to its common stockholders, as a result of the over-all application of the Act would be to impose an impossible administrative task both in this case and in relation to the general administration of the Act.

3. The holdings in the court's opinion with respect to the applicable standard of judicial review are believed to be erroneous at least insofar as it is held, with respect to the issues presented in this case, that the District Court would be authorized to reject the determinations of the Commission on grounds which would not be open to a circuit court of appeals upon direct review of the Commission's orders, or upon grounds which this Court would not be free to re-[fol. 56] examine on appeal from the District Court's order. While we note the extent of our disagreement with the court's views on this point, we believe the relevant considerations have already been fully presented and considered

and therefore do not seek to present anything further with reference to the issue of the scope of review.

4. Statements in this Court's opinion with respect to the power of the Section 11 (e) enforcement court to take new evidence, while not necessary to the decision, are contrary to a long course of decisions in this and other circuits and if followed would open up avenues of delay which could seriously impede the administration of the Act.

Argument

This Court has agreed with the Commission and the District Court that under the *Otis* case the charter involuntary liquidation preference is not "dispositive" of the amount of cash payable to Engineers' preferred stockholders. Despite statements as to the breadth of discretion in the District Court, this Court has also held, we believe, that a District Judge's weighing of "colloquial equities" is not the proper method of arriving at the amount of cash payable to preferred stockholders. Instead this Court has held that (a) allocation is to be determined according to a valuation technique, (b) valuation is the statutory function of the Commission, and (c) "the selection of possible though varying techniques is for the Commission in the exercise of its expert administrative judgment." The Dis- [fol. 57] trict Judge is upheld in rejecting the plan as submitted by the Commission because this Court found the Commission to have been inconsistent in its own approach, and to have misunderstood the principle of equitable equivalents enunciated in the *Otis* case, but the District Judge is held to have erred in substituting his own determination of the fair and equitable amount for that found by the Commission.[1] The plan is remanded to the Commission

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[1] If the ruling is that the Commission is bound by the District Judge's determination as to amount, then we believe that no remand to the Commission would be necessary, because the Commission has already contingently approved an alternative allocation of cash to preferred stockholders at the amount of the liquidation preference if as a result of the processes of review in the District Court and on appeal therefrom this should be judicially determined fair and equitable.

for what this Court holds would be a more consistent application of the technique chosen.

This Court's criticism of the Commission's approach, its related statements as to the inadequacy of the Commission's findings, and its direction as to what the Commission should do on remand, present issues which the Commission has not heretofore had an opportunity to meet. In any event, the Commission respectfully requests a more explicit statement of what it is required to do upon remand.

The opinion states, with reference to the Commission's use of the technique described as computing the investment value of the preferred stocks of Engineers "*ex* the Act;" that "the reasoning which moved the Commission is not as plain as it might be." By restating that reasoning in terms of what the Commission has done and said in this and other [fol. 58] cases, and heretofore with judicial approval, it is our hope to correct what we believe is a complete misinterpretation of the Commission's technique employed in this case. That misinterpretation appears to us attributable largely to the use by counsel and witnesses in this case, and to a more limited extent by the Commission itself, of an unfortunately vague shorthand expression for a conception which had been more fully articulated in prior cases.

I

The Commission has not been inconsistent in the employment of the valuation technique which it selected

A. The Commission has not attempted to value either the preferred or common stocks of Engineers as though the Holding Company Act had not been passed

The Commission believes that any attempt to reconstitute an eventful decade in the history of the Engineers system and of the holding company industry as well, as though the Holding Company Act had not been passed, would be an even more impossible task than that which the Supreme Court rejected in *Taylor* v. *Standard Gas & Electric Company*, 306 U. S. 307 (1939).[2]

[2] In that case the Court stated that it would be impossible to recast the history of a single operating company to show what would be its condition if holding company acts of mismanagement had not occurred. See 306 U. S. at 323.

[fol. 59] Confronted with the task of bringing about a sweeping reorganization of the more than 15 billion dollar industry subject to the Act, the Commission has necessarily adopted a step by step approach. This Court has recognized in another connection that such an approach is a proper one. See *Commonwealth & Southern Corporation* v. *S. E. C.*, 134 F. 2d 747, 754 (C. C. A. 3, 1943). If the Commission had been required to do the entire job of bringing about compliance with Section 11 in one comprehensive order for each holding company system, the issues of fact and law presented would have been so multifarious as to preclude the conclusion of administrative hearings, let alone the subsequent course of judicial review, without making the process interminable. But use of the step by step approach would be without substantial value unless each step could be treated as a unit to be appraised with finality in its impact upon investors and consumers and subject to judicial review only within the time limits prescribed by the statute as applicable to individual Commission orders.[2a]

In accordance with this step by step approach, and likewise we believe in conformance with universally applicable reorganization practice, the Commission has treated each reorganiaztion plan presented to it as a unit and has applied [fol. 60] the fair and equitable standard for the purpose of determining, with respect to the impact of the particular plan, whether what each class of security holders receives under the plan is the equitable equivalent of the rights surrendered as a result of the plan. In doing so it has invari-

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[2] In the present case the District Judge said (R. 292a):

"I do not consider the argument advanced as to what these series of preferreds would be worth if there were no Public Utility Holding Company Act. I do not think it profitable to consider an argument based on unreality for *there is a Public Utility Holding Company Act.* Unless one subscribes completely to the doctrine of foreordination, things might always be different from what they are."

The Commission is in complete agreement, although it does not regard the observation as applicable to the valuation technique which it has used in this and other Section 11 (e) plans.

[2a] Prospective orders under Section 11 (b) are expressly subject to modification for change of circumstances.

ably, and we believe inevitably, made its appraisal in the light of the then existing assets and liabilities of the company undergoing reorganization.[3]

B. The Commission has merely valued the rights surrendered by the plan according to their worth apart from the reorganization.

The opinion states: "The new doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equitable equivalence enunciated in the Otis & Co. decision." It is elsewhere stated that the Commission has misunderstood the doctrine of the *Otis* case. But the Commission in valuing the rights surrendered by the Engineers' plan as if the instant reorganization were not occurring, was not employing, we submit, a novel tech- [fol. 61] nique.[4] It was following the only possible method

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[3] Of course there are circumstances where this mere financial appraisal is not conclusive. Thus the Commission has treated the occasion for reorganization as an occasion for enforcing an accountability for past inequitable conduct thought to warrant subordination or limitation to cost of particular claims. Thus many of the cases under Section 11 (e) of the Act have involved an issue as to whether a parent holding company's ostensibly prior claim should be subordinated to publicly held junior securities in the application of the principles of *Taylor* v. *Standard Gas and Electric Corporation*, 306 U. S. 307 (1939). Limitations to cost of management securities purchased in the course of the reorganization have presented to the Commission a comparable problem. See *S. M. C.* v. *Chenery Corporation*, 67 Sup. Ct. 1575 (1947). We do not understand this Court to have ruled, however, that any such basis exists in this case for limiting the claims of Engineers' preferred stock, vis-a-vis the common stockholders who have voting control.

[4] The question of whether it was novel or inconsistent with such cases as *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. 2d 274 (C. C. A. 2, 1942) cert. den. 318 U. S. 786, for the Commission to treat the liquidation preference as not dispositive has heretofore been fully argued (Commission main brief, 23-24, reply brief, pp. 17-19). On this point both the district court and this court have upheld the Commission.

of drawing a comparison between the new rights received through the plan and the old rights surrendered by the plan.

We believe this statement is best illustrated by a description of the reorganization process in situations where there is not likely to be any dispute as to the nature of the valuation process required. A simple illustration is afforded by a mere recapitalization of a solvent company where the same corporation continues, and with the same assets, but existing security holders receive a new type of security in exchange for what they give up. Here the comparison of the prospects for receipt of income and the risk factor in relation to both the new and old securities necessarily involves valuing the old securities as if they remained outstanding, i.e., as if there were no reorganization.[5] Other [fol. 62] types of plans may require different techniques in the appraisal of that which is received under the plan but

[5] If the plan contemplates a new corporation to carry on the old business, the old securities are valued as if the old corporation continued in existence. If the plan contemplates addition or subtraction of assets the old securities are valued as if the business operations continued with the existing assets. If the plan contemplates liquidation of a holding company and distribution of its assets among existing security holders, whatever weight may be given (by reason of tax savings, for example) to the prospective disappearance of the holding company in valuing the new securities, the old securities are valued as if the holding company continued in existence. On the other hand, the process of valuing the rights surrendered by a plan does take into account, for their impact on prospective earnings, any changes which could be effected apart from the reorganization itself: for example, the possibility of refunding at a saving in interest or dividend claims, outstanding securities of the company or its subsidiaries not affected by the plan. In some instances the very securities which are dealt with in the plan itself might have been refunded apart from the plan, and in that event this possibility is also relevant to the valuation process.

Past action taken in compliance with the Holding Company Act, and indeed foreseeable future action to comply with the Act, would in our opinion be significant only where such events shed any light upon the future earning power of the assets dealt with by the plan.

always the process of valuing what is surrendered remains the same—one of forecasting on an as if basis what the old securities would be worth if the reorganization did not occur.[6] The Commission has described this process in a num- [fol. 63] ber of decisions, including the findings upheld in the *Otis* case, as valuing the old securities (in relation to the new), "as though in a continuing enterprise." *The United Light and Power Co., et al.*, 13 S. E. C. 1, 9. In upholding the Commission the opinion of the Supreme Court states: "The Commission recognizes and applies the doctrine of full priority by giving value to the rights of the preferred in a going concern rather than as if by sale and distribution." *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 635 (1945).

If Section 11 (e) of the Holding Company Act stood alone and the Act merely authorized but did not compel fair and equitable reorganizations to simplify holding company systems, we believe this statement of the reorganization process would be so obvious in its application as to be taken for granted without express statement. However, both in the *Otis* case and in the *Engineers* case the problem was

[6] We are confining the discussion in the text to the hypothesis of a solvent company. In dealing with matured claims in bankruptcy, the face amount of the matured claim is commonly treated as the measure of that which is surrendered. At least for the purpose of determining whether junior interests participate at all, the assets are valued by capitalization of prospective earning power to see if they are worth the face amount of the debt claims. See *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 526. Even in bankruptcy it has been held permissible, however, to measure the treatment of railroad bondholders with reference to an equivalence between the securities surrendered and the securities received without placing a dollar value upon the securities received or relating such a value to the face amount of the old debt claims surrendered. See *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul and P. R. Co.*, 318 U. S. 523, 565-6. This Court has held such a valuation technique to be applicable where a plan proposed to pay off holding company debentures with an allocation of common stocks of operating companies owned by the holding company. See *Standard Gas and Electric Company*, 151 F. 2d 326, 333, note 12 (C. C. A. 3, 1945).

complicated because of the fact that Section 11 (b) compels simplification of holding company systems, and because the reorganization provisions of Section 11 are contained in the Act as a means of compliance with the requirements of Section 11 (b). In both the *Otis* case and the *Engineers* case the plan in question took the form of liquidation of a corporate entity found "necessary to comply with Section 11 (b)," and in both cases it was contended that the statutory mandate for liquidation matured the involuntary liquidation preference of the preferred stocks. The Commission held, however, that the form of compliance with the requirements of Section 11 could not have been intended by [fol. 64] Congress to affect the values to be received by the respective classes of security holders in view of the expressed interest of Congress that the reorganization provisions of Section 11 should not be permitted to shift values from one class of securities to another.[7] The Commission concluded therefore that "the process of compliance with the statute should not be permitted to mature liquidation preferences." 13 S. E. C. 1, 9. Referring to the analogy of bankruptcy reorganizations it stated: "In both instances the measure of participation allowed should compensate for the substantive rights of security holders as they would exist apart from the reorganization or other procedure in question," *ibid.* In other words, any shorthand description of the technique which the Commission has applied in this and other cases as valuation "*ex* the Act," is a misinterpretation unless understood with the interpolation: "*ex* [the present reorganization required by Section 11 (b) of] the Act."

C. The Commission's findings show that the Commission has measured the equitable equivalence of that which the common stockholders have surrendered and received

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[7] While liquidation was found "necessary to comply with Section 11 (b)," liquidation of the corporate entity involved was only one of a variety of means of compliance, another recapitalization, for example, clearly would not mature the liquidation preference. As was stated in the Supreme Court's opinion in the *Otis* case, 323 U. S. 624 (at p. 631):

"The selection by the Commission of one method of system adjustment to accomplish simplification rather than another is an incident which ought not to affect rights."

through the plan according to the same technique used by the Commission in its valuation of the treatment of the preferred stockholders

The Court's opinion states that the Commission erred in not valuing the common stock of Engineers at all. We submit, however, that the Commission did value the common [fol. 65] stock in determining that it was being accorded its equitable equivalent and did so no more and no less "as the Act" than in the case of the preferred stock. The Commission's valuation merely assumes as a premise, the Euclidian axiom that the sum of the parts equals the whole. That axiom is applicable here unless the liquidation of Engineers resulted in a loss of values to the totality of interests affected. Applying the axiom, the Commission's appraisal of the treatment accorded preferred stockholders as the equivalent in cash of their preexisting interest necessarily involves valuation by the identical standard of the treatment accorded common stockholders.[8]

What the common stockholders surrendered by the plan was the residual value in Engineers subject to the preferred stockholders' prior claims. What the common stockholders received by the plan was the residual value in Engineers' assets after satisfying, at what the Commission found to be the fair value thereof, these prior claims.[9] Expressed in other [fol. 66] terms, the plan results in collective action by the common stockholders (or their transferees) to buy and retire the preferred stockholders' prior claims against the assets of Engineers and the value taken away from the preferred stockholders in removing their prior claim against Engi-

[8] With reference to the redemption price as a ceiling the Commission did use the phrase "apart from the Act" (R. 67a). Since common stockholders could retire the preferred without resorting to the reorganization provision of the Act, they were given the benefit of the call price as imposing that limitation on the preferred stockholder's claim most beneficial to the common. This is the only reference in the Commission's Engineer's opinion to the "or the Act" concept.

[9] We note below that the rule of absolute priority permits no alternative to limiting the common stockholders to what is left after satisfying the preferred stockholders' prior claim.

neers' earnings and assets, is necessarily transferred to the common stockholders in added value to their residual holdings.[10]

The Commission's opinion deals explicitly with the fairness of the plan to common stockholders and finds that, by reason of economic value added in the reorganization process, the common stockholders were substantially better off as a result of the plan than before. Thus, the Commission found that "elimination of this prior charge is highly beneficial to the common," in view of idle cash and in view of the hastening of the day when the common will begin receiving dividend income (R. 69a).[11]

[fol. 67] Neither this Court nor the District Court has held that the Commission erred in approving the method of reorganization chosen by the Engineers management whereby they elected to pay off the preferred stockholders in cash rather than on the basis of an allocation of Engi-

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[10] As a matter of mechanics the cash surrendered by and on behalf of the common stockholders is in part by distribution of Engineers' cash on hand and in part by any cash received from the sale of Engineers' holdings in Gulf States Utilities Company to Engineers' common stockholders. For the further convenience of Engineers' common stockholders they were given transferrable warrants which could be sold on the market if they did not elect to make the cash contribution.

[11] It was conceded by the Engineers' management throughout—and not disputed by appellees when they subsequently appeared and objected, that the plan was advantageous to Engineers' common stockholders whether or not it should be held necessary to pay the preferred stockholders amounts equal to the redemption prices. It was merely contended that any amount in excess of the liquidation preference was more than preferred stockholders were entitled to receive. It was stated by management witnesses when Engineer's management was supporting their earlier proposal to pay preferred stockholders only the liquidation preference that the management had decided to pay off the preferred stockholders in cash rather than to present a plan proposing an allocation of assets among the preferred and common stockholders because it was desired to preserve underlying companies for the common stock (R. 719a, 723a, 807a).

neers' assets, and no spokesman for the common stockholders has made any such contention. We believe, however, that it would be anomalous to sustain the Commission in its approval of a program for discharge of the preferred stockholders' obligation in cash but to reverse it for not applying techniques of valuation required in allocation plans. Such plans necessarily reduce to the same level, for the purpose of paying off with different amounts of the same class of new securities, claims which were not theretofore of the same rank. This problem does not arise at all where the prior claimant is satisfied by cash, or by a new prior ranking security, found to compensate fairly for the claim surrendered and where the junior security holder retains, under the plan as before, the residual value in the enterprise.

We submit, therefore, that to require a remand merely for the purpose of a Commission finding that what the common stockholders receive in the plan is at least equal [fol. 68] to what they give up in the plan, is to require a statement in different terms of what the Commission has already found. Delay in complying with such a requirement would impose an added burden of expense upon the common stockholders whose rights the Court seeks to safeguard, since the common stockholders bear the costs of maintaining the escrow funds, regardless of whether the preferred or common stockholders ultimately prevail in this litigation.[12]

D. Contrary to the statements in the Court's opinion (p. 26) the Commission did give substantial consideration in its valuations to the future earning power of Engineers and its subsidiaries

The opinion of the Court criticizes the Commission's valuation as inconsistent with its own professions and the principles enunciated in the *Otis* case and reorganization decisions generally, because it did not consider the future earning power of Engineers and its subsidiaries. The witnesses before the Commission and the Commission itself had to, and did, consider the future earning power of the

[12] The escrow fund is not invested, but is held by the escrow agent in cash. Thus, the common will receive no interest or return on any fund to which it is ultimately found entitled.

Engineers system in determining the investment value of the preferred stock, since such a determination involves a consideration of the earnings coverage of that stock in the light of the accompanying risk factors. That the underlying forecast of future earnings was not dwelt on to a greater extent in the Commission's opinion was attributable to the absence of any controversy on the proposition that the prospective future earnings of Engineers substantially [fol. 69] exceeded the preferential dividend claims and that the risk factor was such that in the absence of the call privilege the stock would have an investment value substantially in excess of the call price.[13]

The criticism of the Commission on this score would thus seem understandable only in terms of a requirement that the Commission place an over-all valuation on the enterprise for the purpose of determining the value of the common stock or directly value the common stock and the assets to be received for it. This criticism of the Commission, therefore, is, in actuality, identical to that to which we have already addressed ourselves, to wit, that it should have placed a dollar valuation on the residual claims of the common stockholders for the purpose of ensuring their receipt of an equitable equivalence. As we have already pointed out, the technique employed by the Commission ensured that the common stockholders, by paying off the preferred stock in cash at an amount found to be no greater than the minimum investment value of the preferred stock, would receive greater values as a result of the plan than they previously had enjoyed. The placing of a dollar value on the enterprise through capitalization of future earnings could at most be only a check on this conclusion and a check of a far more speculative nature than

[13] The past earnings record reviewed in the Commission's findings shows the substantial basis for this forecast (R. 63-65). It will be noted that the recently available 12 months earnings figures showed a two times coverage on a corporate basis of the dividend requirement and on a consolidated basis a 1.6 times coverage of the aggregate requirements for fixed charges and preferred dividends of subsidiaries and for the holding company preferred. Cf. Group of Institutional Investors *v.* Chicago, M., St. P. & P. R. Co., 318 U. S. 523, 529.

[fol. 70] the processes sought to be checked.[14] The fact that allocation plans, such as that involved in the *Otis* case, do not afford the opportunity of applying the relatively certain technique applied to Engineers but require an attempt to express in dollar figures the uncertainties of the future, is not a virtue but, as the Commission and the courts have recognized, a necessary defect.[15] It would seem to be highly unfortunate to import this defect into a situation in which, for the reasons stated, it is wholly unnecessary.

[fol. 71] II

The Court's mandate requires clarification as to the choice of techniques available to the Commission in this case.

The mandate does not clearly specify whether the Commission is required in this case to value the assets of Engi-

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[14] Both the *Consolidated Rock Products* case, cited by this Court in its Engineers opinion, and the opinion of this Court in the Otis case expressly recognize that the valuation process as conventionally applied in reorganizations does not depend upon forecast of earnings standing alone, but upon earnings forecast combined with the application of an appropriate discount rate designed to compensate for the degree of uncertainty in the particular case whether the forecast earnings are likely to be realized. See 312 U. S. 510, 525; 142 F. 2d 411, 420.

[15] Valuation of the residual interest in a holding company pyramid is attendant upon unusual uncertainty because of the leverage factor, and in the *United Light and Power* case the uncertainty was recognized by the Commission, as this Court noted, thru the application of the extraordinarily high discount rate of 15.2% to the estimates used. See 142 F. 2d 411, 421. The dissenting Commissioner and the dissenting Justices thought the valuation too attenuated to warrant any participation. Cf. Chief Justice Stone's dissenting comment:

"Peering into the future with almost clairvoyant percipience the Commission prophesied that if the company now being liquidated and dissolved were allowed to continue its operations it would, 15 years hence, have paid all arrears of dividends on the preferred and would then be able to pay an estimated annual return on the common stock in excess of $2,500,000." 323 U. S. 624, 642.

neers upon an actual or as if basis. While this Court has stated that the Commission has a choice of techniques and may make its valuation either "*intra* the Act" or "*ex* the Act" (p. 29), the opinion is not explicit as to what would constitute a valuation "*intra* the Act." Nor is it made explicit whether both techniques are deemed available in the present case. If the statement that the Commission may make its valuation "*intra* the Act" means that the Commission may treat the liquidation preference as dispositive, we cannot reconcile this statement with the holding earlier in the opinion that under the *Otis* case the liquidation preference is not dispositive, unless the holding is merely that there are cases other than the present one where it is permissible to treat the liquidation preference as dispositive.[16] That interpretation would leave as the sole problem, how the Commission is expected to value Engineers' stocks "*ex* the Act." If, on the other hand, it is intended that the Commission shall remain free to elect in this very case [fol. 72] between valuing "*ex* the Act" or "*intra* the Act," and valuation "ex the *Act*" means valuation predicated upon an as if reconstitution of the assets of Engineers, then, as we show below, the impossibility of making such a valuation makes the choice illusory. The Commission would be constrained to treat the liquidation preference as dispositive, which, as we state above, would appear to be in direct contradiction of the *Otis* case.

III

To require the Commission to ascertain and compute the alleged losses to Engineers through the operation of the Act would be both fruitless and impossible of achievement

A. The opinion states that after calculation "such losses should be returned to the credit side of the enterprise's

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[16] As noted in our main brief, the Commission has treated the face amount of a debt or the liquidation preference of a preferred stock as a sufficient measure of fair and equitable treatment for discharging the claim through payment in cash in the absence of indication that such an amount would be disproportionate to the value of the interest which is paid off under the plan, computing that value apart from the plan; i.e., "*ex* the Act."

balance sheet as a matter of bookkeeping." But unless the Commission is required to shift the incidence of losses from common to preferred stockholders, adding back losses to the enterprise would be of no avail. Valuation of the preferred stockholders' prior claims in relation to the hypothetically swollen assets would merely strengthen the case for appraising their investment values *ex* the plan as at least equal to the redemption prices.

If the Commission were to add back the losses for the benefit of the common stockholders (which would not be returning the losses to the balance sheet of the enterprise), and to measure what common stockholders received through the plan in relation to what they might be thought to have lost by the over-all operations of the Holding Company Act, we submit that the Commission would be acting in direct [fol. 73] conflict with the holding of the Supreme Court in the Otis case that:

> Like the bankruptcy and reorganization statutes, the Public Utility Holding Company Act, in providing that plans for simplification be "fair and equitable," incorporates the principle of full priority in the treatment to be accorded various classes of security interests. This right to priority in assets which exists between creditors and stockholders exists also between various classes of stockholders. 323 U. S. 624, 634.

Thus, whether the Commission directs its attention first to the claims of the preferred or to those of the common against the totality to be distributed, the principle of full priority requires that the Commission take into account, *before* determining how much may be given or paid to the common stockholders, the amount fairly due to the preferred stock. Thus adding back the assumed losses can have no effect whatever but of reinforcing the fairness of giving the preferred stockholders an amount equal to the redemption price ceiling.

B. Reference has already been made in general terms to the impossible administrative task of computing whether the over-all application of the Act has resulted in loss or benefits to Engineer's common stockholders in actions antedating the plan. This Court's opinion suggests the desirability of making use of hindsight to improve upon past decisions based, as the Court notes, upon necessarily

inadequate foresight. Our difficulty with this suggestion [fol. 74] is that, short of eternity, one is nearly always concerned with foresight in determining whether a shift from one investment position to another will ultimately turn out advantageous or disadvantageous, while the passage of time soon makes it impossible to trace the consequences of any single step among the multiplicity of causal factors which are operative. Take for example the Puget reorganization.

In its opinion this Court refers to the 1946 and 1947 net profits of Puget of $5,325,320 and $5,067,410, respectively, as indicative of a loss to Engineers, presumably because these profits are in excess of the estimate of future earnings which formed the basis of the allocation of common stock in the Puget recapitalization of 1943, when Engineers gave up a 99.3 percent interest in common stock in exchange for a 3 percent interest in the common stock of the recapitalized company, thus losing some of the leverage which would cause increased earnings to benefit Engineers.

Apart from the difficulty of attempting to re-examine the fairness of this allocation, we believe the reference to the 1946 and 1947 earnings vastly over-simplifies the problem of proof.

As of September 30, 1942, the time of the Puget hearings, the prior preference and preferred stock of Puget had accumulated arrearages totalling $18,580,705. These accumulated and still mounting arrearages made it apparent that, for some time in the future, the holdings of Engineers in Puget, which consisted solely of common stock, would receive no return. Calculated on the basis of [fol. 75] *average* earnings of $2,657,000 per year (and assuming dividends equal to 100% of such earnings) it would take 34.1 years to discharge these arrearages, and on the basis of *average* earnings of $3,083,000 it would take 18.4 years. Accordingly, Engineers was given a small participation in the recapitalized company only because of the speculative character of its holdings.

The Commission's forecast of *average* earnings, which expressly envisaged peaks and valleys would not necessarily be subject to modification on the basis of a hindsight glimpse at the 1946 and 1947 earnings figures judicially noticed by the court even if those figures were otherwise comparable. Secondly, the Commission's figure

is based upon a depreciation allowance of between $600,000 and $1,000,000 more than that which the company used in its financial statement.[17] Finally, the recent statement by Puget's President that the 1947 gross income figure would probably be $1,000,000 less in 1948 than it was in 1947[18] should be considered in projecting future earnings as of today.[19]

Even if a present day evaluation of Puget's earnings should lead to a different long term forecast of average earnings, the figure so obtained would not measure the profit or loss suffered by the common stockholders of [fol. 76] Engineers as a result of the divestment of Puget from the Engineers system. It would still be necessary to trace the probable course of Puget's development under the aegis of the Engineers' management and undo the actions taken by that management as a result of the compulsions of the Act. Thus, one of the Puget subsidiaries, Independent Stages, is under orders of divestment pursuant to the antitrust laws. What effect this divestment, independent of the Holding Company Act, should have on the system should, of course, be considered in attempting to reconstitute the Engineers' interest in Puget. Moreover, Puget has divested another transportation subsidiary, the North Coast Transportation Company, after it ceased to be subject to the Act. This sale hardly has been compelled by the Act, but it might be difficult to eliminate the Act as a causal factor, since it sets a pattern for electric utility companies abandoning unrelated transportation properties.

In addition, it appears probable that good business management would have compelled, at some time, the recapitalization of Puget, and there is some possibility that the small interest Engineers could command in such

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[17] Puget takes, for income tax purposes, a depreciation allowance $1,400,000 higher than that which it used to compute the figure which this Court used.

[18] Moody's Public Utility Manual, Suppl. Vol. 19, p. 1442.

[19] The Commission, in its allocation, also recognized that "a combination of favorable contingencies might in fact result in higher future earnings," and provided for this factor. *Puget Sound Power & Light Co.*, 13 S. E. C. 226, 247 (1943).

recapitalized company might have been sold aside from the compulsions of the Act. As an alternative, Engineers might have been persuaded to make a substantial new investment in equity securities of Puget and it would be necessary to estimate the return from that investment as against other possible uses of Engineers' funds.

Again, if it be assumed that the divestment of Puget was the result of Holding Company Act pressure, it would [fol. 77] be necessary, if the effect of the Act upon the holding company system is to be calculated, to determine the effect of the withdrawal of the $770,000 which Engineers received from the sale of Puget from Engineers' general funds. These funds, including proceeds of other sales and retained earnings,[20] generally, were used to increase Engineers' investment in El Paso and Virginia and to make payments to the preferred stocks of Engineers. It would also be necessary to recompute Engineers' taxes without reference to the tax advantages derived from the sale of Puget.[21]

Finally, at the time of the Puget sale, and since then, there has been an ever present possibility that Puget electric properties might be sold either to the Bonneville administration or to public utility districts in the State of Washington, or that they might be acquired by con-

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[20] The published financial statements of Puget indicate that its working capital, which was approximately $980,000 on December 31, 1943, showed a deficit of $1,465,000 on December 31, 1947. This factor, plus the inadequate depreciation allowances being made and the reduced earnings forecast may lead to a need for additional financing in the near future. An attempt to recompute the consequences of the Puget reorganization would have to appraise this prospect also and any resulting dilution in the per share earnings attributable to the former Engineers' holdings—or in the alternative, the cost to Engineers in supplying the necessary capital itself.

[21] See Securities and Exchange Commission brief, p. 34. See also the reference to the Virginia Public Service Company acquisition, ibid., p. 35. That the over-all impact has not hurt Engineers common is inferable from its thirty-fold increase in market value since the Act (R. 63 (a), n. 45, 1361 (a)).

demnation by public bodies existing under the laws of the [fol. 78] State of Washington, and that the condemnation award would not leave any value for Engineers' common stock interest in Puget. To the extent that this involves appraising a local political hazard the appraisal would have to take into account possible local hostility toward absentee holding company management. The effect of the Act upon these possibilities and the likelihood that in its absence such sales or condemnations would occur would also have to be determined in any attempt to reconstitute and value the Puget holdings of Engineers.

This entire process, time consuming and well nigh impossible when only one of the holdings of Engineers is considered, would have to be repeated in the case of each of the properties held by Engineers. Each order of the Commission would have to be examined with all of these factors in mind and each company would have to be valued according to a somewhat similar procedure. When it is remembered that the Commission issued 22 separate orders which substantially affected the financial condition of Engineers [22] and that the system, as late as 1940, consisted of 8 direct subsidiaries, a service company, and numerous subsidiaries of subsidiaries, the magnitude of the task becomes apparent. Indeed, in view of the number of variables which would be present in such a computation we believe such a task, even if accomplished, would have little utility wholly aside from the question of its relevance to the problem of determining equitable equivalence.

When the Commission had to decide whether individual transactions proposed by the Engineers' management [fol. 79] were "detrimental to the interest of investors" (apart from questions arising under other applicable statutory standards), it was not its function to prophesy whether the transactions proposed would prove more advantageous than other alternative courses open to Engineers, but merely with whether, taking into account possibilities of gain as well as risks of loss, there was anything fundamentally unfair in the management's proposals. Appraisal of such transactions by the Commission becomes futile and meaningless, however, unless upon the execution of the approved transactions there is to be finality in the shift of risks which the individual transactions presuppose,

[22] See Appendix A for a list of these orders.

i. e., profits or losses therefrom are to accrue to security holders in accordance with their contracts. If resulting gains or losses are to be reallocated from the vantage point of hindsight at a future date, the consequence would be comparable to a rule which permitted reformation of insurance contracts after the risk has been run—either letting the insurance company off in the event of a casualty covered by the policy because of disproportion between the premium paid and the amount of the contract liability, or if no loss has occurred enabling the insured to recover his premium because he does not appear to have benefited. To require a retroactive reallocation of risks as between Engineers' preferred and common stockholders would be subject to the further criticism of unfairness because reallocation appears to be a technique which applies only for the benefit of the common stockholders.

[fol. 80] For that reason we believe that insofar as the opinion directs the Commission to reexamine executed transactions with a view to reallocating from the vantage point of hindsight either losses or profits attributable to such transactions, the mandate amounts to collateral attack upon decisions which the Congress intended to be final unless set aside upon timely review.[23] Even in the case of timely challenge to Commission action, Congress has been solicitous to protect those acting in good faith. *Cf.* Section 20 (d), providing: "No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

IV

The statement that the Section 11 (e) enforcement court may take new evidence is contrary to the universal practice and to a long line of decisions under the Act, and opens up avenues of delay which could seriously impede the Administration of the Act.

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[23] In the case of Puget there would be collateral attack also upon the holdings of the United States District Court for the District of Massachusetts, which approved and enforced the Puget plan.

With respect to the taking of new evidence the opinion contains three separate though related statements: (1) Where "the record furnished by the Commission has grown 'stale' for any reason the court may remand."; (2) If it [fol. 81] appears that "cogent evidence has not been submitted to the SEC" the court may remand for reconsideration; (3) The court may "receive evidence *aliunde* the Commission's record * * * and decide upon the new evidence and that contained in the Commission's record that the plan is unfair and remand * * * for further consideration."

We agree, of course, that the enforcement court could remand to the Commission under the circumstances suggested by the first of the above propositions, since that is no more than the standard which Section 24 (a) of the Holding Company Act lays down where an order of the Commission is before a circuit court of appeals upon direct review, e. g., where " it is shown to the satisfaction of the court that such evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission."

Without urging that the requirements of Section 24 (a) are necessarily to be read into Section 11 (e), we submit that the second and third of the above statements, unless very narrowly construed, would lead to a complete undermining of the Congressional direction for administrative hearings on plans and would place burdens on the enforcement courts which could not conscientiously be discharged without causing great delay.

The Commission itself has emphasized the independent responsibility upon the enforcement court to satisfy itself as to the fairness of a plan even in the absence of objection, and has supported the right of persons who did not appear [fol. 82] before the Commission to voice objections before the District Court.[24] But we submit that, whether or not the

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[24] In the Otis case the Commission supported the standing of Otis & Co. to be heard before the District Court and to appeal. There, however, objections were limited to the issue squarely raised by the dissenting opinion and were based upon the administrative record. Similarly in this case we have not challenged the standing of Engineers' common stockholders to object in the District Court, and to partici-

substantial evidence rule applies, objectors should be limited to pointing out insufficiencies on the face of the Commission's record, or points which they or their class could not reasonably have raised before the Commission. Otherwise, the statutory provision for hearings before both Commission and Court would furnish a field day for obstructionists without genuine benefit to investors at large.

It should be noted that the District Court at the time of hearing on a Section 11 (e) plan is in a position which makes it difficult to rule upon proffers of proof to supplement the administrative record. The administrative record in a reorganization proceeding is usually a voluminous one and it would be unreasonable to expect the District Judge to have become sufficiently familiar with the administrative record, prior to the opening of court hearings, to put him in a position to determine how far proffered evidence is merely cumulative upon a point already adequately covered before the Commission. If objectors are excused from participating in the administrative hearings, and are not limited [fol. 83] to the administrative record, they will be encouraged to dispense with even familiarizing themselves with the administrative record before making their proffers of proof in the District Court.

Under such pressures the District Court would be compelled to receive evidence of dubious value because it may then appear to have some bearing upon the issues presented by the plan, subject to later evaluation after a study of the administrative record. Proponents of the plan in turn would be compelled to offer answering testimony however duplicatory and the tendency would be to relegate the administrative record to the background.

The only alternative would be to reserve a ruling on a proffer of proof until consideration of all the other points concerning the merits of the plan and after the District Court has had a chance to examine its significance in relation to what is already in the administrative record.[25] This

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pate as appellees insofar as they merely carry on a position which the Engineers management had fully developed before the Commission.

[25] In instances where a petitioner for review under Section 24 (a) has moved the reviewing court for leave to adduce additional evidence, the Court has deferred ruling on the motion until hearing the case on the merits, and in each

would be at the risk of requiring a reopening of the factual hearing in the District Court, if the proffered evidence is [fol. 84] found to be "cogent" even though not considered to relate to a matter which would necessarily control the Court's decision.

The third of the above propositions suggests that the Court, on the basis of evidence not before the Commission, might actually "*decide* * * * that the plan is unfair," and remand, presumably with the Court's ruling binding upon the Commission. While the opinion goes on to say that the court would then remand the case "for further consideration", we do not understand that the Commission could be free to consider more than what modification of the plan would conform to the Court's decision.[26]

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instance the Court was then convinced that the new evidence sought to be adduced was not sufficiently pertinent to require the case to go back to the Commission. See *Public Service of Oklahoma* v. *Securities and Exchange Commission*, unreported, No. 2229 (C. C. A. 10, Jan. 17, 1941); *Central and South West Utilities Co.* v. *Securities and Exchange Commission*, 136 F. 2d 273 (App. D. C., 1943). We believe that these rulings, relatively early in the administration of the Act, have served to discourage the filing of such motions merely for the purpose of delay.

[26] The *decision* in the present case rests upon consideration of new evidence only to the extent that there has been consideration on the basis of judicial notice, of a matter concerning which the Commission rejected Engineers' proffer of proof. But this Court has upheld the District Court's rejection of the plan, as we understand it, only because the Court disagrees with the Commission's valuation technique. As previously indicated, we do not construe the mandate as a definitive ruling that payment to preferred stockholders of the amounts which the Commission found fair and equitable may not ultimately be upheld if supported by a proper valuation. But the statement which we are here discussing in the text is susceptible of the construction that the District Court could actually make a *decision* of disapproval which would be binding upon the Commission on remand, on the basis of evidence which the Commission never had an opportunity to consider in the first instance.

We mention the foregoing consideration as illustrative of the difficulty of attempting to deal with the problem of new evidence without having a concrete case before the Court. The statements are in any event contrary to the established practice in Section 11 (e) enforcement proceedings, [fol. 85] and, we believe, contrary to rulings of the Supreme Court in analogous cases.

As was said by the Supreme Court respecting an equity suit before a three-judge district court to enjoin the enforcement of a rate order of the Secretary of Agriculture—

> "A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial de novo. The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now. On all other issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceeding. To allow his findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal as the rate making body."[27]

The problem of the introduction of evidence in a Section 11 (e) enforcement court first arose in *In re Jacksonville Gas Co.*, 46 F. Supp. 852 (D. Fla. 1942), one of the earliest of the Section 11 (e) cases. In an oral ruling from the bench, Judge Strum barred the taking of new evidence; and, in doing so, enunciated certain practical considera- [fol. 86] tions which have been deemed equally persuasive

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[27] *Tagg Bros.* v. *United States*, 280 U. S. 420, 443-44 (1930). See also *Manufacturers Railway Company* v. *United States*, 246 U. S. 457, 488-490 (1918) (action to invalidate an I. C. C. rate order); *Cf. Reconstruction Finance Corporation* v. *Bankers Trust Company*, 318 U. S. 163, 168-70 (1943) (allowance of fees under Section 77 of the Bankruptcy Act).

by the other district judges who have considered the problem. Judge Strum stated:

> . . . what we are trying here really is a plan submitted by the Commission, and I think we ought to try that plan on the record before the Commission. I do not think it is appropriate, and I could see how it could lead to all sorts of complications and difficulties if we took the plan and tried it in part here on the record before the Commission, and in part upon evidence adduced de novo at this trial; evidence which had never been before the Commission. I do not think it would be appropriate to test the plan of the Commission in that manner by weighing facts and evidence which the Commission had never had; but which there had been an opportunity to produce before the Commission.
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> Now, I am of the opinion, however, if it is proposed and provided, any testimony of sufficient weight and import to convince and satisfy the Court that it ought to be considered upon the fairness and equitableness of this plan, that it is the duty of this Court, and I think this Court would refer this case back to the Commission for consideration of that evidence, and then after the Court of original instance, so to speak, had considered it, had sent it back here for this statutory review. So, if counsel considers the proposed evidence of such import that it ought to be considered by the Commission, I will hear you on that question for the [fol. 87] purpose of determining whether the case should be remanded and referred with the suggestion that this evidence be considered. But I will sustain the objection to its introduction here now, de novo, and without the Commission ever having had the benefit of it.

As previously stated, the district courts have uniformly followed this rule in Section 11 (e) enforcement proceedings.[28] For cases in which the issue was made the subject

[28] In *In re United Gas Corporation*, 58 F. Supp. 501, aff'd 162 F. 2d 409 (C. C. A. 3, 1947); and in *In re Electric Bond and Share Company*, 73 F. Supp. 426, aff'd 161 F. 2d 978

of a specific ruling, see *In re Laclede Gas Light Company*, 57 F. Supp. 997 (E. D. Mo., 144), *aff'd sub nom. Massachusetts Mut. Life Ins. Co.* v. *S. E. C.*, 151 F. 2d 424 (C. C. A. 8, 1945), *cert. denied* 327 U. S. 796; *In re Electric Bond and Share Co.*, 73 F. Supp. 426, 443 (S. D. N. Y., 1946), *aff'd* 161 F. 2d 978 (C. C. A. 2, 1947). A holding to the same effect is implied in the First Circuit rulings in Section 11 (e) cases that the determination of the Commission should be sustained if supported by substantial evidence. *Lahti* v. *New England Power Association*, 160 F. 2d 845, 850 (C. C. A. 1, 1947); *In re New England Public Service Co.*, 73 F. Supp. 452, 456 (D. Maine, 1947). The substantial evidence rule was also applied by the Circuit Court of Appeals for [fol. 88] the Eighth Circuit in its affirmance of the *Laclede Gas Light Company case*, supra. See 151 F. 2d at 430.

Conclusion

Although this Court's opinion appears to treat the scope of the powers of the District Court as the principal question in the case, we have believed and still believe that there has been and will be no real problem in adjusting the complementary roles of the Commission and the courts so long as both apply the same consistent and determinable legal standard of fairness and equity on the same record. We believe that the Commission in this case applied such a standard, consistent not only with that employed in prior reorganizations under the Holding Company Act but also with that applied in reorganizations generally and we have tried to show that the criticisms in the opinion of that standard and the Commission's application of it were based upon misconceptions resulting from a shorthand presentation by counsel. We therefore respectfully urge that the Court reconsider that portion of its decision and opinion on the basis of the fuller discussion of the proc-

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(C. C. A. 2, 1947), some inquiry was permitted concerning alleged procedural irregularities not susceptible of evaluation on the basis of the administrative record—specifically, charges by one Samuel Okin that the corporate management had been "coerced" by the Commission's staff into filing the particular plan. In both cases the court satisfied itself after a preliminary investigation that there was no factual basis to the charges.

cesses actually employed by the Commission, and the reasons therefor, set forth above.

Accordingly, we submit that the petition for rehearing should be granted.

Respectfully submitted, Roger S. Foster, Solicitor, Securities and Exchange Commission, 425 Second Street NW., Washington 25, D. C.

April 2, 1948.

[fol. 89] APPENDIX A TO PETITION

List of Significant Commission Orders Which Have Affected the Engineers System

Release No.

2535 Merger of Mesilla Valley Electric Co. into El Paso Electric Co. and recapitalization of El Paso.

2569 Refunding of bonds of Virginia Electric and Power Co.

2699 Approval of Engineers' acquisition of its own preferred stock.

2884 Approval of consolidated tax returns by Engineers and Puget Sound Power and Light Co.

2897 Order of divestment directed against Engineers.

3230 Approval of dissolution of the Western Public Service Co. of Delaware.

3796 Order directing divestments by Engineers.

4114 Order disapproving plan to reacquire preferred stock.

4255 Approval of amended recapitalization plan of Puget Sound.

4421 Application for approval of divestment of El Paso.

4479 Extension of time for disposition of Puget Sound securities.

4559 Approval of divestment of El Paso.

4997 Approval of reacquisition of preferred stock.

5021 Merger of Virginia Public Service into Virginia Electric.

[fols. 90-91] 5058 Release of jurisdiction for securities sale of Virginia Electric.

5146 Extension of time for disposition of El Paso Electric.

5180 Extension of time to acquire preferred stock.

5499 Approval of liquidation and dissolution of El Paso
5738 Sale of Savannah Electric and Power Co.
5741 Refinancing of Virginia Electric.
5844 Sale of investment in Missouri Service Co.
6420 Sale of investment in the Western Public Service Co.

[fol. 92] In the United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Petition for Rehearing of Thomas W. Streeter, et al.—Filed April 16, 1948

The appellants, Thomas W. Streeter, *et al.*, preferred stockholders of Engineers Public Service Co., have upon application of counsel been granted permission by this Court to adopt so much of the Petition for Rehearing of the Securities and Exchange Commission (hereinafter called the "Commission") as appears appropriate and consistent with their previous position, and to file a brief in support thereof. Broadly speaking, we adopt the views of the Commission with respect to valuation and the complementary roles of the Commission and the District Court as set forth in its Petition for Rehearing, but do not thereby relinquish or abandon the claims previously asserted by us to the following effect: (1) that the remand to the Commission is proper, for the reason, *inter alia*, that the District Court [fol. 93] failed to approve the plan *in toto*;[1] (2) that the plan, as modified by the District Court, is not fair and equitable to preferred stockholders on the grounds, among others, that it permitted the premature termination of divi-

[1] The Commission apparently opposes remand if, on review in the District Court or on appeal, stated value, *i. e.*, $100, or the involuntary liquidation amount, is determined to be fair and equitable in view of the so-called contingently approved alternative allocation. (See Commission's Petition for Rehearing at p. 5, fn. 1.) In this respect, we are in disagreement with the Commission for the reason that such partial approval of the plan requires remand under such circumstances, as more fully explained in Streeter Main Brief at pp. 45 ff.

dends and that, accordingly, the Escrow Agreement is inadequate; and (3) that the modification or amendment of the plan was accomplished without notice and an opportunity to be heard; and (4) that, under the circumstances of this case, the retirement of the preferred stock was voluntary within the meaning of the charter.[2] However, we do not intend to press these claims further, at this time on this particular Petition.

It is our present purpose to seek clarification of various statements in this Court's opinion relating to the respective functions of the district court and the Commission and the proper standards for valuation by the Commission of the preferred and common stock; to ascertain the proper application of such standards to the facts of the instant case; and to draw to the attention of the Court relevant facts, which apparently have been overlooked or of which sight has been lost.

Argument

This Court has stated that an 11(e) district court must function as an equity reorganization tribunal with the powers and functions of such court, and elsewhere indicates that respect is to be accorded to the findings of the Commission and that the administrative record may be reopened [fol. 94] for additional evidence before the district court. It is not clear from the opinion of the Court whether the treatment of the Commission's findings with respect, involves the application of the substantial evidence rule or another standard. Furthermore the reopening of the administrative record would be contrary to the preponderance of the judicial authorities and would also pave the way for a trial *de novo* and the dangers incident thereto. A proper division of the function between the court and the agency requires recognition of their complementary roles.

This Court also directs consideration of all pertinent factors and substantial equities in arriving at equitable equivalents whether *ex* or *intra* the Act, and criticizes the Commission for an attempted substitution of a novel doctrine of investment value for that of equitable equivalents. The significance of the phrases "substantial equities" and "pertinent factors" needs amplification.

It is possible that the Court has a misconception of the meaning of "*ex* the Act" and offers a choice in valuation

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[2] Streeter Main Brief, pp. 45 ff., 41 ff., 43 ff., p. 33, fn. 104.

not in accordance with the applicable decisions. Moreover, its criticism of the Commission for employing inconsistent techniques in valuation appears not warranted. Furthermore, the Court has lost sight of the real meaning of investment value as merely signifying going concern value. In this sense investment value is merely the method for arriving at the equitable equivalent and not a substitute for it. In addition, it is urged that the Commission properly evaluated the security interests by taking into account earning capacity, asset position, dividend record, and other pertinent data relating to the going concern value thereof.

[fol. 95]

I

The Court should clarify the respective roles of the district court and the Commission in respect to the treatment of the Commission's findings and the status of the administrative record.

Due regard for the proper distribution made by Congress of legal authority as between two law-enforcing agencies of government—the administrative and the judicial—is required.[3] The courts do not carry the sole burden of carrying out the Public Utility Holding Company Act (hereinafter called the "Act"), as the Commission has been entrusted with a share of that responsibility. Not only the courts are the guardians of rights of stockholders in simplifications pursuant to the Act, but the Commission has also received its legislative mandate to protect investors' values.[4] Court and agency are not totally independent and unrelated instrumentalities, but exercise roles complementary to each other and can achieve the objectives of the Act

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[3] *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407, 441, 86 L. Ed. 1563, 1584 (1942).

[4] It may well be that the statutory interpolation in the reorganization process of an expert body as the Commission charged with the duty of protecting the rights of stockholders as well as the public interest is the basis for the omission of voting requirement of traditional bankruptcy reorganization. In any event, no vote is required, where an overriding statutory policy compels the reorganization as for instance under the Hepburn Act. *Continental Ins. Co.* v. *U. S.*, 259 U. S. 156, 66 L. Ed. 871 (1922).

only through coordinated action.[5] The respective roles of [fol. 96] court and agency have not been sharply defined in every detail by Congress and therefore are gradually being spelled out by the judicial decisions. In the course of delineation the Court should be wary against interpolating its notions of policies in the interstices of legislative provisions and must not distort the statutory scheme by a jealous predilection for the judicial role, in the exercise of its power, in disregard of the legislative division of functions between the Commission and the district court. *Scripps Howard Radio* v. *F. C. C.*, 316 U. S. 4, 11, 86 L. Ed. 1229, 1235 (1942). In the instant case, this Court's conclusion that a section 11(e) "district court must function as an equity reorganization tribunal with the powers and functions of such court, and not a mere review court"[6] by the very breadth of its language apparently relegates the Commission to a position of comparative insignificance and renders ambiguous, if not meaningless, its various statements relating to the respect to be accorded the findings of the Commission and permits the reopening of the administrative record.

A. The findings of the Commission should be accorded due weight

It would seem to follow from this Court's view to the effect that the district court is "to exercise its independent plenary judgment as an equity reorganization tribunal upon every matter relating to the fairness and equity of the reorganization", that the district court can ignore completely the findings of the Commission, with respect to the fairness of the plan, and, in reality, conduct a trial *de novo*.

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[5] *Federal C. C.* v. *Pottsville Broadcasting*, 309 U. S. 134, 142, 84 L. Ed. 656, 661 (1940). In the *Pottsville* case, the Supreme Court made this pertinent observation:

"* * * The technical rules derived from the interrelationship of judicial tribunals forming a hierarchial system are taken out of their environment when mechanically applied to determine the extent to which congressional power, exercised through a delegated agency, can be controlled within the limited scope of 'judicial power' conferred by Congress under the Constitution." (at p. 141 of 309 U. S.).

[6] Opinion, p. 21.

But then in a somewhat different vein the court says at two places:

> "* * * The [district] court of course may not act capriciously in rejecting valuations made by the Commission. * * *
>
> * * * * * * * *
>
> [fol. 97] "The findings and conclusions of the Commission were not binding upon the learned District Judge though, as was proper, he treated them with respect" (Opinion, pp. 24, 25).

The foregoing quotations closely approximate the "substantial evidence" rule, as applied by the majority of circuit and district courts that have passed upon this question to date. *Ladd* v. *Brickley*, 158 F. (2d) 212, 216 (C. C. A. 1, 1946), cert. den. 329 U. S. —, 67 S. Ct. 675 (1947); *Lahti* v. *New England Power Ass'n.*, 160 F. (2d) 845, 850 (C. C. A. 1, 1947), affirming *In re New England Power Association*, 66 F. Supp. 378, 382 (D. Mass., 1946); *Public Service Commission of N. Y.* v. *S. E. C.*, C. C. H. Fed. Sec. Serv. Current Vol. Par. 90,405 (C. C. A. 2, 1948), affirming *In re Kings County Lighting Co.*, 72 F. Supp. 767, 783 (E. D. N. Y., 1947); *Massachusetts Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424, 430, cert. den. 327 U. S. 795, 66 S. Ct. 817 (1946); *In re New England Public Service Co.*, 73 F. Supp. 452, 456 (D. Me., 1947). For instance, the Circuit Court of Appeals for the First Circuit in *Ladd* v. *Brickley*, *supra*, says in this connection:

> "* * * But the studied conclusion of an expert body which has made a prolonged investigation of a subject from the standpoint of the public interest is to be taken seriously."

More recently within the same Circuit, the District Court in *In re New England Power Association*, *supra*, stated:

> "In truth, any court charged with a review of the findings of the Securities and Exchange Commission, in a matter so complex in its nature as is the present proceeding, should accept the findings of the expert body unless it concludes that an error of law has been committed or the findings are of an arbitrary or capricious nature."

[fol. 98] Again in the Eighth Circuit, the Circuit Court of Appeals there establishes a similar standard in the following terms:

> "* * * The proper measure of such equivalence is for the determination of the Commission in the first instance, and its expert skill in appraising the facts to be considered must be accorded due weight by the Court" (*Massachusetts Mutual Life Ins. Co.* v. *S. E. C.*, *supra*, at p. 430).

The same principle has apparently been applied by the Circuit Court of Appeals for the Second Circuit in the *Public Service Commission* case, *supra*, where the Court said:

> "* * * Whether there was any evidence to support the conclusion that the old common shares had any value, based upon the future earning power of the Kings County Company, is an inquiry into which we are not disposed to enter. Any opinion is at best a guess, dependent, among other things, upon what rates the Company will be allowed to charge. There was certainly some basis for the valuation of the SEC when the order of the District Court was entered on July 16, 1947" (at pp. 91, 228-9 of C. C. H. Fed. Sec. Serv. Current Vol.).[7]

[7] The Circuit Court in the *Public Service Commission* case, *supra*, appears to endorse the same principle announced in the following language by the District Court at page 783 of 72 F. Supp.:

> "As far as I am concerned, my duty is at an end when I find, as I do, that the action of the Securities and Exchange Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. I do not pretend to have either technical competence or legal authority to pronounce upon the wisdom of the course taken by either commission. *Board of Trade* v. *United States*, 1942, 314 U. S. 534, 548, 62 S. Ct. 366, 86 L. Ed. 432; *National Broadcasting Co.* v. *United States*, 1943, 319 U. S. 190, 224, 63 S. Ct. 997, 87 L. Ed. 344; both of which cases are cited in *Securities and Exchange Commission* v. *Chenery Corp.*, 67 S. Ct. 1575."

[fol. 99] Moreover, this same doctrine has been applied in analogous situations to findings of other administrative agencies (*Dobson* v. *Commissioner*, 320 U. S. 489, 64 S. Ct. 239 (1943)) and has just been reaffirmed in *Commissioner of Internal Revenue* v. *Sunnen*, 16 U. S. Law Week 4301, 4303 (April 6, 1948), where the Supreme Court said:

> "* * * And it is well established that its [Tax Court's] decision is to be respected on appeal if firmly grounded in the evidence and if consistent with the law."

And this substantial evidence rule has been currently applied by this Court to a Tax Court finding of value stating:

> "* * * Examination of the record and of the briefs filed by the parties and consideration of the oral argument convince us that the conclusions of the Tax Court do find substantial ground in the evidence. As we stated in *Cochran* v. *Commissioner*, 163 F. (2d) 153, 155, * * * the values of properties 'are purely questions of fact'. We went on to say that if there was any evidentiary basis for the Tax Court's finding we could not substitute our own evaluation for that of the Tax Court. The appeal at bar is ruled by such cases as *Dobson* v. *Commissioner*, 320 U. S. 489 and *Commissioner* v. *Scottish American Co.*, 323 U. S. 119" [*Lehn & Fink Products Corp.* v. *Com.*, 48-1 C. C. H. USTC Par. 9123 (C. C. A. 3, 1948)].

Furthermore, even in what may be considered the reverse situation, where the pertinent statute appeared to have made an Interstate Commerce Commission finding of value conclusive, the Supreme Court has indicated that such finding of value can only be sustained if supported by material evidence.[8]

[fol. 100] Accordingly, a similar treatment of the findings of the Commission would be appropriate and warranted in view of the statutory scheme of complementary roles. In fact, such view accords with the earlier expressions of this Court as well as of the district courts within

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[8] *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 473, 87 L. Ed. 892, 932 (1943).

this circuit (or at least their spirit and philosophy) relating to the weight to be attached to findings of the Commission. Thus in *In re Standard Gas & Electric Co.*, 59 F. Supp. 274, 283 (D. Del., 1945) rev'd on other grounds, 151 F. (2d) 326 (C. C. A. 3, 1945), the District Judge (Leahy, *J.*) said in no uncertain terms in a section 11(e) proceeding:

> "* * * Under the substantial evidence rule, we are required and should follow the 'informed' judgment as articulated in the Commission's findings.
>
> * * * * * * * * *
>
> "Examination of testimony and documentary proofs presented to the Commission demonstrates manifestly there was substantial evidence to support the Commission's findings as to the value of the securities to be distributed to the Noteholders under the plan. * * *"

In the same spirit, this Court, although reversing on appeal on a point of law, said:

> "This case does not come to the court as the result of agreement between the parties or the action of a special master approving a plan in the common form of reorganization proceeding. It comes following a thorough consideration by the Securities and Exchange Commission which has a very broad grant of power from Congress in the premises.
>
> "It can be set out as a well established rule of administrative law that the action of an expert administrative body in determining the particular remedial measures demanded in an individual case is not to be overturned by court action unless the ad- [fol. 101] ministrative body has lost sight of the law. The more technical the subject matter before the administrative tribunal, the more reluctant the court should be, we think, in disagreeing with it on a matter which is a question of judgment" (at p. 331 of 151 F. (2d)).

In view of the general adherence to the substantial evidence rule, the earlier judicial pronouncements within this circuit and the statements in this Court's opinion, it is

urged that this Court provide a standard under which the District Court will not be permitted to ignore the findings of the Commission relating to the fairness and equity of the plan as it did, but be required to accord them their due weight.

On the other hand, if the substantial evidence rule is not to be applied to the findings of the Commission, then this Court should clarify its statements regarding the treatment with respect to such findings in order to establish a comprehensive standard for the guidance of the district court. A rejection of the substantial evidence doctrine would clearly be contrary to the preponderance of judicial authorities and may result in a trial *de novo* by the district court. To that extent then, this Court would have thereby minimized the role of the Commission, an expert administrative body, in violation of the spirit of its own remarks, if not the words themselves, in the *Standard Gas & Electric Co.* case, quoted above.

B. The administrative record should not be reopened before the District Court and a trial *de novo* conducted.

This Court has also sanctioned an attack upon the position of the Commission, and at the same time generated uncertainty and confusion, by its statement as to the reopening of the administrative record by a section 11(e) court. In this connection, this Court said:

> "* * * This does not mean, however, that the Section 11(e) court may not receive evidence *aliunde* the [fol. 102] Commission's record respecting the fairness and equity of a plan. It may decide upon the new evidence and that contained in the Commission's record that the plan is unfair and inequitable and remand the proceeding to the Commission for further consideration; or it may remand without taking new evidence, pursuing the course outlined at an earlier point in this paragraph" (Opinion, p. 17).

The Court's ruling in this respect would not seem to be supported by the Commission's interpretation of the Act, as is evident from the following testimony of a former director of the Public Utilities Division of the Securities

and Exchange Commission which this Court quoted in another connection as follows:

> "[the district court], on the basis of the record made before the Commission, holds full hearings on the plan, including briefs and oral argument * * *" (Opinion, p. 14).

It is explicit from, or at least implicit in, the foregoing statement that the Commission does not contemplate the receipt of evidence *aliunde* the Commission's record in respect to the "fairness and equity of a plan" and a trial *de novo* before the district court, but a hearing conducted "on the basis of the administrative record". Moreover, such reopening of the administrative record for the receipt of additional evidence is contrary to the rule uniformly and generally applied by the courts to 11(e) proceedings under the Act.[9] *In re Electric Bond & Share Co.*, 73 F. Supp. 426, 443 (S. D. N. Y., 1946), aff'd 161 F. (2d) 978 (C. C. A. 2, 1947); *In re Laclede Gas Light Co.*, 57 F. Supp. 997, 1002 (E. D. Mo., 1944), aff'd *sub nom. Massachusetts Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424 (C. C. A. 8, 1945), cert. den. 327 U. S. 796; *In re Jacksonville Gas Co.*, 46 F. Supp. 852 (D. Fla., 1942). This prin- [fol. 103] ciple has been succinctly stated in *In re Electric Bond & Share Co., supra*, where the district court said:

> "* * * The function of the court is to approve and enforce the plan of reorganization submitted to it, if it finds such plan fair and equitable and appropriate to effectuate the purposes of the Act. To do this the court must examine the plan and the record upon which the Commission's approval of the plan was based. To judge the plan on any other record would run counter to the procedure expressed in the statute.
>
> "The reason for this procedure is evident. The method of procedure outlined in the Act * * * plainly discloses that it was the purpose of Congress to set up a body in the Commission that would be especially trained and versed in matters relating to Public Utili-

[9] Recognition of this doctrine appears in the cases applying the substantial evidence rule. See cases cited at p. 6 of this Petition.

ties. These are complex matters calling for the services of experts'. *In re Laclede Gas Light Co., supra.*"

Furthermore, the dangers incident to a procedure reopening the administrative record are obvious; in substance a trial *de novo* may be had and obstructionists may make a Roman holiday of these complex utility simplification proceedings. The delay incident thereto may in a swiftly moving world result in a procession of stale records and thus a complete frustration of congressional intent. Also as the Commission so aptly points out in its Petition for Rehearing, the ruling on remand for a finding on unfairness based on additional evidence not heard by the Commission may conceivably be construed as binding upon the Commission, even though such limitation upon the action of the Commission is not intended.

[fol. 104] II

The Court appears to establish a different standard for valuation than that enunciated in the *Otis* case. Its criteria for valuation are vague and it unjustly criticizes the Commission for using inconsistent techniques in valuation and for attempting to apply the new doctrine of investment value in place of the doctrine of equitable equivalents.

It is well established that the words "fair and equitable" are words of art and have the same meaning under Section 11(e) as in other reorganizations.[10] In other words, fairness and equity require "full priority in treatment to be accorded various classes of security interests"—creditors and stockholders and various classes of stockholders, or that "each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered". *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 639-40 (1945), quoting from *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523, 565, 87 L. Ed. 959 (1943). It is also clear under the doctrine of the *Otis* case that in evaluating the rights surrendered liquidation preferences are not matured by the

[10] *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 84 L. Ed. 110 (1939); *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 647 ff., 89 L. Ed. 511 (1945).

impact of section 11 and that the entire bundle of rights surrendered must be determined as though in a continuing enterprise—a going concern.

This Court, although recognizing the doctrine of the *Otis* case, seems to suggest a somewhat different standard for arriving at the equitable equivalent in the following language:

> "* * * All pertinent factors and all substantial equities must be considered by the Commission whether [fol. 105] equitable equivalents are to be reached by the approach *ex* the Act or the approach *intra* the Act. The new doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equitable equivalents enunciated in the Otis & Co. decision" (Opinion, p. 30).

A. The phrase "substantial equities" is ambiguous and nebulous.

In the first place, it is not clear what the Court means by "substantial equities". If this phrase is intended to mean "colloquial equity" as used by the District Judge in a non-technical sense, such significance, we submit, is at variance with the technical definition ascribed to the expression "fair and equitable" as indicated above and was not applied in the *Otis* case by this Court or the Supreme Court, although previously suggested by the District Court. In any event, the expression "substantial equities" is too nebulous to afford an adequate guide in valuation by the Commission and consequently requires further definition.

B. The expression "pertinent factors" requires explanation.

The Court, moreover, in the statement quoted above directs the Commission to consider "All pertinent factors" in arriving at equitable equivalents. It is not clear as to what is embraced within the phrase. If the phrase refers to such factors as earnings, market history, dividend record, etc., then these factors were considered by the Commission as reference to its Opinion and Findings (R. 61a ff.) and the administrative record (R. 2087a ff.) will disclose. If market history is to receive weight in the opinion of this Court, it would not be amiss to point out that market prices

do not constitute a test of fairness (Streeter Reply Brief, p. 21). If investment value is to be treated only as one of a [fol. 106] series of factors as the Court indicates, then it is our view that the Court has misconceived the meaning of investment value as will be demonstrated below. In any event, the phrase should be more fully defined so as to afford a comprehensible criterion for valuation.

C. The Court labors under a misconception of the meaning of "*ex* the Act" and offers a choice of valuation not in accordance with the applicable decisions. Its criticism of the Commission for employing allegedly inconsistent techniques in valuation is not warranted.

Furthermore in the quotation above from the opinion of the Court, the Commission is given the choice of valuing "*intra*" or "*ex*" the Act and elsewhere in the opinion is criticized for attempting "to value the securities of Engineers both *ex* the Act and *intra* the Act." The phrase "*intra* the Act" cannot be interpreted to permit valuation of the securities as if the liquidation pursuant to the Act comes within the coverage of charter liquidation provisions, since in the opinion of the Court, under one of the principles enunciated by the Supreme Court in the *Otis* case, the charter provisions of Engineers are "not dispositive of the issues presented."[11] Consequently the significance of the phrase "*intra* the Act" is nowhere explained, even if viewed as a proper basis of valuation, and should therefore be the subject of clarification.

The approach to valuation "*ex* the Act" conceivably involves two interpretations, as the Commission carefully points out in its Petition for Rehearing (at p. 19 ff.), namely "as if the Act had never been passed (which the Court apparently adopts)[12] or as if the present reorganization were not required by section 11(b) of the Act. For the purpose of this Petition we concur in the Commission's [fol. 107] view that if valuation *ex* the Act embraces the first alternative and is to be predicated upon an "as if"

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[11] It should be noted that Commissioner Hanrahan held that the action proposed by Engineers was "voluntary" within the meaning of voluntary call or liquidation provision of the Charter. R. 141a.

[12] Opinion, p. 26.

reconstitution of the assets of Engineers, then the requisite ascertainment and computation of losses to Engineers through the operation of the Act by the Commission would be both fruitless and impossible of achievement. Moreover, as the Commission properly notes, any re-examination of divestments, or other transaction executed pursuant to the Act, such as Puget Sound[13] or El Paso Natural Gas Co.[14] divestments, with a view to hindsight reallocation may constitute collateral attacks upon final decisions. Such re-examination would run counter to the salutary policy underlying the doctrine of *res judicata* as recently reaffirmed by the Supreme Court in the *Sunnen* case, *supra*, where the following statement is made:

> "* * * The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. * * *.
>
> "* * * Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel" (at pp. 4302-3 of 16 U. S. Law Week).

On the other hand, valuation, as if the present reorganization were not required by the Act or apart from the present reorganization (which is the other interpretation of "*ex* the Act" advanced) is, we submit, the correct basis under the *Otis* case, where the Supreme Court said:

> "We reach the conclusion that the Securities and Exchange Commission applied the correct rule of law as to the rights of the stockholders inter sese. That is to say, when the Commission proceeds in the simplifica- [fol. 108] tion of a holding company system, the rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place" (323 U. S. 633).

The Court has apparently misapprehended the meaning of "*ex* the Act" and consequently unjustly criticized the

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[13] *Puget Sound Light & Power Co.*, 13 S. E. C. 226 (1943).

[14] *Engineers Public Service Co.*, H. C. A. R. No. 4559.

Commission for adopting inconsistent techniques in valuing the preferreds "*ex* the Act" and the common "*intra* the Act". The Commission valued both the common and the preferreds, "*ex* the Act" or apart from the reorganization, in accordance with the principles enunciated in the *Otis* case. Applying the doctrine of full priority, the Commission first valued the preferreds and consequently in valuing the preferreds apart from reorganization or on a going concern basis, necessarily reciprocally valued the common by the same standard. In other words, since the total enterprise is to be divided between the preferreds and the common, once the preferreds have been valued on a going concern basis and that value subtracted from the total, the residual value is thereby established for the common, on the same basis. This valuation process is further elaborated in the Commission's Petition for Rehearing (at p. 12 ff.), in which we concur in this respect.

Moreover, an allocation may properly be made without dollar valuation, as long as each security holder receives in the order of his priority, the equitable equivalent of the rights surrendered. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523, 565, 87 L. Ed. 959, 1007 (1943); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 482, 87 L. Ed. 892, 936 (1943); *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 89 L. Ed. 511 (1945). But that determination cannot be made by the use of any mathematical formula nor with mathematical certitude. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P.* [fol. 109] *R. R. Co., supra.* Furthermore, compensatory treatment may be made in either cash or securities.[15]

D. A distinction on the basis of the termination of the enterprise in the instant case is contrary to the language in the *Otis* case, fails to recognize the virtual continuation of the enterprise and overemphasizes the sequence of simplification.

The Commission in evaluating the preferreds and the common on a going concern basis as indicated above was merely following the doctrine of the *Otis* case. This Court, however, maintains that the Commission disregarded what it conceives to be a substantial difference between the instant case and the *United Light & Power Co.* reorgani-

[15] Streeter Main Brief, p. 38.

zation in that in the former "the fact is that the holding company is at an end, both for the preferreds and the common," while in the "latter case, the security holder participation in the enterprise was shifted from the top holding company to a subsidiary holding company but the holding company enterprise continued."[16]

If by the foregoing statement the Court implies that the *Otis* case involved a "nominal" liquidation and does not apply to a "real liquidation", assuming *arguendo* but without conceding that the present Engineers' plan is a real liquidation, this distinction, we submit, overlooks the following language in the Supreme Court's opinion:

[fol. 110]

> "* * * Where pre-existing contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate. * * * The reason does not lie in the fact that the business of Power continues in another form. * * * It lies in the fact that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors. We must assume

[16] It is interesting to note that the District Judge in the instant case (R. 288a, fn. 2) apparently takes a somewhat different view from that of this Court, stating:

> "Although I have an entirely open mind on the question, my present thought is that the rule of Otis & Co., applies also to a situation in which there is a true liquidation rather than a nominal or formal liquidation mainly because this is not a change in corporate form contemplated by the charter. But counsel argue forcefully that Otis & Co. by its stress that the court was there concerned with a continuing enterprise impliedly holds that a different result would obtain in a true liquidation. I think that perhaps Otis & Co. was not intended to go that far. When a novel question is before a court, it frequently grabs any and all reasons in support of its conclusion. It does not follow, however, that any one of those facts is the *sine qua non* for the decision."

that Congress intended to exercise its power with the least possible harm to citizens" (323 U. S. 624, 638, 98 L. Ed. 511, 522 (1945)).

In fact, the Commission considered the dissolution of the United Light & Power Company as an *actual* dissolution and not merely the "peeling off" of a company in a holding company system. In the reorganization of Puget Sound Power & Light Company, the former subsidiary of Engineers, the Commission quoted the views enunciated in its *United Light & Power* decision (H. C. A. R. No. 4215) and then said:

> "These views were expressed in the course of our discussion of a proposal which contemplated an actual liquidation."

It would be anomalous if this Court should now hold that the Commission's decision in the original "investment value" case was based upon the fact that there was no actual liquidation taking place.

Even assuming that the *Otis* case applies only where there is no liquidation of the enterprise in the real sense of [fol. 111] the word, we submit that in substance the enterprise represented by Engineers is not being liquidated. The security holders of Engineers have nothing more than indirect interests in the operating companies, which operating companies are the business of Engineers. All that will happen after the plan is consummated insofar as the common stockholders are concerned, is that they will hold directly what they now hold indirectly. The company itself has pointed out to its stockholders that the results of the Plan would be to give them a direct ownership of the subsidiary companies.[17] In this connection, the Supreme Court has pointed out that dissolution of a holding company means little more than the receipt of securities of the operating company in lieu of their present shares in the holding companies.[18] Thus even if the rule of the *Otis* case depends on the absence of a true liquidation, which we deny,

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[17] R. 1396a.

[18] *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, 91 L. Ed. 89 (1946).

that rule applies to this case because there is no actual liquidation.[19]

Likewise if the Court suggests that the rule of the *Otis* case is not to be applied in the instant case since here there is no continuation of an underlying holding company system which was the fact in the *United Light & Power* system, we submit that such distinction does not bear analysis. [fol. 112] The *Otis* rule has been applied in simplification proceedings under section 11, regardless of whether or not there was a continuing holding company system. For example, it was applied by Engineers itself when it filed a plan for Puget Sound Power & Light which had no holding company system beneath it.[20] It was applied by the Commission in *Southern Colorado Power Company*, H. C. A. R. No. 4501, in which the holding company interest was wiped out so that Southern Colorado was no longer in a holding company system. The District Court enforced the plan,[21] the Circuit Court of Appeals affirming on appeal on the authority of the *Otis* case and the Supreme Court denying certiorari.[22]

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[19] In *El Paso Electric Co.*, H. C. A. R. No. 5499, at p. 14, Commissioner McConnaughey discusses the meaning of "liquidation" as follows:

> "'Liquidation' has various meanings depending upon the setting in which it is used. In its most generally accepted sense, as applied to corporate operations, the word describes a complete winding up that brings to an end the active participation in the going enterprise of all who theretofore had been associated with it. Not only is the intangible corporate vehicle dissolved as is proposed here, but the rights and property with which the business had been conducted are disposed of and the proceeds distributed among all the participants in proportion to their interests. Thereafter, none of them draws benefit from the continued operation of the enterprise. The interest of all participants is liquidated."

[20] *Puget Sound Light & Power Company*, 13 S. E. C. 226, 246 (1943).

[21] *In re Southern Colorado Power Company*, Civil Action No. 670 (D. C. Col. 1944).

[22] *Disman v. S. E. C.*, 147 F. (2d) 679, (C. C. A. 10, 1945); cert. den. 325 U. S. 863; 89 L. Ed. 1984 (1945).

If the Court's view is applied to its logical conclusion, the sequence of simplification becomes highly significant. For instance, suppose a holding company system where there is an intermediate company between the top holding company and the operating companies. It would seem from the Court's language quoted above that the *Otis* rule would be applied to the first of these two holding companies but not to the liquidation of the second, since no holding company system remains after the liquidation of the second. Such result could hardly be justified as fair and equitable when each holding company has separate groups of stockholders whose interests are accorded different treatment although both companies were dissolved because of the Act. It is merely a matter of procedure when the liquidation of a particular company in a holding company system occurs, and such procedural decisions should not affect rights any more than the selection of a particular method of system [fol. 113] adjustment, as merger, consolidation, etc. In this connection, the Supreme Court has cautioned:

> "* * * The selection by the Commission of one method of system adjustment to accomplish simplification rather than another is an incident which ought not affect rights" (*Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 631, 89 L. Ed. 511, 518 (1945)).

Consequently, it is urged that the Commission properly applied the principle of the *Otis* case to the case at bar, regardless of whether or not a liquidation be deemed to have occurred or the enterprise to have ended.

E. The Court has lost sight of real meaning of investment value as merely signifying going concern value, which is the basis for arriving at equitable equivalents. The Commission considered all data relevant to going concern value including asset position, dividend record, earning capacity, etc.

The Court also criticizes the Commission for attempting to substitute "the new doctrine of investment value" for "the doctrine of equitable equivalents enunciated in the Otis & Co. decision" and for failing to give substantial consideration to the future earning power of Engineers and its subsidiaries.

The general use of the expression "investment value" to connote the process of a valuation on a going concern basis

may have misled the Court into believing that a novel technique for valuation is being introduced. The fact is otherwise. The Supreme Court in the *Otis* case recognized that the Commission in the simplification of a holding company system evaluates the rights of stockholders of a solvent company "on the basis of a going business." Reference to "investment values" as found by the Commission is even made in that decision by the Supreme Court. Furthermore, the import of this expression as well as its lack of novelty is further clarified by consideration of the following [fol. 114] statement by the Commission when in passing upon the reorganization in *United Light & Power Co.*, H. C. A. R. No. 6603 (1946), it said:

> "It is settled that in a Section 11 reorganization a security holder must receive, in the order of his priority from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered. The criteria which determine the measure of participation under the fair and equitable standards of Section 11(e) have been developed in a series of decisions * * * In these cases we have held that the 'fair and equitable' standard does not permit us to treat liquidation preferences as though they were claims matured by operation of Section 11; that a liquidation preference is not, therefore, controlling but is significant only as comprising one of the bundle of rights attaching to a security; and that the present investment worth of a security, based on the bundle of rights surrendered, must be the measure of its participation in a Section 11(e) plan."

Thus it is clear that investment value or worth is not a substitute for equitable equivalent, but a means of arriving at it—in other words, the product of the valuation process. Reflected in the present investment worth is the earning power, market history, dividend record, asset priorities, etc. That such factors were considered by the Commission is readily apparent by reference to the Commission's Opinion and Findings (R. 61a) and to the administrative record as well (R. 2087a). An analysis of the corporate and consolidated capitalization and surplus accounts of Engineers and its subsidiaries was submitted and considered. Dr. Badger, an expert witness, prepared an extensive report analyzing the values of the three series of

preferred stock. After analysis of the earnings and assets of Engineers, he compared Engineers' preferreds with preferred stocks of five public utility holding companies which he believed to be similar to Engineers for the period [fol. 115] 1940 to 1945, with reference to "times all charges and preferred dividends earned," "proportion of prior obligations to total capitalization," "book value of equity per share of preferred," "per cent of net quick assets to prior obligations" and "times parent company dividends were earned." Dr. Badger also prepared a study of the preferred stock of ten operating and holding companies selected for similarity of their earnings to those of Engineers. He concluded that the $5.00, $5.50, and $6.00 preferreds had a fair investment value of $106.25, $111.38 and $111.50 respectively, which values were equivalent to the full call prices for the stock plus three months cumulative dividends and that the investment values absent the call features would have been substantially in excess of the vaues set forth (R. 2118a). It also appears from the opinion of the Commission that "No additional expert testimony on value was introduced into the record and no serious challenge was made in the proceedings to Dr. Badger's conclusion that the fair investment value of the preferred on a going concern basis is in excess of the call price" (R. 67a). In fact this view was substantiated by other testimony as that, for instance, by Mr. Barnes, President of Engineers (R. 522a). In the opinion of both witnesses the call price of the securities established a ceiling or "stopper" on their value.

It is apparent that the Commission in arriving at equitable equivalents has taken into account asset coverage, earning records, earning capacity, the nature and condition of the underlying properties, etc. Such criteria as earning records, assets, etc. in addition to earning capacity, provide a proper basis of valuation. *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 526, 85 L. Ed. 982, 994 (1941). In this connection, it is evident from Dr. Badger's analysis, that in his opinion the estimated 1946 earnings indicated a continuation in earnings shown for the 1940-1945 period, that earning trends of Engineers' subsidiaries should not run counter to the strong growth trend of the public utility industry as there were no peculiar [fol. 116] economic characteristics in respect to the territories served by these companies, and that Engineers

should continue in future years to register progress along with other units in the industry (R. 2103a). Thus in the instant case, actual as well as estimated earnings were considered, although projection into the indefinite future was unnecessary, especially since the exclusion of the common stock or its "indefensible participation" was not at stake. The extent and method of inquiry for a valuation on the basis of earning capacity are necessarily dependent on the facts of each case. *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527, 85 L. Ed. 982, 994 (1941). Thus it is clear that the Commission determined the equitable equivalents of the rights surrendered on the basis of asset coverage, condition of the property, earnings record, earning power and all other data relevant to going concern or investment value.

Conclusion

The respective roles of Court and Commission require amplification. In this connection, actual recognition should be accorded the findings of the Commission when supported by substantial evidence in the record, as in the instant case.

In addition, the court has misapprehended the approach followed by the Commission evaluating the rights surrendered and its criticism of the Commission for allegedly applying inconsistent techniques in valuation and for substituting the novel "doctrine of investment value" for "the doctrine of equitable equivalents", appears unjustified.

Accordingly we respectfully urge that the Court reconsider those portions of its opinion which are apparently based upon misconceptions indicated and grant a rehearing.

In the event the Court should deny a rehearing, it is respectfully requested that the mandate of the Court, in addition to its present provisions, also direct the stay of [fols. 117-118] any further steps, actions or proceedings in performance of or execution of the plan, pending determination of the issues herein.

Respectfully submitted, Lawrence R. Condon, Attorney for Petitioners, Thomas W. Streeter, et al., 165 Broadway, New York 6, N. Y.

Certificate

I, Lawrence R. Condon, of 165 Broadway, New York, N. Y., an attorney admitted to practice *pro hac vice* in the United States Circuit Court of Appeals for the Third

Circuit and counsel for Thomas W. Streeter, *et al.*, Petitioners herein, do certify that, in my opinion, the foregoing Petition for Rehearing is presented in good faith and not for delay.

Lawrence R. Condon.

April 15, 1948.

[fol. 119] In United States Circuit Court of Appeals

Petition for Rehearing of Home Insurance Company, et al.—Filed April 16, 1948

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

The Home Insurance Company, City of New York Insurance Company, National Liberty Insurance Company of America, The New Brunswick Fire Insurance Company, The Homestead Fire Insurance Company, The Georgia Home Insurance Company, and Tradesmens National Bank and Trust Company (herein called the Home-Tradesmens Group), as holders of preferred stocks of Engineers Public Service Company, respectfully request the Court to grant a rehearing in the above entitled matter. The bases of this petition are as follows:

The Court has ordered the District Court to remand the record to the Commission for further and appropriate action in the area defined by the Escrow Agreement. The Court correctly concludes that "*the problem is and will remain, until its disposition by the Commission, one of valuation of the securities of Engineers, viz., the preferreds and the common*" (Opinion, 31, emphasis supplied). Underlying this conclusion are the statements of the Court that the District Court may not value the securities, find equitable equivalents therefor, and substitute its own estimates for those of the Commission (Opinion, 30, 31). The collective import of the foregoing is that the findings of the Commission in these respects have stature in the District Court and that the District Court's veto power is subject to the restraints customarily applied in administrative law. Were this the ultimate and only distillate of the Opinion, the solution of the problem would be relatively simple.

We believe that the findings of the Commission, rightly understood, establish the call prices of the preferred stocks

as the equitable equivalents of the preferred stocks. All the questions raised in the District Court were raised and argued before the Commission as the record and briefs will show. In the proceedings before the Commission the efforts of all counsel were addressed to the questions whether the [fol. 120] controlling measures were the involuntary liquidating prices for the preferreds or the equitable equivalents, and what were the equitable equivalents. The Commission recognized this in the following words (R. 62a):

> "It is settled that in a Section 11 reorganization a security holder must receive, in the order of his priority, from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered. Since under the circumstances of this case, we do not think it proper to regard the liquidation provisions of the charter as conclusive in determining those rights, we must consider all provisions of the charter applicable to the preferred, such as the dividend rate and the call price as well as the liquidation preferences, and we must analyze the financial condition of the company with particular regard to the asset and earnings coverage of the preferred."

The Commission then proceeded to examine the factors and in the course of its examination found that the fair investment values of the preferreds exceeded the call prices of the preferreds (R. 67a). According to our understanding of the Opinion, this Court believes that the Commission abandoned its announced precept and considered only investment values in appraising the equitable equivalents, whereas the conclusion of the Commission was that, upon a full consideration of the record, the fair and equitable standard would require the payment of amounts equal to the call prices plus accrued dividends (R. 68a). Were the record remanded to the Commission, we do not see how the Commission could do anything but reaffirm its present findings in language to show more clearly, if need be, that the relevant impacts of all the factors discussed were considered and weighed and are inherent in the Commission's determination of the equitable equivalents. We will not expand upon this aspect of the case in view of the comprehensive treatment accorded it in the Commission's petition for rehearing.

[fol. 121] However, if we understand the Opinion, this Court holds that the District Court must exercise its independent plenary judgment as an equity reorganization tribunal upon every matter relating to the fairness and equity of the reorganization, and may reject valuations made by the Commission in fulfilling the Court's statutory function in determining whether the plan is fair and equitable. The only restraint on the District Court is that it may not act capriciously in rejecting valuations made by the Commission, just as the Commission may not act with caprice in valuing securities (Opinion, 24, 25). The Opinion expressly rejects as inapplicable to the findings of the Commission in proceedings under Sections 11 (e) and 18 (f) the contentions that the District Court may not disturb the findings of the Commission unless they lack rational or statutory foundation, and may not reverse the Commission's judgment unless the Commission has abused its discretion (Opinion, 25). By implication the Court also rejects the more conservative rule that such findings should not be set aside if based on substantial evidence and consistent with law. Unless the term "caprice" has some special significance in this setting which we do not comprehend, the stage is thus set for an impasse in any situation where there may be a reasonable difference of opinion, unless the Commission bows to the discretion of the District Court as the tribunal having the last word. If the District Court be free to reject the findings of the Commission in the area of reason, then the veto power of the District Court would be the equivalent of the power to value securities, to resort to its own estimates, to find equitable equivalents. All that is left to the Commission is the power to keep on trying. If our analysis of the Opinion be correct, we respectfully submit that Congress intended the findings of the Commission to have greater stature in the District Court in proceedings under Section 11 (e) and that the question should be reexamined. Several factors seem to us to compel the conclusions that the District Courts in such proceedings may [fol. 122], not exercise undiminished all the powers which a court of equity may exercise in equity reorganizations and that at least the substantial evidence rule should apply.

First, the Opinion in this respect seems to us to be at variance with and overrule the decision of this Court in *In re Standard Gas & Electric Co.*, 151 F. 2d 326. In the proceedings in the District Court, *In re Standard Gas &*

Electric Co., 59 F. Supp. 274, the District Court accepted the Commission's valuations of Standard's notes and of the portfolio securities to be given in payment of the notes, but disqualified the medium of payment as unfair and not the equitable equivalent of the bundle of rights represented by the notes. The District Court held that the market values of the portfolio stocks were subject to fluctuation, that the market history was irrelevant and unreliable, that no plan should be based on the possibility of constancy of the security markets, and that fairness could under the circumstances only be accomplished by cash payment (pp. 280, 281). On the question of valuation, the District Court held that the findings of the Commission were supported by substantial evidence and that the Court was required and should under the substantial evidence rule, at least in this respect, follow the "informed judgment" of the Commission as articulated in its findings (p. 283). Thus the District Court rejected the Commission's findings on the equitable equivalent of the notes. On appeal this Court circumscribed the veto power of the District Court in unmistakable terms (151 F. 2d 326 at 331). It said, inter alia, that neither the District Court nor the Appellate Court is to substitute its notion of practical expediency for that of the Commission, that the Commission's judgment was not unreasonable nor inequitable and should be allowed to stand. Here is clear mandate that the findings of the Commission should stand unless they are affirmatively unreasonable or inequitable, even though the District Court might have reached a different conclusion if left to itself. [fol. 123] This Court has cited the Standard case for the proposition that any question which goes to the issue of what is fair and equitable may be raised in and must be passed upon by the District Court, *with the notation that the question here presented was not in focus* (Opinion, 23). It seems to us that the question of the standing of comparable administrative findings was completely within the orbit of the case on appeal and in focus. The factors which persuaded the District Court to overrule the Commission on the fairness of the plan were within the special competence of the Commission, whether the problem be classed as one of method or practical expediency or of equitable equivalence. Since the problem in Engineers is admittedly one of valuation by the Commission, we do not see how anything less than the substantial evidence rule can be

applied unless the Court means to overrule its decision in the Standard case.

Second, we submit again, that the provision of Section 24 (a) that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive on the Circuit Court of Appeals has significance in Section 11 (e) proceedings in spite of the fact that it is not mentioned therein. Situations have arisen and presumably will continue to arise where appeal under Section 24 (a) may be the only method whereby an aggrieved person may test the fairness and equity of a Section 11 (e) plan as, for example, where a company plans to proceed without requesting enforcement proceedings. Thus the findings of the Commission have different quality depending on procedural accident.

The Commission's petition for rehearing expresses the belief that there has been and will be no real problem in adjusting the complementary roles of the Commission and Courts so long as both apply the same consistent and determinable legal standards of fairness and equity on the same record. We concur in the necessity of establishing the same standards of fairness and equity for both tri-[fols. 124-128] bunals, but we doubt that the complementary roles of the Commission and the several District Courts can be adjusted without the aid of the substantial evidence rule. Standards of fairness and equity are not susceptible of precise definition, and common understanding and uniform application of such standards are seldom, if ever, attained in human affairs. We urge that the absence of any express provision in Sections 11 (e) and 18 (f) does not preclude resort to the substantial evidence rule in proceedings under those sections, where as failure to apply the rule in enforcement proceedings in the District Court leaves the two appraisers without an umpire.

We realize that the substance of these arguments has already been presented and considered by this Court, but the far reaching consequences and conflicting impact of the Opinion impel us to urge reconsideration of these issues by the Court. In so doing we do not mean to waive the related and subsidiary questions on these and other issues presented in the Commission's petition for rehearing. Acting pursuant to the permission heretofore granted by this Court we adopt the views of the Commission as set forth

in its petition subject to the comments above with respect to the substantial evidence rule.

Accordingly we respectfully request that a rehearing be granted in accordance with this petition and the petition of the Commission hereby adopted.

Respectfully submitted, Francis H. Scheetz, Attorney for Petitioners. Evans, Bayard & Frick, Of Counsel.

April 16, 1948.

I hereby certify that the petition for rehearing is filed in good faith and not for purposes of delay.

Francis H. Scheetz, Attorney for Petitioners.

[fol. 129] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ANSWER TO PETITIONS FOR REHEARING AND CROSS-PETITIONS FOR REHEARING BY CENTRAL-ILLINOIS SECURITIES CORP., ET AL.—Filed May 13, 1948

Preliminary

This answer is filed by Appellees Central-Illinois Securities Corporation and C. A. Johnson, in an effort to clarify the issues raised by the Appellants in their respective petitions for rehearing, and in the hope of facilitating the Court's disposition thereof. In addition, the Court is requested to treat a specific portion of this answer as in substance a cross-petition for rehearing on one limited phase of the Court's decision.[1]

[fol. 130] In general, it may be observed that the petitions of Appellants, although purporting to seek "clarification" of the Court's opinion and decision, actually proceed to reargue the various points which were fully briefed and argued before the Court prior to the rendition of its decision. Not only are no meritorious new arguments advanced, but Appellants persist in pressing upon the Court the same fallacious reasoning which the Court carefully considered and specifically rejected in its opinion.

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[1] See discussion at p. 21 and note 31, infra.

Without attempting to deal with all Appellants' arguments in exhaustive fashion, the ensuing discussion touches upon most of the principal ones.

I

The argument that the Commission was not "inconsistent" in the valuation technique which it employed.

A major portion of the petition filed by the Solicitor of the Securities and Exchange Commission is devoted to taking issue with the Court's analysis of the inconsistent treatment accorded by the Commission to the respective claims of the Preferred and Common stockholders of Engineers. The particular target at which this phase of Commission Counsel's criticism is aimed is the portion of the Court's opinion which is set forth at pages 26-30. We believe that a reading of this section of the Court's opinion in conjunction with the arguments advanced in the Commission's petition establishes that the criticisms are devoid of merit, and have already been carefully considered and disposed of in the Court's opinion.

1. The Court did not misconceive the meaning of "*ex* the Act."

At the outset, the petition of the Commission suggests that the Court has misconceived the meaning of the "shorthand" expression "ex the impact of the Act", as employed by the Commission and the witnesses whose testimony [fol. 131] was cited in the Commission's Findings and Opinion.[2] The Court is informed that:

> "In other words, any shorthand description of the technique which the Commission has applied . . . as valuation 'ex the Act' is a misinterpretation unless understood with the interpolation 'ex [the present reorganization required by Section 11(b) of] the Act.'"[3]

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[2] The petitions of the other Appellants echo this note. See Commission petition, pp. 6, 12; Streeter petition, pp. 3, 17; Home Insurance petition, p. 6.

[3] Commission petition, p. 12.

That the Court was not under any misapprehension on this point is evident from the statement early in its opinion that (p. 5):

> "It [the Commission] takes the position it has obeyed the clear mandate of the Act in that it has measured the rights to be surrendered by the preferred stockholders in terms of investment value; that is to say *ex* the Act *which itself necessitated the dissolution of Engineers* . . ." (Emphasis supplied.)

It is indeed perfectly clear that there was no *lack of comprehension* on the part of either this Court or the District Court as to the meaning and significance of the Commission's rationale; it is equally clear that after careful consideration both courts concluded that this rationale was gravely fallacious. For the Commission's new "valuation technique" is predicated on the erroneous hypotheses that in determining the rights of security holders in a liquidation necessitated by Section 11 of the Act: (1) values of senior securities are to be determined on the basis of their hypothetical market price as of the time of liquidation "apart from the impact of liquidation under Section 11", and in disregard of all the other impacts of the statute and their vital bearing on such "value"; (2) despite the fact that such values of the senior securities are said to be measured "as though in a continuing enterprise", no deter- [fol. 132] mination need be made of their future value on an earnings basis or otherwise if permitted to remain outstanding in the hypothetical "continuing enterprise"; and (3) no determination whatever need be made of the value of the *common stock* "apart from liquidation", "as though in a continuing enterprise", or otherwise (see Court's opinion, pp. 26-29).

2. The anomaly of Petitioners' insistence upon the applicability of the United Light formula which the Commission disregarded in the instant case.

The attempt made in the Commission's petition to defend the "valuation technique" employed by the Commission in its Engineers findings and opinion serves only to highlight the inconsistencies and paradoxes pointed out by the Court in its opinion. For example, throughout the petition the complete and final liquidation of the Engineers holding

company enterprise is referred to as a "reorganization", and is analogized with the reorganization of the *continuing* United Light & Power system discussed in the various *Otis* decisions. Thus, Petitioner pays no heed whatever to the Court's explicit finding that (p. 27):

> "Under the plan the common stock is excluded from the holding company enterprise as effectually as are the preferred for the common under the plan will receive participation only in operating companies. *The fact is that the holding company enterprise is at an end, both for the preferred and the common. The Commission apparently has disregarded this fact which supplies the substantial difference between the instant case and the United Light & Power Company reorganizations.* In the latter case the security holder participation in the enterprise was shifted from the top holding company but the enterprise as such continued. * * *
>
> * * * In determining whether the plan was fair and equitable the court valued the securities *ex* the Act, considering the holding company enterprise to be at an end *as it is in fact.*" (Emphasis supplied.)

[fol. 13] Yet, while erroneously insisting upon equating the *liquidation* of Engineers with the mere *reorganization* of the continuing United Light system, Petitioner is placed in the anomalous position of striving to justify its failure to apply the formula employed in the United Light decision wherein it valued the rights of *both* the preferred and the common, in relation to one another, on the basis of a determination of the future earning power of the system and the respective proportional claims of the two classes in such earning power.[3a]

Thus, Petitioner is in the logically indefensible position of arguing that the *Otis* formula is applicable to the Engineers liquidation in the face of the fact that the Commission *did not* apply this formula to Engineers, but sought instead

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[3a] Consistent application of the *United Light* formula in the instant case would have resulted in an allocation to the Engineers preferred holders having a realizable cash value considerably *less* than $100 per share (see our Main Brief, pp. 55-58).

to substitute in its place the new "investment value" doctrine for measurement of the rights of the preferreds, but not the commons; causing this Court to say (p. 27):

> "In the instant case the Commission ascribed 'investment value' to the preferreds but failed to make a similar approach to the common. The result is that the Commission has attempted to value the securities of Engineers both *ex* the Act and *intra* the Act. We have used the phrase 'attempted to value' advisedly for we think that in the employment of the formula of 'investment value' the Commission erred in the light of the decision of the Supreme Court in the Otis & Co. case for the reasons set forth at a later point in this opinion."

3. The fallacy of Petitioners' reliance on "the Euclidian Axiom" for determining stockholders' rights in a liquidation.

In an attempt to controvert the Court's finding that the Commission had not appraised the rights surrendered by the common stockholders of Engineers either "*ex* the Act", [fol. 134] as in the case of the preferreds, or otherwise, Petitioners argue that the Commission did value the common stock because "The Commission's valuation merely assumes as a premise, the Euclidian axiom that the sum of the parts equals the whole".[4] But this "Euclidian axiom", whatever its other virtues, was never intended to provide, and does not, a standard for measuring the relative rights of different classes of security holders in either a liquidation or a reorganization.[5] In the *United Light & Power (Otis)* case,

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[4] Commission petition, p. 13.

[5] See Jerome Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking* (1932), 17 Cornell Law Quart. 568, 573-4:

> "* * * The axioms of Euclid are now recognized as mere assumptions. * * *
>
> The axioms or fundamental assumptions of pure mathematics can be chosen arbitrarily. The axioms or fundamental assumptions in any other kind of thinking cannot.
>
> This distinction is frequently overlooked. It is essential to clear thinking. For pure mathematics need

the demand of the preferred holders for 100% of the assets was entirely consonant with this "Euclidian axiom", since "the sum of the parts equalled the whole"; but the Commission and the various Courts in turn held that such a distribution was *not* consonant with the "fair and equitable" standard which governs reorganizations and liquidations under Section 11(e). Nor is it more logical to urge, as Petitioner does, that the common stockholders as junior security holders are merely entitled to receive whatever is left, if anything, after satisfying the prior claim of the preferred holders. For the basic question which presses for answer is: "But what *is* the correct measure of the preferreds' preferential claim?"

A preferred stock does not have a *prior* claim in liquidation by virtue of any divine ordinance, nor even one enacted by man. To the contrary, the settled rule of law is, [fol. 135] and has long been, that a preferred stock has no preference in liquidation except such as is expressly granted in the corporate charter; and if the charter is silent the preferred holders merely participate in liquidation *pro rata* with the common, share for share.[5a] On such a basis the preferred holders of Engineers would have realized something less than $50 per share in this liquidation.

The charter of Engineers, however, grants to the preferred holders a preferential claim to the extent of $100 per share in any liquidation "not voluntary"; and neither the Commission, the District Court nor this Court found the liquidation of Engineers to be "voluntary" within the charter meaning. Thus, $100 per share necessarily marks the outer limit of the preferred's contractual *preference* in liquidation; and no *preferential* claim can exist which

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have no relation to anything in the existing world. Its axioms or assumptions may be nonsensical from the point of view of what has happened or is happening or will ever happen. * * * Bertrand Russell was speaking of pure mathematics when he said, 'Mathematics may be defined as the science in which we never know what we are talking about nor whether what we are talking about is true."

[5a] See authorities cited at p. 40, note 106, of our Main Brief (dated September 15, 1947).

does not stem from the contractual undertakings of the parties as embodied in the corporate charter.

It does not lie in the power of an administrative agency or even of a court of equity to enlarge the *preferential* claim of senior security holders, because such preference is purely a creature of contract. If in a liquidation or reorganization equitable considerations are found to warrant payment to senior security holders of amounts in excess of the preferential claim established by the charter, such additional amounts do not form part of the *preferential* claim of the senior security holders but merely constitute a supplemental claim which must be balanced against corresponding equitable considerations in favor of the junior security holders.[8]

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[8] In *Otis & Co. v. S. E. C.*, 323 U. S. 624, the Supreme Court held that the preferential charter liquidation claim of the preferreds was not "matured" by the mere simplification and reorganization of the continuing holding company system there involved, and that fairness and equity required some participation to compensate the common holders for their measurable claims in the foreseeable future income of the continuing system. The Supreme Court did *not* find that the preferred holders, even in a reorganization of a continuing system, have a preferential claim *in excess* of that provided by the charter. Nor did the District Court or this Court, in the instant case, in stating that the charter provisions were not necessarily "dispositive of the issues presented", undertake to say that the preferred holders could under any circumstances be deemed to have a *preferential* claim in excess of that agreed to in the charter contract. At most both Courts were stating that the preferential claim might be added to or subtracted from, if special equitable considerations warranted, in determining the final rights of the respective classes of security holders; but to the extent that any amount in excess of the charter preference was allowed, such additional amount would not be a *preferential* claim but merely an additional allowance predicated on equitable considerations which would have to be balanced against corresponding equitable considerations in favor of the common holders. "All pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached

[fol. 136] The failure to recognize this fundamental principle must necessarily lead to the shocking result under the "investment value" doctrine as applied by the Commission in the instant case that senior security holders may be held entitled (absent a call provision) to receive in an authentic liquidation amounts 50% *or more*[7] in excess of the preferential claim accorded them by charter *leaving little or nothing for junior securities possessed of substantial value on the basis of every recognized criterion of reorganization law.* This wholly inadmissible result was clearly foreseen by Judge Leahy when he stated:

> "The argument for payment of the premium is comparable to dealing cards off the top of a deck. When full hands (based on theoretical 'investment value') have been dealt to all the senior security holders, the common would merely get whatever happens to remain. Under the Act the interest of all investors must [fol. 137] be considered. An emphasis on a preferred's rights must not slight the interests of a common stockholder. For if this occurs this is the direct opposite of the arguments utilized in United Light & Power, D. C. Del., 51 F. Supp. 217, aff'd 3 Cir., 142 F. 2d 413, aff'd sub. nom. Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, where participation was accorded the various security holders in accordance with the standard of colloquial equity" (R. 291a).

At pp. 93-95 of our Main Brief we demonstrated graphically the disastrous impact of the Commission's investment value doctrine when employed to value merely senior securities in a liquidation, while relegating the common to receive the "residual interest", *if any.* And this Court correctly apprehended the vice of this approach when it stated:

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by the approach *ex* the Act or the approach *intra* the Act. The new doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equivalents enunciated in the Otis & Co. decision" (this Court's Opinion, p. 30).

[7] See, for example, Reply Brief of the Commission, p. 22:

> "For example, 6% preferred stock would be worth, if noncallable, approximately $175 on a 3.42 percent yield basis and $160 on a 3.75 percent yield basis."

> "* * * In the instant case the Commission ascribed 'investment value' to the preferreds but failed to make a similar approach to the common * * *" (p. 27).
>
> "* * * But whatever technique is chosen it must be employed consistently throughout the entire operation of valuation. * * * No particular, specific approach is to be nailed to the Commission's head. The Commission must, however, approach the problem of valuation with a full view of all the pertinent factors employing the same scales and the same measure throughout" (p. 29).

4. The futility of the attempt to contravene this Court's finding that the paramount criterion of future earning power was neglected by the Commission.

We believe that the foregoing discussion adequately demonstrates the futility and error of Petitioner's insistence that the Commission adequately "valued" the common stock by merely allowing to it whatever "value" remained after paying over to the preferreds the amounts determined on the basis of "investment value ex the impact of the Act". Brief reference may now be made to Petitioner's [fol. 138] equally futile and erroneous insistence[8] that this Court erred in stating (p. 26):

> "But we think it is clear that it did not give any substantial consideration to the future earning power of Engineers and its subsidiaries which the Supreme Court has held is one of the fundamental tests for reorganization valuation."

Finding itself wholly unable to controvert this completely accurate finding, Petitioner seeks to advance two arguments:

> (1) That the witnesses before the Commission did accord some consideration to *past* earnings, and did not find it necessary to "dwell" on a forecast of *future* earnings because of the "absence of any controversy

[8] Commission petition, p. 16.

that the * * * risk factor was such that in the absence of the call privilege the stock would have an investment value substantially in excess of the call price";[9]

(2) That the Commission found "by reason of economic value added in the reorganization process, the common stockholders were substantially better off as a result of the plan than before".[10]

Both of these arguments are patently devoid of merit. With respect to the first, it is to be noted that the tables of past earnings coverage set forth in the Commission's opinion without discussion[11] demonstrate a woefully slim margin of coverage in past years which fully justified the characterization by Barnes, President of Engineers, that [fol. 139] these preferreds were "closer to a low grade preferred", and which clearly cast grave doubt on their future "investment value" if permitted to remain outstanding.[12] Moreover, even accepting *arguendo* the extremely dubious

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[9] Commission petition, pp. 16-17.

[10] Commission petition, p. 14.

[11] R. 64a-65a.

[12] R. 1138a, 1140a: It is to be noted that on a consolidated or system basis, the tables showed fixed charges and preferred dividends to have been earned during the period 1937-1945 by the scant margin of only 1.3 times, and that if the survey had been carried back several more years it would have shown that preferred dividends had not been covered *even once* during certain of those years (R. 1433a, 1434a).

Although Petitioners customarily refer to the Engineers preferreds as though they were the top-ranking security of the Engineers system, the fact of the matter is that they were actually a highly speculative *junior* security; the Commission's opinion itself concedes that the Engineers preferreds were *junior to 66.2% of the capitalization of the system* (R. 64a). Consequently, when system earnings were adversely affected, the impact on the Engineers preferreds was immediate and drastic. During the depression years, not only were the Engineers preferreds in default of dividends, but the preferred stocks of the operating company subsidiaries also had large dividend arrears (R. 1444a).

contention that the Commission might be excused from performing the vital task of determining future earning power merely because of "the absence of any controversy" that the preferred would *presently* have an investment value in excess of call price, the fact of the matter is that President Barnes (one of the two witnesses on valuation) *vigorously and repeatedly disputed* that such "investment value" could be accepted for the future as a "fair value", or as any value "which will be maintained as an average for an indefinite time in the future."[13]

Finally, it may be observed that the attempt now to urge that the Commission did give consideration to the future earning power of the enterprise is not only unpersuasive, but is also scarcely consistent with the virtual admission of Commission Counsel in their Main Brief that the Commission was merely concerned to determine the cash equivalent of the price which the preferred stockholders would [fol. 140] have had to pay *at that time* to reinvest in an allegedly "comparable" security.[14]

Turning now to the second of Petitioner's arguments referred to above, it is plain that any such "finding" by the Commission could certainly not be deemed a substitute for valuing the future earning power of the enterprise for

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[13] R. 522a-523a, and see also additional quotations at pp. 73-4 of our Main Brief.

[14] See, for example, note 30, p. 28, of Commission Main Brief:

> "* * *. But regardless of the types of plan involved, forecasts as to the future are involved only with reference to a present appraisal of the fairness of the exchange. Here the possible yield from the cash proceeds was susceptible of measurement only on the hypothesis of reinvestment in a comparable security, in which event, as shown above, the cash equivalent must necessarily be measured in relation to the *current value* of the security surrendered. Apart from this reinvestment hypothesis, and looking only upon the immediate impact of the plan to compel the termination of the preferred stockholders' investment, we submit that there can be no objection to measuring the *current* value of that investment." (Emphasis supplied.)

reorganization purposes. But in any event, there is not even such a "finding", nor could there be.

The only possible basis for this expansive pronouncement of Petitioner is the statement in the Commission's opinion to the effect that "the retirement of the preferred stock will be of immediate benefit to the common stockholders".[15] An examination of the context in which this statement appears, however, makes it incontrovertibly plain that the Commission merely recognized that the impact of Section 11 on Engineers had been so severe, and the degree of governmental frustration of the enterprise so great, that the preferred stock had been transformed *as the result of the Act* into a burden for the common stockholders, instead of the valuable advantage it had formerly [fol. 141] constituted and would at present constitute, *if not for the Act*.[16]

[15] R. 69a.

[16] The Commission's own words leave no room for argument on this point (R. 59a):

> "The reduction of the Engineers holding company system from its previous size and diversity to a single operating company necessitates a commensurate contraction of its financial structure. Engineers' outstanding preferred, instead of providing valuable leverage for the common, has become a burden."

It is thus plain that it was *solely* the restrictions and sacrifices imposed upon Engineers *by the Act* which, even prior to the necessity for dissolution, had transformed the preferred from a valuable asset into a burden.

Cf. also, p. 37 of our Main Brief:

> "The process of liquidating Engineers had been under way in some measure ever since the passage of the Act in 1935, and has been large-scale since 1941. Yet throughout this entire period and long after the company was able to employ its senior capital profitably, the preferred stockholders have claimed and received dividends at the full rate stipulated in a contract which contemplated continuance of a going enterprise and not piece-meal protracted liquidation under Section 11 of an Act not foreseen."

Even disregarding the impact of the sacrifices and partial liquidation imposed on Engineers during the decade since adoption of the Act and prior to the final plan, it would still have been highly advantageous to the common stockholders of Engineers if they had been permitted to retain their enterprise alive, *and to continue the preferred stock outstanding.*[17] But again the Act intervened to impose upon them the final and ultimate necessity—the complete dissolution of the remainder of the enterprise. Under these circumstances, to refer to the "advantages" to the common of retiring the preferred stock which the Act alone had transformed from a "valuable asset" into a "burden" (as the Commission itself recognized), partakes of the character of "an exercise in semantics" to at least as great an extent [fol. 142] as the analysis of the preferreds on a fictional "going concern basis", respecting which Judge Leahy so cogently stated:[18]

> "Analysis of the value of the Engineers preferreds on a 'going concern' basis is largely an exercise in semantics, since the Act dictates the dissolution of Engineers and of the entire holding company enterprise, and thus makes impossible the 'going concern' in which the preferred and common stockholders engaged to invest. *If not for the requirements of the Act, Engineers as a 'going concern' would have been free to take advantage of the present low money markets by calling and redeeming its preferred stocks and replacing them with preferred stocks carrying a lower dividend rate than those now outstanding; it would thus continue to enjoy the leverage advantages of senior*

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[17] Many sound utility operating company stocks can now be purchased at a price equal to 8 times current earnings, equivalent to approximately 12½% on cost. If not for the Act, Engineers' common holders would have been free to retain the capital of the preferred holders without any limitations of time at an over-all cost of approximately 5.40%, while realizing some 12½% upon this capital; or, in the alternative, the common stockholders had the option of calling the preferred stock and replacing it with preferred carrying an even lower dividend rate (cf. Judge Leahy's statement quoted above in the text).

[18] R. 311a-312a.

capital, but at a substantialy lower cost. Under these circumstances, payment of the premiums to the preferred stockholders would have been consonant with the purposes and intent of the charter redemption provision. *But the Act has made it impossible for the Company and the common stockholders to avail themselves of these benefits contemplated by the contract,* along with the many other advantages which would have accrued to them as a going concern, exclusive of the impact of Section 11.' " (Emphasis supplied.)

II

The argument that the Court's "mandate" requires the Commission to perform the "fruitless" and "impossible" task of "computing" the losses under the Act.

1. Petitioners set up a straw man through adoption of a distorted interpretation of the Court's language.

A major argument of Petitioners is that the Court's opinion "is susceptible of the construction that it imposes [fol. 143] upon the Commission both a legally irrelevant and an administratively impractical task".[19] In our view, however, the opinion is "susceptible" of such a construction only as the result of subtle exaggerations and misplaced emphasis of certain sentences in the Court's opinion.

As to the contention concerning the "legal irrelevance" of the factors stressed in the Court's opinion, we believe the discussion set forth above has demonstrated that this contention rests on Petitioners' basic misconception that the Commission has the right and power to enlarge the *preferential* claim of the preferred holders in disregard of all contractual limitations, in disregard of the values and equities of the common, and in disregard of the reality that the holding company enterprise has terminated for the common as well as for the preferred. Further discussion of this contention seems unnecessary.

Turning now to the argument that the Court has imposed on the Commission the "administratively impractical" task of "computing" all losses imposed on Engineers through the operation of the Act, we suggest that the

[19] Commission petition, p. 1; see also pp. 20-28.

Court's language is *not* susceptible of such construction on any fair or reasonable basis. An examination of the language to which the criticism is directed [20] establishes at the outset that the Court did not state that such losses must be "computed", but merely that they must be "weighed into the calculation". The significance of this distinction should be obvious, for it makes plain that the Court had [fol. 144] no intention of insisting upon the exact ascertainment and computation of each loss sustained by Engineers, but merely upon giving reasonable and due consideration to the fact that such losses (without necessity for precise computation) had been sustained.

Moreover, the Court emphasized that even this relatively simple task was not mandatory upon the Commission, unless the Commission elected to determine values "ex the impact of the Act"; in such event, the Court held, logic and consistency would be violated if the Commission took into consideration in valuing the *senior securities only* "ex the impact of the Act", favorable factors created by the deprivations and sacrifices imposed upon the common stockholders by this very same Act. *The Court was at pains to point out that what was required from the Commission was not the employment of any one particular technique, but simply logical consistency in the application of whatever technique the Commission elected to use.* We do not see how the Court could have made this plainer than its statement that (pp. 28-9):

> "The selection of possible though varying techniques is for the Commission in the exercise of its expert

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[20] "The difficulty with the Commission's position in this connection, the formula of 'investment value' aside, lies in the fact that while it has attempted to appraise the preferreds (as distinguished from the common) *ex* the Act its basis of valuation, insofar as it has composed one, lies in factors which have come to existence because of the impact of the Act. Paradoxically, though the paradox is more apparent than real, if the equitable equivalents for relinquished securities are to be arrived at by the Commission under the doctrine of the Otis & Co. case, *ex* the Act, losses of the sort referred to in this paragraph must be *weighed into the calculation*, i.e., such loses should be returned to the credit side of the enterprise's balance sheet as a matter of bookkeeping" (p. 28, emphasis supplied).

administrative judgment. But whatever technique is chosen it must be employed consistently throughout the entire operation of valuation. We do not say that the Commission must approach the problem *intra* the Act or *ex* the Act as the Commission purports to have done in the instant case. Either course consistently followed could, we think, lead to just and appropriate valuations. *No particular, specific approach is to be nailed to the Commission's head. The Commission must, however, approach the problem of valuation with a full view of all the pertinent factors employing the same scales and the same measure throughout.*" (Emphasis supplied.)

It is thus only if the Commission itself elects to adopt the approach of valuation "ex the impact of the Act", that the problems of which Petitioners complain arise at all; and even in such event the Court's language does not justify the exaggerated complexity which Petitioners insist [fol. 145] upon attributing to the fair and consistent approach besought by the Court.[21]

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[21] Thus, in their Main Brief Counsel for the Commission embarked upon an involved exposition of "Account 107" and "Account 100.5" items in an effort to impress this Court with the "speculative morass" created by Judge Leahy's reference to the loss sustained by Engineers in connection with Puget Sound (see our Main Brief, pp. 87-88). Now Petitioner comes forward with a new barrage of "speculative conjectures" with reference to the Puget Sound loss in an asserted "demonstration" of the "time consuming and well nigh impossible" task which it is alleged this Court's Opinion has imposed on the Commission (Commission petition, pp. 22-26). Once again we are impelled to suggest that the various arguments advanced on this score "have little bearing on the question except insofar as they may serve the purpose of *creating an atmosphere of pseudo-complexity*" (Main Brief, p. 87).

Analysis of the new arguments establishes that Petitioner is unable to controvert the finding of this Court and the District Court that the Commission allowed only 3% of the common stock of Puget Sound to Engineers on the assumption that future earning power would be somewhere between $2,657,000 and $3,083,000 per year whereas Puget's earnings

[fol. 146] Furthermore, Petitioners' concentration upon the alleged difficulties of "computing" the losses resulting from divestments required by Section 11 of the Act, places an unduly restricted emphasis upon "the factors which have come to existence because of the impact of the Act" [22] which this Court and the District Court had in mind as having been credited to the investment value of the preferred at the expense of the common. Thus Judge Leahy, in his "*care-*

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for the past several years have averaged in excess of $5,000,000 per annum (Court's Opinion, p. 28). From this very fact alone it is axiomatic that if the Act had not compelled the drastic recapitalization of Puget at the low point in its earnings, Engineers would have realized far more on this investment than it was permitted by the Commission's orders. Apart from the Act there was nothing to compel the immediate recapitalization of Puget, and an unchallenged offer of proof before the District Court established that the equity interest which Engineers was forced to surrender for approximately $774,000 had a current realizable cash value of $10,000,000 (Main Brief, p. 88).

Petitioner's further argument that there is "an ever present possibility" that Puget's properties may be sold to Bonneville Administration or may be acquired by condemnation by local public bodies, not only fails to establish that such events would necessarily cause further loss to Puget's stockholders but on the contrary suggests that the stockholders may thereby be enabled to recoup a large measure of past losses sustained. Indeed, reputable investment advisory services are presently urging the purchase of Puget's securities primarily on the basis of the enhancement that may be realized if either a sale or condemnation takes place.

It must again be pointed out that this Court did not require the amount of such losses as Puget to be "computed", nor did the District Court, which stated: "It is not necessary to determine this amount with exactitude" (R. 307a). Moreover, it is significant that Petitioner does not even make reference to Engineers' losses in such stark and simple instances as El Paso Natural Gas, where the $4,000,000 sacrifice (Court's Opinion, p. 28) has now increased to more than $6,000,000.

[22] This Court's Opinion, p. 28.

ful and far-reaching examination of the relevant factors",[23] laid great stress upon the approximately $24,500,000 of earnings which had accrued to the interest of the common stockholders since the adoption of the Act, and which had been left in the system largely to provide for the liquidation which Section 11 dictated.[24] This was indisputably one of the highly important factors which came into existence "*because* of the impact of the Act", yet the preferred stockholders and the Commission blandly appropriated this vast amount withheld from the *common* in order to provide for the liquidation necessitated by the Act, in determining the so-called investment value of the *preferred* "*ex* the impact of the Act."[25]

[fol. 147] 2. The Commission experienced no difficulties in considering the "pertinent factors and equities" prior to adoption of its new "investment value" doctrine.

Petitioners further complain of the "burden" imposed upon the Commission by this Court's admonition that:

> "All pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached by the approach *ex* the Act or the approach *intra* the Act" (p. 30).

In the light of Petitioners' plaints as to "the legal irrelevance" and "administrative impracticability" of according consideration to the factors mentioned by this Court, as well as to such factors as the issue price and past market

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[23] This Court's Opinion, p. 25.

[24] Findings of Fact 34, 35 and 47 of the District Court (R. 306a, 312a).

[25] See Finding of Fact 47 (R. 312a):

> "The favorable effect upon the values estimated by Badger for the Engineers' preferred stocks, of the large amount of earnings which have accrued to the equity of the common stockholders of Engineers and have been retained within the system under the circumstances referred to above (Paragraphs 34 and 35) is clearly evident in the importance attributed by Badger to the large amount of liquid assets and cash in the Engineers' system, and to the high ratio of 'net quick assets to prior obligations.'"

history and low investment rating of the preferreds referred to by Judge Leahy, it may once again be pointed out [26] that for a period of some five years the Commission's decisions consistently accorded such factors detailed consideration; indeed, they accorded such factors *controlling weight*. These decisions of the Commission, uniformly approved and enforced by the courts, scarcely bear out Petitioners' present contentions either as to the "legal irrelevance", or the "administrative impracticability" of according consideration to such factors. Nor is there room for an argument that these decisions were superseded by the *Otis* decisions, since many of them were issued by the Commission *subsequent* to the Supreme Court's decision in the *Otis* case. Thus, for example, in its *Interstate Power Company* decision, submitted to Judge Leahy for enforcement only a few weeks prior to the Engineers case, the Commission held that owners of *first mortgage 5% bonds of an operating company* were entitled to receive only the par value, notwithstanding the fact that the bonds had been selling at a premium of 3-3½ points above par, the Commission stating:

> [fol. 148] "The bonds were originally sold to the public in 1927, 1928 and 1931 at prices of 97½, 96 and 93, respectively. During most of the years since issuance, the bonds have sold on the market at prices substantially less than par; indeed the bonds never sold as high as par until 1945. In 1937 the bonds sold as low as 32; and as recently as 1940 they sold at a low of 51½. At original issuance and sale of the bonds in 1927, a rating A was assigned them by *Moody's Investors Service*, Standard Statistics rated them B1+. In following years, both ratings were successively lowered to a Moody rating of B in 1938, and all subsequent years, and a Standard's rating of C1 + in 1940 and all subsequent years." [27]

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[26] See discussion in our Main Brief at pp. 60-70, inclusive.

[27] *Interstate Power Co.*, H. C. A. R. No. 7143 (Jan., 1947); approved and enforced, 71 F. Supp. 164 (D. C. Del., 1947); cf. also the Commission decisions cited in n. 161 (p. 67) of our Main Brief. And see a Commission decision issued only two weeks ago (*Republic Service Company*, H. C. A. R. No. 8170, April 30, 1948), in which the Commission re-

Yet, the very same factors referred to by the District Court in the instant case, pointing to *an even more speculative caliber* for the Engineers' preferreds,[28] were wholly ignored by the Commission in its decision; and Petitioners now seek to contend that this Court has imposed upon the Commission an onerous task which is "legally irrelevant" and "administratively impractical", in requiring such factors to be considered.[29]

[fol. 149] III

The argument that remand to the Commission will be prejudicial to the common stockholders.

1. The proceedings should not be remanded to the Commission, but for reasons very different from those urged by Petitioners.

Petitioners warn that:

> "* * * to require a remand * * * is to require a statement in different terms of what the Commission has already found. Delay in complying with such a requirement would impose an added burden of expense upon the common stockholders whose rights the Court seeks to safeguard, since the common stockholders bear the costs of maintaining the escrow funds,

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affirmed an allowance of only par to holders of debentures, *emphasizing their past market history and original issue price* (p. 9).

[28] See detailed comparison set forth in n. 169 (p. 70) of our Main Brief.

[29] While the decisions of the Commission above referred to did not discuss the subject of losses sustained by the various holding companies in complying with the Act (a subject which is naturally one of some delicacy for the Commission) we believe the preceding discussion demonstrates that Petitioners' fears as to the onerousness of this task must evaporate once it is understood that the Court was not insisting upon a precise "determination" and "computation" of the amount of such losses, but merely a general recognition of the existence of this factor as among those to be "weighed into the calculation" in considering the equities.

regardless of whether the preferred or common stockholders ultimately prevail in this litigation."[30]

With respect to the contention that remand of these proceedings to the Commission will result in regrettable delay at the expense of the common stockholders, we are obliged to agree; *although for reasons very different from those suggested by Petitioners.* Indeed, if not for our anxiety to avoid aggravating the delay, we ourselves would previously have requested a rehearing limited to the final portion of the Court's opinion dealing with the necessity of a remand of these proceedings to the Commission.[31] For while we recognize the force and validity of the general proposition enunciated by the Court that a District Court may not place into effect a Section 11(e) plan amended [fol. 150] by the District Court in important respects not passed upon by the Commission, we urge that in the instant case the Commission itself took the position that if the District Court's disapproval of the premium payments was legally valid remand of the proceedings to the Commission would be neither necessary nor desirable. Indeed, Commission Counsel *urged* Judge Leahy *not to remand the plan to the Commission* if he disapproved the premium payments, but merely to require an escrow fund covering the premiums and expenses to be set up pending appellate review of the legal soundness of Judge Leahy's decision.[32]

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[30] Commission petition, pp. 15-16 (footnote reference omitted).

[31] In view of the fact that this delay has now ensued as the result of the filing of Appellants' petitions for rehearing, we respectfully request that the Court treat this portion of our answer as in substance a cross-petition for rehearing on this limited aspect of the Court's opinion, and that the time for filing may be deemed enlarged to the extent necessary to meet the requirements of Rule 35 of the Court's rules.

[32] Thus, at the hearing before the District Court on Feb. 17, 1947, when Mr. Tucker, counsel for Engineers, stated that if the Court was unable to approve the plan in its entirety, "it goes back to the Commission" (R. 281a), Mr. Slater, Commission Counsel, stated to the Court:

"If your Honor please, I hesitate to do so, but we must disagree with the statement just made by Mr.

This course was fully consistent with the *express provisions* of the Commission's Amendatory Order of February 11, 1947 (R. 165a), in which the Commission approved payment to the preferred holders of $100 per share, and of any additional amounts which might be decreed "by the District Court or any appellate court" (R. 174a); and the Commission subsequently approved and joined in presenting to the District Court the escrow agreement annexed to the Court's decree which explicitly provides that the money [fol. 151] in the escrow fund *shall be released and paid over to Engineers* upon proof that a final decree of the Commission or of a Court having jurisdiction determines that the preferred holders are not entitled to receive more than $100 per share plus accrued dividends (R. 328a). Judge Leahy having followed the procedural course urged by the Commission, and this Court having affirmed Judge Leahy's determination holding the payment of the premiums unfair and inequitable, we respectfully submit that the order of the District Court should have been affirmed, rather than ordering the proceedings remanded to the Commission.

While recognizing that even the Commission may lack the power to alter by waiver, stipulation or estoppel the statutory requirements for approval of a Section 11(e) plan by both the Commission and the enforcing Court, we submit that the action of the Commission referred to above constituted *effectual approval* by the Commission of the

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Tucker. As we view this escrow, it is a two-way escrow. The Commission or the preferred stockholders might appeal in the event that this Court should determine only one hundred dollars is payable. The common stockholders have indicated they would appeal if the Court agreed with the determination of the Commission. But certainly the reorganization process and equity powers of this Court can't be so inflexible that this Court can't by appropriate order approve those portions of a plan which are clearly separable and in no way impinge on the controverted portions of a plan. * * * It is just silly to upset ten-elevenths of this plan, at least that, if not ninety-nine-one hundredths, simply because there is a disagreement as to a segregated small portion in relation to the whole of what we are doing here. * * *" (R. 281a).

plan as amended to provide for payment of the preferred holders of $100 per share, subject only to judicial review as to the legal authority and correctness of the District Court's determination that payment of the premiums was not consonant with the standards of fairness and equity.

Thus, subject only to this further judicial check on the premium point (which this Court has now supplied) *the statutory requirement for approval of the plan by both the Commission and the enforcing Court had been satisfied.*[33]

[fol. 152] If it be urged that this procedure was not characterized by a sufficiently rigid formalism, we submit that flexible and somewhat informal procedure of the type outlined above is sometimes necessary in the course of a com-

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[33] See Commission petition, p. 5 (note 1) where, after a somewhat oblique statement of the issue, it is conceded: "* * * the Commission has *already* contingently approved an *alternative allocation* of cash to preferred stockholders *at the amount of the liquidation preference* if as a result of the processes of review in the District Court and on appeal therefrom this should be judicially determined fair and equitable." (Emphasis supplied.)

Clearly, throughout the proceedings it has been the understanding of the parties that if this Court upheld the authority and reasoning of the District Court in disapproving payment of the premiums, remand of the proceedings to the Commission would be neither desirable nor necessary: as Commission Counsel stated to this Court in their Reply Brief (p. 3):

> "* * * we believe it follows that if appellees are right in assuming $100 a share to be the proper measure of the preferred stockholders' claim, then there are no considerations of colloquial equity upon which the Commission would rely as a basis for according an increased participation to the preferred stockholders."

And similarly, Home Insurance Co. stated in their Main Brief (p. 25):

> "* * * the Commission has already evaluated all the relevant factors considered by the Court. No useful purpose would be served by remanding the case to the Commission under the circumstances."

prehensive reorganization in order to conform to the spirit of the Supreme Court's admonition that:

> "These reorganizations may be attained only through properly coordinated action between the Commission and the Court."[34]

2. The drastic change in money rates has now made impossible on any basis an award of more than $100 per share of preferred.

As we stated at the outset of our discussion on this point (*supra*, p. 21) our agreement with the contention that remand of these proceedings to the Commission will result in prejudicial delay, entirely at the expense of the common stockholders, is predicated on very different reasoning from that advanced by Petitioners. In essence, Petitioners seek to argue that upon remand the Commission might merely [fol. 153] restate "in different terms" its finding that the preferred holders are entitled to the premiums. Not only does such a suggestion flout both letter and spirit of this Court's opinion, including the Court's pointed statement that "* * * *we do not believe that such a finding could be supported on the present record*",[35] but it seems indeed little short of disingenuous in the face of the further drastic changes in money rates which have occurred since the case was submitted to this Court, *rendering an award in excess of $100 per share to the preferred holders impossible on any basis.*

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[34] *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 475 (footnote reference omitted).

See also *Continental Illinois Bank* v. *C. R. I. & P. Ry. Co.*, 294 U. S. 648, where the Court stated (p. 685):

> "Not only are those who institute the proceeding and those who carry it forward bound to exercise the highest degree of diligence, but it is the duty of the Court and of the Interstate Commerce Commission to see that they do. Proceedings of this character, involving public and private interests of such magnitude should, so far as practicable, be given the right of way both by the Court and by the Commission, to the end that they may be speedily determined."

[35] Court's Opinion, p. 30. (Emphasis supplied.)

When the proceeding was still before Judge Leahy, he had occasion to point out the fallacy of the astonishing assumption made by Badger, witness for the preferred stockholders whose views were adopted by the Commission, that the artificially low money rates prevailing at the time of Badger's testimony could be deemed "permanent".[36] Judge Leahy also took judicial notice of the sharp upward revision which had occurred in money rates in the relatively short period which had intervened between Badger's testimony and the Court's findings.[37] And this Court in its opinion referred to Judge Leahy's "cogent finding respecting Dr. Badger's use of interest rates as an aid in fixing values for the preferred * * *," and set out a portion of such finding in the margin.[38]

The course of money rates in the further period which has elapsed since Judge Leahy made these findings has [fol. 154] incontrovertibly established the cogency and expertness of his observation that:[39]

> "A continuance for two or three years of the trend indicated over the past year could substantially reduce or *wholly eliminate* the differential in the current yield rate over dividend rate in the case of preferred stocks of the type of Engineers." (Emphasis supplied.)

This "entire elimination" of the differential in the current yield rate over dividend rate of preferred stocks of the type of Engineers has now taken place. In consequence there has now been *completely wiped out* the *entire basis* on which the Commission held that the Engineers preferreds were entitled to receive amounts in excess of $100 per share. Thus, not only did both the District Court and this Court hold that the Commission's award of the premiums to the preferred holders was erroneous *even assuming the "investment value" found by the Commission,* but we are now confronted with the further fact that even on the basis of the Commission's own reasoning and computations *an "investment value" in excess of $100 per share*

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[36] District Court Finding of Fact No. 51 (R. 313a).

[37] Finding of Fact of No. 52 (R. 314a).

[38] Court's Opinion, p. 9 and note 9.

[39] Finding of Fact No. 52, R. 314a.

cannot possibly be found for these preferred stocks.[40] [fol. 155] In the light of the foregoing significant developments making it plain beyond cavil that neither the Commission nor the District Court at the present time could

[40] This can be easily demonstrated by the following table showing the increase in money rates compared with those found by Judge Leahy as of the date of his findings, and using the same reference sources (R. 314a):

	March, 1946 (date of Badger's Testimony)	*April, 1947 (date used by Judge Leahy)*	*March 31, 1948*
Federal Reserve Index of Utility Common Stocks	123	107	93*
Yield on Long Term Gov't Bonds	2.09%	2.19%	2.45%**
Yield on "high grade Corporate Bonds"	2.35%	2.49%	2.81%**
Yield on high grade Preferred Stocks	3.42%	3.75%	4.12%***

* Federal Reserve Bull., April 1948, p. 428.

** Federal Reserve Bull., April 1948, p. 426.

*** Standard & Poor's, Trade & Securities, Current Statistics Section, April, 1948, p. 27.

Using the increase in the yield on "high grade preferreds" as a guide, the above table shows that the yield of 3.42% at the time of Badger's testimony has risen to 4.12% at present, or an increase of approximately 21%. Based on the money rates prevailing at the time, Badger contended that the Engineers preferreds would have sold on a 4.6% yield basis "ex the impact of the Act". If an increase in the yield of Engineers preferreds had taken place merely to the same extent as is shown for "*high grade preferreds*", the Engineers preferreds would today sell on a 5.56% yield basis. Since the weighted average of the dividends on the three series of Engineers preferreds outstanding was slightly under 5.40% (the greater portion of the preferred having been of the $5 and $5.50 series), *it is evident that on the average the Engineers preferreds would now sell for something less than $100 per share*, even accepting *arguendo* Badger's estimate of 4.6% for the Engineers preferreds at the time he testified.

Moreover, the increase on the yields of low to medium grade preferreds such as those of Engineers *would neces-*

find that the Engineers preferreds have an investment value in excess of $100 per share, "ex the Act", "intra the Act" or on any basis whatever, it is *doubly surprising* to find [fol. 156] Commission Counsel suggesting that upon the remand the Commission might merely "state in different terms what the Commission has already found".[41] And all

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sarily be greater than the increase on "high grade preferreds", as Judge Leahy stated (R. 314a), thus indicating a present price for the Engineers preferreds probably in the neighborhood of $90 per share.

Full corroboration of the figures is furnished by consideration of the present yields of the very holding company preferreds which Badger employed in his report in determining the yield for the Engineers preferreds "ex the Act" (see R. 2109a and p. 6 of this Court's Opinion). Of the five holding company preferreds used by Badger, three are presently outstanding (Columbia Gas & Electric having been retired and Wisconsin Electric Power refunded). The following table gives the relevant data regarding the three now outstanding:

	Niagara Hudson Power	*Pacific Public Service*	*Public Service of New Jersey*
Market price used by Badger	$102.75	$26.50	$114.38
Yield found by Badger	4.87%	4.91%	4.37%
Market price 3/26/48	$97.38	$22.50	$105.00
Current Yield	5.14%	5.78%	5.27%

Reference may also be made to *Public Utilities Fortnightly* (April 22, 1948, p. 572) for a list of representative holding company preferred stocks selling on an average yield basis of 6.6%; some of these preferreds are the subject of recapitalization plans currently pending before the Commission.

[41] It is of course axiomatic in equity jurisprudence that the decree of a court of equity speaks "as of the date of entry", and must therefore take account of all material changes which have occurred since the commencement of the proceedings. See *Randel* v. *Brown*, 2 How. 405, 422; *McCabe* v. *Guaranty Trust Co.*, 243 Fed. 845, 849; *Brooks Bros.* v. *Brooks Clothing of California*, 60 F. Supp. 442, 456; *Knight* v. *Wertheim & Co.*, 158 F. 2d 883, cert. den. sub nom. *McGuire* v. *Equitable Office Bldg. Corp.*, 91 L. Ed. 1078, 67 S. C. 1535.

the more so since the Commission several months ago had occasion to take official notice of the sharp changes which have taken place in money rates during the very period here in question, and the significant impact of these changes upon "investment values ex the Act" of holding company preferred stocks. In its Findings and Opinion in *The United Light and Railways Company-American Light & Traction Co. et al.*, issued December 31, 1947 (H. C. A. R. No. 7951), the Commission stated (p. 33):

> "The record upon which the value of $40 (apart from liquidation) was reached, while incorporated in the present record, was made several years ago; while the Commission's findings were issued in May of 1946, *in what has since proven to be the peak of the post-war market.* The market has declined substantially from the highs reached at that time and there has been a material firming of interest and preferred yields. It is apparent that insofar as investment value is derived from an analysis of the current yields of comparable securities, *the investment value of American's preferred has been substantially affected in the interim.* In addition, there have of course been changes in the financial and business aspects of the company which have a direct bearing on the value of the security." (Emphasis supplied.)

In the Joint Answering Brief of Appellees (pp. 15-16) we discussed *seriatim* the various bases of valuation which have been recognized by the Courts in determining the [fol. 157] rights of security holders in liquidations and reorganizations, and showed that none of these methods would have permitted an award to the Engineers preferred stockholders in excess of $100 per share, such as was made by the Commission in this case by the use of its novel and erroneous "investment value ex the Act" doctrine.[42] Now

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[42] As we had occasion to point out in our Joint Answering Brief (n. 47):

> "This term is a double misnomer because: (1) the process to which it applies does not produce an estimate of 'investment value' in any true sense, but merely of theoretical market value as of a given moment; and (2) in appraising this theoretical market value, no attempt

that it incontrovertibly appears from facts which the Court may judicially notice[43] that *even on the basis of this investment value doctrine of the Commission* an award in excess of $100 per share cannot be made, this would seem pre-eminently a case calling for the application of the well-established principle that:

> "An appellate court in the exercise of its judicial discretion, on reversing a case, may render or direct final judgment where the ends of justice would not be promoted by a new trial."[43a]

In applying this principle to the review of the action of an administrative agency, the Supreme Court stated:

> "If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn the matter may be and ordinarily, we think, should be remanded to the Commission—the primary fact-finding body—with direction to make additional findings, *but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay* the court [fol. 158] has full power under the statute to do so. * * *"[44] (Emphasis supplied.)

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is made to segregate values which were actually created solely and directly by the Act. Therefore, this formula gives *neither* 'investment value', *nor* value 'apart from the Act'."

[43] See our Main Brief, p. 77, note 182.

[43a] 3 *Corpus Juris Secundum* 1426.

[44] *Federal Trade Commission* v. *Curtis Co.*, 260 U. S. 568, 580; see also *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 234, 297.

Cf. also *Ecker* v. *Western Pacific*, where the Supreme Court considered and decided an important point which the Court below had not even passed upon, stating:

> "As the matter is fully presented by the petition for certiorari and its decision is essential to a complete review of the District Court we have concluded to consider the question. § 240(a) Judicial Code, 28 U. S. C. § 347; *United States* v. *Bankers Trust Co.*, 294 U. S. 240, 290, 295. Such action is in the interest of expedi-

We respectfully submit that it would be consonant with the foregoing salutary principle, and with the admonitions of the Supreme Court concerning the importance of expediting proceedings of the character here concerned, if the Court saw fit to modify its judgment so as to affirm the order appealed from, and to eliminate the requirement for remand of the proceedings to the Commission.

IV

The argument that the Court's ruling as to the powers of the District Court will create practical difficulties.

The petition of the Commission, while "noting the extent of [their] disagreement" with the Court's holding as to the functions of the enforcement court in connection with a Section 11(e) plan, does not seek rehearing with respect to this portion of the opinion, stating (p. 4):

> "* * * we believe the relevant considerations have already been fully presented and considered and therefore do not seek to present anything further with reference to the issue of the scope of review."

[fol. 159] In the light of the foregoing, we see no need to present further argument on this phase of the decision, notwithstanding the insistence of the other petitioners in again pressing upon the Court the same fallacious arguments[45]

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tion. *Continental Bank v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 685. Cf. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 567; *Cole* v. *Ralph*, 252 U. S. 286, 290." (318 U. S. 448, 449, emphasis supplied.)

[45] For example, despite all that this Court had to say as to the special functions of the District Court as an equity reorganization tribunal under Section 11(e) of the Act, we note that the Streeter petition (p. 8) continues to argue that the functions of the District Court when called upon to enter its decree finding an 11(e) plan "fair and equitable", are no different from those of an *appellate court* merely reviewing an order of the Tax Court under the rule of the *Dobson* case. In like manner Petitioner Home Insurance continues to argue that the Court's decision in the *Standard Gas & Electric* case narrowly limits the District Court to the status of a review court even though the Court's language in that decision was expressly directed merely to the "*appropriate-*

which the Court rejected in the carefully considered and documented section of its opinion on this phase.

The Commission does, however, express concern respecting the practical difficulties which may result from a sentence in the Court's opinion (which in any event seems *obiter* to the decision in the instant case) as to the power of the District Court to "receive evidence *aliunde* the Commission's record respecting the fairness and equity of a plan".[46]

We think that the fears expressed by the Commission as to the possible adverse effects of the foregoing statement are not justified, particularly in view of the strict limitation carefully specified by the Court that such evidence may be received primarily in aiding the enforcement Court to determine whether the proceedings must be remanded to the Commission. Clearly, a court of equity must always be free, at the very least, to determine whether such change in material facts or circumstances has taken place [fol. 160] since the record was made as to require that it be reopened or supplemented.[47]

We assume that if a party before the enforcement Court sought to present evidence which did not relate to a change of facts or conditions subsequent to the closing of the record before the Commission, and that no satisfactory reason was suggested for the failure to adduce such evidence when the proceedings were before the Commission, the enforcement Court would normally be disinclined to receive such

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ness" of the "particular remedial measures" required to effectuate Section 11(b), and had no application to the vital standard of "fairness and equity". As this Court well said in its Opinion in the instant case (p. 23) concerning the aforementioned language contained in its *Standard Gas & Electric* decision: "Cf. In re Standard Gas & Electric Co. * * *, in which, however, the question here presented was not in focus." (Emphasis supplied.)

[46] Court Opinion, p. 17.

[47] See cases cited at note 41, supra. It may also be noted that in *Ecker v. Western Pacific R. Co.*, the Supreme Court, although functioning merely as an appellate review court, gave due consideration to figures presented to it by the parties showing change of earnings since the date when the record was closed before the Commission and the District Court (318 U. S. 448, 507-9).

evidence, even though it has the power to do so.[48] Faced with this likelihood, as well as with the respectful consideration which the Commission's findings are invariably accorded in the enforcement courts, we doubt that many litigants will run the risk of intentionally withholding from the Commission evidence deemed important, with a view to producing it in the district court for the first time.

Moreover, in the final analysis, we do not perceive any substantial difference between the language which this Court used at page 17 of its opinion to which the Commission takes so much exception, and that used by Judge Strum of the District Court of Florida which the Commission quotes with strong approval at pp. 3-4-5 of its petition. As we read the quoted language of Judge Strum, he too was of the view that the Court should hear evidence *aliunde the Commission's record* for the purpose of determining whether the proceedings should be remanded to the Commission.[49]

[fols. 161-162] Conclusion

The Court's opinion in the instant case has carefully considered and correctly decided all the important issues in the present appeal, and Petitioners have utterly failed to present any new or valid considerations or arguments to warrant imposing upon the Court the heavy burden of rehearing these voluminous and complex proceedings. On the other hand, remand of the proceedings to the Commission in the light of the objections to remand expressed to the District Court by Commission Counsel, and further in the light of the clear evidence that no amount in excess of $100 per share can now be awarded to the preferred holders on any basis, will unjustifiably further delay the termina-

[48] For example, the record establishes that when the instant proceeding was first argued before Judge Leahy, he inquired of all objectors whether they had previously presented their arguments to the Commission (R. 218a, 222a).

[49] "* * * So, if counsel considers the proposed evidence of such import that it ought to be considered by the Commission, I will hear you on that question for the purpose of determining whether the case should be remanded and referred with the suggestion that this evidence be considered * * *."

tion of this protracted litigation at the expense and to the substantial detriment of the common stockholders. Accordingly, we respectfully request that if any rehearing be granted, it should be limited to the sole issue of whether the Court should modify its decree so as to eliminate the requirement for remand to the Commission, and thereby to affirm the order of the District Court appealed from.

Dated, May 10, 1948.

Respectfully submitted, Alfred Berman, 30 Pine Street, New York, N. Y.; Herbert L. Cobin, 228 Delaware Trust Building, Wilmington 28, Delaware, Attorneys for Central Illinois Securities Corporation and C. A. Johnson, Appellees; Guggenheimer & Untermyer, New York, N. Y., of Counsel.

[fol. 163] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ANSWER TO PETITION FOR REHEARING AND CROSS-PETITION FOR REHEARING BY LUCILLE WHITE, et al.—Filed May 14, 1948

This answer is submitted on behalf of common stockholders, Lucille White and Frances Boehm, in opposition to the petitions for rehearing submitted by all of the appellants. Said petitions are opposed generally on the grounds that all of the arguments presented by the appellants have been fully presented in their briefs and argument before this Court and that, in any event, this Court has fully and carefully considered all of the arguments of the appellants and has rendered a comprehensive and clear decision which requires no clarification by way of rehearing.

[fol. 164] I

The Commission has had full opportunity to meet all of the issues in this case.

A reexamination of the Commission's briefs before this Court establishes beyond question that the Commission has had full opportunity and has taken advantage of that

opportunity to present completely every issue involved in this case. And the clarity and breadth of this Court's opinion discloses a full awareness of the position taken by the Commission.

The two basic issues presented by this appeal, as determined by this Court, are: (a) Did the Commission properly approve as "fair and equitable" within the meaning of Section 11(e) of the Public Utility Holding Company Act of 1935, 15 U. S. C. A. Sec. 79 k(e), cash payments in certain amounts to be made to the preferred stockholders of Engineers Public Service Company; and (b) did the court below err in refusing to approve the plan proposed by the Commission as "fair and equitable", deciding that the cash payments should be in lesser amounts than those set up by the Commission?

In contending that the plan is fair and equitable, the Commission has asserted and still asserts that it has applied the doctrine of equitable equivalents as enunciated by the Supreme Court in the *Otis* case. But this Court has neither misconstrued nor misconceived the arguments of the Commission, and in fact has taken judicial notice of its position (Opinion, p. 5):

> "The Commission asserts that it arrived at the amount to be paid in cash for the preferred stocks by the application of the doctrine of equitable equivalents as enunciated by the Supreme Court in *Otis & Co.* v. *Securities and Exchange Commission* (The [fol. 165] United Light and Power Co.), 323 U. S. 624. It takes the position that it has obeyed the clear mandate of the Act in that it has measured the rights to be surrendered by the preferred stockholders in terms of investment value; that is to say *ex* the Act which itself necessitated the dissolution of Engineers."

What this Court has made abundantly clear, which the Commission refuses to accept, is that the Commission has given consideration to only one of the factors to be considered in arriving at an "equitable equivalent for the rights surrendered" and has failed to consider and give due weight to other factors, which, if considered and weighed by the Commission, would establish that the equitable equivalent of the preferred stock is not in excess of $100 per share.

On this point, this Court clearly stated (Opinion, p. 30):

> "In determining equitable equivalents the Commission must weigh all pertinent factors to the end that the security holder may receive as nearly as may be the equivalent of that which he is giving up. All pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached by the approach *ex* the Act or the approach *intra* the Act. The new doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equitable equivalents enunciated in the Otis & Co. decision."

The argument raised by the Commission on page 3 of its petition for rehearing that it has in fact determined the value of the common stock by establishing the equitable equivalent of the preferred stock and therefore what remained was the value of the common stock on the basis of the Euclidian axiom that the sum of the parts equals [fol. 166] the whole, was fully presented by the Commission and disposed of by both the District Court and this Court. On this point, the District Court in its opinion (R., p. 291a) said:

> "The argument for payment of the premium is comparable to dealing cards off the top of the deck. When full hands (based on theoretical 'investment value') have been dealt to all the senior security holders, the common would merely get what happens to remain. Under the Act, the interest of all investors must be considered. An emphasis on a preferred's rights must not slight the interests of a common stockholder. For if this occurs this is the direct opposite of the arguments utilized in *United Light & Power*, D. C. Del., 51 F. Supp. 217, aff'd 3 Cir., 142 F. 2d 413, aff'd sub. nom. *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, where participation was accorded the various security holders in accordance with the standard of colloquial equity."

And this Court in its opinion (p. 26) said:

> "But if values for the securities are to be determined *ex* the Act, it is clear that the Commission should have done so. What the Commission has done

is to consider the investment values of the preferreds *ex* the Public Utility Holding Company Act, i.e., as if the Act had never been passed. But it considered only the preferreds on this basis. It seems to have omitted consideration of the common by a similar standard."

And at page 31:

"The problem is and will remain, until its disposition by the Commission, one of valuation of the securities of Engineers, viz., the preferred and the common."

[fol. 167] The Commission further argues that to reconstitute an eventful decade in the history of the Engineers system would be an impossible task. But no such task has been imposed upon the Commission by this Court. This Court has merely ordered the Commission if it elects to value the securities ex the impact of the Act to value the common on the same basis as it has valued the preferred and, in so doing, to give substantial consideration to the future earning power of Engineers and its subsidiaries.

The clarity of this directive should leave no room for any doubt. On page 26 of its opinion, this Court said:

"But we think it is clear that it (Commission) did not give any substanial consideration to the future earning power of Engineers and its subsidiaries which the Supreme Court has held is one of the fundamental tests for reorganization valuation. See *Consolidated Rock Products Co.* v. *Dubois*, 312 U. S. 510, 526, and *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 565-6. In the instant case the Commission made no attempt to ascertain the future earning power of the system nor to apportion earning power between the preferreds and common based on their respective claims to income as it did in the United Light & Power Company case."

This Court at page 27 also pointed out that the Commission had failed to consider the losses sustained by Engineers by reason of the impact of the Act:

"The anomaly of the Commission's general position is made all the more apparent, we think, by its failure to consider the substantial losses which oc-

curred to Engineers by virtue of divestitures compelled by the Act. * * * We desire to make it clear that we do not criticize, or even suggest criticism of, the Commission because of its orders compelling these [fol. 168] divestitures which were required by the Act. Hindsight demonstrates facts which foresight, however apt or well-informed, may not be able to foretell. But if the Commission is to make valuations ex the Act in respect to the preferreds, it must do likewise in respect to the common."

The argument raised by the Commission on page 28 of its brief that a reexamination of executed transactions constitutes a collateral attack upon past decisions was raised by the Commission in its original brief before this Court. On page 35 of their brief, the Commission said:

"More fundamentally, the district court, by seeking to shift the burden of a sale of assets long after the sale occurred and was approved, seeks to affect collaterally the decisions reached at the time of the sale when they are no longer open to direct attack."

However, there is not the slightest intimation of collateral attack either in the language of this Court's opinion or in its effect. What the Commission overlooks, or refuses to accept, is the decision of the District Court and this Court that it has failed, in its determination of equitable equivalents, to give any weight or consideration, or has given insufficient weight and consideration to certain factors such as the losses sustained by Engineers as the result of the divestitures of Puget Sound and El Paso. The following portion of this Court's opinion should leave no room for any doubt on this score (Opinion, pp. 29-30):

"The difficulty in sustaining the Commission's position in respect to 'investment value', even in so far as the Commission has applied that value, lies in the fact that investment value is and can be only *one* of a series of factors to be used in arriving at equitable equivalents. We conceive that the Commission could make a finding under certain circumstances that in- [fol. 169] vestment value was the equitable equivalent to the security holder. The Commission in the instant case, however, has not made such a finding and we do

not believe that such a finding could be supported on the present record. In determining equitable equivalents the Commission must weigh all pertinent factors to the end that the security holder may receive as nearly as may be the equivalent of that which he is giving up. All pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached by the approach *ex* the Act or the approach *intra* the Act."

Moreover, in stating that such factors should be "considered", this Court did not state or even infer, as petitioners suggest, that they must be determined with anything approaching mathematical exactitude. In other decisions, the Commission has found no difficulty in according consideration to such factors. But now an attempt is made by petitioners to draw a gruesome picture for this Court of the terrible "burden" which such consideration would impose on the Commission.

The argument raised on page 7 of its petition by the Commission that a step by step approach to the reorganization of Engineers was a necessity is wholly irrelevant since this Court went out of its way to point out on page 28 of its opinion, that the past actions of the Commission are not subject to criticism by this Court.

II

The function of the Section 11(e) enforcement court was fully considered by this Court.

The points raised by the Commission concerning the function of the Section 11(e) enforcement court were most fully presented by all the appellants not only before the [fol. 170] District Court but also before this Court. No better reply to the raising of this issue again on the petition for rehearing can be found than in the opinion of this Court. The most exhaustive analysis not only of the Act itself and the judicial determinations thereunder, but also of the legislative history and the Congressional debates preceding the passage of the Act fully set forth in its opinion establishes beyond a peradventure that this Court has given full and complete consideration to all aspects of this issue.

It is interesting to observe how the temper of the Commission's argument has waned. Whereas, in its brief to this Court, the Commission stated (pp. 16-17): "Chaos in the administration of Section 11 would result from sustaining the precedent established by the district court * * *", in its Petition for Rehearing the Commission has in fact eliminated this issue completely (Petition for Rehearing, p. 36) by stating:

> "We have believed and still believe that there has been no real problem in adjusting the complementary roles of the Commission and the courts so long as both apply the same consistent and determinable legal standard of fairness and equity on the same record."

The contention advanced by the Commission (p. 29) that the effect of this decision would be to "place burdens on the enforcement courts which could not conscientiously be discharged without causing great delay" is entirely without foundation and a reflection upon the District Court. We believe and this Court apparently also believes that the District Court is well qualified to pass upon all questions which may arise concerning the enforcement of a plan of reorganization including the question of whether or not new evidence should be accepted, before the case is re- [fo]. 171] manded to the Commission for further consideration. The argument that if objectors are not limited to the administrative record they will be encouraged to dispense with even familiarizing themselves with the administrative record before making their proffers of proof in the District Court" seems to us puerile. Unless objectors familiarize themselves with the administrative record it seems to us that it would be most difficult, if not impossible, to raise objections to the Commission's findings and determinations which would receive any serious consideration from the Court. Furthermore, how can such objectors make an intelligent proffer of proof unless they have first ascertained what proof has been submitted before the Commission. We feel that the District Court is qualified to weed out the obstructionists from those who are sincerely seeking to help determine whether or not a proposed plan is fair and equitable, and the record of the enforcement courts clearly establishes that this is so.

And with particular reference to the case at bar, this

Court has taken judicial notice of the fact that Judge Leahy's opinion is entitled to especial weight by virtue of his familiarity and experience with Section 11 (e) proceedings and plans of reorganization under the Act (Opinion, Note 20).

It is interesting to note that the Commission, now so solicitous concerning the cost to the common stockholders of maintaining the escrow fund which is not invested (Petition for Rehearing, p. 16 and note 12), has refused and still refuses, in a motion now pending before the District Court, to approve the investment of the escrow funds in short term U. S. Treasury bills, which carry interest at 1%, are due in 90 days, and are the practical equivalent of cash.

[fol. 172] Conclusion

We submit that the petitions of appellants for a rehearing should be denied on the ground that all of the points raised in their petitions have been fully presented to this Court both in oral argument and written briefs and on the further ground that this Court has fully considered all of the arguments raised by the appellants and has rendered an opinion which is clear and open to no reasonable misunderstanding.

We desire to support the position of the Central-Illinois Securities Corporation, et al. in their request that the answers to the petitions for rehearing be deemed a cross petition for a rehearing of the question as to whether it is necessary or proper in this case to remand the proceedings to the Commission for further consideration.

Appellants' petitions for rehearing should be denied.

May 12, 1948.

Respectfully submitted, Louis Boehm and Raymond L. Wise, Attorneys for Common Stockholders, Lucille White and Frances Boehm.

Louis Boehm, Raymond L. Wise, William Esbitt, of Counsel.

[fol. 173] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER AUTHORIZING APPLICATION TO DISTRICT COURT FOR LEAVE TO INVEST ESCROW FUND—June 10, 1948

[fol. 174] Present: Biggs, Albert Lee Stephens and Maris, *Circuit Judges.*

And now, to wit, this 10th day of June, 1948, it is

Ordered that the parties in the above entitled appeals or any of them be and they hereby are authorized forthwith to make application to the District Court of the United States for the District of Delaware for leave to invest the escrow fund pending the final disposition of the controversy; and it is

Further ordered that the District Court of the United States for the District of Delaware be and it hereby is authorized to take appropriate action upon such application, if it shall see fit to do so.

For the Court, Biggs, United States Circuit Judge.

[File endorsement omitted.]

[fol. 175] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9428

In the Matter of ENGINEERS PUBLIC SERVICE COMPANY

THOMAS W. STREETER, Appellant

OCTOBER TERM, 1947

No. 9435

In the Matter of ENGINEERS PUBLIC SERVICE COMPANY

HOME INSURANCE COMPANY OF NEW YORK,
NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA,
NEW BRUNSWICK FIRE INSURANCE COMPANY,
HOMESTEAD FIRE INSURANCE COMPANY,
GEORGIA HOME INSURANCE COMPANY,
TRADESMENS NATIONAL BANK & TRUST COMPANY, etc., Appellants.

OCTOBER TERM, 1947

No. 9440

In the Matter of ENGINEERS PUBLIC SERVICE COMPANY

[fol. 176] SECURITIES and EXCHANGE COMMISSION, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

ON PETITIONS FOR REHEARING AND ANSWERS THERETO AND ON CROSS-PETITIONS FOR REHEARING

Before Biggs, Albert Lee Stephens and Maris, Circuit Judges

OPINION OF THE COURT—Filed June 11, 1948

By Biggs, Circuit Judge:

Petitions for rehearing, answers thereto, and cross-petitions for rehearing have been filed in these cases. The petition of the Commission by Note 1 asserts that if the

Commission is bound by the District Judge's determination "as to amount" to be paid to the preferred stockholders of Engineers "no remand to the Commission would be necessary, because the Commission [by its amendatory order of February 11, 1947] has already contingently approved an alternative allocation of cash to preferred stockholders at the amount of the liquidation preference if as a result of the processes of review in the District Court and on appeal therefrom this should be judicially determined fair and equitable." The cross-petitions assert that the proceedings should not be remanded to the Commission for a somewhat different reason, specifically because by the amendatory order referred to the Commission approved payment to the preferred stockholders of $1.00 per share, and of any additional amounts which might be decreed "by the District Court or any appellate court. * * *" It is also pointed out by the cross-petitions that the Commission [fol. 177] approved the terms of the escrow agreement and joined in presenting it to the court below for an appropriate order and also that counsel for the Commission before the District Court indicated his belief that those portions of the plan of reorganization which were not subject to attack, should be carried out as has been done.

We are not unmindful of the delay, perhaps of short duration, which necessarily must ensue upon the return of the record to the Commission pursuant to our decree but we are of the opinion that neither the Commission, nor the District Court, nor this court possesses the power to waive the provision of Section 11 (e) providing for approval of a plan of reorganization as fair and equitable by the Commission and by the District Court. Moreover, we cannot treat the Commission's amendatory order of February 11, 1947 or its approval of the escrow agreement as a rejection of the role imposed on the Commission by Congress. The correctness of our position in this regard is demonstrated by the fact that the amendatory order of the Commission provides that the escrow agent may make payment to the preferred stockholders only when the order of the District Court has become final and not subject to appeal. What the Commission intended to effect by the order was nothing more than the establishment of a means for expediting the execution of the plan of reorganization when the approval required by the statute had been attained.

The Commission approved the plan as amended by it, requiring amounts equivalent to redemption premiums to be paid to the preferred, finding this to be fair and equitable. Thereafter it presented the plan to the District Court. The District Court found the plan to be unfair and inequitable and rejected it. We affirmed that decision for the reasons stated in our opinion. The Commission must now proceed to a reconsideration of the problems presented in the light of our opinion or procure the review thereof by the Supreme Court.

The loss which will occur to the common stockholders [fol. 178] by reason of the remand may be lessened to some extent by appropriate investment of the escrow fund. An order will be entered authorizing the court below to take appropriate action on an application for investment of the fund, if such be made to it.

Other questions raised by the petitions for rehearing do not require discussion. Orders will be entered denying the prayers of the petitions and of the cross-petitions.

[fol. 179] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER DENYING PETITIONS AND CROSS-PETITIONS FOR REHEARING—June 11, 1948

[fol. 180] And now, to wit, this 11th day of June, 1948, it is Ordered that the petitions and cross-petitions for rehearing in the above entitled appeals, after due consideration, be and the same hereby are denied.

For the Court,

Biggs, United States Circuit Judge.

[File endorsement omitted.]

[fol. 181] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATES—July 19, 1948

Upon consideration of the application by counsel for Thomas W. Streeter, et al., for further stay of mandate,

and of the Answers in opposition, and after hearing oral argument on the application,

It is ordered that issuance of the mandates in the above-entitled appeals be, and it is hereby stayed until August 16, 1948.

By the Court.

Biggs, Circuit Judge.

July 19, 1948.

[File endorsement omitted.]

[fol. 182] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

STIPULATION CONCERNING THE PRINTED RECORD ON PETITION FOR WRIT OF CERTIORARI—Filed August 3, 1948

It is hereby stipulated by and between Roger S. Foster, General Counsel of the Securities and Exchange Commission; Francis H. Scheetz, attorney for The Home Insurance Company, et al., preferred stockholders; Lawrence R. Condon, attorney for Thomas W. Streeter, et al., preferred stockholders; William E. Tucker, attorney for Engineers Public Service Company; Alfred Berman, attorney for Central-Illinois Securities Corporation and C. A. Johnson, common stockholders; and Louis Boehm and Raymond L. Wise, attorneys for Lucille White and Frances Boehm, common stockholders, as follows:

1. The Clerk of the Circuit Court of Appeals shall certify as the transcript of record in the above entitled matter pursuant to United States Supreme Court Rule 38, only the following appendices:

A. Joint Appendix of five (5) printed volumes certified June 27, 1947 by the Clerk of the United States District Court for the District of Delaware as the record on appeal to the Circuit Court of Appeals.

B. Supplemental Appendix of the following proceedings in the Circuit Court of Appeals:

1. Notice of petition dated June 2, 1947 and petition to the Circuit Court of Appeals for stay dated May 29, 1947.

2. Order of Circuit Court of Appeals dated June 2, 1947, denying petition for stay.

[fol. 183] 3. Opinion of the Circuit Court of Appeals filed on March 19, 1948 and orders of same date vacating decree of District Court.

4. Petitions for rehearing filed on behalf of the Securities and Exhange Commission, The Home Insurance Company, et al. and Thomas W. Streeter, et al.

5. Answers to petitions for rehearing and cross-petitions filed on behalf of Central-Illinois Securities Corporation and C. A. Johnson, and on behalf of Lucille White and Frances Boehm.

6. Orders of Circuit Court of Appeals, dated June 10, 1948, authorizing application to the United States District Court for the District of Delaware, for investment of escrowed fund.

7. Opinion of the Circuit Court of Appeals filed on June 11, 1948 and orders of same date denying petitions and cross-petitions for rehearing.

8. Orders of Circuit Court of Appeals, dated July 19, 1948, staying mandates.

II. All proceedings in the Circuit Court of Appeals which are not listed in paragraph IB above shall be omitted from the printed record as matter not essential to a consideration of the questions presented by the petition for the writ of certiorari under the provisions of the United States Supreme Court Rule 38, paragraph 8, and shall not be certified by the Clerk of the Circuit Court of Appeals.

Dated: July 28, 1948.

(S.) Roger S. Foster, Francis H. Scheetz, Lawrence R. Condon, Wm. E. Tucker by Paul D. Miller; Alfred Berman, Louis Boehm and Raymond L. Wise.

[File endorsement omitted.]

[fol. 184] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 185] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 226

ORDER ALLOWING CERTIORARI—Filed October 25, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 186] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 227

ORDER ALLOWING CERTIORARI—Filed October 25, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 187] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 243

ORDER ALLOWING CERTIORARI—Filed October 25, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.
Office-Supreme Court, U. S.
FILED
AUG 16 1958
JAMES R. BROWNING, CLERK

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 226

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE, AND FRANCES BOEHM

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari issue to review a final order of the United States Circuit Court of Appeals for the Third Circuit vacating a decree of the United States District Court for the District of Delaware with directions to enter an order disapproving in part a plan under Section 11(e) of the Public Utility Holding Company Act and to remand to the Commission which had approved the plan.

OPINIONS BELOW

The opinion and judgment of the court below (R. 12), and the opinion denying petitions and cross-petitions for rehearing (R. 138) have not yet been reported. The opinion of the district court is reported at 71 F. Supp. 797 (R. 283a). The findings and opinions of the Commission dated December 4, 1946, and January 8, 1947, have not yet been officially reported but are set forth in the Commission's Holding Company Act Release Numbers 7041 (R. 25a) and 7119 (R. 128a).

JURISDICTION

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on March 19, 1948. Petitions and cross-petitions for rehearing were denied on June 11, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 803 (15 U.S.C. 79 *et seq.*).

STATUTE INVOLVED

Section 11(e) of the Public Utility Holding Company Act of 1935 provides as follows:

"(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the

Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (*f*) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

Section 24(a) of the same Act provides as follows:

"SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is

material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347."

QUESTIONS PRESENTED

The holding company which is being liquidated in compliance with Section 11 is solvent. Under its charter, the three classes of preferred stock have call or redemption prices higher than their liquidation preferences. Each of the three classes of preferred shares has an investment value at least equal to the call price. The following questions are presented:

1. Did the Commission properly apply the "fair and equitable" standards of Section 11(e) of the Public Utility Holding Company Act as interpreted in *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, in approving a plan which would pay to the preferred stockholders cash equal to the current going concern value of their shares but not in excess of the call price, where this amount exceeds the inventory liquidation preference of such shares?

2. Where preferred stockholders are accorded the going concern value of their rights surrendered in the liquidation of a holding company pursuant to Section 11 of the Holding Company Act, is the Commission required to reconstitute the history of the company so as to determine whether there have been any losses as a result of divestments or other action taken by the common stock management by reason of the Act, with a view to shifting those losses in whole or in part to preferred stockholders?

3. Where a plan satisfies a preferred stockholder's senior claim in cash and the Commission (a) equates the cash received to the value of the interest surrendered by the preferred, and (b) finds that the residual common stock interest is benefited through the retirement of the preferred, is the Commission required to put a cash value on what the common stockholders should receive and surrender?

4. Where a plan under Section 11(e) of the Public Utility Holding Company Act is enforced

in a district court and there is no dispute as to the sufficiency of the evidence upon which the Commission based its finding of fairness, is the court authorized to reject such finding on the basis of a discretionary weighing of equities without reference to the limitations upon the scope of judicial review which this Court has held apply to a Circuit Court of Appeals in direct review of a plan under Section 24(a) of the Act?

STATEMENT

This case involves a plan filed under Section 11(e) of the Public Utility Holding Company Act of 1935 by Engineers Public Service Company ("Engineers"). The plan contemplated *inter alia* satisfying the claims of Engineers' preferred stockholders in cash as a preliminary to distributing its remaining assets to common stockholders and dissolving. The only substantial controversy before the Commission, and the question upon which the Commission and both courts below have differed, was the application of the "fair and equitable" standard of Section 11(e) to the division of the assets of the company between the preferred and common stockholders. The other aspects of the plan raised no important dispute and have been consummated, reserving the present issue through an "escrow" arrangement which set aside the funds in dispute.[1]

[1] This Court has previously been advised of the partial consummation of the plan as mooting the cases then pending upon cross petitions of the Commission and of Engineers to review the decision of the United States Court of Appeals

Engineers had outstanding three series of cumulative preferred stock of equal rank: 143,451 shares of $5 series, 183,406 shares of $5.50 series, and 65,098 of $6 series. The plan as originally filed by the company proposed to pay all preferred stockholders only the amount of their involuntary liquidation preference, which was $100 a share and accrued dividends for each series of preferred stock. The plan had been formulated by management which was controlled by the common stockholders, and was supported in the administrative proceedings by company counsel. In order to assure an adequate presentation of the preferred stockholders' point of view, the Board of Directors authorized a member primarily interested in the preferred stock (Streeter) to employ counsel partially at the company's expense. There also appeared before the Commission representatives of a group of institutions which held preferred stock (Home Insurance Company, et al). The preferred stockholders' representatives appeared in opposition to the plan and contended that they should receive $105 for the $5 series and $110 for the $5.50 and $6.00 series, amounts which were equal to the voluntary liquidation or redemption prices specified in the charter.

Expert witnesses who testified on behalf of the preferred stockholders and the management

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for the District of Columbia, 138 F. 2d 936, which upheld in part determinations of the Commission under Section 11(b)(1). That decision was vacated as moot. 332 U. S. 788.

agreed, as Engineers stated in its brief before the Commission, that "the present value or investment worth of these three series of stock, on a going concern basis and apart from the Act, under prevailing yields applied to comparable securities", was in excess of the respective call prices (R. 67a, see also R. 193a). The estimates of value ranged from $106.25 to $111.11 for the $5.00 preferred, from $111.38 to $122.22 for the $5.50 preferred, and from $111.50 to $133.33 for the $6 preferred (R. 66a-67a).

The Commission agreed with Engineers that the proposed liquidation was "caused by the Act and is in that sense 'involuntary' " (R. 61a). This holding accords with a long line of Commission and court precedents under which bonds and preferred stocks have been retired in liquidations required by Section 11 without payment of the call price.[2] Disagreeing with Engineers, the Commis-

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[2] Cases involving bond retirement: *The United Light and Power Company*, 10 S.E.C. 1215 (1942), affirmed *sub nom. N. Y. Trust Company* v. *S.E.C.*, 131 F. 2d 274 (C.C.A. 2 certiorari denied, 318 U. S. 786, rehearing denied, 319 U. S. 781; *North American Light & Power Company*, 11 S.E.C. 820 (1942), affirmed *sub nom. City National Bank & Trust Company* v. *S.E.C.*, 134 F. 2d 65 (C.C.A. 7); *North Continent Utilities Corporation*, S.E.C. (1943), Holding Company Act Release No. 4686, plan approved and enforced, 54 F. Supp. 527 (D. Del.); *Standard Gas and Electric Company*, S.E.C. (1944), Holding Company Act Release No. 5430, plan disapproved, 59 F. Supp. 4 (D. Del.), reversed 151 F. 2d 326 (C.C.A. 3).

Cases involving preferred stock: *Lahti* v. *New England Power Association*, 160 F. 2d 845 (C.C.A. 1); *Buffalo, Niagara and Eastern Power Corp.*, S.E.C. (1945), Holding Company Act Release No. 6083; *Georgia Power & Light Co.*,

sion held that the liquidation, although "involuntary," did not require the preferred stockholders to accept the charter involuntary liquidation preference as the sole measure of their claims. In so holding the Commission relied on this Court's ruling in *Otis & Co. v. S. E. C.*, 323 U. S. 624 (R. 61a). Both courts below agreed that, under the *Otis* case, Engineers' charter provisions were not dispositive of the issues (R. 228, note 2, and R. 34). Having found neither the voluntary nor involuntary liquidation preference dispositive, the Commission determined in accordance with priority rights whether the plan accorded each security holder "from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered" (R. 62a). The Commission found that the preferred had an investment value at least equal to the respective call prices, but treated the call prices as setting "a ceiling." This sum the Commission found to be the equitable equivalent of the rights surrendered, and since the plan did not provide for payments in that amount the Commission disapproved it.

Engineers decided on advice of counsel (R. 1949a) to accept the Commission's findings and amended the plan to provide for the additional payments to the preferred. Two common stock-

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S.E.C. (1945), Holding Company Act Release No. 5568, plan approved and enforced, Civil Action No. 133 (M. D. Ga., 1945); *Cities Service Power & Light Co.*, S.E.C. (1944), Holding Company Act Release No. 4944.

holder groups (respondents herein) then appeared in opposition to the amended plan. However, the amended plan was approved by the Commission as fair and equitable to both the preferred and common stockholders.[3] Upon application for enforcement of the plan, the district court, in the exercise of what it considered to be its "affirmative and independent duty" (R. 286a), found that $100 per share was the fair and equitable equivalent of the preferred stockholders' claim and disapproved that portion of the plan calling for a payment of more than $100 per share. This conclusion was reached by the district court despite its acceptance of the Commission's finding that the "present value for these preferreds [is] substantially in excess of the charter liquidating preferences."[4] (R. 290a). The court entered an order approving and enforcing the plan except insofar as it contemplated payments of any amount in excess of $100 per share and accrued dividends to the preferred stockholders.

On appeal by the Commission and preferred stockholders, the Circuit Court of Appeals for the Third Circuit upheld the district court in its

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[3] —— S.E.C. —— (1947), Holding Company Act Release No. 7119 (R. 128a).

[4] Subsequent to its opinion the court adopted certain findings of fact, in the form presented by the common stockholders, which, while not repudiating the acceptance of the expert testimony as to present value, stressed the possibility that through future increase in interest rates, or decline in earnings, or both, the future value of the preferred stock, if allowed to remain outstanding, might well be substantially less than its present value (R. 310a-315a).

rejection of the Commission's determination that the amended plan was fair and equitable. The court criticized the valuation methods employed by the Commission, and held that even if there was not a "plain abuse of discretion" by the Commission, it was within the province of the district court to reject the Commission's determination. It held that the district court "cannot value the securities, find equitable equivalence therefor and substitute its own estimates for those of the Commission" (R. 39) but can merely veto the Commission's decision. The decree of the district court was accordingly vacated and the case was remanded to the Commission for a fresh determination of the amount which the preferred stockholders should receive.

All appellants filed petitions for rehearing, and in the Commission's case for clarification as well. All appellees filed cross-petitions for rehearing, which were denied in an opinion which declined further to discuss the problems raised by the petitions but which directed the Commission either to "proceed to a reconsideration of the problems presented in the light of our opinion or procure the review thereof by the Supreme Court." (R. 140).

REASONS FOR GRANTING THE WRIT

This case involves issues of substantial importance in the administration of the Public Utility Holding Company Act. Plans which contemplate discharging preferred stockholders'

claims in cash have been proposed to resolve Section 11 problems of a number of major holding companies, and whether the preferred stockholders shall receive the full value of the interest which the plan requires them to surrender, where this is claimed to exceed the involuntary liquidation preference, is an issue involved in at least 5 cases now pending before the Commission. Some $194,200,000 of total preferred stockholders' claims are involved in these cases, of which some $23,260,000 represents the disputed area in excess of the charter involuntary liquidation preference.[5] The problem arises out of the fact that many preferred stock charter provisions provide for an involuntary liquidation preference which is lower than the call or voluntary liquidation price (where the preferred stock is callable), and from the fact that many of such preferred stocks have a dividend rate which is high in relation to current money rates.

I

In determining the value of the rights surrendered by preferred stockholders, the Commission starts with the doctrine of strict priorities

[5] While the escrow device used in this case is available to limit the area of controversy, the confusion which the holding below engenders as to the determination of the total preferred stockholders' claims necessarily tends to complicate the entire processes of working out reorganization plans. Indeed, some of the implications of the holding below confuse the standards applicable even to plans which propose to satisfy preferred stockholders by an allocation of earnings assets rather than cash.

and with the principle that the "rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place." *Otis & Co.* v. *S.E.C.*, 323 U. S. 624, 633. The latter principle has been paraphrased by this Court as "that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors." *Ibid.* p. 638.

Here, as in *Otis*, the holding company is solvent. Upon analysis of the financial condition of the company and particularly the asset and earnings coverage of the preferred stocks, and comparison in the light of these factors with the market prices of other utility holding company preferred stocks, the Commission found from undisputed evidence that Engineers' preferred stocks had investment values at least equal to the respective call prices of $105, $110 and $110. These call prices were regarded as the "ceiling" upon the values to be accorded to the preferred stocks, since they could be retired at those prices (R. 61a-68a).

In determining that the "fair and equitable" standard of Section 11(e) required payment to the preferred stockholders of the call or redemption prices of their shares, the Commission be-

lieved this result was consistent with, if not compelled by, the decision of this Court in the *Otis* case. In *Otis*, the claim of the preferred stockholders if measured by the liquidation value would have been greater than its existing value as an interest in a going business; in that case, this Court approved valuation of the preferred stockholders' claim as part of a continuing enterprise and refused to apply the liquidating value. In the instant case, in contrast to *Otis*, the liquidating value of the preferred stocks is less than their investment value as interests in a going business (as limited by the call price). Here, the Commission construed the *Otis* case as meaning that the Holding Company Act should not be permitted to mature claims and thereby transform the existing value of a security in a going concern into a matured claim, i.e., a liquidation value, which might be greater or less than such existing value (R. 72a). Since the "existing" value of Engineers' preferred stocks, whether measured by investment value or by the redemption price at which the common stockholders can terminate the preferred stock interest in the business, exceeds the liquidating value, the Commission concluded that the rule of strict priorities requires that the preferred stockholders be paid an amount equal to their redemption prices in order to satisfy their prior claim to the assets and earnings of the company.

1. While the court below has agreed with the Commission that under the *Otis* case the liquida-

tion preference is not dispositive, it has rejected what the Commission regards as the only method of computing the equitable equivalent of the rights surrendered consistent with the doctrine of strict priorities reaffirmed as applicable to Section 11 reorganizations by the *Otis* case. The court below criticized the Commission for failure to ascertain the future earning power of the system and to apportion that earning power between the preferreds and common based on their respective claims to income, "as it did in the United Light & Power case" (R. 35). But that technique is appropriate only where, as under the United Light & Power plan, a new security is being allocated between preferred and common stockholders. The plan here involved—and both courts below held it to be appropriate—contemplates paying off the preferred in cash. Thus, as the court below recognized, the problem was simply to determine "just recompense [in cash] for the security which he [the preferred stockholder] would give up" (R. 38). To the Commission, this meant giving to the preferred stockholder in cash the current value of his stock as ascertained from undisputed evidence. Any valuation formula based upon apportionment of earning power which gave a lesser amount to the preferred stockholders would presumably violate the strict priorities rule as applied in the *Otis* case.

2. Similarly, the court below also criticized the Commission because it made no finding at all as

to the value of Engineers' common stock. Where, as here, the propriety of paying off the preferred stockholders in cash is unchallenged, and the common stockholders receive the residue of Engineers' assets, determination of the dollar value of the common stock would serve no purpose. If the price to be paid to the preferred stockholders for their shares is the price required by law, the common stockholders receive the full economic benefit of the retirement of the preferred and the residual assets—and that is all they are entitled to receive. Under such circumstances, this Court has held that the determination of dollar values is not required. *Ecker* v. *Western Pacific R. Co.*, 318 U. S. 448; *Group of Institutional Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 564-565.

3. The court below held that the Commission erred in valuing the preferred stock "*ex* the Public Utility Holding Company Act, i.e., as if the Act had never been passed", and not valuing the common stock "by a similar standard." The context indicates that the court below regarded the Commission's valuation of the preferred stock on a going concern basis, rather than at the amount of its liquidation preference, as valuing the preferred as if the act had not been passed. From this premise the court reasoned that consistency requires the Commission to value the common stock as if the act had not been passed, i.e., by reconstituting the entire history of the enterprise since 1935, determining, *inter alia*, what divest-

ments were attributable to the act and computing in retrospect what "losses" had occurred where the proceeds of the sales might be found less valuable by today's standards than the divested assets if retained. Thus, the Commission is required to add back such losses "to the credit side of the enterprise's balance sheet" (R. 37) and thus in some way shift all or part of the burden of such losses from the common to the preferred stockholders.[6] We submit that the Commission valued both preferred and common stockholders' interests by a "similar standard" in making sure in each case that the interest received by reason of the plan should have a value at least equal to the interest surrendered.[7] Nor was it inconsistent for the Commission to apply the fair and equitable standard to the plan before it, so as to prevent the plan itself from causing a shift in values from preferred to common stockholders (or vice versa) as those values would exist apart from the plan, without pushing the "ex the act" concept to the extent of attempting to decide how preferred and

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[6] The opinion below suggests as a possible escape from such a hypothetical reconstitution of Engineers' balance sheet that the Commission may do its valuation "intra the act" which we interpret as treating the preferred stockholders' liquidation preference as dispositive (R. 37). This, however, would in our opinion contravene the decision in the *Otis* case, and apparently the court below agrees (R. 34).

[7] Both of the courts below accepted the hypothesis of losses due to the Act despite the fact that marketwise the common stock increased in value from a low of 1⅛ in 1935 to 36 on February 13, 1946, the latest date covered in the hearings before the Commission (R. 62a-63a, n. 45).

common stockholders would have fared if the Act had never been passed.

It seems clear that any method of shifting to the preferred stockholders losses as determined by such a reconstruction of Engineers' balance sheet would violate the doctrine of strict priorities. It also makes the task of administering the Act one of constantly increasing difficulty whereby each new step in simplifying a holding company system requires a reappraisal of everything that has gone before. The respondent common stockholders have interpreted the opinion below as not requiring a definitive evaluation by the Commission of the precise amount of losses and offsetting gains attributable to the enactment of the Holding Company Act, but as requiring the weighing of such hypothetical losses with other equities in the case (R. 111). This interpretation is close to the concept of "colloquial equities" articulated by the district judge as supplanting in Section 11(e) reorganizations the fixed principle of strict priorities (R. 291a). The district court had stressed as colloquial equities which "looked towards 'non-payment of the premium" (a) that Engineers did not receive as much as $98 per share and the public did not pay initially more than $100 per share for the preferred; (b) the market history of the preferreds; (c) the assumed losses from past divestments; (d) that the present high value of the preferred reflects retained earnings which might have been paid out in dividends to common stock

if the management had not deemed it desirable to conserve cash *inter alia* in anticipation of retirement of the preferred as a step in compliance with Section 11 (R. 289a).[8] The court below restates this theory of the district judge without expressly accepting or rejecting it, and admonishes the Commission to weigh "all pertinent factors and substantial equities" (R. 38) in arriving at the equitable equivalent of the interests surrendered, and makes it clear that a mere financial appraisal of "the investment value" of the interests surrendered is not a sufficient measure of "equitable equivalents".[9] To the extent that the opinion be-

[8] The district judge's rejection of a fixed principle of fairness and equity in favor of an undefinable concept of colloquial equity was further elucidated in a subsequent case in which the same court happened to agree with the Commission's 71 F. Supp. 1003, 1004, 1005 (D. Del), in which the court below stated:

> * * * the test is not simply whether the senior security holders, in their order of preference, get the equitable equivalent of the rights surrendered as they would in a reorganization case where insolvency obtains, i.e., the test exemplified by Group of Institutional Investors et al. v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 318 U. S. 523, * * * but whether all classes of stockholders are getting fair and equitable treatment based on notions of colloquial equity.
>
> * * * * * * *
>
> * * * I wish to re-emphasize that once the charter provision [on liquidation] is regarded as not controlling, the relative rights of the various security holders are determined by the applications of standards of colloquial equity.

finding as to fairness. See In the matter of cities Service Co.

[9] The Commission, of course, recognizes the propriety of applying the sanction of subordination or limitation to cost. Cf *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, rehearing denied, 332 U. S. 783. Here, however, there was no suggestion of inequitable conduct on the part of the preferred stockholders who did not even have voting control.

low does rest upon the necessity for including such imponderables in the "fair and equitable" standard, it brings to the valuation process a scope of discretion that is without standards, for the innumerable hypotheticals which might be constructed with equal justification will place the Commission and perhaps the enforcement court in an almost wholly arbitrary realm.

II

The court below held that under Section 11(e) a district court must, like "an equity reorganization tribunal", exercise a full and independent judgment as to the fairness and equity of the plan, and, conversely, that such a court is not limited in its role as is a circuit court of appeals under Section 24 of the Act. Asserting that this was "a question of law which, we think, goes to the heart of the instant controversy", the court below recognized that its conception of the function of the district court was in conflict with decisions of the First and Eighth Circuits in *Lahti* v. *New England Power Ass'n*, 160 F. 2d 845, 858, and *Massachusetts Mutual Life Ins. Co.* v. *S.E.C.*, 151 F. 2d 424, 430, respectively. The court below rejected as not controlling, the principle enunciated by this Court in *S.E.C.* v. *Chenery Corp.*, 332 U. S. 194, 207, in which a Commission order issued under Section 11(h) was reviewed under Section 24, that the review function is at an end "when it becomes evident that the Commission's action is based upon

substantial evidence and is consistent with the authority granted by Congress."

The court based its interpretation of the role of the district court under Section 11(e) upon the language of that sub-section read in the light of other reorganization statutes, and upon certain excerpts from the legislative history of the Act and statements by Commission officials. The Commission agrees with much of what the court below states concerning the intention of the Congress to have the Section 11(e) court function as an independent check upon the Commission's determination that a plan is fair and equitable and also that the respective roles of Commission and enforcement court should be in general similar to the relationship under Section 77 of the Bankruptcy Act between the Interstate Commerce Commission and the reorganization court. Thus, even in uncontested proceedings the Commission has consistently taken the position that the district court must be satisfied affirmatively that the plan is "fair and equitable." The Commission has also taken the position that the "opportunity for hearing" prescribed in connection with proceedings in the district court extends to persons who did not appear in the administrative proceeding.[10]

[10] The district court's supervision of the execution of the plan serves as a further safeguard, the significance of which may depend on the nature of the plan: Section 11(e) provides "that the court shall have jurisdiction to appoint a trustee", which could be the Commission, to "hold or adminis-

We believe, however, that the Court below has misapplied the analogy to Section 77 of the Bankruptcy Act and has erred in assuming that that analogy authorized the district court to reject the Commission's finding with respect to the instant plan on discretionary grounds which would not be open to a Circuit Court of Appeals upon direct review of a similar order under Section 24(a) of the Act.

The following anomalous consequences would flow if the construction by the court below should prevail: (a) while Section 24(a) and Section 11(e) are alternative ways of submitting to judicial scrutiny a plan theretofore approved by the Commission, the scope of review in the two proceedings would be radically different; (b) where after affirmance of the Commission's approval order by a Circuit Court of Appeals it becomes necessary to seek enforcement in a district court it may be urged that the enforcement court has discretion to reject the findings which the Circuit Court of Appeals has affirmed;[11] (c) the breadth of dis-

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ter, under the direction of the court and in accordance with the plan" the assets involved. Thus far Section 11(e) plans have not involved substantial discretion as to execution and have been administered by corporate officers under the direction of the court.

[11] We question whether even the court below would push its conception of the independent responsibility of the district court this far. Section 24(a) provides that upon the filing of a transcript the reviewing Circuit Court of Appeals "shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part," and that the judg-

cretion conferred on the district court, unless limited by exercise of equally broad revisory powers in the Circuit Courts of Appeals and in this Court, would preclude uniform administration of the statute and make the treatment of a nation-wide groups of security holders depend upon accidents of venue; (d) to the extent that the district judge is vested with a discretion to check the Commission but not to prescribe the standard which shall govern the Commission's disposition of the case there would be a possibility of deadlock resulting from conscientious disagreement.

The importance of the issue as to the scope of review and the practical difficulties raised by the decision below as to that issue, are interrelated with the question of whether there is any room at all in the application of the fair and equitable standard for the special or colloquial equities emphasized by the courts below. For these reasons and because of the conflict of decision between the Circuit Courts of Appeals, it is important that this Court determine the scope of the powers vested in the district court by Section 11(e).

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ment of the court "shall be final" subject to review upon certiorari. In the only instance where a district court has considered a plan theretofore affirmed by a Circuit Court of Appeals, the district judge deemed himself limited to inquiring into developments subsequent to the order which the Circuit Court of Appeals had affirmed. See *In re Columbia Oil & Gasoline Corp.*, Civ. Action No. 290 (D. Del. 1942, unreported).

CONCLUSION

For the reasons stated, this petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROGER S. FOSTER,
General Counsel,
Securities and Exchange Commission.

AUGUST, 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948

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In the Supreme Court of the United States

OCTOBER TERM 1948

Nos. 226, 227, 243

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, ET AL., THE HOME INSURANCE COMPANY AND TRADESMANS NATIONAL BANK AND TRUST COMPANY, PETITIONERS

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCIS BOEHM

No. 266

CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinion and judgment of the court below (R. 12), and the opinion denying petitions and

cross-petitions for rehearing (R. 138) are reported at 168 F. 2d 722. The opinion of the district court is reported at 71 F. Supp. 797 (R. 283a). The findings and opinions of the Commission dated December 4, 1946, and January 8, 1947, have not yet been officially reported but are set forth in the Commission's Holding Company Act Release Nos. 7041 (R. 25a) and 7119 (128a).

JURISDICTION

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on March 19, 1948 (R. 41). Petitions and cross-petitions for rehearing were denied on June 11, 1948 (R. 138). The Commission petition for a writ of certiorari was filed August 16, 1948, and granted on October 25, 1948 (R. 143). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 803 (15 U. S. C. 79 *et seq.*)

STATUTE INVOLVED

The applicable provisions of the Public Utility Holding Company Act of 1935 and of Section 77 of the Bankruptcy Act are set forth in Appendix A, *infra*.

QUESTIONS PRESENTED

The holding company which is being liquidated in compliance with Section 11 is solvent. Under its charter, the three classes of preferred stock

have call or redemption prices higher than their involuntary liquidation preferences. Each of the three classes of preferred shares has an investment value at least equal to the call price. The following questions are presented:

1. Did the Commission properly apply the "fair and equitable" standards of Section 11 (e) of the Public Utility Holding Company Act as interpreted in *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, in approving a plan which would pay to the preferred stockholders cash equal to the current going concern value of their shares but not in excess of the call price, where this amount exceeds the involuntary liquidation preference of such shares?

2. Did the Commission and the courts below properly hold that under the *Otis* case the involuntary liquidation preference of the preferred stocks is not a controlling determination of what the preferred stockholders should receive under the instant plan?

3. Where a plan under Section 11 (e) of the Public Utility Holding Company Act is enforced in a district court and there is no dispute as to the sufficiency of the evidence upon which the Commission based its finding of fairness, is the court authorized to reject such finding on the basis of a discretionary weighing of equities and without reference to the generally recognized

limitations upon the scope of judicial review of policy and fact finding functions of the agency?

4. If the Commission erred, is remand necessary under the circumstances of this case?

STATEMENT

This case involves a plan filed under Section 11 (e) of the Public Utility Holding Company Act of 1935 by Engineers Public Service Company ("Engineers"). The plan contemplated *inter alia* satisfying the claims of Engineers' preferred stockholders in cash as a preliminary to distributing its remaining assets to common stockholders and dissolving. In addition to $14,650,000 in cash and U. S. treasury securities, Engineers' assets consisted chiefly of 99.8 per cent of the common stock of Virginia Electric and Power Company ("Virginia"), all of the common stock of Gulf States Utilities Company ("Gulf States"), and all of the common stock of El Paso Electric Company ("El Paso"). The only substantial controversy before the Commission, and the question upon which the Commission and both courts below have differed, related to the application of the "fair and equitable" standard of Section 11 (e) to the treatment accorded the preferred and common stockholders. The other aspects of the plan raised no important dispute and have been consummated, reserving the

present issue through an "escrow" arrangement which set aside the funds in dispute.[1]

Engineers had no debt outstanding, but had three series of cumulative preferred stock of equal rank: 143,451 shares of $5 series, 183,406 shares of $5.50 series, and 65,098 shares of $6 series. The plan as originally formulated and filed by the company's management, which was controlled by common stockholders,[2] proposed in

[1] This Court has previously been advised of the partial consummation of the plan as mooting the cases then pending upon cross petitions of the Commission and of Engineers to review the decision of the United States Court of Appeals for the District of Columbia, 138 F. 2d 936, which upheld in part determinations of the Commission under Section 11 (b) (1). That decision was vacated as moot. 332 U. S. 788.

[2] Counsel had advised Engineers' directors that—

"Although, as will appear, I am unable with assurance to advise you that the premium is not payable, I have no hesitancy in advising you that, as directors, I think you should, for your own protection, take the position that the premiums are not payable. This is so because if you should, as a Board, voluntarily pay the premiums and it should later, as the law on the subject develops further, be determined that the premiums were not payable, it is possible that you might incur liability to the common stockholders on the ground of waste of assets" (R. 1725a).

One director, Kellogg, who agreed that preferred stockholders should receive only $100 per share objected that "the Board should honestly apply their best judgment to the case without fear that their good faith would be questioned" (R. 1962a). President Barnes agreed with counsel that if "there is any doubt as to whether the preferred stockholders are entitled to a premium, the Directors would be guilty of wasting the assets if they voluntarily paid the premium" (R. 1965a).

general to pay preferred stockholders only the amount of their involuntary liquidation preference, which was $100 a share and accrued dividends for each series of preferred stock, to distribute the remaining assets to the common stockholders,[3] and to dissolve.[4] In order to assure an adequate presentation of the preferred stockholders' point of view, the Board of Directors authorized a member primarily interested in the preferred stock (Streeter) to employ counsel partially at the company's expense. That director and members of his family are the petitioners in No. 227. There also appeared before the Commission representatives of a group of institutions which held preferred stock (Home Insurance Company, et al., petitioners in No. 243). The preferred stockholders' representatives appeared in opposition to the plan and contended that they should receive $105 for the $5 series and $110 for the $5.50 and $6.00 series, amounts which were equal to the voluntary liquidation preferences and the redemption prices, specified in the charter. The possibility

[3] Gulf States was to be distributed pursuant to a rights offering program entitling Engineers' common stockholders to one share of Gulf States for each share of Engineers common held at a subscription price of $11.50 per share.

[4] At first Engineers proposed, in the alternative, that after paying off the preferred it would dispose of its interests in Gulf States and El Paso and merge with Virginia. The merger alternative was removed during the hearings on the plan.

that Engineers would be required to pay the preferred amounts equal to the voluntary liquidation preference and redemption price of the stock had been recognized from the start, and it was likewise recognized that it was advantageous from the common stockholder's point of view to go forward with the plan irrespective of how that issue might be ultimately determined (R. 719a, 723a, 807a).

All the testimony adduced, by both the preferred stockholders and management, valued the preferred stocks on a going concern basis at figures in excess of their voluntary liquidation preferences and redemption prices. Dr. Ralph E. Badger, an expert witness called by the preferred stockholders, in an exhaustive and detailed analysis (R. 2088a), concluded that, apart from their call provisions, and on the basis of quality and yield, the three series of preferred should be valued at $108.70, $119.57, and $130.33, respectively. Even the president of Engineers, Mr. Barnes, testified that the preferred stocks would have been refinanced and retired by call if it were not for the impact of Section 11, and that on a going concern basis the stocks should sell above their redemption prices (R. 522a, 658a–663a). Barnes agreed that apart from the impact of Section 11, and taking into account the redemption prices, the fair value for the preferreds, meaning "what a willing buyer

would pay and what a willing seller would take in today's market for such securities", would be somewhat above the redemption prices (R. 522a). Barnes referred to possibilities of inflation, depression, government competition, adverse changes in regulatory policy, or developments in the field of atomic energy which might in the future cause Engineers' preferred stocks to sell below "this top level". These factors, he conceded (R. 525a), "are common to the utility industry generally * * * so that present price levels of securities reflect the extent to which the investing public is presently appraising these hazards. * * *" Although Badger and Barnes characterized the preferred stocks differently, Badger using the term "medium grade" (R. 1133a) and Barnes using the term "closer to a low-grade preferred" (R. 1140),[5] they

[5] In the context of their testimony it is clear that both witnesses were characterizing as "high grade" preferred stocks having such a low risk factor as to sell upon a yield basis approaching high grade, long term bonds. Badger expressed the opinion in the light of the then current yields for other preferred stocks which he regarded as comparable that a proper yield for the Engineers preferred, absent a call price, would be 4.6% (R. 1062a–1063a, 2118a). His valuation figures given in the text are the mathematical results of applying this yield basis. Badger referred to a Standard Statistics report on the yield of high grade bonds disclosing that they had dropped from a 5.28 per cent basis in 1932 to a 2.7 per cent basis in 1945, and that the yields on high grade preferred stocks had dropped from a 6.13 per cent basis in 1932 to a low level of 3.65 per cent in 1945, pointing to individual high grade preferred stocks selling to yield as low as 3½ per cent (R. 1017a). Badger also testified to his belief

agreed, as Engineers stated in its brief before the Commission, that "the present value or investment worth of these three series of stock, on a going concern basis and apart from the Act, under prevailing yields applied to comparable securities" was in excess of the respective call prices (R. 67a, see also R. 1211a, 1953a). Other evidence in the record also confirmed the position of the preferred. For example, the financial statements disclosed that, as of June 30, 1945, each share of preferred stock had an asset coverage of $218.11.[6] From the point of view of income which the Commission emphasized; the average coverage of fixed charges and preferred dividends by the system over the five years preceding 1945 was 1.4 times and preferred dividend requirements were earned an average of 1.5 times over the same period on a corporate basis (R. 64a).

Applying the Holding Company Act standards, which required the payment to the stockholders to be the fair and equitable equivalent of what was surrendered, the Commission considered all the charter rights being surrendered by the pre-

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that the low money rates which were an element in his valuations were likely to continue in the foreseeable future. (R. 1064a). This prophecy was disputed by Engineers. The Commission did not prophesy as to the future course of the money markets since it directed its inquiry to an evaluation of the Engineers preferred as of the time its decision was rendered.

[6] Even if the entire unrestricted surplus were used to pay dividends to the common stock the preferred would still have an asset coverage of $194.91.

ferred, including the right to receive annual dividends of $5, $5.50, or $6.00 per share in perpetuity or until redemption or the liquidation of the company, the remoteness of the possibility of involuntary liquidation in view of the asset coverages and equity value of the stock, and the right to $105 or $110 per share, depending on the series, in the event of voluntary liquidation or redemption. The Commission determined, in accordance with the undisputed testimony, that the current worth of the preferred, or its "investment value" on a going concern basis, was at least equal to the respective call prices.[7] It thereupon concluded, on the basis of its own analysis of the record, that it was not fair and equitable to pay the preferred any less than the call prices, which fixed a "ceiling" upon their claims. The Commission did not find it necessary to determine what the preferred stocks would be worth in the absence of a call price.

The common stock was then considered under the same standards of the Act, and as a residual equity interest, with a right to assets or dividends

[7] The figures before the Commission covered actual earnings through June 1945. At the time of oral argument before the Commission, September 5, 1946, counsel for Engineers advised the Commission that there had been no material change in the earnings picture, and that the management's estimates of earnings for the year 1946, which were slightly higher, and which "the Commission can consider * * * admissions against interest," had proved on the conservative side in the light of experience (R. 1282).

only after the preferred was satisfied. It was determined that the plan, in according to the common the entire interest in the enterprise after the retirement of the preferred stock, satisfied those standards. The Commission noted that "the fair and equitable" standard being one of absolute priority "requires that full compensation be given the senior securities before any payment or participation is permitted to the junior securities," making it necessarily fair to the common, in the absence of other circumstances, to give them everything that was left after according fair treatment to the preferred (R. 73a). The Commission found that "the retirement of the preferred stock will be of immediate benefit to the common stockholders" (R. 69a).[8] The Commission found it unnecessary, however, to place a dollar valuation upon the interest the common stockholders received and surrendered.

In considering the charter rights of the preferred stock, the Commission agreed with Engineers that the proposed liquidation did not make applicable the charter voluntary liquidation preferences as dispositive of preferred stockholders' claims since the proposed liquidation was "caused by the Act and is in that sense 'involuntary'"

[8] The management had made it clear that they regarded the plan as desirable from the point of view of the common stockholders whether or not it should be held necessary to pay the preferred amounts equal to their voluntary liquidation preferences redemption prices (R. 719a, 723a, 807a).

(R. 61a).[9] This holding accords with a long line of Commission and court precedents under which bonds and preferred stocks have been retired in liquidations required by Section 11 without treating such a liquidation as necessarily requiring payment of the call price.[10] The Commission rejected Engineers' contention that because the liquidation was not "voluntary", the charter involuntary liquidation preferences should be treated as the exclusive measure of the preferred stockholders' claims. In so holding the Commission relied on this Court's ruling in *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, at p. 638, "that Congress did not intend that its exercise of power to simplify should mature rights created without regard to the possibility of simplification of system structures which otherwise would arise only by voluntary action of the stockholders, or involuntarily, through action of creditors" (R. 61a). This conclusion was accepted by both courts below (R. 288a, note 2, and R. 34).

Engineers had urged that losses had resulted from previous dispositions of property required by the Act and that the payment of anything in excess of $100 a share to the preferred would for that reason operate as a "windfall" such as the

[9] Commissioner Hanrahan, concurring in the result, expressed the opinion that the liquidation was voluntary and that the voluntary liquidation preferences were dispositive of the issues (R. 140a–141a).

[10] The pertinent authorities are discussed at p. 79, *infra*.

Otis case sought to avoid. The Commission rejected the factual basis for this hypothesis in view, *inter alia*, of the vast improvement in market value and investment position of Engineers common stock since the passage of the Act (R. 72a, n. 55). In fact, independent analysis by members of the investment industry indicated that the common stock would be the chief beneficiary of the dissolution of Engineers and the elimination of the preferred (R. 1990a, 2023a). In any event, the Commission regarded the issue as to losses in prior transactions as irrelevant. It understood the *Otis* case as holding only that the Act was not intended "to mature claims and thereby transform the existing value of a security in a going concern into a matured claim which might be greater or less than such existing value"[11] (R. 72a).

Engineers decided on advice of counsel (R. 1949a) to accept the Commission's findings and amended the plan to provide for the additional payments to the preferred. Two common stockholder groups (both are respondents in Nos. 226, 227, and 243 and one is petitioner in No. 266) then appeared in opposition to the amended plan.

[11] The Commission noted that the precise issue in the *Otis* case was whether preferred stockholders should benefit at the expense of the common stock by treating the liquidation preference as matured, whereas in the instant case the issue was whether common stockholders should receive a windfall by being permitted to retire preferred stock at less than its going concern value (R. 72a).

The amended plan was approved by the Commission as fair and equitable to both the preferred and common stockholders.[12] Upon application for enforcement of the plan, the district court, in the exercise of what it considered to be its "affirmative and independent duty" (R. 286a), found that $100 per share was the fair and equitable equivalent of the claim of each series of preferred stock, and disapproved that portion of the plan calling for a payment of more than $100 per share. This conclusion was reached by the district court despite its acceptance of the Commission's finding that the "present value for these preferreds [is] substantially in excess of the charter liquidating preferences"[13] (R. 290a). The district court rejected the conception that the amount of cash to which the preferred stockholders were entitled should be determined on the basis of a valuation of (or the investment value of) what they surrendered by the plan. Instead it construed the *Otis* case as determining participation in accordance with a standard of

[12] — S. E. C. — (1947), Holding Company Act Release No. 7119 (R. 128a).

[13] Subsequent to its opinion the court adopted certain findings of fact, in the form presented by the common stockholders, which, while not repudiating the acceptance of the expert testimony as to present value, stressed the possibility that through future increase in interest rates, or decline in earnings, or both, the future value of the preferred stock, if allowed to remain outstanding, might well be substantially less than its present value (R. 310a–315a).

"colloquial equity." (R. 291a). Various non-valuation criteria were weighed to determine whether or not they "look toward non-payment of the premium" (R. 289a). The facts cited were (a) the issue price and market history (R. 289a); (b) that past divestments required by the Act occasioned losses and were a hardship on the common stock (R. 290a); (c) that the present high value of the preferred reflects retained earnings representing "past sacrifices" by the common stock (R. 291a). As we note in the argument, some of the factors emphasized by the district judge are relevant to appraising the present value of the preferred and to that extent were considered by the Commission. The district court, however, having agreed with the Commission's findings as to the present value of the preferred on a going concern basis, regarded these factors as significant in determining that it was not fair in a colloquial sense to give the preferred stockholders the full going concern value of the interest which the plan required them to surrender.[14]

[14] The district judge's rejection of a fixed principle of fairness and equity in favor of an undefinable concept of colloquial equity was further elucidated in a subsequent case in which the same court happened to agree with the Commission's finding as to fairness. See *In the Matter of Cities Service Company*, 71 F. Supp. 1003, at pp. 1004, 1005 (D. Del), in which the court below stated:

"* * * the test is not simply whether the senior security holders, in their order of preference, get the equitable equiva-

The court entered an order approving and enforcing the plan except insofar as it contemplated payments of any amount in excess of $100 per share and accrued dividends to the preferred stockholders. It also approved the proposed escrow agreement whereby additional amounts were set aside for preferred stockholders if as a result of an appeal they should be held entitled to the larger amounts which they claimed and which the Commission had approved. (R. 318a.)

On appeal by the Commission and preferred stockholders, the Circuit Court of Appeals for the Third Circuit upheld the district court in its rejection of the Commission's determination that the amended plan was fair and equitable, but held that the district court "cannot value the securities, find equitable equivalents therefor and substitute its own estimates for those of the Commission" (R. 39). The decree of the district court was accordingly vacated and the case was remanded to the Commission for a fresh determination of the amount which the preferred

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lent of the rights surrendered as they would in a reorganization case where insolvency obtains, i. e., the test exemplified by *Group of Institutional Investors, et al.* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 318 U. S. 523, * * * but whether all classes of stockholders are getting fair and equitable treatment based on notions of colloquial equity.

* * * * * *

"* * * I wish to re-emphasize that once the charter provision [on liquidation] is regarded as not controlling, the relative rights of the various security holders are determined by the application of standards of colloquial equity."

stockholders should receive. The court neither expressly approved nor disapproved the conception of the district judge that "colloquial equities" rather than strict priorities should govern in Section 11 (e) reorganizations. It did, however, indicate that it was proper for the district judge in the exercise of his independent judgment to weigh as reasons for rejecting a plan approved by the Commission the various elements which the district judge had characterized as "colloquial equities." Apparently, the Commission on remand would be required in some fashion to appraise these "equities."

All appellants filed petitions for rehearing and in the Commission's case for clarification as well, which were denied. All appellees filed cross-petitions for rehearing, directed to the holding that the case should be remanded to the Commission. These petitions were also denied.

SUMMARY OF ARGUMENT

I

The Commission properly accorded Engineers preferred stockholders the going concern value of their interests. It is not disputed that the Commisson properly approved a type of plan under which the preferred stockholders surrendered their investment for cash, and the common stockholders received the entire residual assets. Both courts below agreed with the Commission that under *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, the

involuntary liquidation preferences of $100 per share were not determinative of the preferred stockholders' claims, and both courts below likewise upheld the Commisson's determination that the value of the preferred stocks on a going concern basis was at least equal to the amount of the redemption prices.

The *Otis* case holds that the principle of strict priority applies under Section 11 (e) in determining the rights of stockholders of a solvent company, and that the preferred stockholders are entitled to the going concern value of their stock. Full compensation must be given for the entire "bundle" of rights surrendered, including the preferential dividend claims as well as the liquidation preferences. Under the principle of the *Otis* case the preferred is entitled to this going concern value whether it is more or less than the amount to be received on liquidation. The holdings of the courts below are contrary to the rule of full priority insofar as they permit diminution of what the preferred stockholders would otherwise receive by reason of "colloquial" or "special" equities which relate neither to the appraisal of the financial value of the interests surrendered, nor to the imposition of sanctions for inequitable conduct.

The Commission's findings of present value, which the courts below accepted, took into account the risk that the future value of the preferred stock, if it remained outstanding, might be less

than its value as of the time when the preferred stockholders were required by the plan to surrender their investment. This appraisal of the risk factor, which was conceded by the Engineers management, necessarily took into account the future earning power of Engineers although it did not require a precise forecast of the extent that future earnings might exceed what was necessary to maintain preferred stock dividends.

According the preferred stockholders no more and no less than their full priority rights and giving everything else to the common stockholders was necessarily fair to the common. In any event, it appeared that the common were benefited by the plan, and to have reduced to a dollar valuation what the common received and surrendered by the plan would have complicated the appraisal of fairness without affording any useful check upon the results reached by the simpler process of focusing attention upon the proper amount of cash payable to the preferred. Contrary to the holding of the Court of Appeals, this method of valuation involved the consideration by a similar standard of the interests of both preferred and common stockholders. It did not involve valuing either the preferred or the common "as if the Act had never been passed." Instead, as in the *Otis* case, the method which the Commission used was that of "giving value to the rights of the preferred in a going concern rather than as if by sale and distribution." *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 635.

The requirement of the court below that the Commission reconstitute the balance sheet of Engineers as it would have been if the Act had never been passed is administratively impracticable and could not affect the result unless, contrary to the rule of strict priorities, the risk of loss in prior transactions is to be shifted from junior to senior security holders. Other colloquial equities such as the issue price and past market history and the dividend history of Engineers are likewise irrelevant to the fair and equitable standard, and insofar as pertinent to the valuation of the preferred on a going concern basis were adequately reflected in the valuations which the courts below accepted.

II

The Commission and the courts below properly followed the *Otis* case in holding that the liquidation preferences of the preferred are not the controlling measure of their rights of participation. The decision in the *Otis* case upholding the Commission's valuation of the preferred stock on a going concern basis rests on the conclusion that Congress did not intend Section 11 plans to accelerate maturities and thereby shift values from one class of security holders to another. It does not rest upon the particular form which the liquidation takes, nor upon whether the holding company being liquidated is a top holding company whose assets consist of stock in an-

other holding company which survives the plan, or a holding company in the first degree, the assets of which consist of operating company common stocks.

III

The scope of judicial review applicable in this case depends we believe, not upon differences between the review function of a court of appeals under Section 24 (a) and a district court under Section 11 (e), but upon the nature of the administrative determination upon review. The question here does not relate to the evidentiary foundation for the Commission's decision, assuming that it followed a proper method of valuation. Whether or not it followed a proper method presents the question of law which we think is the issue in this case.

If, as the court below seemed to assume, the question is not one of law, we submit that the scope of review under Section 11 (e) is limited in the same manner as that applicable to determinations of the Interstate Commerce Commission under Section 77 of the Bankruptcy Act, which embodies a similar statutory scheme. Under this standard administrative determinations of value are sustained if supported by substantial evidence, *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 473; *R. F. C.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 505–509. The court's responsibility for the exercise of independent judgment concerning the plan is a review func-

tion limited primarily, though not entirely, to issues of law. On any theory of review, the court's function does not extend to rejection of policy determinations which are not arbitrary and are within the area of discretion delegated to the agency by the statute.

To whatever extent the review function of the Section 11 (e) court may extend beyond issues of law, its determinations as to what is fair and equitable should be controlling upon the Commission upon remand lest stalemates result from conscientious disagreement between court and agency. Such determinations of the court should likewise be open to full examination on appeal so that there may be uniform nation-wide administration of the fair and equitable standard rather than making allocations dependent upon accidents of venue.

ARGUMENT

I

THE COMMISSION PROPERLY INTERPRETED AND APPLIED THE FAIR AND EQUITABLE STANDARD OF SECTION 11 (e) IN THE LIGHT OF THE UNDISPUTED FACTS

A. *The Otis case upholds the Commission in applying the doctrine of full priority by valuing preferred stock on a going-concern basis*

There was, and is, no dispute that the Commission properly approved as "appropriate to effectuate the provisions of" Section 11 (b) a type of plan under which the preferred stockholders were to be paid in cash whatever amount might be

found fair and equitable and the entire residual assets were made available to the common stockholders.[15] This type of plan was the choice of Engineers' management, elected exclusively by common stockholders. The management regarded this type of plan rather than an allocation plan as advantageous from the point of view of the common stockholders (R. 719a, 723a, 807a). Thus, the basic issue of fairness which the plan tendered to the Commission was how much cash would constitute fair compensation to the preferred stockholders for the compulsory surrender of their investment. The Commission concluded that, under the doctrine of strict priorities, it was fair for the preferred stockholders to receive, and the common stockholders to pay, the undisputed value of that investment, computed on a going concern basis and in relation to the then current yield on investments of comparable risk.

[15] The cash which the plan made available was in part cash already on hand, and in part the proceeds derived from the sale of Engineers' holding in Gulf States Utilities Company pursuant to subscription warrants issued under the plan to Engineers' common stockholders. The subscription warrants were transferable and, since the market price of the stock was higher than the exercise price in the warrants they could be sold by stockholders who might not elect to pay the subscription price. To the extent of such sales it was, of course, the transferees of Engineers' common stockholders who received the Gulf stock free of the preferred stockholders' claim. Common stockholders who sold their warrants and did not contribute cash received in any event common stock of Virginia and El Paso plus the proceeds of the sale of their subscription warrants.

The district court, in applying what it described as standards of "colloquial equity" to determine the amount of cash which would fairly compensate the preferred for the surrender of their rights, apparently did not regard the doctrine of strict priorities as applicable. The Court of Appeals did not use the phrase "colloquial equities" except in summarizing the opinion of the district court. It did refer to the necessity that the Commission consider "all the pertinent factors" (R. 37, 38), and the context indicates that the Court of Appeals considered as pertinent what the district court weighed as "colloquial equities." Since the valuation standards which the opinion of the Court of Appeals imposes on the Commission appear to us also to be in contravention of the principle of strict priorities, we point out at the outset that this Court has unanimously held the doctrine applicable under the Holding Company Act to the reorganization of solvent companies and as between different classes of stockholders. The majority opinion in *Otis & Co.* v. *S. E. C.* 323 U. S. 624, 634, states:

> Like the bankruptcy and reorganization statutes, the Public Utility Holding Company Act, in providing that plans for simplification be "fair and equitable," incorporates the principle of full priority in the treatment to be accorded various classes of security interests. This right to priority in assets which exists between creditors and

> stockholders, exists also between various classes of stockholders.

See also n. 14, p. 634. The dissenting opinion was, if anything, even more emphatic in its assertion that the principle of strict priority applies in Section 11 (e) reorganizations of solvent companies (323 U. S. 624, at 647–648).

The point of difference between the majority and dissenting opinions in the *Otis* case was whether the charter liquidation preference was the measure of the preferred stockholders' rights to which priority should be accorded or whether, as the majority put it, the Commission properly "recognizes and applies the doctrine of full priority by giving value to the rights of the preferred in a going concern rather than as if by sale and distribution" (p. 635). In upholding the Commission as to that issue the majority opinion states (p. 638):

> * * * Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors.

For that reason this Court concluded that the Commission "applied the correct rule of law as to the rights of the stockholders *inter sese*" in that "the rights of stockholders of a solvent

company which is ordered * * * to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place" (p. 633).

In the *Otis* case the claim of the preferred stockholders, if measured by the charter liquidation preference, would have been greater than its existing value as an interest in a going business. The Commission considered the same principle applicable in the *Engineers* case where, in contrast to *Otis,* the involuntary liquidation value of the preferred stock was less than the undisputed value of its claim as an interest in a going business (as limited by the call price). In other words, the Commission construed the *Otis* case as meaning that Section 11 (e) reorganizations of solvent companies should not mature otherwise inchoate stockholders' liquidation preferences whether the amount of such liquidation preferences might be greater or less than going concern values (R. 72a). Both courts below upheld the Commission's interpretation of the *Otis* case as not making Engineers' involuntary liquidation preference "dispositive" (R. 288a, n. 2, and R. 34).[16] Engineers' common

[16] Since the decision of the court below this Court has had occasion to restate its holding in the *Otis* case as follows (*Schwabacher* v. *United States*, 334 U. S. 182, 199):

"In construing the words 'fair and equitable' in a federal statute of very similar purposes, we have held that although the full priority rule applies in liquidation of a solvent holding company pursuant to a federal statute, the priority is

stockholders still dispute the correctness of this holding, and urge grounds for distinguishing the *Otis* case which the courts below rejected. Nevertheless, in arguing that the courts below erred in their disposition of the valuation issues, we start with the assumption that they properly held the liquidation preferences not dispositive. In Point II, *infra*, pp. 75–84, we answer the common stockholders' contention that the courts below erred in so holding.

Once it is settled that the involuntary liquidation preference is but one factor in valuation, rather than the controlling measure of what Engineers' preferred stockholders are entitled to receive in the reorganization, and that the plan properly provided for a cash settlement with preferred stockholders, we believe it necessarily follows under the doctrine of strict priority that the amount of cash which the preferred stockholders should receive should be equal to the undisputed "present value or investment worth * * * on a going concern basis" or the "in-

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satisfied by giving each class the full economic equivalent of what they presently hold, and that, as a matter of federal law, liquidation preferences provided by the charter do not apply. We said that, although the company was in fact being liquidated in compliance with an administrative order, the rights of the stockholders could be valued 'on the basis of a going business and not as though a liquidation were taking place.' Consequently the liquidation preferences were only one factor in valuation rather than determinative of amounts payable."

vestment values" of the preferred. If this is the correct rule of law, the Commission's valuation finds clear support in the evidence and indeed rests upon undisputed evidence.[17] We discuss below the various grounds upon which the common stockholders and the opinion below reject the Commission's ultimate conclusion that it was fair to give the preferred stockholder the current going concern value of their investment.

B. *The principle of strict priority applies to the entire bundle of preferred stockholders' rights, including going-concern values in excess of involuntary liquidation preferences*

This Court has held that the principle of strict priority requires full compensation for the entire "bundle of rights" surrendered. *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 528; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 556. Similarly, the *Otis* case expresses the requirement for "full compensatory treatment," as an alternative expression for the requirement that " 'each' security holder in the order of his priority [shall receive] from that which is avail-

[17] Engineers' counsel themselves conceded this, both in argument before the Commission and in an opinion rendered the directors in connection with Engineers' decision to amend the plan to accept the Commission's view as to what fairness required (R. 67a, 1211a, 1953a). As we show below, the common stockholders' challenge to this valuation is, insofar as it relates to value as of the effective date of the plan, wholly unsupported in fact and basically involves a contention that it was not fair to value the preferred stockholders' claims as of the time they were compelled to surrender them.

able for the satisfaction of his claim the equitable equivalent of the rights surrendered.'" 323 U. S. at 639–640. See also *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448.

Counsel for the common stockholders have attempted to reconcile the decision below with the doctrine of strict priorities by arguing that the involuntary liquidation preference is the measure of the preferred stockholders' claim. See Point II, *infra*. Even where they purport to assume *arguendo* the correctness of the holdings below that under the *Otis* case the involuntary liquidation preference is not dispositive, they insist upon treating any claim on the part of the preferred stockholders to be compensated for loss of values in excess of $100 a share as a right of an ephemeral character not entitled to strict priority, but only to such limited recognition as may commend itself to the discretion of the court. This amounts to arguing that preferred stockholders are entitled to strict priority for their liquidation preference but not to receive the equitable equivalent of their dividend preference. But clearly the dividend preference is as much a part of the contract as the liquidation preference.[18]

[18] However, see Central Illinois' answer to petition for rehearing in the court below (R. 103), which states in part:

"It does not lie in the power of an administrative agency or even of a court of equity to enlarge the *preferential* claim of senior security holders, because such preference is purely a creature of contract. If in a liquidation or reorganization equitable considerations are found to warrant payment to

Common stockholders in the court below compared the preferred stockholders' claim to full compensatory treatment for their right to "excessive dividends" with the claim for interest on interest on corporate debt disallowed by this Court in *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156. We believe there is an obvious distinction, however, between refusing to allow interest on the unpaid interest which is accumulated during judicial administration, and refusing to allow preferred stockholders compensation for deprivation of future dividend claims at rates slightly higher than the going rate for investments of comparable risk. One of the evils of holding company preferred stocks was that their characterization as "preferred" tended to deceive the preferred stock investor by obscuring the extent of the risk factor resulting from the holding company preferred being junior to the operating company preferred stocks as well as to the bonds of the system. The past market history of Engineers' preferreds and the interruption of dividends during depression years illustrates the fact that the original preferred investment involved substantial risk. The fact that the

senior security holders of amounts in excess of the preferential claim established by the charter, such additional amounts do not form part of the *preferential* claim of the senior security holders but merely constitute a supplemental claim which must be balanced against corresponding equitable considerations in favor of the junior security holders." (See also the footnote to the above statement.)

dividend rates on Engineers' preferred stocks can now be characterized as "excessive", reflects improvement in Engineers' financial condition and lowered money rates from which Engineers common stockholders, on any theory, receive the major benefit.[29]

It should be noted that disallowance of interest on interest is a doctrine designed to prevent the misfortune of junior interests from operating to enrich senior security-holders. But allowing preferred stockholders compensation for being deprived of future dividend claims in amounts above the going rate in relation to risk is merely in recognition of a basic implication of the contract that (subject to the redemption price ceiling) the preferred stockholders are to share prosperity, to the extent of their limited dividend, in return for running risks which all too often approach that of common stockholders.

The common stockholders have also urged that recognition of going concern values which exceed involuntary liquidation preferences is unsound

[29] Engineers was benefited by cheap money in refunding operating company preferreds at lower rates. In addition, the value of the operating company common stocks which the plan makes available to Engineers common stockholders reflects the prospective yield on those common stocks, which, as qualified by the risk factor, must be evaluated in relation to the current cost of money. Because of the redemption price ceilings Engineers preferred will, even under the plan as approved by the Commission, obtain only a portion of the value otherwise added by cheap money to their dividend claims.

because recognition of the full going concern value of a high grade non-callable preferred would result in "leaving little or nothing for junior securities possessed of substantial value on the basis of every recognized criterion of reorganization law" (R. 104). This argument ignores the obvious fact that preferred stocks only become "high grade" so as to be valued in the market at rates approaching the yields for high grade bonds when their margin of security, both asset wise and earnings wise, is so substantial as to indicate that a great deal would remain for the common after full satisfaction of the prior rights of the preferred.[20]

Similarly, the district court in its appraisal of colloquial equities drew a distinction between the preferred stockholders receiving back their, or their predecessors', original investment, which approximated the involuntary liquidation pref-

[20] The only actual cases in which the Commission has had occasion to deal with non-callable preferred stocks under Section 11 (e) plans have been cases where, unlike Engineers, the charter limited the preferred to the same amount on voluntary liquidation as on involuntary liquidation. The Commission's valuation took into account the possibility that, apart from Section 11, the enterprise would have been liquidated, voluntarily or involuntarily. See *In the Matter of American Light and Traction Co., et al.*, Holding Company Act Release No. 7951, affirmed on a review petition which did not raise the issue of allocation, November 3, 1948 (C. C. A. 8); *In the Matter of Public Service Co. of N. J.*, Holding Company Act Release No. 8002, approved and enforced, United States District Court for the District of New Jersey, Civil Action No. 11,105 (1948).

rence of $100 a share, and receiving compensation for "the theoretical future deprivation of their present excessive [sic] dividend rate" (R. 291a). Consistent with this approach the district judge "valued" the $5, the $5.50 and the $6 preferred alike, according to each series $100 per share. The Commission's valuation, on the other hand, reflected the differences in the dividend rates on each series of preferred except as the redemption prices imposed ceilings.

The opinion of the Court of Appeals is less clear in distinguishing between the priority to be accorded dividend preferences and the priority to be accorded liquidation preferences.[21] That opinion holds "that investment value is and can be only *one* of a series of factors to be used in arriving at equitable equivalents"; and that "the new doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equitable equivalents enunciated in the Otis & Co. decision" (R. 38). The Court of Appeals also paraphrased the principle of equitable equivalence as one of "just recompense" rather than "full compensatory treatment", indicating that its requirement is not satisfied by a mere financial appraisal. This appears to be in

[21] The Court of Appeals in according the Commission latitude to value either "ex the Act" or "intra the Act", apparently leaves it free to take into account differences of dividend rates if it does value "ex the Act," but couples this with the requirement that the Commission add back losses

line with its upholding the discretion of the district court in the weighing of special or colloquial equities, since none of the special equities adverted to have any relation to the imposition of sanctions for inequitable conduct in connection with the acquisition of claims.[22]

The allowance for such equities by the courts below appears to us to permit that which this Court has repeatedly condemned in the decisions which state the rule of strict priority, namely, the subordination of prior rights for the benefit of junior interests. As this Court has stated "Unless that principle [of priority] is respected, * * * the property of one group will be subtly appropriated to pay the claims of another while lip service is rendered the principles of priority." *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 570.

[22] Since the preferred stockholders did not elect the management of Engineers, and indeed had no voting rights at all, there was and could be no suggestion that inequitable conduct on their part warranted special treatment amounting to less than full recognition of their claim. As we show below, none of the "colloquial" or "special" equities emphasized by the courts below had any relation to the equities which have been held to warrant disallowance, subordination or limitation to cost in such cases as *Taylor* v. *Standard Gas and Electric Co.*, 306 U. S. 307; *Pepper* v. *Litton*, 308 U. S. 295, 307; *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194.

C. *Contrary to the holding of the Court of Appeals the Commission's valuation of Engineers' preferred stock gave adequate consideration to the future earning power of Engineers*

The opinion of the Court of Appeals criticizes the Commission's method of valuation because as the court stated (R. 35):

> But we think it is clear that it [the Commission] did not give any substantial consideration to the future earning power of Engineers and its subsidiaries which the Supreme Court has held is one of the fundamental tests for reorganization valuation. See *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 526, and *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 565–6. In the instant case the Commission made no attempt to ascertain the future earning power of the system nor to apportion earning power between the preferreds and common based on their respective claims to income as it did in The United Light & Power Company case. But if values for the securities are to be determined *ex* the Act it is clear that the Commission should have done so.

The United Light & Power plan (which was involved in the *Otis* case) was a plan to use a single medium of payment, common stock of

Power's sole subsidiary, to compensate both preferred and common stockholders of Power for the surrender of their respective claims against Power. The apportionment of that stock necessarily involved evaluation of the expectation of income (together with the risk factor) from the new security in relation to what each class of security holders received and surrendered. The Engineers plan, however, did not permit any apportionment of earning power to the preferred stock,[23] but settled with the preferred in cash and reserved the earnings assets for the common.

The "earning power" of the cash received could be appraised only in relation to the reinvestment opportunities open to the preferred. They were, of course, free to choose an investment which might yield less but be more secure than what they gave up, or a more risky investment which might promise a higher yield. But the most workable hypothesis for finding a fair equivalent between cash received and the security surrendered under the compulsion of the plan, is that of reinvestment in a security of comparable risk. How much money would it cost the preferred stock-

[23] Some of the earnings assets, *i. e.*, the Gulf States stock, were distributed pursuant to a warrant program under which the common stockholders could either sell their warrants and realize some cash from the distribution or exercise their warrants and receive Gulf States stock upon the payment of $11.50 per share. This distribution was analyzed by the Commission and it was found that the additional investment, if made, would entitle the common stockholder to additional earnings on a pro forma basis of $1.04 per share (R. 71a).

holders to replace their securities with comparable ones? This equation was substantially the basis upon which the valuation witnesses testified as to what a willing buyer and a willing seller would give for Engineers preferred stocks apart from Section 11.

Both Badger and Barnes agreed that on a going concern basis and ex Section 11 a "willing buyer and * * * a willing seller" would so appraise the risk factor of Engineers preferred in relation to its dividend rate, that they would be willing to pay slightly in excess of the redemption prices (R. 522a, 658a–663a). Badger reached his result by comparison of current yields of other similar preferred stocks. He concluded that a proper yield basis for the Engineers preferred was 4.6%. This yield basis represented his estimate of how the investment markets would evaluate the risk of Engineers stockholders not receiving their preferential dividends in perpetuity, disregarding both the impact of Section 11 and the redemption price ceilings. This 4.6% yield basis, or capitalization rate, resulted, as a matter of mathematical computation, in values ranging from $108.70 per share for the $5 preferred to $130.33 per share for the $6 preferred.

In appraising what the preferred stockholders surrendered through the plan, the Commission was dealing with a limited, although prior, claim on earnings and the focus of the Commission's inquiry was, therefore, not the total amount of

Engineers' prospective earnings but the degree of risk that future earnings would be sufficient to maintain the preferred dividend. The Commission, in addition to considering the expert valuation testimony, made its own analysis of the financial data in the record, including the historical earnings record of the holding company system, and the coverage for the preferred dividends. (See especially R. 63a–65a and 86a–101a.) It appeared, for example, that the preferred dividends were covered by earnings 1.6 times on a consolidated basis and 2 times on a corporate basis according to the most recently available 12 months figures (R. 64a–65a). These were among the factors Badger had relied on in his testimony that the risk factor on the preferred was low enough to warrant it selling on a going concern basis (and disregarding the redemption prices) at values ranging from $108.70 per share for the $5 preferred to $130.33 per share for the $6 preferred. The Commission recognized, however, that the common stockholders were free to exercise the redemption privilege as a means of retiring the preferred stock without reference to the reorganization provisions of Section 11, and therefore treated the redemption prices as a ceiling. In view of this holding, it was only necessary for it to find, as the Engineers' management conceded, that the going concern value of the preferreds was at least equal to the

redemption prices[24] (R. 522a, 658a–663a). For the Commission to have attempted a precise forecast of Engineers' future earnings would have in no way advanced its valuation process.

The Court of Appeals noted, apparently without disapproval, that "the District Court expressly stated that it accepted Dr. Badger's values and that in the absence of a showing of changed circumstances it would deem them to be applicable at the time of the hearing" (R. 17). At another point, however, it is stated: "The trial judge also made a cogent finding respecting Dr. Badger's use of interest rates as an aid in fixing values for the preferred deeming the interest rate used by the latter to be too low" (R. 19).[25] Reference is then

[24] Allowing the preferred stockholders the redemption prices of $105 for the $5 and $110 for the $5.50 preferred and $6 preferred involved, as a matter of mathematical computation, allowing to their dividend claims in perpetuity capitalization rates of 4.76%, 5% and 5.45%, respectively. The difference between the lowest of these rates and the 4.6% figure arrived at by Badger illustrates the margin between the Commission's valuation and the Badger testimony accepted by the district court.

[25] The district court did not make any finding that the interest rate used by Dr. Badger was too low by then prevailing standards of the markets. Instead it adverted to a rise in interest rates since the Badger testimony and concluded that (Finding No. 52, R. 314a):

"A continuance for two or three years of the trend indicated over the past year could substantially reduce or wholly eliminate the differential in the current yield rate over dividend rate in the case of preferred stocks of the type of Engineers."

Because of the risk of future adverse changes in interest rates the district court concluded that the current values as

made to one of the court's findings "of fact" to the effect that "the extremely low money rates which resulted in Badger's finding that the preferred stocks of Engineers have an 'investment value' greater than $100 per share, largely reflect artificial factors which are clearly subject to changes at any time and may well be of purely transitory character." (See Finding No. 51, R. 313a–314a quoted in full at R. 19–20, n. 9.)

The possibility of change in interest rates, like the risk that earnings might decline for a variety of causes, was clearly a risk common to the comparable investments with which Engineers preferred stock was compared, and could apply also to any investment the preferred stockholders might make with the cash which they received under the plan.[26] There is no suggestion

found by Badger "are by no means determinative of the investment value of these stocks for any considerable period of time in the future." (Finding No. 54, R. 315a.)

[26] Barnes mentioned five factors which might adversely affect the future price level of the preferreds if they remained outstanding: (1) continued inflation, (2) periodic depressions, (3) possibilities of government competition, (4) adverse changes in the policy of regulatory authorities, and (5) nuclear energy. He did not, however, claim that any of these risks affected the present value of the Engineers preferred, conceding (R. 522a, 525a):

"These adverse factors which I have just referred to are common to the utility industry generally and are no more imminent in the areas served by our subsidiaries than they are generally throughout the country so that present price levels of securities reflect the extent to which the investing public is presently appraising these hazards, but to say that

in the opinions below that the probability of an increase in the cost of money was sufficiently great to warrant the preferred stockholders in maintaining the cash received from the Engineers plan intact to await a more favorable reinvestment opportunity in the future, or that investment yields were likely to rise sufficiently rapidly to compensate for the loss of any interest at all while waiting for an expected drop in the market price of comparable investments. We believe it utterly unrealistic to assume that the average investor would have sufficient percipience to follow such a course ever if it were the subject of accurate forecast by experts.

If it were the preferred stockholders who were insisting upon being paid off in cash, rather than receiving an allocation of operating company common stocks, which would give them, in compensation for the surrender of their prior position, an opportunity to share in earnings beyond their existing preferences, there would be more color of fairness in insisting that the preferred stockholders' participation be related to necessarily fallible estimates as to the future earnings. Even in that event we believe the standard of fairness requires the application of realistic discount factors which compensate for the element of uncertainty in the forecasting process. Here, however, it was the common stockholders' choice

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these prices reflect reasonably foreseeable future values is obviously not correct as only the future can disclose what these later values may be."

to retire the preferred in cash and the timing was also to a large extent the common stockholders' choice. Under the circumstances, the Commission was, we submit, fully warranted in valuing the preferred in accordance with its cash value as of the date of its determination rather than speculating as to its possible future value.[27]

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[27] While the district court took official notice that interest rates had changed slightly since the testimony was taken before the Commission he did not find sufficient change to warrant on that ground a rejection of the Commissoin's valuation. The district court and the court below merely referred to interest changes as illustrating the possibility of future interest changes. In the cross petition and in the brief in opposition counsel for Central Illinois adverted to changes in interest rates since the decision of the district court. However, inasmuch as the plan had been consummated shortly after the decision below, and the preferred stockholders were then required to surrender their investment for cash, we believe that any later changes in interest rates would be wholly irrelevant. In any event, such changes in interest rates as have occurred have not been sufficient to render obsolete the Badger valuation testimony, accepted by the district court, in view of the ample margin between the Badger going concern values and the redemption price ceilings fixed by the Commission. Our own computation, based upon market prices on December 14, 1948, shows an average yield at the present time of 4.87 per cent for the securities now outstanding used by Badger as the basis for his comparisons. This calculation was made as follows:

Security	*Price*	*Yield*
Bangor Hydro Electric	150.00	4.67
California Oregon Power	109.00	5.50
Central Illinois Light	104.00	4.33
Consumers Power	103.50	4.35
Georgia Power	104.75	4.77
Kansas Power & Light	103.00	4.37
New Orleans Public Service	98.25	4.83

D. *The Commission's finding that the plan accorded preferred stockholders no more and no less than fair compensation for the surrender of their prior claim, and that it was beneficial to the common to retire that prior claim in cash, was adequate support for its conclusion that the plan was fair to common stockholders*

The Court of Appeals likewise criticized the Commission because it "made no finding as to the 'value' of the common stock" (R. 35). Here again we believe the court below misconceived the nature of the valuation problem presented by the plan.

Since the common stockholders received everything that remained after satisfying the preferred stockholders' prior claim, the Commission merely applied the Euclidian axiom that the sum of the parts equals the whole when it concluded that it was necessarily fair to the common to recognize "the full priority of the preferred stockholders as required by the statute" (R. 73a).

The district court stated (R. 291a):

> The argument for payment of the premium is comparable to dealing cards off the top of a deck. When full hands (based on theoretical "investment value") have been dealt to all the senior security holders, the

Security	Price	Yield
Niagara Hudson Power	97.25	5.14
Pacific Public Service	23.50	5.53
Pennsylvania Power & Light	101.25	4.44
West Penn Electric	105.50	5.69

> common would merely get whatever happens to remain. Under the Act the interest of all investors must be considered.

The Commission, of course, agrees that the interest of all investors must be considered in applying the fair and equitable standard but, as this Court has repeatedly held, they must be considered in the strict order of their priorities, which means that the common gets what is left after the preferred gets the value of its share. There thus is no point to attempting to ascertain the separate value of the common.

It may be urged that the above quoted statement by the district court, and the Court of Appeals' insistence that the Commission make a "finding as to the 'value' of the common stock", reflect merely belief that valuing what the common stock received and surrendered through the plan would afford a necessary check upon the Commission's determination of the investment value of the preferred. With the investment value of the preferred undisputed, however, and expressly accepted by the District Court, we are unable to reconcile such a requirement for duplicate valuation with the holding of the Court of Appeals that "the selection of possible though varying techniques [of valuation] is for the Commission in the exercise of its expert administrative judgment" (R. 37).[28] In any event placing a dollar value

[28] The Commission had checked the fairness of the treatment accorded the preferred by finding that the common

upon what the common stock received and surrendered through the plan could not serve as a check upon the Commission's conclusion as to the amount of cash which it was fair for the preferred stockholders to receive and for common stockholders to pay under the plan. Such a valuation would have involved a process far more speculative than the determinations already made by the Commission[28] and this would be of no value as a check.[29]

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stockholders were benefited by retiring the preferred at the redemption prices, and this also was undisputed.

[28] Although for purposes of establishing fixed charges and making valuations Subsections 77 (b) (4) and 77 (e) of the Bankruptcy Act, 11 U. S. C. 205 (b) (4) and (e), expressly direct the Interstate Commerce Commission to give due consideration to past, present, and *prospective* earnings, it seems clear that both the Commission and the courts have not deemed it essential that the Commission attempt to make precise forecasts of future earnings as distinguished from forecasting that future earnings will be sufficient to support the new capital structure which the plan provides, or determining that in the light of earnings records plus opinion evidence as to prospective earnings, the new securities allocated to each class are the equitable equivalent of the interests surrendered. See *Western Pacific R. R. Co. Reorganization*, 230 I. C. C. 61, 233, I. C. C. 409, *affirmed sub nom. Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448; *In re Erie R. Co.*, 37 F. Supp. 237, 245 (N. D. Ohio); Note, 51 Yale L. J. 967, 978. The Securities and Exchange Commission has on occasion used as a working hypothesis what it has described as "earnings forecasts." In so doing the Commission has, of course, recognized the limitations upon human foresight and has applied discount factors which recognize the risk that actual earnings may fall short of the "forecast".

[29] It was a drawback, although we believe an unavoidable one, of the valuation technique employed in the *Otis* case that

E. *The Court of Appeals erred in its criticism of the Commission for allegedly valuing "the preferred ex the Public Utility Holding Company Act, i. e., as if the Act had never been passed" but omitting "consideration of the common by a similar standard".*

The opinion below states: "What the Commission has done is to consider the investment values of the preferred *ex* the Public Utility Holding Company Act, i. e., as if the Act had never been passed. But it considered only the preferreds on this basis" (R. 35). We noted in the previous section of this brief that giving the preferred stockholders the value of their prior claim as computed by the Commission and giving the common stockholders the full residual value of the enterprise necessarily involved consideration of both interests by a similar standard. In this section we show:

(1) the Commission did not value either com-

it did require the Commission to appraise the relative treatment of the United Light and Power Company preferred and common stockholders in the light of forecasts of future earnings. The dissenting Commissioner and dissenting Justices relied in part upon the necessarily attenuated character of that valuation process in arguing that the principle of strict priorities required a denial of any participation to the common stock. The majority of the Commission and of this Court, however, concluded that the difficulties of the valuation process did not warrant denial of participation to a common stock which, as a matter of judgment had a legitimate investment value. See 323 U. S. at 632.

mon or preferred stock "as if the Act had never been passed", but merely valued them on a going concern basis, i. e. apart from the reorganization required by Section 11 of the Act;

(2) there is no warrant for *a priori* assumptions, as a matter of judicial notice, that the overall impact of the Act has been to cause losses to Engineers as an accounting entity, or to its common stockholders;

(3) it would be utterly impractical to require the Commission to reconstitute the history of Engineers since the Act with a view to restoring to its balance sheet any ascertainable excess of losses over gains;

(4) if practical, such a process would involve collateral attack on past transactions which the Act intended should be no longer open to reexamination, and in any event could only strengthen the claim of the preferred stockholders, unless contrary to the rule of strict priorities the risk of losses is to be shifted from junior to senior security holders.

(1) The court's concept of valuation as if the Act had never been passed

The court below noted that "the reasoning which moved the Commission is not as plain as it might be" (R. 35). Apparently what misled the court below was merely that the Commission did not rearticulate the reasons it gave and which this Court approved in the *Otis* case, for valuing

the preferred stocks without treating their liquidation preferences as having been matured by the reorganization process. As was explained to the court below in the Commission's petition for rehearing, the shorthand expressions "apart from the Act" or "ex the Act" must be read with the interpolation, "ex [the present reorganization required by Section 11 (b) of] the Act." [31]

The Commission makes two references to the concept in its opinion. The first is by way of quotation from Engineers' administrative brief upon which the Commission relied for its concessions concerning the value of preferred. Engineers agreed that amounts slightly higher than the voluntary liquidation preferences and the redemption prices "are substantially the present value or investment worth of these three series of stock, on a going concern basis and apart from the Act, under prevailing yields applied to comparable securities" (R. 67a). The Commission also states as its reason for treating the redemption prices as imposing ceilings on the preferred stockholders' claims and thus precluding the preferred from receiving their full going concern

[31] This meaning was urged upon the court below in the petition for rehearing, which was the Commission's first occasion to address itself to what it believed was a misunderstanding by that court of its valuation technique (R. 45–50). The Badger valuation which the courts below accepted was expressly explained in Badger's report as "predicated upon the assumption that Engineers Public Service Company shall continue in operation as presently constituted." (R. 2092a. See also R. 1035a–1036a.)

values, that the redemption price "provides a means, apart from the Act, whereby the security can be retired at a maximum price" (R. 67a). Both of these statements involved dealing with Engineers' assets and liabilities as they actually exist as of the date of the plan rather than as they might have been if the Act had never been passed. In determining, however, the equitable equivalence between the rights accorded by the plan and the rights surrendered, the statutory necessity for a reorganization was not permitted by the Commission to affect the valuation of the rights surrendered, as they would have existed apart from the plan. Instead the old securities were valued (in relation to the new) "as though in a continuing enterprise." *The United Light and Power Co., et al.*, 13 S. E. C. 1, 9. Thus, in both the *Engineers* case and the *United Light* case the interest surrendered by the plan was treated, not as a matured claim to a fixed amount of cash, but as an interest in a going business with the possibility, apart from the reorganization required by Section 11, of becoming a matured claim through involuntary liquidation (a remote possibility), voluntary liquidation or redemption. Under either of the latter possibilities the preferred stock of Engineers would have received the amounts provided under the plan as approved by the Commission.

This use of the "*ex* the Act" concept, as a means of equating rights surrendered and rights

received, occurs repeatedly in the Commission's *United Light* opinion and in this Court's opinion in the *Otis* case. Thus, the Commission noted that in bankruptcy or equity reorganizations, where creditors and other claimants are prevented from foreclosing or compelling an actual liquidation, new securities have traditionally been distributed "according to their contractual and other rights determined *as though in liquidation*," and urged that, similarly, where the legislative policy of the Holding Company Act has precluded security holders of a holding company "from maintaining their respective interests in a going corporation," it is consistent with the bankruptcy precedents that those affected "should be given participations according to their contractual or other rights determined *as though in a continuing enterprise*, and that the process of compliance with the statute should not be permitted to mature liquidation preferences. In both instances the measure of participation allowed should compensate for the substantive rights of security holders as they would exist apart from the reorganization or other procedure in question." 13 S. E. C. 1, 9. An alternative statement of the same rationale was that "under the circumstances, fair and equitable compensation will be given to all of the claimants if their rights are measured not in terms of the situation created by the statute but rather in terms of the situation terminated

by it—i. e., as though no liquidation were to take place" (13 S. E. C. 1, 12).

In upholding the Commission this Court stated (*Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 635):

> The Commission recognizes and applies the doctrine of full priority by giving value to the rights of the preferred in a going concern rather than as if by sale and distribution. [See also *Schwabacher* v. *United States*, 334 U. S. 182, 199.]

Elsewhere in the opinion it is stated that "rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place." (Ibid. p. 633.)

We believe that there is nothing in the Commission's or the Court's rationale in the *Otis* case which could be characterized as permitting, or requiring, valuation "as if the Act had never been passed" in the sense used by the court below. The decision on the part of the Commission and this Court to value on a going concern basis, rather than to treat the reorganization process of the Act as maturing liquidation preferences, was premised on the conviction that Congress intended Section 11 to operate without destroying legitimate investment values—i. e. without transferring value from one class of security holders to another. Because of the evidence of this intention in the legislative history

and because "Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders,"[32] this Court concluded that "Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors." 323 U. S. 624, 638.[33]

The *Otis* rationale of determining equitable equivalents in relation to going concern values rather than liquidation preferences did not in that case involve valuing the enterprise with prior divestments reinstated as if the Act had not been passed. Nor did the Commission value either the preferred or common stocks of Engineers on that basis. Thus the real thrust of the Court of Appeals' criticism of the Commission for inconsistency appears to be that since valuation of both preferred and common on the basis of their going concern values is to a limited extent equating what is received to rights which

[32] *Otis & Co.* v. *Securities and Exchange Commission*, *supra*, at p. 637.

[33] In the case of Engineers, liquidation through voluntary action of the stockholders would have resulted in the same payments as resulted from the Commission's valuation since the voluntary liquidation preferences coincided with the redemption prices of the preferred.

would exist apart from the Act, consistency requires the Commission to reconstitute the entire history of the holding company system as if the Act had not been passed.

There is no inconsistency, we submit, in applying a criterion of fairness to evaluate what is received and surrendered in a particular reorganization, and in not reopening prior consummated transactions so as to equate the rights received with what there would have been to surrender if the Act had never been passed.

(2) The hypothesis of losses attributable to the Act

The courts below appear to have taken it for granted that a reconstitution of Engineers' history since the Act would show that Engineers' common stockholders have suffered losses attributable to the Act. This assumption was one of the "colloquial equities" moving the district judge to conclude that in his judgment $100 a share was the proper amount to be paid each series of preferred (R. 290a–307a).[34] The Court of Appeals referred to "losses which were indubitably occa-

[34] The district court stated (R. 288a, n. 2):

"It is, of course, true that once the charter is not accepted as controlling, there is no reason why 100 is the necessary figure for a senior security holder to receive. It may be more or it may be less. But, in this case, after consideration of all factors involved, I conclude that $100 would be fair and equitable, but that the payment of premiums would not be fair and equitable."

sioned to the holding company enterprise by the sale of securities from Engineers' portfolio because of the divestitures required by the Act" (R. 34), but nevertheless decided that while the district court "may reject a plan, it cannot value the securities, find equitable equivalents therefor and substitute its own estimates for those of the Commission" (R. 39). The court stated with reference to the Commission's valuation duties that "if the equitable equivalents for relinquished securities are to be arrived at by the Commission under the doctrine of the *Otis & Co.* case, *ex* the Act, losses of the sort referred to in this paragraph must be weighed into the calculation, i. e., such losses should be returned to the credit side of the enterprise's balance sheet as a matter of bookkeeping" (R. 37).

We interpret the opinion of the Court of Appeals as holding that the Commission must compute in dollars and cents the extent that the overall impact of the Holding Company Act, or at least of Section 11 thereof, may have been harmful to Engineers common stock, in order to take such loss into account in determining how much less the preferred stockholders should receive than their investment values as of the date of the plan. Central Illinois, in its brief in opposition, disputes this interpretation and argues "that the Court had no intention of insisting upon the exact ascertainment and computation of each loss sustained by Engineers, but merely upon giv

ing reasonable consideration to the fact that such losses (without necessity for precise computation) had been sustained" (Brief in Opposition, Pt. IV, p. 34). We do not believe that this is a fair construction of the opinion of the Court of Appeals; for it is clear that the Commission did in its opinion consider the argument that losses had resulted from prior divestments. The Commission specifically found that the prior divestments did not result in the plan taking anything "unfairly" from the common (R. 72a).

The Commission itself rejected the hypothesis that Engineers' common stockholders had suffered losses as a result of the Act, pointing out in support of its view that marketwise the common stock increased in value from a low of 1⅛ in 1935 to 36 on February 13, 1946, the latest date covered in the hearings before the Commission, and that in all of its divestments Engineers had been free in its choice of methods and, within limits, in the choice of time for divestment. While the Commission concedes that it is impossible to demonstrate the relationship between this increase and the statute, the increase is in accord with the basic economic premise adopted by the Congress in passing the Act, namely, that holding companies such as Engineers with widely separated properties are disadvantageous from the point of view of security holders, as well as from the point of view of the public interest, and that their elimination adds rather than subtracts value

from the totality of security holders' interests affected.[35] We believe that experience with the administration of the Holding Company Act has tended to confirm this economic judgment, but, as we show below, we do not believe it practical in the case of the Engineers system or the holding company industry generally to attempt to support this economic judgment by an itemized reconstitution of events, as if the Act had not been passed.

[35] (See Appendix B, *infra*, pp. 129–130, 130–139.) Insofar as the court below has proceeded on the hypothesis that a holding company contributes to the earning power, and therefore to the intrinsic value, of assets which must be divested pursuant to Section 11, this case plainly demonstrates the insubstantiality of the assumption. Engineers' contribution to the management of its underlying subsidiaries was largely limited to financial matters and it seems clear that each of the subsidiaries was capable of operating independently in as economical a fashion as it operated under the aegis of Engineers. And even assuming that there was some economic value to the stockholders in the holding company, it was counterbalanced by the added costs incident to maintaining the separate corporate existence of Engineers and the salary costs of the personnel involved. See *In the Matter of Engineers Public Service Co.*, 12 S. E. C. 41 (1942). Moreover, Congress has repeatedly emphasized that Section 11, by providing the machinery whereby unproductive and unrelated entities may be severed from the system, preserves and increases the value of the enterprise, and has labeled the argument that the divestment process itself will result in loss of value due to forced liquidation "false." S. Rep. 621, 74th Cong., 1st Sess., p. 16. Experience has demonstrated repeatedly that there is a higher break-up value in holding company equities, and that the value of direct ownership in the underlying properties exceeds the value of the holding company stock.

(3) Impracticability of reconstituting Engineers balance sheet as if the Act had never been passed.

Confronted with the task of bringing about a sweeping reorganization of the more than 15 billion dollar industry subject to the Act, the Commission has necessarily adopted a step by step approach. If the Commission had been required to do the entire job of bringing about compliance with Section 11 in one comprehensive order for each holding company system, the issues of fact and law presented would have been so multifarious as to preclude the conclusion of administrative hearings, let alone the subsequent course of judicial review, without making the process interminable. But use of the step by step approach would be without substantial value unless each step could be treated as a unit, to be appraised with finality in its impact upon investors and consumers, and subjected to judicial review only within the time limits prescribed by the statute as applicable to individual Commission orders.

In accordance with this step by step approach and likewise we believe in conformance with universally applicable reorganization practice, the Commission has treated each reorganization plan presented to it as a unit and has applied the fair and equitable standard for the purpose of determining, with respect to the impact of the par-

ticular plan, whether what each class of security holders receives under the plan is the equitable equivalent of the rights surrendered as a result of the plan. In doing so it has invariably, and we believe inevitably, made its appraisal in the light of the then existing assets, liabilities and earning power of the company undergoing reorganization.

The opinion below indicates that the Commission should make use of hindsight to compensate for past decisions based upon necessarily inadequate foresight. The Commission itself has urged that down to the date of actual consummation of a reorganization the reorganization process should be sufficiently flexible to allow for reexaminations of allocations in the light of changed economic conditions. See *Knight* v. *Wertheim & Co.*, 158 F. 2d 838 (C. C. A. 2), certiorari denied *sub nom. McGuire* v. *Equitable Office Bldg. Corp.*, 331 U. S. 818; *In re Standard Gas & Electric Co.*, 63 F. Supp. 876 (D. Del.). Even in this area, however, it is necessary to strike a balance between the desirability of minimizing the risk of unfairness in allocations and the desirability of not making the reorganization process interminable.[36] Wherever this balance is to be drawn in the framework of a par-

[36] Cf. *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 506–509; *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495; *Insurance Group* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607.

ticular reorganization proceeding, we believe that only chaos can result from opening up consummated plans and transactions to reevaluation in the light of hindsight, particularly where, as in this instance, the reexamination is not to readjust equities between parties to the transaction but to shift the burden of the impact of the consummated transaction in the relationship *inter sese* of security holders of one of the parties thereto.

a. *Puget Sound reorganization*

Thus the court below would have the Commission reexamine for the purpose of adjusting its impact upon Engineers' preferred and common stockholders a reorganization of Engineers' former subsidiary, Puget Sound Power and Light Corporation, approved by the Commission and the United States District Court for the District of Massachusetts in 1943. This reorganization, which did not affect the debt of the company, cleared up dividend arrears on publicly held prior preference stock through the issuance of additional preference stock, and substituted new common stock for the preexisting (junior) preferred stock and arrears and the old common stock. Engineers received approximately a 3% interest in the new common stock in return for its old holdings of 99.3% of common stock, estimated in the absence of reorganization to be from

18 to 34 years away from dividends. This interest it subsequently sold for $764,765.

The court below points to Puget Sound's net profit as they appear in Moody's Public Utility Manual for the years 1946 and 1947, and holds that since the figures there given exceed the estimates of average future earnings made by the Commission at the time it approved the recapitalization of Puget Sound, the reorganization and subsequent divestment of Puget Sound resulted in a loss to Engineers' common stockholders. Apart from the collateral nature of this attack upon the determinations made in the prior proceedings, we believe the court's computations are based upon a gross oversimplification of the complex problems involved in the Commission's evaluation of Engineers' interest in Puget and of the relationship between Engineers' interest in Puget Sound's earnings in 1943, when the recapitalization was ordered, and its hypothetical interest in those earnings today if no recapitalization had been ordered and the divestment had not occurred.

Indeed, the controversy over Puget Sound's recapitalization plan was concerned chiefly with whether Engineers was entitled to any interest in the new company in view of its junior position as to assets and earnings and the contingent character and remoteness of its interest in future

dividends.[36a] The Commission decided in favor of Engineers in awarding it a three percent interest in the new enterprise, free of prior claims upon income. Moreover, even if the Commission's forecast of Puget Sound's earnings and its actual earnings for 1946 and 1947 were otherwise comparable,[37] it would seem presumptuous to assume that earnings for those two years will represent an average for the system upon which interests in the enterprise should have been allocated.[38] In addition, it appears probable that good business management would have compelled, at some time, the recapitalization of Puget, and there is some possibility that the small interest Engi-

[36a] The book loss of more than $33,000,000 noted by the courts below (R. 19, n. 8) fails to reflect factors not caused by the Act (a) that the book investment (on Puget's books) represented $9,386,982 of write ups and (b) that there were $18,600,705 of dividend arrears. Deducting these two items, the Commission found a minus book value for the Puget common stock of $9,386,982 as of the time of the reorganization. See 13 S. E. C. 226, 232. These findings, offered by Engineers, are part of the unprinted record.

[37] It should be noted that the earnings figures which the court took from Moody's Public Utility Manual reflect (1) a depreciation allowance between $600,000 and $1,000,000 less than that which the Commission found appropriate in making its estimate of net earnings, (2) capital expenditures since 1943, and (3) divestment of certain properties after it ceased to be subject to the Public Utility Holding Company Act.

[38] Puget's president has stated that the gross income figure in 1948 will probably be $1,000,000 less than in 1947. Moody's Public Utility Manual Supplement, Volume 19, Page 1442.

neers could command in such a recapitalized company might have been sold aside from the compulsions of the Act.[39] As an alternative, Engineers might have been persuaded to make a substantial new investment in equity securities of Puget and it would be necessary to estimate the return from that investment as against other possible uses of Engineers' funds.[40]

[39] The book loss acted as a fund from which subsequent capital gains could be deducted. Thus $2,000,000 was used to set off the capital gains arising from the sale of certain assets (Engineers' Ex. 68, R. 1833a). If Virginia and El Paso had been sold about 22 million dollars more would have been available (R. 616a-623a). Secondly, there existed a strong possibility that Puget Sound would be purchased under the law of eminent domain by public power authorities in the State of Washington. In such event it then appeared probable that the interest of Engineers would be valued at much less than $764,765. Finally, the price received was arrived at by arm's length bargaining (R. 72a, n. 55). All of these considerations, none of which are associated with Section 11, undoubtedly weighed heavily with management in connection with their decision to dispose of Puget Sound at a particular time in a particular fashion.

[40] The published financial statements of Puget indicate that its working capital, which was approximately $980,000 on December 31, 1943, showed a deficit of $1,465,000 on December 31, 1947. This factor, plus the inadequate depreciation allowances being made and the reduced earnings forecast may lead to a need for additional financing in the near future. An attempt to recompute the consequences of the Puget reorganization would have to appraise this prospect also and any resulting dilution in the per share earnings attributable to the former Engineers' holdings—or in the alternative, the cost to Engineers in supplying the necessary capital itself.

Again, if it be assumed that the divestment of Puget was the result of Holding Company Act pressure, it would be necessary, if the effect of the Act upon the holding company system is to be calculated, to determine the effect of the withdrawal of the $764,765, which Engineers received from the sale of Puget from Engineers' general funds. These funds, including proceeds of other sales and retained earnings generally, were used to increase Engineers' investment in El Paso and Virginia [41] and to make payments to the preferred stocks of Engineers. It would also be necessary to recompute Engineers' taxes without reference to the tax advantages derived from the sale of Puget.

b. *El Paso Natural Gas Co. divestiture*

The court below also illustrates its determination of "substantial losses which occurred to Engineers" by pointing to a "loss" of "at least $4,000,000" which it states flowed from the divestiture of El Paso Natural Gas Company (R. 36–

[41] Virginia Public Service Company was acquired by Engineers and merged with Virginia Electric and Power Company (Virginia) when the Associated Gas and Electric system was compelled to divest itself of this subsidiary on the ground that its retention in the Associated system violated the standards of Section 11 and elected to accomplish the divestment by sale. Any increase in value gained by Virginia might therefore be termed an increase to Engineers due to the operation of Section 11. *Virginia Electric and Power Company — S. E. C. —* (1944), Holding Company Act Release No. 5021.

37). The history of Engineers' relationship with El Paso Natural Gas goes back to 1931, when Engineers loaned El Paso Natural Gas $3,500,000 and in return received $3,500,000 of bonds and an option to purchase 192,119 shares of its common stock. In 1936, after the passage of the Holding Company Act but prior to Engineers' registration with the Commission as a holding company, it became necessary to exercise this option in order to prevent its expiration. Accordingly, arrangements were effected whereby 57,119 shares of stock were obtained at $25 per share, options to purchase 16,576 were assigned to persons active in the management and financing of El Paso Natural Gas for $125,760, options to purchase 18,424 shares were assigned to Phelps Dodge Corp., and options for the purchase of 100,000 shares were permitted to expire. A five year trust was formed for the purpose of holding and selling the stock acquired by Engineers. These shares of stock were shortly thereafter split three for one, reducing their cost basis to $8.33 per share. Sixty thousand of the new shares were sold in 1936 for $19 per share and sixty thousand were sold in 1937 for $25 per share (R. 1484a-1485a, 1504a). Then, after Engineers registered with the Commission as a holding company, no more shares were sold by the trustee, and at the termination of the trust Engineers took direct title to the remaining 51,357 shares. These shares

were sold in March 1944, at an average price of $29.661 per share (R. 508a–509a).

As a result of these sales in 1936, 1937, and 1944 Engineers realized (in addition to the repayment of the loan), a profit of $2,700,000 from its El Paso Natural Gas investment. Nevertheless, the court below regarded the transactions as involving a loss "indubitably occasioned * * * by the Act" of at least $4,000,000, on the theory that but for the Act Engineers would have sold the shares at a higher subsequent value (R. 34, 37). The timings of these sales were not, however, compelled by Section 11, but were dictated by managerial judgment which must have reflected not only market judgments at the time but the advantage which management expected to derive from the cash proceeds.

The entire argument of losses due to sales of securities in a market lower than the present one presupposes a management so prescient that it will sell its stock holdings at the very peak of the market. Such omniscience, we submit, is not properly attributable to corporate management. Indeed, had the common stockholders who controlled the management of Engineers considered the prospect for appreciation of the El Paso stock disproportionate to prices obtainable, there is no reason why they could not have arranged to dispose of the Engineers' holdings of El Paso Natural Gas under a plan which en-

abled the common stockholders to retain this investment, as was done with the investments distributed under the instant plan.

Moreover, sale of the El Paso Natural Gas stock by Engineers did not preclude common stockholders of Engineers, if they so desired, from retaining an equivalent interest by directly purchasing El Paso Natural Gas stock on the market, or from the underwriting group which purchased it from Engineers. It is conceded, of course, that this would have required a fresh investment by common stockholders since the cash proceeds of the sale were not distributed by Engineers.

Computing the loss of profit that might have been realized if El Paso had been retained and sold at a later time is meaningless without attempting to draw a comparison between the profit Engineers did realize through retention of the cash proceeds of the sale. It is, of course, impossible to earmark the use made by Engineers of cash derived from a particular source. Thus, evaluation of the consequences of the El Paso Natural Gas sales is necessarily merged with a consideration of the over-all benefit to Engineers of the cash derived from a variety of sources including (a) the El Paso Natural Gas sale, (b) other sales, and (c) retention of what could have been declared in common stock dividends. Assuming with the courts below that the transactions by which Engineers realized or retained cash were all attributable to Section 11, it would still be

necessary to compare the hypothetical profits which might otherwise have been realized with the results of utilizing cash resources to build up the system and improve the common stock equity. If, for example, cash had not been so realized and retained, would the Engineers common stock have increased in market value from 1⅛ in 1935 to 37 in 1945, when the plan was filed? This is the utterly speculative type of inquiry which the opinion below appears to require of the Commission.

(4) The irrelevance of the issue of losses

Assuming *arguendo,* that there were losses as a result of the Act and that their existence and amount were ascertainable, the existence of such losses would not warrant according the preferred stockholders under the plan anything less than fair compensation for what they surrendered by the plan. The court below assumed that such losses would as a mere matter of bookkeeping require the Commission to allow preferred stockholders less than their investment value *ex* the plan. The opinion below states "such losses should be returned to the credit side of the enterprise's balance sheet as a matter of bookkeeping" (R. 37). We assume the court meant that such losses should be added to the asset side of the balance sheet. If this were done, however, the effect would be merely to improve the coverage for the preferred and thus strengthen the case

for finding an investment value in the preferred at least equal to the re-emption prices.

It is necessary, therefore, to take the further step of shifting the risk of loss from common to preferred stockholders before such a bookkeeping adjustment can affect the fairness of the plan's treatment of preferred and common stockholders. In other words, the losses must be added back only in computing what common stockholders receive, and not in determining whether preferred stockholders receive the equitable equivalent of what they surrender. Thus, the essence of the requirement of the court below is that the Commission shift from the common stockholders to the preferred stockholders all or a portion of the losses. If, however, the doctrine of strict priorities has any vitality at all, it precludes allowing the junior security holders to use the reorganization process to shift from the junior to the senior security holders the risk of losses from the prior operation of the enterprise. This is so irrespective of whether the management elected by the junior security holders may have had some responsibility for decisions which were a causal factor in producing the losses. The decision in the *Otis* case to value the United Light and Power preferred at its going concern value rather than on the basis of its liquidation preference, did not rest on any theory of requiring senior security holders to share losses which the

Act might otherwise impose upon the junior security holders. Instead it rested upon the Congressional purpose to prevent the very process of reorganization itself from creating a "windfall" by taking from the common stockholders and giving to the preferred stock values which, apart from the reorganization itself, inhered in the common stockholders' charter rights (See *supra*, pp. 28 *et seq.*).

F. *The miscellaneous "colloquial equities" upon which the district court relied and which the circuit inferentially considered appropriate in determining the equitable equivalent of what was surrendered are likewise irrelevant to such a consideration*

In addition to the circumstances surrounding past divestments, which we have already discussed, the district court cited as factors looking toward the nonpayment of the redemption prices of the preferreds the issue price and past market history of the preferreds and the difference between the dividend history of the preferreds and the dividend history of the common. The court below, although it did not refer to these nonvaluation criteria, upheld the right of the district court to reverse the Commission on these grounds, stating that "all pertinent factors and all substantial equities must be considered by the Commission" and concluded that "the District Judge did not err" in this respect (R. 38–39).

(1) The issue price and past market history

The $5 preferred was issued to the public for $100 per share, the $5.50 preferred for $99.50 per share, and the $6 preferred for $100 per share between 1928 and 1930. After the deduction of underwriting spreads it is estimated that the company received between $95 and $98 per share (R. 301a). It was these facts, which did not appear to the Commission to indicate the existence of any unusual circumstances, that the district court characterized as looking "toward nonpayment of premiums" (R. 288a). We believe the Commission, which simply appraised the current worth of the interest held by the preferreds, correctly declined to modify their valuation in the light of factors which might have been pertinent some 16 or 18 years before, when the then current money market had largely determined the issue price and underwriting spread of the preferred stocks. The correctness of this view was recently implied by this Court, *Schwabacher* v. *United States*, 334 U. S. 182, 199, in connection with a controversy over the proper criteria which the Interstate Commerce Commission should apply to determine the interest of a security holder in a merger. It was there said:

> In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put

into a constituent company but what value he is contributing to the merger that is to be made good.

The intervening market fluctuations in response to general economic conditions, the passage of the Holding Company Act and the course of progress thereunder, and all such similar circumstances are equally irrelevant in this regard. Nor does the amount for which the stock sold either initially or at some particular period in its history bear upon present value except in the most remote sense, as pointing to factors in the history of the enterprise which should be subjected to analysis. To that extent they were given full consideration by the Commission."[42]

(2) Dividend history

Another colloquial equity emphasized by the district court but not by the Court of Appeals was that "a significant reason why the present preferreds are able to be evaluated at more than

[42] It is interesting to note that if the issue price and market history of the common stock is analyzed on the same basis, it appears that the common stock receives, under the plan, more than "colloquial equities" would entitle them to receive. Thus, the average price at which the common stock was issued was $30.40 per share (R. 1820a). Accepting the value placed upon the interest received by the common stockholders in the Central Illinois brief in the court below of $33.90 (p. 84, n. 202) there appears to be a "bonus" of more than 10 per cent being paid the common by the plan. Comparing the market histories of the two securities we find no significant difference.

their redemption prices is because of retained earnings over a period of years not paid as dividends to the common stockholders" (R. 291a). Since the Court of Appeals omitted reference to this colloquial equity even in its summarization of the district court's reasoning, it may have agreed with the Commission's argument that at least this colloquial equity is irrelevant. On the other hand, the same logic which would require a reconstitution of the balance sheet of Engineers to determine what the balance sheet would have been if the Act had not been passed would seem to point to the necessity of deducting dividends that might have been paid but for the Act.

It is clear on the face of the record that the dividend policy was motivated by considerations dictated by the interests of the common stockholders, and that plans for compliance with Section 11 were a relatively minor factor in their motivation. In the first place, Engineers' witnesses freely conceded that they regarded it as in the interest of the common stockholders, from the point of view of minimizing Federal income taxes, to avoid receipt of dividends and instead to build up the equity value of the common stock upon which they might realize capital gains taxable on a more advantageous basis than dividends.[43]

[43] Engineers' Ex. 16, R. 1390a, shows that 72.54% of Engineers common stockholdings (as of June 30, 1945) were held

Of the $24,300,000 of undistributed earnings which the district court found had accrued to the interest of Engineers' common stockholders, Engineers' officers admitted that dividend "freezes" in the subsidiaries would have permitted only $9,868,000 to have been paid out in dividends. (R. 306a.) This amount roughly corresponded to the idle cash in the system which the management was anxious to apply through the plan to the retirement of preferred stock. The retained earnings, it was testified, "added materially to the value of the Preferred Stock because the funds, together with funds derived from the sale of properties, have been used in part to finance improvements and additions which have increased the earning power of the subsidiaries and in part to retire 60,346 shares of Preferred Stock of Engineers and El Paso of Delaware combined, at an aggregate cost of $5,894,227" (R. 470a). The

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by some 338 stockholders having in each case holdings of more than 500 shares. Referring to this Exhibit the Secretary of Engineers testified that "these relatively large unit holdings indicate ownership by people of substantial means, many of whom in all probability would prefer to have capital appreciation rather than dividend income * * *" (R. 462a. See also R. 556–557). While that testimony was given with specific reference to the tax impact of the plan it would appear equally relevant to motivation for the dividend policy antedating the plan. Engineers' secretary conceded that the tax factor had a bearing upon stockholders' attitude toward the dividend policy but expressed the opinion that the directors would have accumulated cash to retire the preferred stock "regardless of the tax law" (R. 920a–921a).

various dividend "freezes" were in part concessions made to obtain relatively cheap senior money for the operating companies, and, in the case of Virginia, in part to facilitate the merger with Virginia Public Service Company, which Engineers acquired from the trustees of Associated Gas and Electric Company in a transaction involving a relatively small amount of cash in proportion to the amount of properties acquired."

Assuming that the present relatively strong investment position of Engineers preferred is attributable to the managerial policies which dictated the retention of cash to build up the subsidiaries, nevertheless the plan accords the common stockholders the enhanced value of their residual equity as legitimate compensation for their self-restraint. Moreover, the benefit to the common

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[44] Engineers acquired from General Gas & Electric Corporation, a subsidiary holding company of Associated Gas & Electric Corporation, all of the common stock of Virginia Public Service Company and the claim of General Gas & Electric Corporation for certain escrow funds of about $1,165,000 for approximately $2,500,000. Upon acquisition of this stock Virginia Public Service Company was merged into Virginia Electric and Power Company. The Virginia Public Service debt securities were refunded through the issuance of debt securities by Virginia Electric & Power Company, and Engineers made a cash contribution of $2,500,000 to Virginia Electric & Power Company. As a result of these transactions Virginia Electric & Power Company acquired utility property of a gross book value of $52,510,000 and a net book value of $39,197,000 for net cash contributions on Engineers' part totalling $3,835,000. In the *Matter of Virginia Electric and Power Co.*, — *S. E. C.* — (1944), Holding Company Act Release No. 5058.

through building up the value of the subsidiaries, was obviously far greater than the indirect benefit to the preferred. In addition, the margin of coverage for the preferred stock was so substantial that even if the Engineers management had pursued relatively liberal dividend policies it is by no means clear that the resultant diminution of the coverage for the preferred would have brought it below the redemption price ceilings. It should be noted in that connection that the earnings coverage for the preferred which received the principal emphasis in the Badger testimony, and in the Commission's financial analysis, gave no effect to the potential earning capacity of the idle cash and relatively little to so much of the "cash equivalent" as was invested in low yield, short term, government securities.[45]

II. BOTH COURTS BELOW AND THE COMMISSISON CORRECTLY REFUSED TO TREAT THE INVOLUNTARY LIQUIDATION PREFERENCES SPECIFIED IN THE CHARTER OF ENGINEERS AS CONTROLLING

Neither court below accepted the common stockholders' contention that the Commission

[45] It should be noted that even if the entire unrestricted earned surplus as of December 31, 1945, were eliminated in the calculation of the asset coverage of the preferred it would only be reduced from $218.11 per share to $194.91 per share. If the unrestricted earned surplus should be eliminated from the capital account, the percentage of capitalization which the preferred stock represents, the ratio used by the Commission in its analysis, would be increased from 17.5 per cent to 18.3 per cent, less than 1 per cent.

erred in not according controlling weight to the charter involuntary liquidation preference, the district court stating "my present thought is that the rule of Otis & Co. applies . . ." (R. 288a, n. 2), and the Circuit Court stating "Neither the Commission nor the [district] court, in what we consider to have been a proper application of one of the principles enumerated by the Supreme Court in *Otis & Co.* v. *S. E. C.* (*The United Light & Power Company* case), 323 U. S. 624, 637, treated the charter provisions of Engineers as dispositive of the issues presented" (R. 34). Nevertheless, the common stockholders continue to urge that the charter involuntary liquidation preferences should determine the rights of the stockholders in the enterprise (see Central-Illinois petition in No. 266, pp. 5, 22–24).

Recognizing that, in the *Otis* case, the charter provisions were specifically held inapplicable to a dissolution pursuant to Section 11 of the Holding Company Act, the common stockholders contend that the *Otis* case is distinguishable chiefly on the ground that the dissolution of United Light and Power, in the *Otis* case, did not involve a dissolution of all the holding companies in that system. The plan involved in the *Otis* case provided for the dissolution of the top holding company as an initial step in bringing the system into compliance. There remained, under that plan, subsidiary holding companies in a still highly stratified system.

In justification for not treating the charter liquidation provisions as binding, an argument was advanced in that case that under the circumstances the enterprise was continuing in an altered form and without substantial change in the total of the inherent rights of the security holders. Significantly, however, this restrictive analysis of the case, which, if accepted, would have disposed of that issue, was expressly disavowed. This Court made it clear that the *Otis* doctrine did not depend upon the particular form of reorganization or liquidation selected as the vehicle for compliance with Section 11. Instead, the liquidation provisions of the United Light and Power charter were held inapplicable on the ground that Congress did not intend Section 11 to operate to mature charter rights. The Court said (at p. 638):

> *The reason does not lie in the fact that the business of Power continues in another form.* That is true of bankruptcy and equity reorganization. It lies in the fact that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors. We must assume that Congress intended to exercise its power with the least possible harm to citizens. [Italics added.]

The management of the United Light and Power system and the management of Engineers followed a different sequence of steps in complying with Section 11, probably because of the much higher degree of stratification in the United Light and Power system. However, the sequence of steps ought not to affect rights any more than should the particular method selected for accomplishing each step. Otherwise management, by its choice of procedure, would have the power to give preferential treatment to a particular class of security holders.[46]

Moreover, acceptance of this phase of the common stockholders' argument would permit the common stockholders of a one-story holding company such as Engineers to appropriate to themselves the entire residual value of the company's assets, subject to the necessity of according preferred stockholders only their charter liquidation preference no matter how great the disparity between that liquidation preference and the going concern value of the preferred stockholders' in-

[46] It should be noted that Engineeers, like United Light and Power in the *Otis* case, could have complied with Section 11 by merger or consolidation with a subsidiary. Indeed, this procedure was seriously considered until repeal of the excess profits tax eliminated the tax advantages of such a method of compliance. Engineers' charter expressly provided that a consolidation or merger which "does not substantially impair the rights and preferences of the preferred stock" should "not be regarded as a liquidation, dissolution, or winding up" for purposes of the paragraph defining liquidation preferences (R. 914a, 1413a).

vestment. Conversely, if the value of that one-story holding company's assets is found to be less than the liquidation preference of the preferred stockholders, the argument would permit the wiping out of the common stock despite a finding that, apart from the operation of Section 11, the common stock has a reasonable prospect of sharing in future earnings after satisfying the dividend preference of the preferred stock, including any arrears.

Nor do we believe that any specific language differences between the charter involved in the *Otis* case and the Engineers charter have any vital significance. The Engineers charter was drafted in 1925, four years prior to that of United Light and Power, and even if it be assumed that a charter provision making specific provision for the possibility of a Section 11 liquidation would be controlling, there appears to be no justification in the stereotyped phraseology of the two charters to attributing to the Engineers' draftsmen a greater degree of discernment and prescience.

Finally, common stockholders cite a number of cases in which the Commission approved plans calling for the payment of amounts equivalent only to the involuntary liquidation preferences of the securities involved, and contend that this precluded approval of the Engineers plan on the basis of what is termed "the Commission's new views." (Central-Illinois' petition in No. 266, p. 2?.) It is true that, in many instances, the Commission

has found that the equitable equivalent of a security to be surrendered was only its involuntary liquidation preference.[47] It is equally true, however, that many of these cases have stressed the absence of indication of any investment value in excess of that amount,[48] and other cases have per-

[47] Cases involving bond retirement: *The United Light and Power Company*, 10 S. E. C. 1215, affirmed *sub nom. N. Y. Trust Company* v. *S. E. C.*, 131 F. 2d 274 (C. C. A. 2); certiorari denied, 318 U. S. 786, rehearing denied, 319 U. S. 781; *North American Light & Power Company*, 11 S. E. C. 820, affirmed *sub nom. City National Bank & Trust Company* v. *S. E. C.*, 134 F. 2d 65 (C. C. A. 7); *North Continent Utilities Corporation*, — S. E. C. — (1943), Holding Company Act Release No. 4686, plan approved and enforced, 54 Supp. 527 (D. Del.); *Standard Gas and Electric Company*, — S. E. C. — (1944), Holding Company Act Release No. 5430, plan disapproved, 59 Supp. 274 (D. Del.), reversed, 151 F. 2d 326 (C. C. A. 3).

Cases involving participation by stockholders: *Lahti* v. *New England Power Association*, 160 F. 2d 845 (C. C. A. 1); *Buffalo, Niagara and Eastern Power Corp.*, — S. E. C. — (1945), Holding Company Act Release No. 6083; *Georgia Power & Light Co.*, — S. E. C. — (1945), Holding Company Act Release No. 5568, plan approved and enforced, Civil Action No. 133 (M. D. Ga. 1945); *Cities Service Power & Light Co.*, — S. E. C. — (1944), Holding Company Act Release No. 4944.

[48] *North Continent Utilities Corporation*, — S. E. C. — (1943), Holding Company Act Release No. 4686, plan approved and enforced, 54 F. Supp. 527 (D. Del.); *Consolidated Electric & Gas Company*, — S. E. C. — (1944), Holding Company Act Release No. 4900, plan approved and enforced, 55 F. Supp. 211 (D. Del.); *The Laclede Gas Light Company*, — S. E. C. — (1944), Holding Company Act Releases Nos. 5062 and 5071, plan approved and enforced, 57 F. Supp. 997 (E. D. Mo.), affirmed *sub nom. Mass. Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. 2d 424 (C. C. A. 8), certiorari

mitted the retirement of senior securities for amounts in excess of the involuntary liquidation preference."

denied, 327 U. S. 795; *Standard Gas and Electric Company*, — S. E. C. — (1944), Holding Company Act Release No. 5430, plan disapproved, 59 F. Supp. 274 (D. Del.), reversed, 151 F. 2d 326 (C. C. A. 3), certiorari denied, 327 U. S. 797. See also *New England Power Association*, — S. E. C. — (1946), Holding Company Act Release No. 6470, plan approved and enforced, 66 F. Supp. 378 (D. Mass.), affirmed *sub nom. Lahti v. New England Power Association*, 160 F. 2d 845 (C. C. A. 1); *Interstate Power Company*, — S. E. C. — (1947), Holding Company Act Release No. 7159, plan approved and enforced, Civil Action No. 4063 (D. Del. 1947).

[49] *The Western Public Service Co.*, H. C. A. R. Nos. 3175, 3230, 3245 (1942) and *El Paso Electric Co.* (Delaware), 8 S. E. C. 366, which were subsidiaries of Engineers; *Mississippi River Power Co.*, H. C. A. R. No. 5776 (1945); *The North American Co.*, H. C. A. R. No. 5796 (1945); *Minnesota Power and Light Co.*, H. C. A. R. No. 5850 (1945); *N. Y. Pa. N. J. Utilities Co.*, H. C. A. R. No. 5975 (1945); *Buffalo, Niagara and Eastern Power Corp.*, H. C. A. R. No. 6083 (1945); *Pennsylvania Power & Light Co.*, H. C. A. R. No. 6167 (1945); *American Power & Light Co.* — S. E. C. — (1945), H. C. A. R. No. 6176; *Standard Gas and Electric Co.*, H. C. A. R. No. 6435 (1946), following the decision in *Standard Gas & Electric Co.*, 63 F. Supp. 876 (D. Del.); *Community Gas & Power Co.*, H. C. A. R. No. 6436 (1946); *Scranton Spring Brook Water Service Co.*, H. C. A. R. No. 6458 (1946); *Northern States Power Co.*, H. C. A. R. No. 6578 (1946); *Pennsylvania Edison Co.*, H. C. A. R. No. 6723 (1946); *Washington Railway & Electric Co.*, H. C. A. R. No. 7410 (1947), enforced June 16, 1947 (D. C. Dist. of Col.); *In re United Gas Corp.*, 58 F. Supp. 501 (D. Del); *In re Central & Southwest Utilities Co.*, 66 F. Supp. 690 (D. Del.); *In the Matter of American and Foreign Power Company*, unreported, decided Sept. 21, 1948 (D. S. D. Me.) Civil Action No. 490; *Pennsylvania Edison Co.*, — S. E. C. —

It seems unnecessary, in view of this Court's unequivocal holding in the *Otis* case that Section 11 does not mature liquidation preferences, to defend the challenge to the administrative consistency of the Commission offered by the common stockholders.[50] However, we believe it is entirely clear from the Commission opinions that each case involved a progressive analysis of the problems presented, and that the peculiar problems of each new case were considered in view of the accumulated administrative experience. The instant case involved no more than an application to a new state of facts of the principles developed and foreshadowed by prior holdings.

(1948), H. C. A. R. No. 8550. (Decided after the decision below.) Most of these cases were not approved as part of a Section 11 (e) plan due to their nature, for where management agrees that payment of the redemption price is fair and equitable the normal procedure simply requires a call of the security.

[50] In the *Otis* case itself the petitioner urged that the Commission's decision was inconsistent with the earlier *New York Trust Co.* case, and also that a consistent application of the standard of fairness applied by the Commission might require a payment in excess of liquidation preference to a preferred stock having a high dividend rate relatively free of risk in view of earnings and asset coverage. The Commission pointed out that it had not yet had occasion to deal with this problem, but that "we would scarcely regard it as a valid criticism of the standard of fairness applied in this case, that it might under converse circumstances prevent common stockholders from obtaining through operation of Section 11 a windfall at the expense of preferred stockholders." See Point I 2 (b) of the Government's brief, pp. 49, 54, October Term 1944, No. 81.

New York Trust Co. v. *S. E. C.*, 131 F. 2d 274 (C. C. A. 2), on which the common stockholders have placed their chief reliance, was the first case in which a Section 11 (e) plan called for prepayment of debt at its face value where the indenture contained an option to call the debt at a price higher than the face amount of the debt. It was there held that since the venture had been frustrated by government edict performance of the contract according to its terms was excused. Accordingly, payment of the debt at face amount was permitted prior to maturity. However, this holding does not warrant prepayment of debt at the face amount where it appears the debt would have a value in excess of that amount. See *American Power & Light Co.*, — S. E. C. — (1945), Holding Company Act Release No. 6176. In the case of preferred stock, moreover, what is involved is an ownership interest in the enterprise—not a creditor claim of a definite principal amount against it.

Insofar as there is any issue of constitutionality raised by the plan, we believe it has been resolved by this Court's opinion in the *Otis* case. That portion of this Court's opinion which deals with the possible application of the gold clause cases contains no suggestion of a "constitutional doubt" as to the overriding force of the commerce power if it had been concluded that the charter liquidation preference was applicable but would thwart

the legislative purpose. Insofar as there must be a choice between a restrictive interpretation of a private contract as applied to a situation not specifically envisaged, and a restrictive interpretation of the Congressional purpose to bring about simplification of holding company systems with the least possible harm to investors, it is obvious that it is the Congressional policy, not the private stipulation, which must receive the benefit of the doubt. This at least was the approach of the majority of the Court in the *Otis* case. Only if Section 11 (e) were construed in accordance with the common stockholders' contentions to benefit the common at the expense of the preferred stockholders would there appear to be any serious constitutional issue.

III. THE COURT BELOW ERRED IN HOLDING THAT THE DISTRICT COURT'S INDEPENDENT RESPONSIBILITY FOR APPROVAL OF THE PLAN INCLUDES A POWER TO REJECT THE RESULTS OF THE COMMISSION'S VALUATION ON THE BASIS OF A DISCRETIONARY WEIGHING OF IMPONDERABLE "COLLOQUIAL" OR "SPECIAL" EQUITIES.

The Commission believes that the basic issue in this case is the proper legal standard which should control both the Commission and the district court in their consideration of the plan. We have argued in Points I and II that the Commission applied a proper legal standard in according Engineers' preferred stockholders full compensation for their undisputed going-concern values; that the colloquial or special equities relied on by the

courts below are irrelevant to the fair and equitable standard; and that as the Commission and both courts below held, the involuntary liquidation preferences of Engineers' preferred stocks are not controlling. If this is a correct interpretation of "fair and equitable," neither the Commission nor the district court had any discretion to diminish the participation of the preferred stockholders, inasmuch as they did not dispute (R. 67a and p. 28, *supra*) the Commission's finding as to going-concern value of the preferred, if that were assumed to be the proper test. If, on the other hand, the Commission did not apply the correct rule of law as to the rights of the stockholders, then of course the district court properly discharged its own statutory responsibility in refusing to approve the plan as approved by the Commission.

While the Court of Appeals' criticisms of the Commission's valuation methods seem to us to present issues of law, it did not express them as controlling legal standards, and did not purport to decide whether the Commission's conclusion lacked "any rational and statutory foundation." (R. 21.) Its holding that the district court did not err in finding the plan as submitted by the Commission unfair is qualified with the statement, "Certainly we cannot say that this conclusion was clearly erroneous" (R. 39). The Court of Appeals held that a question of law which "goes to the heart of the instant con-

troversy" is the extent of the power conferred on the district court by Section 11 (e) to reject determinations of the Commission (R. 20). We believe this is a correct statement of the issue only if, contrary to our interpretation, the "fair and equitable" standard of Section 11 (e) lodges in either Commission or court a discretion whether to accord Engineers' preferred stockholders the full going concern value of their interest or something less.

The Court of Appeals held that a district court under Section 11 (e) has a much broader power to reject the Commission's valuations than where the fairness of the plan is presented directly to a Court of Appeals by a petition to review under Section 24 (a) of the Act. Section 24 (a) is the provision of the Act applicable in terms to judicial review by any person aggrieved "by an order issued by the Commission under this title." It expressly provides for review in a Court of Appeals upon the transcript of the record made before the Commission and under the substantial evidence rule.

Commission orders approving plans under Section 11 (e) may be the subject of petitions to review under Section 24 (a), and, indeed, since Section 11 (e) provides for court enforcement of plans only at the request of the proponent company, Section 24 (a) affords the only avenue of review under Section 24 (a), and, indeed, since enforcement. The Section 24 (a) avenue of re-

view has in fact been followed in a number of cases. See *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80; 332 U. S. 194; *New York Trust Co.* v. *S. E. C.*, 131 F. 2d 274 (C. C. A. 2), certiorari denied, 318 U. S. 786, rehearing denied, 319 U. S. 781; *Phillips* v. *S. E. C.*, 153 F. 2d 27 (C. C. A. 2), certiorari denied, 328 U. S. 860. Where a plan by its terms contemplates court enforcement, and the Commission's approval order expressly conditions its authorization to consummate the transactions proposed by the plan upon the entry of an enforcement order under Section 11 (e), direct review of the Commission's order under Section 24 (a) has been held unavailable. *Okin* v. *S. E. C.*, 145 F. 2d 206 (C. C. A. 2); *Lownsbury* v. *S. E. C.*, 151 F. 2d 217 (C. C. A. 3), certiorari denied, 326 U. S. 782.[51]

Thus the proponent company, or rather its management, can, by requesting court enforcement, channel judicial review through the district court, or, by not requesting enforcement, allow objectors to seek review in a Court of Appeals.

[51] The reasons urged by the Commission for this position were in part that Congress could not have intended both avenues of review to be applicable to the same order, and in part that a Commission order which is to be operative only after a subsequent enforcement order of the district court is interlocutory in nature with reference to review elsewhere than in the enforcement court. This was the rationale of the Second Circuit in the *Okin* case. The opinion of the Third Circuit was based upon the *Okin* case. Judge Biggs, however, in a separate concurring opinion, expressed the view that the district court should adjudicate "all questions relating to integration, simplification and the fairness and equity of the plan" (at p. 220).

Such a choice on management's part seems to us consistent with the statutory purpose only if its exercise cannot affect the ultimate allocation of assets between classes of security holders. The latitude for managerial initiative was provided in the hope that "if the compulsions of the act are made sufficiently clear to convince the interlocking lawyers of the holding-company bankers that it can't be evaded or compromised, the legal and economic imagination which put these holding-company combinations together will devise many means of taking them apart." Additional views of Congressman Eicher appended to House Report No. 1318, 74th Cong., 1st Sess., pp. 44, 50.[52]

Management is not likely to be neutral, however, upon the vital issue of the fairness of the allocation. Congress could hardly have intended to permit management to determine the scope of judi-

[52] Management may legitimately desire an enforcement proceeding in order to obtain the protection of a court decree enjoining future challenge to the plan or to preclude state court injunction suits actually threatened. In other situations, depending upon the nature of the plan, it may be thought that Commission approval itself is sufficient protection to the management in carrying forward the plan in the absence of opposition. Again where opposition appears and is prepared to take the case promptly to a court of appeals, district court enforcement may appear unnecessary to obtaining a final determination of the challenge to the plan. Procedural strategy directed to timely consummation of a proper plan would thus clearly accord with the objectives of Section 11 (b) to carry out compliance "as soon as practicable."

cial review of that issue.[53] Management would have such a power if given a choice between a forum in which the reviewing court would be bound by a reasonable Commission decision and a forum in which it would not. It is thus plainly not desirable that the scope of review by a district court under Section 11 (e) be substantially greater than that by a court of appeals under Section 24.

It is our position that the analogy to Section 77 of the Bankruptcy Act, upon which the court below relied, does not warrant reading a widely different scope of review into Section 11 (e) than would apply under Section 24;[54] that the issue in this case, if not a pure issue of law, must be one of policy which would be for the Commission to decide under any theory of the scope of review; and that in any event Congress could not have intended judicial review to check the Commission without imposing a controlling standard to govern its reconsideration of the plan after rejection by a district court.

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[53] *Cf.* Senate Report No. 621, 79th Cong., 1st Sess., p. 33, p. 143, *infra*, which states with reference to subsections (d), (e) and (f) of Section 11:

"Under these subsections, Commission approval of reorganization plans and supervision of the conditions under which such plans are prepared will make it impossible for a group of favored insiders to continue their domination over inarticulate and helpless minorities, or even as is often the case, majorities."

[54] There are certain procedural differences between enforcement proceedings brought under Section 11 (e) and review

A. *Section 11 (e) grants to the district court a scope of review similar to that exercised in the district court under Section 77 of the Bankruptcy Act*

Section 11 (e) parallels Section 77 of the Bankruptcy Act in providing for an administrative hearing on a plan prior to judicial consideration thereof and a subsequent judicial hearing at which the court must also approve the plan. In contrast with the relatively detailed articulation in Section 77 of the respective functions of the Interstate Commerce Commission and the court, Section 11 (e) deals in two sentences with the Commission's function and in one with the district court's. This brevity of Section 11 (e) makes it necessary to turn to the closest similar arrangement for an understanding of the interrelationship which was contemplated.

The similarity between Section 77 and Section 11 was specifically adverted to in the course of the legislative history of the Holding Company Act. Section 11 (f) of the Holding Company Act, which deals with proceedings in the Federal courts for the reorganization of registered holding com-

by a Court of Appeals under Section 24 (a). These, including the equity court's responsibility in the exercise of an independent judgment to review the Commission's determination even in the absence of articulate opposition, are discussed below. These procedural differences, however, are not such as to permit one standard of fairness to pretail under Section 24 (a) and a substantially different one under Section 11 (e).

panies or subsidiaries "whether under this section or otherwise" (including proceedings for the reorganization of insolvent companies), provides that no plan of reorganization for a registered holding company or a subsidiary in such a proceeding shall "become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court." It was on this subsection rather than Section 11 (e) that debate was directly focused.

In the course of debate on the Senate floor Senator Borah asked with reference to the above quoted language of Section 11 (f) (79 Cong. Rec. 8845):

> I do not exactly understand that language. Does it mean that the court's jurisdiction with reference to the reorganization, or what shall be permitted by decree of the court, is limited; or is it simply recommendatory to the court?

Senator Wheeler replied:

> We do exactly the same thing at the present time, as I understand, with reference to the Interstate Commerce Commission. A plan for the reorganization of a railroad is supposed to be submitted to the Interstate Commerce Commission for its approval before it is approved by the court. We put this provision in here in practically the same manner, as I recall, as the existing provision with reference to the

Interstate Commerce Commission in the case of railroad reorganizations.

As the Court of Appeals for the Second Circuit has held, the succession of the responsibility in Commission and district court under Sections 11 (e) and 11 (f) are so similar as to make it clear that Congress intended the analogy to apply in both instances. See *Okin* v. *S. E. C.*, 145 F. 2d 206, 208, n. 2 (C. C. A. 2).

The court below agreed that the duties of the Section 11 (e) court with reference to the prior determinations of the Securities and Exchange Commission are similar to those of the Section 77 court with reference to the Interstate Commerce Commission (R. 29, 33). However, we believe the court misinterpreted the scope of review which is exercised by the Section 77 court, and correspondingly misinterpreted the scope of review under Section 11 (e).

B. *The scope of review under Section 77 and Section 11 (e)*

The court below held that both under Section 77 and under Section 11 (e) the District Court is intended to "function as an equity reorganization tribunal with the powers and functions of such a court, and not as a mere review court" (R. 30). This conception was more fully expressed with reference to the Section 77 court (R. 29):

> We are of the opinion that Congress intended the district courts of the United States, within the limitations of the statute, to function as equity reorganization courts. Though the Commission must make the primary determinations respecting the plan, including, in particular, those relating to valuations of railroad securities, the court must exercise its own independent judgment in approving or disapproving the plan whether the court's rulings relate to value, or to some other pertinent subject. See In re Erie R. Co., 37 F. Supp. 237, 243–245, aff'd, 6 Cir. 133 F. 2d 730, cert. den. 320 U. S. 748.

Similarly, the court concluded with reference to Section 11 (e): "that Congress intended to lay substantially the same duty on the court in the second instance as it imposed on the Commission in the first." (R. 24.) The court also held (R. 33–34):

> The [district] court may not substitute its valuations for those of the Commission *but it may reject* valuations made by the Commission in fulfilling its, the court's statutory function in determining whether the plan is fair and equitable. The court of course may not act capriciously in rejecting valuations made by the Commission nor may the Commission act with caprice in valuing securities. The judicial process is brigaded with the administrative process of the Commission but this does not mean that the court in the field allocated to it

> by Congress is not to exercise its independent plenary judgment as an equity reorganization tribunal upon every matter relating to the fairness and equity of the reorganization.
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> * * * The findings and conclusions of the Commission were not binding upon the learned District Judge though, as was proper, he treated them with respect. * * * [Italics supplied.]

In so holding, we believe the court below misinterpreted the scope of review of the Section 77 court, and misconceived what is meant by the exercise of an "independent plenary judgment" to reexamine administrative findings.

This Court decided in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 473 that as to matters of valuation and allocation the Section 77 court reviews the determinatons of the Interstate Commerce Commission under the substantial evidence rule.

> The language chosen leaves to the Commission, we think, the determination of value without the necessity of a reexamination by the court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards. It leaves open the question of whether in reaching the result the Commission had applied improper statutory standards.

Counsel for Central Illinois, while not challenging the view that Section 11 (e) was intended

to parallel Section 77, urged in the court below that "clearly [this view] represents the most favorable view of the Commission's jurisdiction which the legislative history permits since Section 77 contains express provisions (entirely absent from Section 11 (e)) conferring on the Interstate Commerce Commission exclusive powers over 'valuation of the debtor's property'." (Brief, pp. 16–17.) In that connection reference was made to subsection (e) of Section 77, quoted at 318 U. S. 472, which provides in part:

> If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan.

It will be noted that the language adverted to does not expressly make valuation an "exclusive" function of the Interstate Commerce Commission. Section 11 (e) is less explicit than Section 77 in spelling out subsidiary steps in the process by which both agency and court reaches the conclusion that a plan is "fair and equitable", but in specifying that the district court "after notice and opportunity for hearing, shall approve such plan as fair and equitable. * * *"[35] Section

[35] The court below said with reference to this language (R. 24):

"The words employed respecting the respective duties of Commission and court are so alike that we must conclude that Congress intended to lay substantially the same duty on the court in the second instance as it imposed on the Commission in the first."

11 (e) closely parallels what is specified in subsection (e) of Section 77:

> After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) it complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; * * *

quoted by this Court at 318 U. S. 464. Nevertheless, the judge's task under Section 77 was held to be a mere review function with reference to the Interstate Commerce Commission's valuation.[56]

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[56] Conversely, in dealing with subsection (c) (2) of Section 77, where the statute is explicit concerning the Interstate Commerce Commission's responsibility for fees but not as to judicial review thereof, the traditional relationship between fact-finding agency and court has been implied. The provision in question provides:

> * * * "the trustee or trustees and their counsel shall receive * * * such compensation as the judge may allow within a maximum approved by the commission." *Cf.* subsection (8) dealing in similar language with compensation and reimbursement of other persons.

As to this, the Court held in *Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U. S. 163, 170:

> "Our conclusion is that the function committed by the law to the Commission is the ordinary one reposed in a fact find-

An even more explicit provision in Section 77 for judicial reexamination of the Interstate Commerce Commission's determination is the provision of Section 77 (e) that a plan which allows nothing to particular classes of stockholders or creditors need not be submitted to them if the worthlessness of their claims is found by the Commission "and the judge shall have affirmed the finding." With respect to that language the opinion in the *Western Pacific* case states (at pp. 478–479):

> The specificity of the direction for reexamination of the Commission's action points to a wider scope of review than an inquiry as to whether statutory standards for valuation have been followed * * * But we think the requirement of affirmation of the exclusion of claimants does not require an independent appraisal of the valuation which ordained their elimination. The court properly affirms the Commission, when it finds no legal objection to the Commission's use of its own valuation to determine whether particular claimants are entitled to participate in the reorganization. For example, there may arise controversies over the priority of the validity of claims. A Commission finding involving such problems would require an independent examination and an affirmation by the court.

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ing body and that its findings, supported by evidence, may not be disturbed by a court."

The opinion of the Circuit Court of Appeals, which this Court reversed, had indicated that the district court in deferring to the Commission's knowledge of valuation matters may have misconceived its function since "the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject." *In re Western Pacific R. Co.*, 124 F. 2d 136, 140 (C. C. A. 9), quoted at 318 U. S. 448, 466. This language, which this Court rejected, is strikingly similar to the views expressed by the court below (R. 33–34, p. 93, *supra*).[37] The holding in the *Western Pacific* case that Commission findings as to value are subject to the usual rules governing judicial review was reaffirmed in *R. F. C.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 505–509, in which this Court said:

> The basic problems of railroad reorganization under § 77 of the Bankruptcy Act have been so recently considered by this Court in the *Western Pacific* and *Milwaukee* cases that only a summary reference to their conclusions attacked by respondents need to be made now. * * * The agencies employed by Congress to accomplish

[37] The common stockholders relied below on *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523; but nothing in that case, decided the same day as the *Western Pacific* case, is in any way inconsistent with the latter decision.

> reorganizations under § 77 were the Interstate Commerce Commission and the courts. The answer reached by Congress was that the experience and judgment of the Commission must be relied upon for final determinations *of value* and of matters affecting the public interest, *subject to judicial review to assure compliance with constitutional and statutory requirements*. This was the interpretation of all members of this Court from the language of the act and the evidence of congressional purpose in the hearings, reports and discussion. To the courts, Congress confided the power to review the plan to determine whether the Commission has followed the statutory mandates of subsection (e), 318 U. S. at 477, and whether the Commission had material evidence to support its conclusions. 318 U. S. at 477; concurring opinion at 512. [Italics supplied.]

The courts of appeals have likewise construed the holdings of this Court as making the role of the Section 77 judge in relation to Commission valuations and allocations that of applying the substantial evidence rule. See *In re New York, New Haven & Hartford R. Co.*, 147 F. 2d 40, 46–47 (C. C. A. 2), certiorari denied, 325 U. S. 884; *Chicago, Rock Island & Pacific Ry. Co.* v. *Fleming*, 157 F. 2d 241 (C. C. A. 7), certiorari denied, 329 U. S. 780, 811.

The opinion of the court below (R. 21-22) quotes specific statements from the legislative history concerning the anticipated relationship of district court and Commission under Section 11. While the holding of the court does not appear to rest on these quotations, some of them appear to us to give an incomplete picture of the legislative background. Accordingly, we set forth in full in Appendix B the entire discussion of the mechanism of Section 11 in the Senate Report from which the excerpts quoted in the opinion below are taken, and also the entire Senate debate on certain amendments to Section 11 (f) which the opinion quotes in part.[58] Read in context, the references in the committee report to the anticipated advisory function of the Commission relate to the Commission's status as a party to proceedings or as a court-appointed trustee, administering plans or properties, rather than to the court's reexamination of a plan theretofore approved by the Commission in an administrative hearing. The debate over the respective functions of Commission and court, and the amendments prompted thereby, reflect a controversy as to whether there should be any limitation upon the reorganization court's tra-

[58] The debate mentions only Section 11 (f), but, as the opinion below notes, there were corresponding provisions of subsections (d) and (e) of the bills relating to the court's duty to appoint the Commission sole trustee which underwent corresponding revision.

ditional discretion as to the choice of a trustee. There is no indication in the entire debate of any difference of opinion concerning the desirability of giving the Commission the same power with reference to approval of reorganization plans as was accorded the Interstate Commerce Commission under Section 77.

Apparently the court below was misled by references to the function of the reorganization court to exercise an "independent judgment", both in the opinions of this Court dealing with Section 77 of the Bankruptcy Act and in Senator Wheeler's statement comparing Section 11 (f) of the Holding Company Bill with Section 77: "In other words, there is really a double-check upon the plan, and final determination rests as in the past in the courts." See Appendix B, *infra*, p. 152, quoted by the court below (R. 22–23). But the decisions of this Court under Section 77 of the Bankruptcy Act have found ample scope for the exercise of "independent judgment" by the reorganization court without holding that the court's responsibility for valuation and allocation approximates the initial fact finding function of the Interstate Commerce Commission. See especially the *Western Pacific* and *Denver and Rio Grande* cases discussed *supra*, pp. 94–99.[59]

[59] We believe it significant that the court below did not refer to the *Western Pacific* decision, but relied only upon a district court ruling in the *Erie* case prior to the *Western Pacific* case (R. 29). Moreover, as we read the opinion of

As this Court said in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 53, in dealing with a suit to set aside a rate determination under the Urgent Deficiencies Act:

> * * * this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency.

The reorganization court, of course, has an independent responsibility for all issues of law. The *Western Pacific* opinion give as an example; "there may arise controversies over the priority or the validity of claims", 318 U. S. at 479. Again, the *Milwaukee* case (*Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. at 568) held that it was for the district court to resolve a dispute as to whether certain properties were subject to the

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the master which the district court adopted in the *Erie* case, it held that exercise of independent judgment in determining whether the plan complies with the requirements of Section 77 involves merely a review of the prior determinations of the Interstate Commerce Commission to see whether they were in accordance with accepted legal standards and supported by material evidence (37 F. Supp. 237, 244, 245, 247).

after acquired property clause of the General Mortgage.[60]

A traditional function and responsibility of the reorganization courts, as developed in the equity receivership cases, is to exercise "an informed, independent judgment" as to all matters arising in the reorganization. See *National Surety Co.* v. *Coriell*, 289 U. S. 426, 436; *First National Bank* v. *Flershem*, 290 U. S. 504. While this concept developed in situations where there was no administrative agency charged with responsibility for protecting security holders against possibly inadequate, or at least not disinterested, representation, this judicial function survives in part, and gives the court a broader function than the mere determination of questions of law, under both Sections 77 and 11 (e).

Thus, within limits, the district judge has responsibility to take evidence to decide whether the record on which the agency acted has become stale as a result of changing economic conditions. See *R. F. C.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 521–22; *Insurance Group* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607, 611. Inquiries as to matters of law or fact may be made on the court's own motion or at the behest of objecting parties

[60] See also *In re New York, N. H. & H. R. Co.*, 147 F. 2d 40 (C. C. A. 2), where the Court of Appeals reversed both the district court and the Commission for making an allocation on the basis of negotiations by the conflicting groups rather than on the basis of an exercise of the Commission's own valuation function.

who, by ordinary appellate standards, might be precluded from raising a question. For example, in *Comstock* v. *Group of Investors*, 335 U. S. 211, the Interstate Commerce Commission had given no consideration at all, because the point had not been raised before it, to the argument that securities of a parent holding company should be subordinated to otherwise junior holdings of public securities in view of evidence of mismanagement allegedly similar to that involved in *Taylor* v. *Standard Gas and Electric Co.*, 306 U. S. 307. This Court held the district court might, in its discretion, consider these objections for the purpose of determining whether the circumstances warranted a remand to the Commission.[61]

[61] The Court indicated (at pp. 227–8) that the objection should have been voiced before the Commission in the first instance and that "to by-pass the Commission and make the court the original forum for such contentions is not to be encouraged." It was nevertheless held that—

"In view of the functions cast upon the court in such cases, we cannot say that it may not, in its discretion, consider objections on their merits even though they have not been presented to the Commission. Some circumstances might be disclosed to indicate a remand for their consideration by the Commission. They might indicate that the courts would withhold approval, not out of deference to the objecting parties' rights but because of the broad responsibility laid upon the court for the equity and fairness of the plan as a whole. The court will be diligent to protect itself and the public from approval of unfair plans, even by default, and may take for its own use evidence no party would have a right to force upon it. The court below evidently considered the circumstances of this case to warrant such inquiry into the merits, and we do not inquire whether the discretion was wisely exercised."

As the court below noted, the Commission itself has emphasized the "independent duty" of the Section 11 (e) court (R. 23–24). In cases arising under Section 11 (e) the Commission has consistently taken the position that the enforcement court has an independent responsibility to scrutinize the plan even in the absence of opposition, or where the opposition might be belated from the point of view of ordinary review proceedings. In the *Otis* case there had been no opposition to the plan in the administrative hearings, and the United Light and Power Company on that ground resisted the standing of Otis & Co. to appear in the district court in opposition to the plan and to appeal from the adverse order. In both instances the Commission supported the standing of Otis & Co., with the *caveat* that their grounds of opposition related to an issue fully raised before the Commission in the dissenting opinion of Commissioner Healy and in fact basic to the obligations of both Commission and court in respect to examination of the plan. Accordingly, it was not, in the Commission's view, a case where the nature of the opposition amounted to "ambushing" the Commission as was urged by United Light and Power. *Cf. Comstock* v. *Group of Investors*, 335 U. S. 211, 227, *supra*; *Tagg Bros.* v. *United States*, 280 U. S. 420, 443–444; *Manufacturers Railway Co.* v. *United States*, 246 U. S. 457, 488–490.

As a general rule, of course, we believe the district court which receives an application under Section 11 (e) to enforce a plan approved by the Commission exercises a review function and must proceed on the basis of the administrative record.[62] However, there have been instances under the Holding Company Act, where, as in cases under Section 77, additional testimony has been taken to determine whether the case should be remanded to the Commission.[63] See *In re North-*

[62] In an oral opinion by Judge Biggs, sitting as a District Judge, *In the Matter of Midland United Corporation* (D. Del. 1944), and 11 (f) proceeding, he stated this rule as follows:

"I have also reached the conclusion that that adjudication must be based upon the entire record before the S. E. C. and on nothing more unless (a) it be shown that the situation of the debtor has so altered since the case was before the S. E. C. that it would be unfair and inequitable to proceed with the plan. * * * Or (b) where the S. E. C. has denied, or it is alleged that they have denied, due process of law in refusing to receive testimony or in denying a hearing. * * *"

See also *In re Jacksonville Gas Co.* (Unreported, D. Fla.), an 11 (e) proceeding quoted at R. 67.

[63] In an early proceeding in the Third Circuit where the Commission's order had been affirmed on review prior to its consideration in a Section 11 (e) enforcement proceeding, Judge Kirkpatrick held that the enforcement proceeding "is essentially a review proceeding." He noted that the specifications of the substantial evidence rule in Section 24 and the limitation of the Section 24 court's review to issues raised before the Commission "furnishes some basis for the argument that the scope of the hearing before this Court is broader." See *Application of Securities and Exchange Commission*, 50 F. Supp. 965 (D. Del.). It was held that the court could take evidence as to developments since the Commission acted but the particular proffer was rejected as irrelevant.

ern States Power Co. (unreported, August 30, 1948, D. Minn.) where additional evidence was received with reference to a contention, ultimately rejected by the Court, that the valuation data relied on by the Commission was stale.[9]

Whether the review function generally exercised by the district court should be based upon the substantial evidence rule or some other evidence weighing rule has been less sharply focused inasmuch as most of the controversies have turned upon issues of law. Nevertheless, both the First and Eight Circuits have given consideration to that issue and reached conclusions, contrary to that of the court below that the substantial evidence rule applies. *Lahti* v. *New England Power Association,* 160 F. 2d 845, 850 (C. C. A. 1); *In re Laclede Gas Light Company,* 57 F. Supp. 997 (E. D. Mo.), affirmed *sub nom. Massachusetts Mut. Life Ins. Co.* v. *S. E. C.,* 151 F. 2d 424 (C. C. A. 8), certiorari denied, 327 U. S. 795.

The district court's supervision of the execution of the plan also serves as a further safeguard

[9] In one case the district court received testimony, and on the basis thereof found unsubstantiated charges by a minority stockholder that the company which proposed the plan in question had been "coerced" by the Commission's staff. *In re United Gas Corp.,* 58 F. Supp. 501 (D. Del.), affirmed, 162 F. 2d 409 (C. C. A. 3). See also *In re Electric Bond and Share Co.,* 73 F. Supp. 426 (S. D. N. Y.), affirmed, 161 F. 2d 978 (C. C. A. 2), where it was charged that the objector had been deprived of due process of law in the administrative hearing.

against abuse of minority stockholders, the significance of which may depend on the nature of the plan; Section 11 (e) provides that "the court shall have jurisdiction to appoint a trustee," which could be the Commission, to "hold or administer, under the direction of the court and in accordance with the plan" the assets involved. Thus far, however, Section 11 (e) plans have not involved substantial discretion as to execution, and have been administered by corporate officers under the direction of the court.[65]

The above are examples of situation in which the district court acts independently and in other than a reviewing capacity. They leave ample room for the exercise of independent judgment without empowering the court to determine *de novo* matters of discretion or policy which the Commission has decided. As to such matters under Section 11 (e) as under Section 77, we submit the courts are not to overturn reasonable Commission findings.

C. *The issue of fairness in this case, if not a pure issue of law, falls within the area where finality attaches to the Commission's determination*

As we have previously argued, whether to reorganize on the basis of going concern values or

[65] It appears that Congress was concerned to safeguard against untimely dispositions if for any reason distribution in kind did not prove feasible and conceivably this might take place under Section 11 (e) plans as distinguished from

involuntary liquidation preferences seems to us to present an issue of law. If that issue in its present context is not already settled by the *Otis* case, we believe that this Court should now decide it as a matter of law. We do not ourselves urge the doctrine of administrative finality in support of the Commission's resolution of this issue.[55]

Addressing ourselves to the hypothesis, however, that the issue is one of discretion in the application of statutory policy, then we believe that discretion is lodged by the Act in the Commission and not in the district courts. The statutory policy emphasized by this Court in the *Otis* case, and upheld by the courts below as well as the Commission, is that the operation of Section 11 should not result in a shift of values from one class of security holders to another. If this policy is not to be effectuated intuitively on the basis of "colloquial equities", the controversy seems to relate primarily to whether inquiry should be confined to the operation of the particular plan before the Commission or should include a re-appraisal of all past transactions as if the Act had never been passed. While we have argued

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Section 11 (d) enforcement proceedings, or dispositions subject to Commission scrutiny under Section 11 (d). See Appendix B, p. 142.

[55] What the going concern value was would present a question of valuation as to which we believe the Commission's reasonable judgment would be binding. See *Western Pacific* case, *supra* p. 94). But the courts below did not disagree with the Commission as to this (R. 17).

that such a re-appraisal is, as a matter of law, inappropriate, we believe that the Commission, which has had to grapple with the past transactions and can best appraise the situation in relation to the over-all problem of achieving compliance with Section 11, is best equipped to decide whether the technique of retroactive revaluation is administratively feasible. As this Court has held, "the relation of remedy to policy is peculiarly a matter for administrative competence." See *Phelps Dodge Corporation* v. *N. L. R. B.*, 313 U. S. 177, 194.

Whether or not, as the Section 77 analogy indicates, the substantial evidence rule is generally applicable to the reexamination by a Section 11 (e) court of the prior determinations of the Commission, we believe that any policy functions which may have been delegated by the Congress are, because of their quasi-legislative character, inherently a function of the Commission rather than the courts. Exercise of such functions is subject to review for arbitrary or irrational exercise, but not because of judicial disagreement with policy determinations of the agency. See *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224, 225; *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 228; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126; *United States* v. *George S. Bush & Co.*, 310 U. S. 371; *American Tel. & Tel. Co.* v. *United States*, 299 U. S. 232; *Houston* v. *St. Louis Independent Packing Co.*,

249 U. S. 479; Final Rep. of the Att'y General's Comm. on Ad. Proc. 115–20.

The court below posed the issue of the scope of judicial review in terms of the applicability to the instant case of what this Court said in *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, 206–207, to the effect that unless the conclusions of the Commission lack "any rational and statutory foundation" they should not have been disturbed by the court below, for the "'fair and equitable' rule of Section 11 (e) * * * [was] inserted by the framers of the Act in order that the Commission might have broad powers to protect the various interests at stake * * * The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters." This standard of review was rejected as inapplicable under 11 (e) because of the district judge's "independent" responsibility. (R. 31, 33.)

The point on which this Court divided in the *Chenery* case was whether the Commission was arbitrary, absent a prospective rule, in limiting to cost management purchases in the course of the reorganization, or whether within this area Congress had delegated to the Commission a discretion to proceed case by case as well as by rule. The Commission's decision was sustained as an authorized "judgment based upon public policy" (332 U. S. 194, 209). Once it be con-

cluded that a particular Commission decision does rest upon a policy judgment within an area delegated to it by the Congress, we believe it clear that neither a Section 24 court nor a Section 11 (e) court can have jurisdiction to set it aside."

While we believe the court below gave the wrong reason for rejecting the applicability of the *Chenery* case, acceptance of our main argument leads to the same conclusion. We believe the statute does not delegate to either Commission or the courts authority to exercise a policy judgment whether to accord security holders full compensation for rights surrendered. As to that the critical policy judgment has been made by the Congress in incorporating into Section 11 (e) the words of "fair and equitable." See *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106.

D. *To construe Section 11 (e) as conferring on the district court a valuation function coordinate with that of the Commission would make the statute unworkable.*

The opinion below states (R. 33–34):

> The court may not substitute its valuations for those of the Commission but it

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"Compare what was said in the first *Chenery* case, 318 U. S. 80, 94:

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so."

> may reject valuations made by the Commission. * * * The court of course may not act capriciously in rejecting valuations made by the Commission nor may the Commission act with caprice in valuing securities.

The decision of the court below remanding the case to the Commission contemplates that the Commission should exercise a fresh valuation function, taking into account the criticisms by the Court of Appeals of its initial valuation. As previously argued, we believe these criticisms raise issues of law and that this Court should resolve the question of law thereby posed. To the extent, however, that the opinion below rests upon the holding that the valuation function of the district court in the second instance is virtually coordinate with that of the Commission in the first instance, and that the district court's rejection of the Commission's valuation is upheld because the appellate court cannot hold the conclusion of the district judge "clearly erroneous" (R. 39), the ruling of the court below sets forth no controlling authority to govern the Commission upon remand. Instead, so long as there is no caprice in the difference of views between the Commission and the district court, each can thwart the other without there being any method of resolving conscientious disagreement as to what is "fair and equitable."

We believe that Congress could not have contemplated any such impasse, and that so to hold is to ignore the mandate of Section 1 (c) that all the provisions of the Act are to be interpreted "to meet the problems and eliminate the evils as enumerated * * * and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title." To avoid such a deadlock, we believe that, whatever authority the district court may have to check the Commission, its rulings as to what is "fair and equitable" should bind the Commission on remand. Conversely, the authority of the district court to reject the Commission's determinations should be no broader than its power to impose controlling directions on remand.[38]

[38] The opinion below recognizes that, the Engineers plan having been substantially executed, the only issue which could be open to the Commission on remand is how much, if any, of the escrowed cash goes to Engineers' preferred stock (R. 39, 40). Where a plan has not been executed at all the refusal of the district court to affirm because the Commission erred in determining the issue of fairness might warrant a reexamination of the type of plan. And, of course, we recognize that the Commission can have a new administrative function to perform in the determination of what is "fair and equitable" where the court's ruling is that the Commission did not properly discharge its administrative function. *Cf.* the first *Chenery* case, 318 U. S. 80.

It is likewise necessary in the interest of uniform administration of the statute, that in so far as the Commission's methods of valuation be rejected, the rejection not depend upon varying conceptions and discretion of individual district judges. This requires that where the district judge disagrees with the Commission his determinations not be binding on the appellate court unless "clearly erroneous" but be subject to full reexamination on appeal.

In suggesting that the district judge's disagreement with the Commission is not to be reversed unless "clearly erroneous" (R. 39), the court below refers to Rule 52 of the Rules of Civil Procedure. That rule, however, is concerned with due regard for the district judge's opportunity "to judge of the credibility of the witnesses," and appears to reflect primarily a policy of respecting the determinations of the initial trier of the facts. While the fact-finding function in connection with reorganizations is, of course, concerned more with the drawing of inferences than weighing credibility, we believe Rule 52 points more to the desirability of district judges upholding agency fact findings, than to their having an unreviewable discretion to disregard them.

CONCLUSION

Whether this Court agrees with the Commission that it applied a proper legal standard in valuing the preferreds or with the common stockholders that a proper legal standard requires the preferreds to be paid only their involuntary liquidation preference, we believe the plan need not be remanded to the Commission. Under either of these circumstances the Commission will have no further valuation function to perform.

However, if this Court agrees with the courts below that "colloquial equities" should be weighed by the Commission, it would be necessary to remand the proceedings for such a determination. Pursuant to such a remand the Commission would, of course, be confronted with a rather nebulous concept of equities to be weighed, and would have no guidance concerning the amount of weight to be attached to each of the equities considered unless the opinion of this Court should provide more specific criteria than does the opinion below. In the absence of such specific criteria we believe the opinion of the Commission already indicates that in its own judgment the weight to be attached to the equities mentioned by the courts below would not affect its valuation and consequently remand would serve no useful purpose.

For the reasons stated, we believe the court below should be reversed and the plan approved by the Commisson should be enforced.

Respectfully submitted.

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DECEMBER 1948.

APPENDIX A

Pertinent Provisions of the Public Utility Holding Company Act of 1935 and Section 77 of the Bankruptcy Act

Section 11 (e) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. 79 *et seq.*) provides as follows:

> (e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of sec-

tion 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

Section 24 (a) of the same Act provides as follows:

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the

Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Section 77 (c) of the Bankruptcy Act (11 U. S. C. 205 (c)) provides as follows:

(c) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may

file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholder; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the

plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time

of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation.

The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law; *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection: *Provided further*, That if in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor

or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The

value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

APPENDIX B

EXTRACTS FROM THE LEGISLATIVE HISTORY OF SECTION 11

Extracts from S. Rep. 621, 74th Cong., 1st Sess., pp. 11–17:

4. SECTION 11.

As has been pointed out above, the purpose of section 11 is simply to provide a mechanism to create conditions under which effective Federal and State regulation will be possible. It is therefore the very heart of the title, the section most essential to the accomplishment of the purposes set forth in the President's message.

There has been much misunderstanding of the provisions of this section in the bill originally introduced (S. 1725). It has erroneously been called a "death sentence" upon all public-utility holding companies. It has erroneously been charged that it would confiscate the investment of the public in the utility industry. For these reasons particular explanation of this section appears in this report.

In its present form the section has been extensively rewritten. In general terms its purposes and effect can be stated substantially as follows:

(1) The "elimination" provided for in section 11, is simply a requirement that within 5 years (with certain permissible extensions) the presently existing public-utility holding companies must choose either—

(*a*) To turn themselves into investment trusts by making legal arrangements which

will deprive them of the control of the management of operating electric and gas companies in which they have investments, or

(*b*) To rearrange or reduce their holdings in operating companies, if necessary, so that each holding company will control the management of only a single system of operating companies, which single system is not mixed up with any extraneous businesses, such as real estate, hotels, and operations in foreign countries, and is either (*x*) predominantly intrastate, or (*y*) geographically and economically integrated in contiguous States, the laws of which will not permit merger into a single operating system.

(2) The title requires that a holding company be permitted to hold only a single system of operating companies in order to break down dangerous and unnecessary nation-wide financial interlockings in the essentially local operating utility business; to break down the concentration of the economic and political power now vested in the power trust; to reduce utility enterprises to a size and power which can successfully be regulated by local and Federal regulatory commissions; to rearrange the relationships between operating and holding companies on a functional basis so that intelligent regulation is possible; to confine the operations and the interest of each public utility system to the actual utility business of a given region so that the system will have to work out a modus vivendi with the population of that region.

Private utilities with their legalized monopolies are chartered to serve public ends. A far-flung disjointed system is independent and absentee so far as any partien-

lar community in its system is concerned. Its management has the problems of no one community for its exclusive consideration. It derives a great portion of its power and its profits from outside sources over which the community has no control. It can never be successfully regulated by the community it serves. It is a breeder of bad public relations.

An operating system whose management is confined in its interest, its energies, and its profits to the needs, the problems, and the service of one regional community is likely to serve that community better, to confine itself to the operating business, to be amenable to local regulation, to be attuned and responsible to the fair demands of the public, and more often to get along with the public to mutual advantage. A regional system, with each company confined to consolidation of its own territory, will offer no chance for the territorial raids at fantastic prices with which for 15 years competing holding company systems disturbed the operating business. Essentially local systems will tend to operate utilities rather than to play with high finance; and essentially local enterprise is far less likely to accumulate a disproportion amount of political and economic power.

All the advantages of large-scale operation and centralized financing claimed for present-day holding companies can be obtained when a holding company holds a single integrated system of operating companies or when a number of operating units are merged into the legal unit of a single large operating company.

Opponents of the title argue that a holding company should be permitted to hold more than one integrated system of operat-

ing companies because of the advantages of diversification of risk such a holding company can offer investors in its own securities. The answer to that argument is as follows:

(*a*) Experience has shown that there is no important actual diversification of economic risk either in the operations or the securities of present-day holding companies. The securities of those holding companies which claim to be most diversified have actually had the worst investment records; their own best securities are bonds secured by liens on specific operating properties. The argument of diversification of risk is an attempt to justify as a matter of economic principle, the accumulation of unrelated operating properties in a completely accidental way for immediate reasons of financial opportunism.

(*b*) Diversification of risk is a matter of investment judgment to be undertaken by the individual investor or an investment trust, not by those actually controlling and managing operating companies. "* * * The holding company in the past has confused the function of control and management with that of investment and in consequence has more frequently than not failed in both functions. * * * An investment company ceases to be an investment company when it embarks into business and management. Investment judgment requires the judicial appraisal of other people's management." (President's message of Mar. 12.)

(*c*) Even if the argument of diversification were sound, it is outweighed by the political and general economic desirability of breaking up concentrations of financial power in the utility field too big to be effec-

tively regulated in the interest of either the consumer or the investor and too big to permit the functioning of democratic institutions.

(3) A presently existing utility holding company can become an investment trust under the title by enfranchisement of independent holders of securities, by "sterilization" of a portion of the voting rights of the securities held by the holding company itself, by abandonment of proxy practices and interlocking directorates, or by divestment of a portion of holdings, etc., until it has satisfied the Securities and Exchange Commission that it has divested itself of control of the management of operating gas and electric companies. For many holding companies the simplest method may be the giving of voting rights to presently disfranchised independent holders of securities in operating companies in sufficient degree to satisfy the Securities and Exchange Commission that the holding company, despite its ownership of securities in operating companies, does not control the management of such companies.

(4) A presently existing utility, holding company with widely scattered holdings may continue to control the management of subsidiary operating utility companies if, within the period permitted by the section, it rearranges or reduces them to obtain a single integrated system.

(*a*) *Voluntary readjustment.*—Substantially such holding companies are given 5 years (with certain permissible extensions) in which to rearrange their affairs in their own way, on their own initiative, utilizing their present connections with investment banking houses for the flotation of new and refunding issues to buy and sell properties

and their present interrelationships with each other for the purpose of arranging exchanges of properties.

The Securities and Exchange Commission and the Federal Power Commission are expressly directed by the title to make a study of rearrangement possibilities to aid such rearrangement on a voluntary basis during the next 5 years. There has been a very pronounced voluntary movement on the part of the better companies in the last 10 years to dispose of outlying properties and to rearrange their properties into integrated systems. There are many forces at work in the industry which, given the machinery and the encouragement of legislation, will undertake to set their houses in order to enlighten self-interest in the same way that groups in the field covered by the Securities Exchange Act have undertaken reforms without compulsion within the framework of that act. Among those forces are new scientific developments, new distributions of financial power, the interests of investment banking houses in salvaging situations they have "sponsored", Government holdings of utility securities taken as collateral for Government loans, and the sheer necessity of reorganization, entirely independent of this title, in many holding company situations.

Section 11 provides that plans for the voluntary readjustment of the affairs of holding companies to conform with the section may be presented to the Federal courts at any time and that in such cases those courts may exercise in the furtherance of such voluntary plans all the extraordinary powers such courts have been accustomed to exercise when called upon under the Sher-

man and Hepburn Acts to effect compulsory corporate readjustments required by the public policy expressed in those acts.

The committee is of the opinion that careful consideration should be given to the advisability of amending the revenue acts to encourage voluntary corporate reorganization for the purposes of simplifying holding company structures, eliminating unnecessary complexities therein, and otherwise complying with the policies underlying holding company legislation. Such amendments should be considered not only in relation to the stamp and transfer taxes but to the income taxes as well. Naturally, any exemptions provided for these purposes should be limited to the needs of such purposes. The committee has taken no definite action on this matter because of the parliamentary procedure which may be construed to require such an amendment of the revenue act to originate in the House, but it definitely recommends concurrence by the Senate in any such amendment originating in the House.

With intelligent cooperation between the commissions, the Federal courts, Federal taxing policy, and the utility interests themselves, practically the entire operation of transformation and arrangement of those holding companies in which investors have anything left to save can be completed prior to the end of 5 years. Where the corporate structure of companies is simple, compliance with the bill will be comparatively simple. Where the corporate structure is complicated and confusing, as is the case with some holding companies, reorganization is inevitable irrespective of legislative compulsion.

(b) *Compulsory readjustment.*—In the case of those holding companies which at the end of the 5 years may not have completed for themselves the task of transformation into an investment trust or of rearrangement of their properties into a single integrated system, the Securities Commission is given power to take them into the Federal courts to require compliance with the title in one or the other way. The process of compulsory divestment of control is left to the Federal courts, without time limit, for the application of the technique worked out in the dissolutions under the Sherman Act and the Hepburn Act (commodities clause).

The title provides that during all court processes the Securities and Exchange Commission shall act as an impartial expert economic adviser and administrative assistant to the courts. That expert assistance will enable the courts to save time and expense in the solution of essentially economic and administrative problems for which in the Sherman Act cases it had no assistance except that of opposing counsel. But the courts can take such time as they deem advisable to dispose of assets without sacrifice.

Time taken in a dissolution proceeding should not injure the investor because the going-market prices of securities in the securities market anticipate in advance the break-up value which any particular security will have at the end of a dissolution proceeding. As a matter of fact, the valuation which the market places on holding companies securities today is but a rough calculation or prediction of the break-up value of an interest in the holding company's conglomeration of interests in op-

erating properties. During any process of reorganization under this title the market's appraisal of values is likely to be more accurate and reliable than at present because of the focusing of attention upon the down-to-the-rail assets which make up the real value of holding company securities.

(5) The reorganization of holding companies which are not necessary for the operation of geographically integrated operating systems will not adversely affect the credit of the utility industry.

(*a*) There may be some instances where the regional holding company, tying together small plants and small distributing areas, has in the past helped to draw capital into the actual industry. But the giant holding companies, by and large, have not drawn money into capital improvement and expansion of the industry but have utilized their investors' funds for the purchase of utility properties already built. Even after the holding company became a dominant factor in the utility industry, credit and investment were obtained for the industry directly through the operating companies rather than through the holding companies. It has been in the securities of the operating companies that insurance companies and savings banks have placed the bulk of their utility investments. They have wisely chosen the tested and secured obligations of the operating companies, and not the so-called "diversified securities" of the holding companies, based on slender and speculative equities.

The President pointed out in his radio address—

"Power production in this country is virtually back to the 1929 peak. The operating companies in the gas and electric utility

field are by and large in good condition but under holding company domination the utility industry has long been hopelessly at war with the industry and with public sentiment."

It is the existence of the unnecessary holding company and not the threat of its elimination that menaces the credit of the utility industry. The holding company advocates have spoken a great deal about the capital flowing into the utility industry while under the domination of the holding company. But they have made no effort to show how much of the investors' money used to purchase holding company securities ever went to build or improve utility properties. Dr. Harold G. Moulton, president of the Brookings Institution, in a recent book entitled "The Formation of Capital", states that very little of the money invested in holding-company securities went into productive capital. Moulton writes:

"The amount of securities floated by investment trust and public-utility holding companies in the years 1924 to 1930, inclusive, was as follows:

Year	Investment trusts	Public-utility holding companies	Year	Investment trusts	Public-utility holding companies
1924	$44,700,000	$246,300,000	1928	$1,026,000,000	$1,104,000,000
1925	208,500,000	401,900,000	1929	2,951,000,000	1,039,000,000
1926	96,600,000	532,900,000	1930	401,700,000	647,600,000
1927	418,700,000	883,500,000			

"Such issues served to confuse the true economic picture. They added to the volume of security offerings; but the funds procured were employed almost entirely in the purchase of corporate securities already outstanding. Instead of adding to productive capital, these financial operations merely served to multiply the number of

pieces of paper (shares of stock) constituting claims to existing properties. Ordinarily such a diluting process might be expected to depreciate the value of each piece of paper outstanding; but owing to the fact that the money was used mainly to buy existing securities it served instead to boost their prices."

The assertion that holding companies provide indispensable credit facilities for operating companies does not stand up against the statistical proof that the credit of operating companies in these days of depression—and depression days are the only true test of credit worthiness—is far better than the credit of holding companies. A recent report of the Federal Power Commission shows that the average quotations in November 1934, for 121 issues of operating company bonds listed as legal investments for trustees in the State of New York were 6.6 points higher than in September 1929. Recent prices have been even higher than those of last November. The selling prices of these investments, made solely on the credit of the operating company, contrast sharply with the low prices obtaining for holding company securities.

Before the House committee, Dr. David Friday, the economist for the utility interests, testified that with companies the size of Detroit Edison, Commonwealth Edison of Chicago, and Southern Edison of Los Angeles, "the holding companies are not necessary at all." According to this testimony, the supercredit and supermanagement of a holding company are not needed for companies in large cities. It is equally unnecessary to superimpose a giant holding company upon an economically integrated system of small plants which in the aggre-

gate afford the same conditions of self-sufficiency as the operating unit in the large city. Title I encourages the building up and strengthening of compact systems of related operating units even to the extent of providing exemption for a holding company if it is necessary for the functioning of such a system. Sound operating units or regionally integrated systems, not the giant holding companies, provide the real and only enduring basis of credit for the utility industry.

(*b*) An argument has been given widespread currency by the opponents of the title that the elimination of the giant holding companies will demoralize the market for all operating securities because many operating-company securities will be thrown upon the market by the giant holding companies in the course of their dissolution. The argument is premised on the false assumption that the proposed title will cause the dumping or forced liquidation of securities by the giant holding companies. As has been explained above, the title does not require the dumping or forced liquidation of securities. Such disposition as may be necessary can be accomplished by reorganization which will equitably redistribute securities among existing security holders. Insofar as there may be some redistribution of the securities of operating companies through investment banking channels, this will not result in a substantial net increase in the supply of utility securities on the market because for every block of operating securities distributed there will be a corresponding block of holding-company securities retired. The net effect of such changes will be to strengthen the market for utility securities

generally by replacing holding-company securities with sound operating-company securities. Such operations, primarily of a refunding nature, should strengthen rather than weaken the credit of operating companies.

The market for operating-company securities will be no longer adversely affected by the disrepute into which holding-company securities generally have fallen. The individual investor in present-day holding companies should come out of any reorganization process under the title with far better securities than those with which he went into it. He should get a security which represents an actual down-to-the-rails investment in a regulated local operating company, or, at most, a regulated regional holding company. He should get a security which will bring him, instead of paper stock dividends, all the legitimate cash dividends the operating company can pay—not what is left of them after high salaries, large fees, bonuses to holding-company officers and bankers, and the purchase of securities at exorbitant prices from corporate insiders. In short, the individual investor should receive the kind of a security he thought he was buying in the first place. The actual clearing up, through clean reorganizations, of the tangle in which holding-company finance has left the industry and those who have invested in it, can reestablish a confident, stable market for good utility securities. But a frightened policy of refusing to take hold of the obvious political and financial difficulties of the industry will only generate even greater future difficulties.

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Extracts from S. Rep. 621, 74th Cong., 1st Sess., pp. 32–34:

SECTION 11. SIMPLIFICATION, REORGANIZATION, AND DISSOLUTION OF HOLDING COMPANIES

Subsection (a) makes it the duty of the Commission to examine the corporate structure of every company in the holding company system of a registered holding company, the relationships among such companies, and the character of their interests and properties, to determine the extent to which unnecessary complexities may be removed, voting power fairly and equitably distributed among security holders, and the properties in a holding company system confined to those necessary or appropriate to the operations of a single geographically and economically integrated public utility system.

Subsection (b) makes it the duty of the Commission after notice and opportunity for hearing, (1) after January 1, 1938, (see subsection (c) below for possibility of extension), by order enforceable only in the Federal courts of equity, to require each registered holding company, and each subsidiary company thereof, to divest itself of any interest in or control over property or persons to the extent that the Commission finds necessary or appropriate to limit the operations of the holding company system of which such company is a part to a single geographically and economically integrated public utility system and to such business as is reasonably incidental or economically necessary or appropriate to the operations of such system; (2) after January 1, 1938 (with the same possibilities of extension) to require each registered hold-

ing company, and each subsidiary company thereof, to be reorganized or dissolved whenever the Commission finds that the corporate structure or continued existence of such company unduly or unnecessarily complicates the structure of the holding company of which it is a part, or unfairly or inequitably distributes voting power among the holders of securities, or is detrimental to the proper functioning of a single geographically and economically integrated public utility system; and (3) promptly after January 1, 1940, to require each registered holding company to take such steps as the Commission finds necessary or appropriate to make such company cease to be a holding company, except that the Commission is directed to permit a registered holding company to continue to be a holding company if such company obtains from the Federal Power Commission a certificate that the continuance of its holding company relation to subsidiaries is necessary, under the applicable State or foreign law, for the operation of a geographically and economically integrated public utility system serving an economic region in a single State or extending into two or more contiguous States or into a foreign country.

Subsection (c) provides that in any order under subsection (b) the Commission shall fix the time within which such order shall be complied with, not later than 1 year from the date of such order, but the Commission may, for good cause shown, extend such time for an additional period not exceeding 1 year.

The foregoing provisions are designed to produce a gradual and orderly elimination of the unnecessary utility holding com-

panies and the simplification of the capital structures and a fair distribution of voting power of those companies which are permitted to continue. Existing holding companies will be obliged (i) to divest themselves of any interest in properties not appropriate to a geographically and economically integrated public-utility system, or (ii) to cease to be holding companies by divesting themselves of all control over the public-utility companies in which they are interested and become investment companies, or (iii) to distribute their securities and assets equitably among their security holders. Precedents under the Sherman Antitrust Act and under the Hepburn Act demonstrate that the necessary corporate adjustments can be made without forced liquidation or the sacrifice of legitimate investment values.

Subsections (d), (e), and (f) outline the procedure whereby the reorganization plans must be approved by the Commission and carried out under the supervision of the Federal courts. The court is to take technical jurisdiction of the assets involved and appoint the Commission sole trustee or receiver to administer the assets as a trust estate for the benefit of the persons interested therein as their interests may appear. By these provisions it is intended to give the Commission the complete supervisory power which is essential to the elimination of the present wasteful practices in corporate reorganizations. It also ensures to investors that their properties will not be needlessly sacrificed but will be conserved by the Commission and the court until a satisfactory reorganization can be arranged. If a company is solvent, the court could continue the payment of

interest and in appropriate cases dividends until a prudent reorganization is effected. Subsection (e) expressly authorizes a holding company subject to the approval of the Commission and the court to work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization by the Commission, and the Commission and the court are authorized to approve any plan so worked out voluntarily by a holding company as the Commission and the court might order under their compulsory powers. Thus the voluntary reorganizations of the holding companies might be facilitated by the recognized powers of a court of equity to make such equitable allocations of general liens and priorities as may be necessary to make it possible for the companies to comply with the policy of the statute (*Continental Insurance Co.* v. *U. S., Reading Co. et al.* 259 U. S. 156). If a company is insolvent or unable to pay its debts, the Commission is empowered by subsection (f) to institute proceedings for the reorganization of the company under section 77B of the Bankruptcy Act; in such proceedings also, the Commission could have itself appointed sole trustee. Under these subsections, Commission approval of reorganization plans and supervision of the conditions under which such plans are prepared will make it impossible for a group of favored insiders to continue their domination over inarticulate and helpless minorities, or even as is often the case, majorities. Fees, expenses, and remuneration paid in connection with any such reorganization, whether under section 77B of the Bankruptcy Act or otherwise, are

made subject to the approval of the Commission.

Subsection (g) makes it unlawful for any person to solicit any proxy, power of attorney, or deposit of securities for or against any reorganization plan, except under the following circumstances. The plan must either have been prepared by the Commission or submitted to it by a person having a bona fide interest in the reorganization. A copy of the report made by the Commission on the plan and other plans submitted to it or an abstract of such report approved by the Commission must accompany each such solicitation. The Commission may, by its rules, regulations, or orders, prescribe other terms of the solicitation which it considers necessary or appropriate in the public interest or for the protection of investors or consumers. It is expressly provided that no person shall be prevented from appearing before the Commission or any court through an attorney or proxy. This subsection is designed simply to assure that a security holder will have a fair opportunity to consider concrete proposals on their merits with full and fair disclosure of all material facts before he is pressed to register his vote on a reorganization plan or to tie himself irrevocably to a plan which in the future may develop to be unfavorable to him and to involve great expense on his part.

These provisions are framed to bring back to the investor such property interest as he may have in the underlying properties owned by the holding company. They destroy and confiscate no property, but they remove the confusing corporate devices and contrivances which have con-

fused the investor and in many cases have been used to deprive him of the fruits of his investment.

Extracts from Congressional Record, Vol. 79, 74th Cong., 1st Sess., pp. 8844–8845:

REGULATION OF PUBLIC-UTILITY HOLDING COMPANIES

The Senate resumed consideration of the bill (S. 2796) to provide for the control and elimination of public-utility holding companies operating, or marketing securities, in interstate and foreign commerce and through the mails, to regulate the transmission and sale of electric energy in interstate commerce, to amend the Federal Water Power Act, and for other purposes.

Mr. WHEELER. Referring now to page 49, I move to amend by striking out lines 8 to 25, inclusive, and substituting therefor the following.

The PRESIDENT pro tempore. The amendment will be stated.

The CHIEF CLERK. On page 49 it is proposed to strike out lines 8 to 25, both inclusive, and down to and including the word "appointed" in line 2, page 50, and to insert in lieu thereof the following:

"(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company or any subsidiary company thereof, the court shall have power, and, at the request of the Commission, it shall be the duty of the court to constitute and appoint the Commission as sole trustee or receiver subject to the direction

and orders of the court, whether or not a trustee or receiver shall heretofore have been appointed."

Mr. WHEELER. In other words, we greatly liberalize that section, because as it read before it provided that, if, in the judgment of the Commission, any registered holding company or any subsidiary company thereof was insolvent or unable to pay its debts, the Commission should have the power to institute proceedings for reorganization of such company under section 77B of the Bankruptcy Act. This amendment takes from the Commission the power to go into court and ask that a company be placed in the hands of a receiver because it is insolvent or because it cannot pay its debts. We simply say to the court now, "In the event you appoint a receiver, then upon the request of the Commission you shall appoint the Commission such receiver, but the Commission shall be subject to the rules and orders of the court."

The reason for these provisions is that it has been a notorious fact, as we all know, and as the Chairman of the Judiciary Committee [Mr. ASHURST] especially knows from his investigations, that a racket has existed in the matter of these receiverships. The section as amended, we believe, provides for the protection of investors in companies in the event they go into the hands of receivers—registered holding companies or their subsidiaries, companies which are engaged in interstate commerce—and only those companies—and that the Commission shall act as receiver and shall be subject to the direction and orders of the court.

Mr. BORAH. Mr. President——

The PRESIDENT pro tempore. Does the Senator from Montana yield to the Senator from Idaho?

Mr. WHEELER. I yield.

Mr. BORAH. I understand the sole effect of the amendment is to make it obligatory upon the court to appoint the Commission as trustee or receiver in case the court adjudges the parties bankrupt.

Mr. WHEELER. The purpose of the amendment is to make it clear that when the court appoints the Commission trustee or receiver, the Commission is to be subject always to the direction and orders of the court; and it is further designed to take away the power of the Commission to investigate bankruptcy proceedings under section 77B. The provision as it stands at the present time has been greatly criticized in some of the advertisements of some of the holding companies. They have held it out that what we were seeking to do was to take them over and have them condemned, thrown into receivership, and that the intention was to have the Government take them over. Of course, no such intention was in mind at all. All that was intended was exactly what we are doing here now for the protection of the investors. We have even taken from the Commission the right to go into court and ask that the company be placed in the hands of receivers. So that with this amendment, only if the court orders the company into receivership can the Commission ask that it shall be appointed as receiver or trustee.

Mr. HASTINGS. Mr. President, will the Senator from Montana yield?

Mr. WHEELER. I yield.

Mr. HASTINGS. My recollection of the section, without having read it for a day or

two, is that under the bill as reported by the committee the Commission itself could make application to the court if, in its judgment, any registered holding company or any subsidiary company thereof was insolvent or unable to pay its debts?

Mr. WHEELER. That is correct.

Mr. HASTINGS. Then the bill provided that, having made the application to the court, the court was compelled to appoint the Commission trustee, and then that there could be no reorganization except the kind of reorganization suggested by the Commission itself. In other words, under the bill we have the Commission itself, which has no monetary interest in the matter, and which makes application for the bankruptcy proceeding, given power to have itself appointed trustee and then itself propose the plan of reorganization. I should like to know what changes the amendment makes in those three respects?

Mr. WHEELER. The amendment completely changes the first of those three things, because, in the first place, it takes away from the Commission the right to go into court and ask the court to appoint a receiver.

Mr. HASTINGS. That is the important matter.

Mr. WHEELER. Yes. As I say, the provision was not intended as it has been interpreted; but I can readily understand how, in view of the language, it might raise a fear in the minds of some people, and they might say, "The Commission may throw us into receivership and be appointed receiver, and then have a reorganization plan", and so forth. They might say, "It is an inducement for the Commission to throw us into the hands of a re-

ceiver"; but the Senator from Delaware will agree with me that this language changes the whole situation.

Mr. HASTINGS. Of course it is a little difficult to follow the language and remember it when one has not the amendment before him; but let me make an inquiry. The Senator says the amendment removes the first objection, which I think was the most serious one.

Mr. WHEELER. Absolutely.

Mr. HASTINGS. Does the amendment leave the other two provisions? As I remember, the Senator said it does provide that the Commission shall be named trustee or receiver by the court.

Mr. WHEELER. That is correct.

Mr. HASTINGS. Does it in any way affect the persons who may suggest the plan of reorganization?

Mr. WHEELER. No. I will say to the Senator from Delaware that another Senator is talking to me about that subject, and we are trying to work out an amendment. On that last point of who may suggest the plan of reorganization, section 11 is quite clear that the suggestion may come from any interested person. It is not limited to the Commission's own plan, so long as the plan is eventually approved by the Commission. All we are seeking to do in this whole section is to protect persons who have invested their money from a racketeering receivership, such as the Senator well knows has taken place in many cases throughout the country, and particularly as was investigated by the Judiciary Committee of this body, under the leadership of the Senator from Arizona [Mr. ASHURST].

The PRESIDENT pro tempore. The ques-

tion is on agreeing to the amendment offered by the Senator from Montana.

The amendment was agreed to.

Mr. BORAH. Mr. President, I desire to ask the Senator from Montana a question.

On page 50, beginning with line 2, the bill provides as follows:

"In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court."

I do not exactly understand that language. Does it mean that the court's jurisdiction with reference to the reorganization, or what shall be permitted by decree of the court, is limited; or is it simply recommendatory to the court?

Mr. WHEELER. We do exactly the same thing at the present time, as I understand, with reference to the Interstate Commerce Commission. A plan for the reorganization of a railroad is supposed to be submitted to the Interstate Commerce Commission for its approval before it is approved by the court. We put this provision in here in practically the same manner, as I recall, as the existing provision with reference to the Interstate Commerce Commission in the case of railroad reorganizations.

Mr. HASTINGS. Mr. President, in that connection, if it be true that no reorganization plan can be considered except that which is suggested by the Commission, why is it necessary to put in the language "Shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court"? My understand-

ing is that the Commission is the only body which can submit a reorganization plan.

Mr. WHEELER. Oh, no; the Senator is wrong about that.

Mr. HASTINGS. A plan may be submitted by somebody else?

Mr. WHEELER. Absolutely. The Commission may submit a plan if it sees fit to do so, or some private individual may submit a plan; but the idea is that if some private individual submits a plan, exactly as in the case of railroad receiverships at the present time, it shall first be approved by the Commission.

Mr. STEIWER. Mr. President, will the Senator yield?

Mr. WHEELER. I yield.

Mr. STEIWER. In respect to the language which is now under discussion, at the top of page 50, has there been urged upon the committee, or brought to the attention of the chairman, the contention that that language would oust the court of its jurisdiction, and, therefore, be objectionable?

Mr. WHEELER. To what language does the Senator refer?

Mr. STEIWER. The language to which the Senator from Idaho [Mr. Borah] has just called attention, near the top of page 50.

Mr. WHEELER. No; I do not think it would oust the jurisdiction of the court. I think there is no question that Congress would have the power to say that the court shall, when it appoints a receiver, appoint the Commission receiver, because, after all, the court is a statutory court, and we have the right to say that before this plan is approved by the court it shall be approved by the Commission. Furthermore, this is a mere matter of Congress providing the administrative machinery surrounding re-

ceiverships, and in no way usurping any judicial powers. The judicial functions remain, as always, in the court.

If I am not mistaken about the matter, we employ exactly that procedure in railroad reorganizations at the present time; and the only complaint we have had has been that the Interstate Commerce Commission has been too lenient, and has approved a number of plans which should not have been approved.

Mr. STEIWER. I make no contention about the matter at this time, but it occurs to me that provision might be subject to the objection that it would oust the jurisdiction of the court.

Mr. WHEELER. The Senator from Indiana [Mr. Minton] has called my attention to the fact that the provision does not oust the jurisdiction of the court at all, because the court has to approve the plan even though the Commission approves it. In other words there is really a double check upon the plan, and final determination rests as in the past in the courts.

Extracts from Congressional Record, Vol. 79, 74th Cong., 1st Sess., pp. 8936–8941:

Mr. MCKELLAR. Mr. President, I have another amendment which I do not believe we have entirely agreed upon.

On page 52 of the reprint of the bill, beginning at line 12, subsection (f), the language has been amended to read as follows:

"In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidary company thereof"—

And I call especial attention to the language I am now going to read—

"the court shall have power, and, at the request of the Commission, it shall be the duty of the court, to constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court."

That language is an improvement on the language of the original bill; but I desire to suggest to the chairman of the committee that in lines 15, 16, and 17 the words "shall have power, and, at the request of the Commission, it shall be the duty of the court to" be stricken out, and the word "may" inserted, so that, if amended, it will read as follows:

"In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court."

I offer that amendment, Mr. President. I hope the Senator from Montana will accept it; and I will say to him that I should then be perfectly willing to offer the suggested amendment which the Senator handed me a few moments ago, which would accord with the words I have just offered.

Mr. WHEELER. Mr. President, let me say to the Senator from Tennessee, referring to his tendered amendment, that the purpose of the amendment on page 52 as it stands at the present time is to do just exactly what the Senator from Maryland [Mr. Tydings] a moment ago said should

be done; that is, that in this bill we should do everything possible to protect investors under a reorganization plan.

When a reorganization plan is offered, if the utilities can go to some one of the Federal judges and pick out a receiver or a trustee who is friendly to them, they can perpetrate a fraud and a racket upon the investor.

I appreciate the fact that the Senator from Tennessee is absolutely in sympathy with the purpose expressed in this bill; and, as I understand, the only thing the Senator is afraid of is that the court may say, "I have the power and the right to appoint anybody. I wish to appoint as receiver or trustee, and the Congress of the United States has not any right to limit my discretion in appointing a trustee or receiver."

Remember that under the language of the bill we say that the Commission shall be appointed. Of course, that means that when the Commission shall be appointed receiver, it will pick out either one of its members or some one of its officers to administer the trusteeship or receivership.

Mr. CLARK. Mr. President, will the Senator from Tennessee yield to me for the purpose of asking a question?

Mr. MCKELLAR. Yes; I yield to the Senator from Missouri.

Mr. CLARK. Does the Senator from Montana know any reason on earth why Federal Commissioners appointed by the President and confirmed by the Senate necessarily have a higher standard of honor, or a higher standard of any sort, than a Federal judge appointed by the President and confirmed by the Senate?

I must say to the Senator from Montana that I cannot go along with him in

this statement that somebody may sneak in to one of the Federal judges. Somebody is just as likely to sneak in to a member of the Federal Securities Commission.

Mr. MCKELLAR. Mr. President, I understand and fully appreciate the argument of the Senator from Missouri; but that is not exactly the matter to which I am attempting to direct my remarks. Here we have a nominal jurisdiction granted to the court to appoint a receiver, but actually the Commission can appoint whomsoever it pleases. If this language, "shall have power, and, at the request of the Commission, it shall be the duty of the court, to" be stricken out, and the word "may" inserted in lieu thereof, I have no doubt in the world that the court will invariably confer with the Commission before it makes an appointment.

I desire to say to the Senator from Montana that, in my judgment, if he attempts to give authority to the Commission to appoint the trustee, or to appoint itself trustee, while ostensibly giving that authority to the court, it is sure to bring about trouble. I really believe the Senator from Montana will make a great mistake if he does not accept language that will bring about a reasonable settlement of this matter in conformity with the well-known principles of law and practice in such cases.

I do not agree with the Senator from Montana that Federal judges are dishonest or corrupt. If they appointed somebody in the interest of these companies, they would be acting fraudulently and corruptly. So far as I am concerned, I am a great believer in the court; and I think it is most essential to leave this provision

in the nature of an advice or a direction to the court, but not make it the duty of the court to appoint the Commission. By the way, I think the paragraph would be very much stronger if it provided for the appointment of some member of the Commission. When the Commission itself is appointed, it may mean the office boy, or it may mean a member of the Commission. We do not know who it will be. It is a "cat in a bag."

Mr. CLARK. Mr. President, will the Senator yield?

Mr. MCKELLAR. Yes; I yield.

Mr. CLARK. The principle of the bill is not to vest any discretion in the Federal courts, but to vest every and any sort of discretion in the Securities Commission.

Mr. MCKELLAR. The Members of the Senate, in view of their recent experience, ought to know that it is a dangerous thing for one branch of the Government to trespass upon the rights of another branch.

Mr. BARKLEY. Mr. President, will the Senator yield?

Mr. MCKELLAR. Yes; I yield.

Mr. BARKLEY. I appreciate the force of what the Senator says. Of course, this is an administrative duty of the court. It is not like telling the court how to decide the law, or as to equities among investors, or how a reorganization shall be brought about. The appointment of receivers is an administrative matter which is performed by courts.

Mr. MCKELLAR. Why not take away from the courts the right to appoint a receiver and vest it in the Commission?

Mr. BARKLEY. I think Congress has the power to direct a court which is its creature

with respect to the appointment of receivers.

Mr. CLARK. Mr. President, if the Senator will yield——

Mr. BARKLEY. Just a moment. Another thing that enters into the matter is, to avoid, as the Senator from Montana has repeatedly said, the appointment of outsiders, or insiders, as a matter of fact; and that is no reflection on the integrity of the court. We all know how frequently these things come about. Application is made to the court for the appointment of a receiver or a trustee——

The PRESIDENT pro tempore. The time of the Senator from Tennessee on the amendment has expired.

Mr. CLARK. Mr. President, I claim the floor in my own right on the amendment.

The PRESIDENT pro tempore. The Senator from Missouri is recognized on the amendment.

Mr. CLARK. I should like to reply to what the Senator from Kentucky has said, if the Senator from Tennessee will permit me to do so.

Mr. MCKELLAR. I shall be very glad to have the Senator do so.

Mr. CLARK. Then I shall be very happy to permit the Senator from Tennessee to consume the rest of my time, because I have been trespassing on his time.

I think the Senator from Kentucky has misstated the theory of a receivership. The theory of a receivership is that the insolvent property is intrusted to the jurisdiction of the judge, the head of the judicial system in that jurisdiction.

Mr. MCKELLAR. Mr. President, will the Senator yield?

Mr. CLARK. I yield.

Mr. MCKELLAR. I imagine the framing of this particular language was brought about—indeed, I am rather inclined to think the chairman of the committee told me it was—because of many scandals in the appointment of receivers. We all know that that has taken place; but with this language changed as I propose to change it, a repetition of such scandals would be almost impossible.

Mr. CLARK. Mr. President, if the language which the Senator has proposed to insert in the bill is offered as a result of just criticisms or unjust criticisms of Federal receiverships, the remedy is to change the law, and, if necessary, to change the Constitution so as to make it easier to impeach or to remove Federal judges who misuse their offices.

The whole theory of a receivership is that the insolvent estate is put into the hands of a judge; and when a receiver is appointed, according to the theory of the law as it has always been up to the time this particular measure came along, the theory has been that the receiver was merely the agent of the court, for whom the court was responsible, over whom the court exercised the ultimate control; and we all know that judges have been impeached, and once in a while a judge has been convicted, because of the acts of his receivers.

Mr. MINTON. Mr. President, will the Senator yield?

Mr. CLARK. In just a moment. This proposition, Mr. President, is simply to restrain the discretion of the judge, as the Senator from Kentucky [Mr. BARKLEY] very well said, to make his office a mere administrative one, removing all responsibility whatever from the judge.

Mr. BARKLEY. Mr. President, if the Senator will yield, let me say that the bill does not do that.

Mr. CLARK. Mr. President, I insist that it does do that. I shall be glad to yield to the Senator from Kentucky in just a moment. I wish, first, to finish this thought.

This proposition is to do away with the whole principle of agency of the court, which the whole receivership theory has always been.

Now I yield to the Senator from Kentucky.

Mr. BARKLEY. The language which has been included in the amendment of the Senator from Montana negatives the very suggestion, because, after the appointment of the Commission as receiver, it is subject to the directions and orders of the court.

Mr. CLARK. In other words, Congress is to appoint an agent and then hold the Federal court responsible for the acts of the agent. This is the Senator's proposition, as I understand. I agree with the Senator from Tennessee that the present form of the section is a very great improvement over the original section.

Mr. MCKELLAR. There is no question about it.

Mr. CLARK. But the Senator wants a Federal judge to appoint an agent, and he may be any agent the Commission may nominate. He may be the office boy, as the Senator from Tennessee said, or he may be any sort of a young lawyer. The court appoints the Commission, and then the Commission sends out an emissary to act as its agent.

Mr. WHEELER. Mr. President, will the Senator yield?

Mr. CLARK. I yield.

Mr. WHEELER. Let me say to the Senator that this does not change the bill in any way. There is a precedent for it at the present time in a law which was enacted during a recent session of the Congress. In applying the rule to the reorganization of railroads, we provided that when a petition was filed with the Federal court, the court should make a selection from a panel. We did not provide that he had to appoint a receiver, but that if he appointed a receiver he had to make his selection from a panel furnished him.

Mr. CLARK. I am very familiar with that act, and I have very grave doubt as to its constitutionality, so far as any compulsion on a judge to select a trustee from a panel is concerned. Nevertheless, that is essentially a different proposition from the one before us.

Mr. WHEELER. The same principle applies, for the reason that these courts are statutory courts. When the Senator talks of its constitutionality, I reply that there cannot be any question as to its constitutionality.

Mr. MCKELLAR. I am not sure that the Senator is right about that.

Mr. WHEELER. There is no question about the constitutionality of it. There may be some question about the wisdom of the policy.

Mr. CLARK. I did not say a word about the constitutionality. The Senator is putting words into my mouth which I did not use. I said I had very grave doubt as to whether the act to which the Senator referred, compelling a Federal judge to appoint trustees from a particular panel, is constitutional; and I do have grave doubts

as to its constitutionality. That is essentially a different proposition, and entirely immaterial to the argument now being made.

Mr. WHEELER. These courts are constitutional courts. The only jurisdiction they have is what the Congress of the United States has granted them, and one of the powers Congress has granted to these judges is, under the equity procedure, to appoint trustees and receivers under certain circumstances. If we have the power to give them that authority we have the power to limit their jurisdiction with reference to it.

I myself felt that the bill as it originally came before us, where it provided that the Commission could throw companies into bankruptcy, was too broad, and I worked out with the Senator from North Carolina [Mr. BAILEY] an amendment, which was offered and which has been adopted.

Mr. CLARK. That amendment has been adopted?

Mr. WHEELER. Yes.

Mr. MCKELLAR. There is an amendment to the amendment here.

Mr. WHEELER. An amendment has been adopted which the Senator from North Carolina and I worked out. I have no interest in the matter, and nobody else has, except that, so far as it is humanly possible, we want to protect the investors who, the utility people say, will be ruined. I know, as a matter of fact, that one of these companies which has been one of the worst in the United States will probably apply to the courts in a very short time for a receivership or trusteeship for the purpose of reorganizing, because it is in such shape that that must be done. I know just as well as

that I am standing here that if that is done they expect to go into the Federal court and undertake to have trustees and receivers appointed, and without casting any reflection upon any court, we do not need to do that. The Senate of the United States, under the leadership of the Chairman of the Judiciary Committee of the Senate, has been investigating receiverships from one end of the country to the other, and every Member of the Senate who has followed the investigation knows that there has been wide-spread scandal.

Mr. CLARK. Mr. President, as the Senator knows I am not in agreement with a great many things which have happened in connection with the Federal courts; but I emphatically and violently disagree with the Senator from Montana in his belief that a commission set up in Washington is necessarily infallible, and will always be pure, and will always be superior to the wisdom of any Federal judge.

A few years ago, during the administration of the late President Wilson, the Federal Trade Commission was set up. The original personnel of that Commission was particularly designed and appointed for the purpose of carrying out the purposes of the Federal Trade Commission Act. In fact, several members of the Commission first appointed to the Commission had participated in the drawing of the act. As I understand, it is contemplated that if the measure before us shall be enacted, some of the men who have participated in drafting it will be appointed on the Securities Commission, which up to date has done exceedingly well.

President Wilson died; the party which sponsored the Federal Trade Commission

Act was defeated and driven from power, and one of the first acts of President Harding was to appoint on the Federal Trade Commission Mr. William E. Humphrey. I do not wish to reflect on Mr. Humphrey, who is dead. As a matter of fact, he was a personal friend of mine in his lifetime, when he served in the House of Representatives. But his whole conception and his whole idea of the function of the Federal Trade Commission was diametrically opposite to that of the President who had recommended the establishment of the Federal Trade Commission, and the Representatives and Senators who had led the fight for its creation. He proceeded completely to reverse the whole theory of the function of the Federal Trade Commission.

I see a man in the press gallery at this moment who took an interview from Mr. Humphrey in which Mr. Humphrey specifically said, "What the hell do you think I was appointed for?" In other words, he was appointed for the sole purpose of reversing the entire intent and purpose of the Federal Trade Commission Act.

I say that I very violently disagree with the theory of the Senator from Montana and of the other sponsors of the bill that any sort of a commission functioning from Washington, through emissaries, or agents, or attorneys, is to be preferred in its discretion to a Federal judge, appointed to one of the very highest honors in this country, appointed by the President usually after careful and most meticulous selection, and confirmed by the United States Senate.

Mr. McKellar. Mr. President, will the Senator yield?

Mr. Clark. I yield.

Mr. McKELLAR. In line with what the Senator is saying, I should like to repeat something I think I mentioned on the floor of the Senate the other day: The representative of a commission now in existence in Washington came to the Capitol to see about a bill being considered before the Committee on Post Offices and Post Roads, of which I am chairman, and he brought with him a man who had charge of the particular department concerned with the bill. From the way he acted and from what he said I judged that the latter gentleman was not connected with the commission at all, but represented the companies which were interested.

The PRESIDING OFFICER (Mr. Hatch in the chair). The Senator from Tennessee has already exhausted his time.

Mr. McKELLAR. I am speaking in the time of the Senator from Missouri.

The PRESIDING OFFICER. The Senator from Missouri has also exhausted his time.

Mr. McKELLAR. Then I will speak in my own right.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. McKELLAR. I have time on the bill.

The PRESIDING OFFICER. The Senator from Tennessee is recognized on the bill.

Mr. HASTINGS. Mr. President, will the Senator yield?

Mr. McKELLAR. I yield.

Mr. HASTINGS. Let me call the attention of the Senator from Tennessee to the last four lines of paragraph (f), which we are now discussing, in response to the suggestion that the Commission is to be appointed receiver because of the bad conditions which have been developed in connection with the appointment of receivers. Most

of those criticisms are due to the compensation allowed receivers. But in the very bill before us it is provided that the Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceeding as the court may allow. I should like to inquire how that relieves us under any condition of the trouble we have experienced in the past.

Mr. McKELLAR. Mr. President, I may say that I hope to have those lines stricken out, because I think that is an open invitation to bring about the very state of scandal of which the Senator from Montana, the chairman of the committee, spoke a few moments ago, and I do not think such a provision ought to be in the bill.

Mr. GORE and Mr. CLARK addressed the Chair.

The PRESIDING OFFICER. Does the Senator from Tennessee yield; and if so, to whom?

Mr. McKELLAR. I yield first to the Senator from Oklahoma.

Mr. GORE. I rose to say to the Senator from Delaware that I intend to move to strike out the language to which he has referred and the whole provision. I think it would be a nest of scandal and ought not to be in the law.

Mr. CLARK. If those lines remain in the bill, would not the language authorize any Federal judge who happened to be particularly amenable to Federal influence to mulct the stockholders or the security holders of any of these companies in any sum that a commission might wish to pay any agent who was sent out?

Mr. McKELLAR. I think the language is very unfortunate, and I very much hope the chairman of the committee will be

willing, as I believe he will be, to strike it out.

Mr. WHEELER. Mr. President, will the Senator yield to me?

Mr. MCKELLAR. I yield.

Mr. WHEELER. I was interrupted, but I believe the Senator was referring to the compensation feature.

Mr. MCKELLAR. Yes; as provided on page 57.

Mr. WHEELER. The intention was not to provide for the payment of compensation but for the payment of expenses. The Senator from Oklahoma [Mr. GORE] called my attention to it, and I said to the Senator from Oklahoma that I thought the most the commission ought to be paid was simply the actual expenses they incurred.

Mr. CLARK. Will the Senator from Tennessee yield?

Mr. MCKELLAR. I yield.

Mr. CLARK. If the Commission should choose to appoint a lawyer and pay him $100,000 a year to act as attorney for the Commission in the receivership of some company, and the court chose to approve it, that would bring back every vicious practice that has ever been complained of and many more.

Mr. MCKELLAR. I agree with the Senator from Missouri entirely. I think it would invite trouble of the kind which it is desired to avoid, and I am quite sure, knowing the chairman of the committee as I do, that he will not insist on that language remaining in the bill.

Mr. WHEELER. If it is desired to strike out the words "The commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceeding as the court may allow",

I am quite willing to have them stricken out.

Mr. McKELLAR. I move that the language in lines 15, 16, 17, and 18 on page 53 of the bill be stricken out.

Mr. BARKLEY. Mr. President, there is an amendment pending. Another cannot be offered until the pending amendment shall have been acted upon.

Mr. GORE. I wish to express my hearty concurrence in that amendment. I had intended to make that motion. I discussed this matter with the chairman of the committee last week, and he indicated not only a willingness but a desire that this language should be modified, and that nothing more than expenses should be allowed. I think even expenses should be limited.

Mr. WHEELER. Has that motion been acted on?

Mr. McKELLAR. It has not been acted on.

The PRESIDING OFFICER. The parliamentary situation is as follows: There is pending an amendment offered by he Senator from Tennessee which has not been acted on.

Mr. McKELLAR. If it is not in order, I ask to withdraw my previous amendment.

The PRESIDING OFFICER. Without objection, the amendment is withdrawn.

Mr. McKELLAR. I now wish to say to the chairman of the committee and to the Senate that I am very anxious to vote for this bill, but I am also anxious that it be a constitutional measure. I have talked it over with the Senator from Montana a number of times. The language on page 52 which I ask to have stricken out is as follows:

"The court shall have power, and, at the request of the Commission, it shall be

the duty of the court, to constitute and appoint the Commission as sole trustee or receiver."

I think that language ought to be eliminated. The courts are going to construe this bill; the courts are going to determine what this bill means; and we are here saying to the courts, "We have no confidence in you. Ordinarily it is true you appoint receivers, but we are going to take this power away from you. We are going to invade your province and take this power away from you." I do not think we ought to pass such legislation. I do not think by this bill we ought to slap the courts in the face.

I believe in courts. Sometimes they do wrong, of course; they sometimes fail to do what they ought to do. They are not perfect; but neither are commissions perfect. From my experience with commissions and with courts, I believe I would rather trust the courts.

Mr. WHEELER. What the Senator wants to do is to strike out the language:

"The court shall have power, and at the request of the Commission, it shall be the duty of the court"—

And so forth?

Mr. MCKELLAR. And insert the word "may", so as to indicate that is what Congress wants to be done, but not control the court or undertake to control the court.

Mr. WHEELER. I will be willing to take that language to conference.

Mr. MCKELLAR. I thank the Senator, and I hope the amendment will now be voted on, and then I will offer the amendment which I have just withdrawn.

Mr. GORE. Mr. President, I wish to suggest an amendment which I think the Senator from Tennessee will accept.

Mr. MCKELLAR. Is that with reference to the pending amendment striking out the language I have just indicated?

Mr. GORE. No.

Mr. MCKELLAR. Will the Senator let that amendment be voted on first?

Mr. GORE. I wish to insert the words, "The Commission or any member thereof."

The PRESIDING OFFICER. The pending amendment will be stated.

The CHIEF CLERK. In the original copy or print of the bill——

Mr. CLARK. Mr. President, which is the original copy? We have had so many copies of this bill that it is difficult to know just what copy is being referred to.

Mr. MCKELLAR. Let us have the language stated, and then we will know which copy is being used.

The CHIEF CLERK. On page 50——

Mr. CLARK. Mr. President, is the clerk reading from the original copy, S. 2796, or the reprint?

Mr. WHEELER. The clerk is reading from the original bill.

The PRESIDING OFFICER. The bill before the Senate is S. 2796, reported May 13, calendar day May 14, 1935.

Mr. MCKELLAR. If the clerk will read the language, I am quite sure we will be able to tell from which copy of the bill he is reading.

The CHIEF CLERK. On page 50, line 22, it is proposed to strike out—

"The Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceeding as the court may allow."

Mr. CLARK. I suggest to the Senator from Tennessee that the language of that entire section has been somewhat changed by the latest amendment.

Mr. BARKLEY. Mr. President, we are dealing with the original bill without these italicized amendments. They were printed for the convenience of Senators, but in the RECORD we are considering the original bill.

Mr. CLARK. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. CLARK. Do I understand on page 52 of the latest print the language in italics—

"In any proceeding in a court of the United States, whether under this section or otherwise"—

and so forth, has not been adopted by the Senate?

Mr. BARKLEY. It has been adopted. We agreed Friday to print the amendments in the bill which had been adopted, so that Members could see what had been acted upon, but in the consideration of the bill as a matter of record for the Journal we must consider, I suppose, the original bill, and the changes in it, without regard to these amendments.

Mr. MCKELLAR. In order to obviate that difficulty, if the Senator from Missouri will let us vote on the motion to strike out the language referred to on page 53, then I will ask for a reconsideration so we can vote on the other amendments.

Mr. WHEELER. Mr. President, I wish to address myself to the Senator from Tennessee [Mr. MCKELLAR] and the Senator from Missouri [Mr. CLARK]. If this language is changed to "may" and is agreed to, would the Senator have any objection

to putting in the bill a provision—this language was just called to my attention by the Senator from Washington [Mr. SCHWELLENBACH]—to the effect—

"*Provided*, That before the court shall appoint any receiver, or trustee it shall notify the Commission of the fact that it is about to appoint such receiver or trustee."

Mr. CLARK. I would not have the slightest objection to that, and more than that, I think that such an amendment ought to be adopted. The Commission ought to be made a party, given the right to be heard, given a standing in court, but it should not be made mandatory on the court to accept the Commission's ukase.

Mr. MCKELLAR. I think the language which the Senator from Montana himself has suggested, which he showed me a while ago, will cover that point.

"In any proceeding in which the Commission is appointed trustee or receiver the Commission shall designate a member or officer thereof to carry out the directions or orders of the court."

Why would that not cover it?

Mr. WHEELER. No; it would not quite cover it.

Mr. MCKELLAR. If the Senator will change it, I am quite sure we can agree on it.

Mr. CLARK. Mr. President, will the Senator from Tennessee yield?

Mr. MCKELLAR. I yield.

Mr. CLARK. If I understand the intention of the Senator from Montana, it is that in any proceeding in which a receiver is applied for, before the receiver shall be appointed the Commission shall be notified and given an opportunity to be heard.

Mr. McKELLAR. I have no objection to that.

Mr. BARKLEY. That amendment ought to be worked out carefully.

Mr. McKELLAR. That can be done later.

Mr. CLARK. That amendment should be carefully drafted.

Mr. WHEELER. I will work it out, Mr. President. That is the language which the Senator from Washington [Mr. SCHWELLENBACH] suggested to me.

Mr. CLARK. Yes.

Mr. GORE. Does that mean that the court is to appoint someone else than the Commission or a member of the Commission?

Mr. McKELLAR. No.

Mr. GORE. I wish to suggest that the Senator include in the final draft some amendment including compensation which shall be paid receivers, whether appointed by the court or whether the Commissioners act as receivers.

Mr. McKELLAR. I think the best way is to let this language be stricken out, as proposed in the pending amendment, and then if there is other language offered it can be taken up later.

Mr. GORE. That will require a motion to reconsider.

Mr. McKELLAR. I ask that a vote may be had upon the pending amendment.

Mr. HASTINGS. May we have the amendment stated?

The PRESIDING OFFICER. The amendment will be stated.

The CHIEF CLERK. It is proposed on page 50, line 22, to strike out the words—

"The Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceeding as the court may allow."

Mr. BORAH. Mr. President, what copy is the clerk reading ffom?

Mr. MCKELLAR. Mr. President, the language is exactly the same in whatever copy the Senator has. The language has not been changed at all.

Mr. STEIWER. In one copy it appears on page 53.

Mr. BORAH. The clerk said "page 50."

Mr. MCKELLAR. It is on page 53 in one copy and on page 50 in the other.

Mr. BORAH. May we have the amendment again stated?

The CHIEF CLERK. It is proposed, on page 50 of the print which has no amendments on it, line 22, to strike out the following language:

"The Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceedings as the court may allow."

The PRESIDING OFFICER. Is there objection to the amendment of the Senator from Tennessee?

Mr. BORAH. I have no objection to the amendment, but I should like to know where it is in the bill.

Mr. MCKELLAR. I will show it to the Senator. It appears on page 50 of the original draft of the bill.

The PRESIDING OFFICER. Without objection, the amendment is agreed to.

Mr. MCKELLAR. Mr. President, I move to strike out, on page 52, lines 15, 16, and 17, the words:

"shall have power, and, at the request of the Commission, it shall be the duty of the court to"—

and insert the word "may."

Mr. BARKLEY. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. BARKLEY. Has the Senator secured reconsideration of the vote by which this amendment was adopted on Friday?

Mr. MCKELLAR. Is that necessary?

Mr. BARKLEY. Yes.

Mr. MCKELLAR. I ask unanimous consent to reconsider the vote by which this amendment was adopted on Friday for the purpose of offering my amendment.

The PRESIDING OFFICER. The Senator from Tennessee asks unanimous consent that the vote by which the amendment was agreed to on Friday be reconsidered. Is there objection? The Chair hears none, and the vote is reconsidered.

Mr. MCKELLAR. Now, Mr. President, ask that the clerk state the amendment.

Mr. HASTINGS. May I suggest to the Senator that it seems to me the Senate ought either to agree to follow the original bill which was reported by the committee or to follow the bill as reprinted.

Mr. MCKELLAR. In this case we have to take the reprinted bill, because my amendment is in the form of an amendment to an amendment which was adopted the other day by the Senate.

Mr. CLARK. I think the Senator is in error as to that. I think the bill, with the amendments thereto, was reprinted for the convenience of the Senate, and that, in considering the bill, the Senate should refer to the original bill.

The PRESIDING OFFICER. The Chair will state that the original bill is used at the desk. The amendment offered by the Senator from Tennessee will be stated.

The CHIEF CLERK. On page 49, on motion of Mr. Wheeler, the following amendment was agreed to:

"(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company or any subsidiary company thereof, the court shall have power, and, at the request of the Commission, it shall be the duty of the court to constitute and appoint the Commission as sole trustee or receiver subject to the direction and orders of the court."

In that amendment, the vote on agreeing to which has been reconsidered, Mr. McKellar proposes to strike out the words, "shall have power, and, at the request of the Commission, it shall be the duty of the court to" and insert the word, "may", so as to read:

"the court may constitute and appoint"—

And so forth.

Mr. GORE. Mr. President, I ask the clerk to read the words following the word "constitute."

The Chief Clerk read as follows:

"Constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court."

Mr. GORE. I move to amend by inserting after the word "Commission" the words "or any member thereof." I do that merely in the interest of simplifying the mechanics of the procedure.

Mr. WHEELER. I hope that will not be done, because I think it is much better that the Commission be appointed and then the Commission may select one of its own members. I have worked that out with the

Senator from Tennessee and we agreed upon an amendment which is satisfactory, and I think it is much better, if I may say so, not to add the words suggested by the Senator from Oklahoma.

Mr. McKellar. I think it will cover the very point the Senator from Oklahoma has in mind.

Mr. Gore. Very well; I am not familiar with the amendment; and, in view of that statement, I will withdraw mine. My assumption was, however, that the Commission would recommend one of its members to the court and that such member would be appointed. My purpose was to simplify the machinery.

Mr. Steiwer. Mr. President, I merely wish to observe that if the amendment suggested by the Senator from Tennessee shall be agreed to, the difficulty, partially if not entirely, disappears because it is simply permissive. The court is not bound to appoint the Commission. It may then appoint the Commission or any member of the Commission or possibly more than one member of the Commission, if the court, in its judgment, should deem it wise to do so. So if the amendment shall be agreed to by the Senate, the difficulty suggested by the Senator from Oklahoma will no longer exist. I think that affords an argument in behalf of the amendment of the Senator from Tennessee.

The Presiding Officer. The question is on the amendment of the Senator from Tennessee to the amendment of the Senator from Montana.

The amendment to the amendment was agreed to.

Mr. McKELLAR. Mr. President, the chairman of the committee suggested in conference with me——

The PRESIDING OFFICER. The question now is on agreeing to the amendment as amended.

Mr. McKELLAR. Before that is done, let me say that the amendment I am about to suggest is an amendment to that section. I will ask the Senator from Montana, if he desires to have inserted the following words?—

"In any proceeding in which the Commission is appointed trustee or receiver the Commission shall designate a member or officer thereof to carry out the directions and orders of the court."

Mr. WHEELER. I think that would be a good provision.

Mr. McKELLAR. I offer the amendment which I ask the clerk to state.

The PRESIDING OFFICER. The amendment will be stated.

The CHIEF CLERK. On page 50, after line 24, it is proposed to insert:

"In any proceeding in which the Commission is appointed trustee or receiver the Commission shall designate a member or officer thereof to carry out the directions and orders of the court."

Mr. BARKLEY. Mr. President, I suggest that the word "may" be used instead of the word "shall." It might be possible in some cases that the whole Commission might desire to act.

Mr. McKELLAR. I have no objection to that modification.

The PRESIDING OFFICER. The Chair is advised that the parliamentary situation is

such that the amendment now offered by the Senator from Tennessee does not relate to the amendment of the Senator from Montana, which has been amended. Therefore, the last amendment offered by the Senator from Tennessee, is not properly in order at this time.

Mr. McKELLAR. The section has been reconsidered, and is still reconsidered.

The PRESIDENT pro tempore. The Senate only reconsidered the amendment.

Mr. McKELLAR. I ask unanimous consent that the section may be reconsidered, in order that I may present the amendment.

The PRESIDING OFFICER. The entire section does not have to be reconsidered. The question now properly before the Senate is on agreeing to the amendment of the Senator from Montana as amended by the amendment of the Senator from Tennessee. When action shall have been taken on that, then the Senator from Tennessee may present the amendment, and it will be in order.

Mr. BARKLEY. Let us agree on the amendment as amended.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Montana as amended by the amendment of the Senator from Tennessee.

The amendment to the amendment was agreed to.

Mr. McKELLAR. Now I offer the amendment to which I have referred.

Mr. LONG. The amendment is now unnecessary, is it not?

The PRESIDING OFFICER. The question now is on the amendment offered by the Senator from Tennessee, which the clerk will state.

The CHIEF CLERK. On page 50, after line 24, it is proposed to insert the following:

"In any proceeding in which the Commission is appointed trustee or receiver, the Commission may designate any member or officer thereof to carry out the directions and orders of the court."

Mr. HASTINGS. Mr. President, may I suggest to the Senator from Tennessee that it seems to me that is a very objectionable amendment. The suggestion is made that the court, as I understand, may appoint, but is not required definitely to appoint, the Commission to act as receiver.

Mr. MCKELLAR. The amendment does not require the appointment of the Commission; but if the court should appoint the Commission, the Commission could select the person on motion to the court.

Mr. HASTINGS. Of course, the court could appoint anybody who had authority under a statute or otherwise to go and do the particular job for the Commission. In other words, it would make it certain that any careful court under no circumstances would appoint the Commission. I am not opposed to compelling them to appoint the Commission.

Mr. WHEELER. Mr. President, if there is any objection to the amendment of the Senator from Tennessee, let me say that I do not care anything about it at all, and I am perfectly willing that the amendment shall not be adopted. I have no interest in it.

Mr. MCKELLAR. If there is any objection to it, I will not insist upon it. The amendment was just a part of the agreement I made with the chairman of the committee.

Mr. WHEELER. If there is any objection to it, I will ask the Senator from Tennessee to withdraw it.

Mr. MCKELLAR. I withdraw the amendment.

The PRESIDING OFFICER. The amendment is withdrawn.

Mr. CONNALLY. Mr. President, I desire to offer two amendments, which I ask to have lie on the table.

The PRESIDING OFFICER. The amendments will be received, printed, and lie on the table.

Mr. GORE. Mr. President, the withdrawal of the amendment of the Senator from Tennessee raises a point which I suggested a few moments ago, that the amendment offered by the Senator from Tennessee should be so amended that the court could appoint either the Commission or any member of the Commission. Then the commissioner appointed by the court would be an agency or officer of the court. The amendment just withdrawn would have enabled the Commission when once appointed by the court virtually to have selected the receiver for the court. It seems to me it would simplify the proceedings if the court were invested with the discretion of appointing as receiver either the whole Commission or any member of the Commission, it all being permissive, because I am not certain that we can dictate to the court whom it shall select as receiver.

The PRESIDING OFFICER. The bill is still before the Senate and open to amendment.

Extracts from the Congressional Record, Vol. 79, 74th Cong., 1st Sess., p. 8943:

Mr. BONE. Mr. President, I have just reentered the Chamber, and I understand that a moment ago an amendment was adopted which restricts the appointment of a receiver in insolvency proceedings, or rather prevents the naming of the Commission as trustee or receiver. I regret

that has been done. I feel that some of my brethern may live to regret it.

The Associated Gas & Electric Co., one of the largest outfits in the country, is now facing insolvency proceedings. This movement may result in the naming of one of the men connected with that organization as trustee or receiver. If there be any untoward results arising from such a receivership, this body will surely have to answer for it to the people of the country. The thing will smell to high heaven if they pursue the method so frequently pursued in cases of that kind. We might as well be advised now. If the Associated Gas & Electric Co. should get into trouble and there should be a scandal, I want Senators to remember what I say now on the floor of the Senate today, because I am going to remind them of it. This might easily project itself into a situation that would be a national scandal. We should allow the Government through its own agency to handle the matter if it reaches the stage of receivership.

We had a Federal judge before us not long ago under impeachment proceedings, and we have seen how tainted and corrupt some of these receivership matters may be. When a judge appoints a trustee or a receiver, he frequently names one of his own friends, and then he has a friend practicing law before him. There is not a lawyer in this body who has not seen that thing occur time after time. We almost impeached a Federal judge for doing that identical thing. He should have been impeached. I voted for his impeachment. I think a court ought to be in a class with Caesar's wife—above reproach, above suspicion—and some of our courts have not been above

reproach or above suspicion. If there is any scandal connected with this Associated Gas affair, Members of the United States Senate who voted to remove vital receivership control from the hands of the Commission are going to have to bear their share of the moral obloquy resulting from that proceeding, if the poor security holders are rooked, and we might have done something to prevent it, and did not.

Mr. LONG. Mr. President, I did not understand we struck out the appointment of the Commission as trustee or receiver. I understand we merely changed the word "shall" to "may."

Mr. BONE. I want the people of the country to know, after years and years of maladministration of the affairs of these companies, that we come here now with a bill to try to correct some of the abuses, and step by step by this process of attrition, we are tearing the heart out of the bill.

Mr. LONG. Let us quit tearing.

Mr. BLACK. Mr. President, I desire to ask the Senator from Washington a question. Is that the amendment which changed the word "shall" to "may"?

Mr. BONE. Yes.

Mr. BLACK. Does not the Senator, from experience and observation of his own, know that if it is left to the court to appoint receivers, the court will never appoint Government agencies where those agencies are already drawing their salaries from the Government? The natural result and the inevitable result would be that in all instances the receiver in the future, as in the past, will be someone whom the court wants to appoint. Is not that correct?

Mr. BONE. That is the record which has been disclosed by one of our Senate committees. The receivership racket all over the country has become a stench. It is a reproach to our system of administering the law. If Associated Gas cracks up and a bad smell emanates from the receivership, they must not walk away from their responsibility, but they must step up and shoulder it like men. We have tried to secure a form of receivership in these cases that would remove the evils and weaknesses of the present system, and apparently we have failed through this amendment.

Mr. BORAH. Mr. President, I do not know that I understood the Senator as to which particular amendment he was discussing. To what amendment did the Senator refer?

Mr. BONE. I understood the amendment had been adopted which struck out of the bill the requirement that the Commission itself should act as receiver. I think that is wrong.

Mr. BORAH. I did not understand that the Senate struck out the provision that the Commission might be appointed, but my understanding was that it was made discretionary. Is that correct?

Mr. BONE. That is correct.

Mr. WHEELER. Let me say to the Senator that in line with what the Senator from Washington [Mr. SCHWELLENBACH] called attention to, and what I called the attention of two or three Senators to a moment ago, I propose to add a proviso saying that in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission, and giving it an

opportunity to be heard before making any such appointment.

That is in accordance with the suggestion of the Senator from Washington [Mr. SCHWELLENBACH], and two or three other Senators. I think it is very helpful to the bill, and will prevent the court from just stepping in and appointing somebody offhand, without giving any consideration at all to the matter. The Commission will have a right to be heard on the matter.

Is there an amendment pending at the present time?

The PRESIDING OFFICER. There is no amendment pending at the present time.

Mr. BORAH. Mr. President, do I understand that the Senator has offered that amendment, or that he will offer it?

Mr. WHEELER. I am going to offer it in a few moments.

Extracts from the Congressional Record, Vol. 79, 74th Cong., 1st Sess., p. 8944:

Mr. WHEELER. Mr. President, I send to the desk an amendment of which I spoke a moment ago, and which I have just worked out. It is to add certain language after the word "appointed", on page 50, line 2:

The PRESIDING OFFICER. The Senator from Montana offers an amendment which will be stated.

The CHIEF CLERK. On page 50, line 2, after the word "appointed" and before the period, it is proposed to insert:

"And in any such proceeding the court shall not approve any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment."

Mr. McKELLAR. Mr. President, is that the amendment which the Senator has worked out?

Mr. WHEELER. That is the amendment I have worked out, as suggested.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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Nos. 226, 227, 243, 266

Office - Supreme Court, U. S.
FILED
JAN 12 1949

In the Supreme Court of the United States

OCTOBER TERM, 1948

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCIS BOEHM

THOMAS W. STREETER ET AL., PETITIONERS

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCIS BOEHM

THE HOME INSURANCE COMPANY AND TRADESMANS NATIONAL BANK AND TRUST COMPANY, PETITIONERS

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCIS BOEHM

CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN REPLY TO BRIEF OF CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, RESPONDENTS-PETITIONERS

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OCTOBER TERM 1948

NOS. 226, 227, 243

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, ET AL., THE HOME INSURANCE COMPANY AND TRADESMANS NATIONAL BANK AND TRUST COMPANY, PETITIONERS

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE AND FRANCIS BOEHM

No. 266

CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN REPLY TO BRIEF OF CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, RESPONDENTS-PETITIONERS [1]

Central Illinois argues that "the District Court was not required to disturb, and did not disturb, any

[1] Pursuant to stipulation the briefs of petitioners in Numbers 226, 227, 243, and 266 were exchanged simultaneously. These briefs set forth the arguments of the Commission, of

factual finding of the Commission" (p. 125); that its "disagreement * * * with the Commission was basically a disagreement as to applicable legal principles" (p. 16); and that because the district court properly held as a matter of law $100 a share to be the proper payment to each series of the preferred, there should be no remand to the Commission as required by the decision of the Court of Appeals. Nevertheless, Central Illinois' brief makes no effort to support the legal theory of the district court that, under the *Otis* case, "standards" or "notions" of colloquial equity, rather than strict priorities, should determine a proper allocation;[2] does not dispute that the doctrine of the strict priorities ap-

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the preferred stockholders and of the Central-Illinois group of common stockholders, in respect to both the petitions and cross petitions. The other group of common stockholders, Lucille White and Francis Boehm, respondents in Numbers 226, 227, and 243 did not file a cross petition. We do not anticipate receiving their brief in time to reply herein to any of their arguments, which may differ from those already stated in the brief filed on behalf of Central Illinois.

[2] Central Illinois insinuates that the Commission and the preferred stockholders invented the term as a derogatory epithet, referring (p. 107n) to the "derisive statements of petitioners in the Court below that the District Court has sought to substitute 'notions of colloquial equity' for the strict priority standard,"; Cf. Central Illinois' statement (p. 17) that the "District Judge ascertained a number of factors * * * corroborative of his view that payment of the premiums to the preferred would result in unfairness and inequity in a 'colloquial' sense, as well as in its technical statutory sense;". That the District Judge himself characterized his approach as one of colloquial equity and did so in all seriousness is shown by the quotations from his views in our main brief (pp. 14–15, 53, 71–72).

plies in Section 11 (e) reorganizations and in fact relies upon that principle (Point V, p. 106); does not repeat its earlier argument to the effect that, if the entire bundle of preferred stockholders' preferential rights could properly be valued at any amount in excess of the involuntary liquidation preference, the excess is entitled to only such recognition as may commend itself to the chancellor's discretion;[3] makes virtually no effort to support the theory of the court of appeals that in determining equitable equivalent "ex the Act" the Commission should value on the basis of a balance sheet reconstituted as if the Act had never been passed and with past losses returned to the credit of the enterprise;[4] and develops as its main argument a thesis which both courts below declined to adopt—that, despite the *Otis* case, the preferred stockholders' liquidation preferences are dispositive.[5]

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[3] See I B of our main brief, pp. 28–34, and especially p. 29, n. 18 quoting from Central Illinois' former position.

[4] See our main brief, Point I E, pp. 46–75, and compare the statement in Central Illinois' brief in opposition (Point III, p. 34) that the Court of Appeals had not intended the Commission on remand to make a "precise computation" of such losses, but merely to give "reasonable consideration to the fact that such losses * * * had been sustained."

[5] An appeal to fireside equities is interwoven with other arguments apparently by way of color and not as any overt formulation of a standard which by itself should furnish a guide to either court or Commission. Because of the factual distortions involved in this indirect argument of colloquial equities we note below our disagreement with numerous parenthetical observations of this character.

In support of this basic legal argument, and in support of the court of appeal's criticism of the Commission for failure to forecast future earnings accruing to the common stock if Engineers continued, Central Illinois advances two interrelated economic arguments. First, it is asserted that because of the alleged economic advantages of retaining Virginia, Gulf and El Paso under a holding company, and because of the leverage advantage to the common stockholders of renting the preferred stockholders capital at an average cost of 5.4%, or perhaps less, something of value disappeared in the liquidation of the holding company for which common stockholders should be compensated before the preferred get more than their liquidation preferences. The second economic argument is that the preferred stocks, if valued on a going concern basis, should not have been valued in relation to the then current yield of investments of comparable risk but that such a "transient market value" should have been rejected by the Commission for a "long term" or "average" value.

We deal first with Central Illinois' economic arguments.

I. REPLY TO THE ARGUMENT THAT VALUE DISAPPEARED IN THE LIQUIDATION OF ENGINEERS UNDER THE PLAN

Central Illinois argues (p. 116, n. 1) that the common stockholders sustained through the plan "deprivations attendant upon entirely giving up the holding company form of organization, the

financial advantage of filing consolidated tax returns. * * * the centralized expert service organization, the leveraged capital structure and the recoupment of past losses which such structure would produce in an economic upswing."

Similar assertions occur throughout its brief. See, for example, the statement (p. 13) that the Commission made no effort to determine "what each class of security holders was losing by the liquidation;" its reference (p. 18) to "further deprivations incident to the liquidation '[that] would necessarily fall on the common stockholders (R. 307a–308a)"; the reference (p. 114) to the fallacy of the Commission's "implicit assumption that if the preferred stockholders sustained a deprivation" from the retirement of the preferred "the common stockholders necessarily became the beneficiaries of that deprivation." Indeed, this is the major thesis of Point VI (pp. 114–123) of Central Illinois' argument.

A. LEVERAGE

In developing this argument Central Illinois mainly stresses loss of leverage. The term "leverage" is used to illustrate the advantage which results to owners of a junior investment if the earnings upon the total capital invested in the enterprise are at a higher rate than the interest cost

[6] The record reference is to the district court's findings concerning losses to common stockholders prior to the plan.

or preferred dividend cost of obtaining senior capital.[7] Central Illinois purports to demonstrate this advantage mathematically by pointing out that apart from the liquidation required by Section 11 the common stockholders could continue to use $39,000,000 of preferred stockholders' capital at an average rental charge of 5.40%, on the basis of existing dividend preferences, or, through refunding, on the basis indicated by the Badger testimony, at only 4.6% It is asserted that, on the other hand, the common stockholders could have obtained a return of 12½% from the use of these funds. From this it is argued that value, to the common stockholders at least, disappeared in the liquidation of Engineers in an amount at least equal to the return obtained from paying in the neighborhood of 5% for senior capital and realizing 12½% from its use (Central-Illinois brief, pp. 117–118). Apart from the element of exaggeration in the hypothesis of a current 12½% return,[8] the argument involves the

[7] A related aspect of leverage involves, of course, magnification in its impact upon the junior security holder of any rise or decline in the value of the total capital at stake.

[8] The eight times earnings figures used by Central-Illinois represent the ratio between market prices of El Paso, Gulf States, and Virginia on August 1, 1947 and estimated earnings for those companies. It should be noted that the average "yield" based upon current dividend rates of those companies is 6.96%. Central Illinois also refers to the Public Utilities Fortnightly issue of December 2, 1948 for a "list" of stocks purchasable at eight times earnings. That list discloses average yields of 7.1% for one group and

obvious fallacy of ignoring what the common stockholders would have been required to risk by keeping the Engineers preferred stocks outstanding.

Central Illinois argues elsewhere that the risk of Engingers not earning enough to cover even the preferred dividends were such as to make it proper to characterize the preferred as a "low grade" investment rather than "medium" (Brief 12–13, 76. See our main brief p. 8).[9] Regardless of the proper characterization, the testimony that a willing buyer and a willing seller would value the preferreds on a 4.6% yield basis, as compared to yields of less than 3% on high grade long term

6.1% for the other group of stocks. The average price-earnings ratio is not eight times but 13 times for one group and 10.3 times for the other group.

[9] Actually, Badger's characterization as "medium" was in comparison to operating company preferreds which he regarded as medium grade from the point of view of earnings and asset coverages. Barnes' characterization as "low grade," and nearer to a common stock in quality, was by comparison with operating company stocks. In a further attempt to undermine the Commission's findings of fact, despite the concession that the District Judge did not disturb them, Central Illinois (pp. 12–13) refers to the Standard & Poor's rating for Engineers preferred. This rating was as of September 11, 1944, shortly prior to the abandonment of such quality ratings for preferred stocks as "meaningless." The service continued however, to give ratings from the point of view of over-all desirability of the investment, and characterized the Engineers preferred as "Ab–A" which means above average and is, therefore, a high rating from the point of view of desirability. See R. 1844a, 2120a.

bonds, is recognition of a substantial risk factor. Any decline in earnings which would prevent full payment of the preferred dividend would, of course, stop common dividends altogether. If the common stockholders had been free to retain the preferred stock in the picture—and had elected to do so—they would have been required to leave as security for the preferred stockholders' prior claim all but the amount of the distributable earned surplus, instead of withdrawing therefrom the valuable equity which they received under the plan when they acquired direct ownership of the operating company common stocks. Thus common stockholders, in addition to paying the "rent" for the preferred stockholders $39,000,000 of senior capital, would have been required, had Engineers not been liquidated, to continue to risk as security for the preferred stockholders' prior claim a junior equity having a much larger market value, as indicated by Central Illinois' own figures of the market value as of the date of distribution of what they received under the plan (pp. 101–102): $88,768,149 less the $22,000,000 paid in the exercise of the Gulf Warrants or a net of $66,768,148 or $34.96 per share.[10]

A great deal was heard of the advantages of

[10] The value which common stockholders would have been required to leave in was $66,768,149 less whatever amount the common stockholders might have withdrawn in dividends, which obviously was not the full amount of the consolidated earned surplus in view of subsidiary dividend freezes. Possibly, not even the amount of the unrestricted surplus could

"leverage" in the lush days of holding company promotions, but the fact that leverage works both ways was dramatically illustrated in the collapse of market quotations for holding company common stocks which preceded the passage of the Act. See Hearings Before Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess. (1935) at p. 2090. Engineers' common stockholders have had their own dramatic experience with the disadvantage of leverage in declining markets, or in the event of other unfavorable developments. The common sold as low as 1⅛ in 1935 and again as recently as 1942 at a low of 1¼, as compared with 36 on February 13, 1946 (R. 63a) and the $34.96 market valuation of what was received under the plan.[11]

Congress has concluded that the extreme leverage which results from introducing senior securities at the holding company level—in addition to such stratification as occurs at the operating company level—is unsound and involves undue speculation from the point of view of the holding company common stockholders as well as other security holders.[12] We submit that the Commis-

have been withdrawn in view of pressure to provide for the expanding plant requirements of subsidiaries and the possible reluctance of large common stockholders to realize income taxable as dividends rather than as capital gain (see our main brief, p. 73).

[11] See *supra*, p. 8. See also the chart of common stock fluctuations since 1930 (R. 1361a).

[12] S. Rep. No. 621, 74th Cong., 1st Sess., p. 4; H. Rep. No. 1318, 74th Cong., 1st Sess., p. 2.

sion was entitled to follow the legislative judgment to the extent of concluding that in giving up the rental of the preferred stockholders' senior capital, whether at the rate of 5.4% or 4.6% per annum, Engineers' common stockholders did not give up a value disproportionate to the risk from which they were thereby relieved, and that despite loss of leverage the common stockholders benefited from the plan.[13] Stated in different terms, since the common stockholders had more capital at risk than the preferred, there is no basis for concluding, so far as the leverage element is concerned, that money spent by the common stockholders to discharge the preferred stock's prior claim would be disadvantageous as a business matter, and hence the Commission properly found the plan beneficial to the common.

B. OTHER ALLEGED DISADVANTAGES TO THE COMMON FROM THE LIQUIDATION OF ENGINEERS

The alleged advantages of diversification and centralized management involve nothing more

[13] A very different aspect of valuing "leverage" was presented by the United Light and Power plan in the *Otis* case, where there were large arrears on the preferred and no present asset value for the common. The charter right of the common to hang on in the hope of future earnings catching up with arrears was found by the Commission to be worth something, although concededly difficult to value. But there, unlike the situation presented by the Engineers plan, the common stockholders had nothing to risk by hanging on, since they were already far below zero on the basis of asset valuation.

than a repetition of arguments fully considered and rejected by the Congress in passing the Act. See e. g. S. Rep. 621, pp. 32–34 (Appendix B to our main brief, p. 140). Here the common stockholders actually acquired through the plan the same diversification they had prior to the plan to the extent that they exercised the Gulf purchase warrants, and could have obtained a similar diversification without any new investment of cash by selling enough of the Virginia and El Paso stock to make a proportionate investment in Gulf.[14] Again, if the independent managements of the operating companies should conclude that there is enough to be gained by pooling certain of their servicing requirements they are free under the Act to organize a mutual service company. See Section 13. Moreover, the argument of Central-Illinois as to loss of economies from centralized management is similar to the argument which the Commission had rejected in the Section 11 (b) (1) case, a ruling which Engineers had not contested in its proceeding to re-

[14] Central-Illinois also refers to the lost diversification incident to divestments which preceded the plan. Apart from the fact that the prior divestments were relatively unimportant as compared to the subsidiaries remaining at the time of the plan, emphasis upon such prior divestments involves the fallacy of either weighing colloquial equities or attempting to reconstitute Engineers' balance sheet as if the Act had never been passed and shifting the incidence of loss in prior transactions contrary to the rule of strict priority. See our main brief pp. 22–28 and 67–69.

view the 11 (b) (1) order and which it made no attempt to retry in the plan hearings.[15]

The argument that liquidation deprived Engineers common stockholders of the tax benefits of filing consolidated returns is either sheer fantasy or requires speculation as to future tax laws. As of the time of the plan it was testified that there was no tax advantage from filing consolidated returns commensurate with the cost of keeping Engineers alive though, of course, if Engineers were kept alive it was deemed advantageous to consolidate (R. 611–624, 833–837). Under existing tax laws filing separate returns for Engineers and its subsidiaries would have resulted in an effective tax of 5.7% of the intercorporate dividends (tax rate of 38% after allowing an 85% credit for dividends). Under the presumably more favorable alternative of consolida-

[15] In the Section 11 (b) (1) proceeding, review of which was mooted by the plan, Engineers failed to satisfy the Commission that there would be a loss of "substantial economies" within the meaning of Section 11 (b) (1) (A) through failure to retain a holding company over the alternative combinations of Virginia with Savannah Electric and Power or Gulf with El Paso (the latter finding being merely advisory since Virginia's electric properties were listed as the "single system"). It would seem to follow *a fortiori* that there would be no loss of substantial economies in the separation of the more widely separated combination of the two largest subsidiaries, Virginia and Gulf. No evidence was taken on that issue, however, since the non-retainability of that combination rested on the Commission's interpretation that clause B of Section 11 (b) (1) required the single and additional systems to be in the same geographic area.

tion, the tax on intercorporate dividends does not apply but 2% of the consolidated income is payable for the privilege of consolidation. On the basis of the earnings of $10,629,724 reported by Virginia, El Paso, and Gulf States for the twelve months ending June 30, 1947, which Central-Illinois assumes *arguendo* constitute prospective "normal earnings," there would be an annual tax saving alone of $212,594 to the common stockholders, which would accrue through the dissolution of Engineers.

Under wartime excess profits taxes much larger savings were attributable to consolidation, largely as a result of utilizing the higher invested capital base of the holding company. Central Illinois suggests that such taxes may be restored. We offer no prediction, but in any event this was a possibility not in contemplation when the Engineers plan was consummated.[16] Moreover, we deem it highly questionable whether the Commis-

[16] It was proposed to retain this benefit, at least in part, under the plan originally filed with the Commission which contemplated the possibility of merging Engineers with Virginia. After the repeal of the excess profits tax this feature was eliminated because the tax advantage appeared to have disappeared, and because it was thought that elimination of the merger alternative would remove a possible legal advantage to the preferred stockkholders in arguing against the management's proposal to limit them to their involuntary liquidation preferences. See our main brief, p. 78, n. 46. If it should turn out that the common stock management outsmarted itself in this litigation strategy, we fail to see how the Commission could fairly visit the consequences upon the preferred.

sion could properly assume as a long term matter that Congress would offer a tax bonus to keep alive the holding companies which it is the policy of Section 11 of the Holding Company act to eliminate.[17]

II. REPLY TO THE ARGUMENT THAT THE COMMISSION'S APPRAISAL OF THE "INVESTMENT VALUE" OF THE PREFERRED STOCKS WAS DEFECTIVE BECAUSE BASED UPON "TRANSIENT MARKET VALUES"

We have shown in our main brief (pp. 7–8; 35–42) that both preferred stockholder and company witnesses testified that on a going-concern basis a willing seller and a willing buyer would value Engineers preferred stocks at slightly in excess of the redemption price and that Engineers' president conceded that such a valuation fully reflected the risk factor as the "investing public is presently appraising these hazards" (R. 525a). We have also shown (pp. 36–37) that

[17] The National Power Policy Committee concluded its recommendations with the suggestion that simplification of holding companies should be stimulated by partial removal of the then exemption under the Revenue Act for dividends received by corporate holding companies and affiliates on the securities of public utility companies and other holding companies. See Senate Report 621, 74th Congress, 1st Sess., p. 60. The Senate Interstate Commerce Committee also recommended the granting of tax exemptions to facilitate voluntary compliance with Section 11 but did not attempt to include such provisions in the Act itself. See S. Rep. No. 621, p. 14. See our main brief, Appendix B, p. 133. Subsequently, the Congress adopted Supplement R of the Internal Revenue Code specifically designed to relieve against realization of capital gains through reorganizations to comply with Section 11.

since the possibility of change in interest rates or other factors affecting the general level of security values would apply to any new investment which preferred stockholders might make with the cash received under the plan, the only fair basis for compensating them for the compulsory surrender of their investment was in accordance with the then cash value of the interest surrendered. The risk factor as appraised by the valuation witnesses and the Commission took into account both the risk that the preferred stockholders might not receive their full preferential dividends and the uncertainty as to the future cost of money.[18] The Badger testimony, which was accepted by the district court, appraised the risk factor on a basis which, apart from the redemption price ceilings, accorded the preferred stocks values substantially above the redemption prices. The Commission, from its own analysis of the investment quality of the preferred, found values on a going-concern basis at least equal to the redemption prices. Granted that the Commission, because it has the statutory responsibility for making its own valua-

[18] Barnes in conceding that a willing seller and a willing buyer would value the preferred at slightly above the redemption prices did not claim that the investing public collectively was wrong in its current appraisal of the risk factor as applied to similar investments. He merely pointed out, what was implicit in the recognition that there was a risk factor, that in the event of unfavorable future developments the preferred stocks might at some future time, if continued outstanding, be worth less than they appeared to be worth then.

tion, might have placed a different appraisal on the risk factor from that made by the valuation witnesses, and might have differed also from the collective judgment of the market place applicable to similar investments, we submit that the Commission's valuation is not to be condemned as irrational merely because it coincided with the judgment of the witnesses and of the general market.[19]

The Commission's appraisal did not, as Central-Illinois argues (p. 81), ignore the historical fact that the securities with which Engineers preferred stocks were compared had sold in times past upon a much higher yield basis, or that current low yields for similar securities were related to government fiscal policies which may have "artificially" lowered interest rates, and which may change. The risk of change in money rates was, as we have seen, simply one of the factors entering into the over-all appraisal of risk. Nor was it of controlling significance that, with the

[19] Central-Illinois points out that the Commission in other cases has consistently rejected the market price of the very securities subject to the reorganization as a test of what constitutes fair and equitable treatment of such securities (pp. 90–91). The obvious reason for this rule is that the market price of the security undergoing reorganization reflects to a substantial degree the market's expectations of the treatment to be accorded such securities in the reorganization. This does not mean, however, that if the market should happen to forecast accurately the kind of treatment which the Commission concludes to be fair then the Commission must necessarily reach a different valuation.

redemption prices tending to fix a ceiling for the preferred, any future change in value could be only in one direction: downward. With the preferred stocks yielding from 5 to 6% as compared to a yield of less than 2% upon relatively risk-free investments such as long-term governments (and yields approaching zero on short-term government securities), the chance of obtaining the relatively favorable return from Engineers preferred stocks up to the date of call at some unpredictable future time, was obviously a factor to be weighed against the risk of lower markets in the future.[20]

Central-Illinois attempts to undermine the district court's acceptance of the Badger valuation testimony by arguing (p. 84) that the district court only accepted his testimony subject to the inherent weaknesses of his method of valuation. But the inherent weakness of the method, as spelled out by Central-Illinois in its brief and as expressed in the district court's findings (drafted by Central-Illinois), involves nothing more than spelling out what is implicit in any attempt to make a valuation of an investment in relation to the risk factor: that there is a risk, or possibility,

[20] It is not uncommon for bonds and preferred stocks to sell in the markets above a currently applicable call price either because investors are willing to take a chance that the call will not be exercised in the immediate future or even, when its exercise appears relatively certain, because then the senior security approaches the characteristics of a short-term investment.

of adverse developments in the future. The district court did not say that the Badger appraisal of risk (equivalent to a 4.6% capitalization rate applied to the preferred dividends) was too low as an appraisal of the risk. It was merely "found" that because of the element of risk the preferred stocks *might* be worth less in the future. See our main brief, p. 39, n. 25. Thus the inherent weaknesses of the Badger testimony, and of the Commission's appraisal, as emphasized by Central-Illinois, involved merely the inherent limitations of human foresight. The possibility that tomorrow's judgment may be different from today's is no reason why, whoever has the responsibility for the valuation, should not make as fair a current appraisal as is humanly possible.[21]

[21] We show in our main brief (p. 42, n. 27) that there is no basis for concluding that changes in the cost of money since the Commission's decision would in themselves warrant according the preferred stockholders less than the liquidation preferences and that any changes since the date of consummation are irrelevant. Central-Illinois makes the ambiguous observation (p. 81, n. 2) that equity speaks as of the time of the decree. If this means that up to the time the preferred stockholders were compelled to part with their investment there would be warrant for reexamining the Commission's valuation in the light of more recent developments, we agree. If it means that developments thereafter are to be taken into account, Central-Illinois' theory would deprive the preferred stockholders of the dividend on their investment while leaving them still subject to the risk of being stockholders in the enterprise.

III. REPLY TO THE ARGUMENT THAT THE INVOLUNTARY LIQUIDATION PREFERENCES OF THE PREFERRED ARE DISPOSITIVE

Petitioner's arguments that the involuntary liquidation preferences are the controlling measure of the amount payable to the preferred largely involve a reargument of the *Otis* case. As we show in our main brief (pp. 47–53), the *Otis* case upheld the Commission in "giving value to the rights of the preferred [of United Light and Power] in a going concern rather than as if by sale and distribution." Central-Illinois argues (1) that as a matter of interpretation of Engineers' charter the liquidation preference is controlling; (2) that application of the Commission's rationale to debt might result in a cash payment of less than the face value of the debt while still according a participation to junior interests; (3) that giving value to the rights of the preferred in a going concern, despite the liquidation of the corporate entity, involves "indulging in the baldest fiction" (p. 63), and (4) that valuing the preferred on a going-concern basis was inconsistent with earlier Commission precedents, notably *New York Trust* v. *S. E. C.*, 131 F. 2d 274 (C. A. 2), certiorari denied, 318 U. S. 786, rehearing denied after the *Otis* case, 319 U. S. 781. While the argument as to inconsistency seems to us to prove at most that the *Otis* case may have rejected some of the reasoning of earlier decisions made in different contexts, Central-Illinois' at-

tempt to convey the impression that the Commission's decision in the instant case was a novel departure from the principles of the *Otis* case itself amounts to arguing that the principle of the *Otis* case is a one-way street, applicable only where it is advantageous to common stockholders to accord preferred stockholders a going-concern value amounting to less than the liquidation preferences, but inapplicable where those going-concern values are worth more than the involuntary liquidation preferences. In addition, the effort is made to distinguish the *Otis* case on the ground (1) that this, unlike Otis, is an "authentic" liquidation, and (2) that here the preferred stockholders are to be paid in cash. The first of these alleged distinctions largely involves the fallacious economic assumption discussed *supra* pp. 4, *et seq.* that value disappeared in the liquidation of Engineers. The second involves the anomalous contention that where the common stockholders, through their control of the management, elect to pay senior securities off in cash, the measure of what is surrendered, for the purpose of equating it with the cash received, is different from the measure of the interests surrendered where the method of compensation is through an allocation of securities.

A. ARGUMENTS BASED UPON THE CONSTRUCTION OF ENGINEERS' CHARTER

Central-Illinois argues (p. 24) that what is taking place is clearly a "liquidation, dissolution, or wind-

ing-up of this corporation," and that since the liquidation is taken in view of the compulsion of Section 11 it is not voluntary and therefore is necessarily covered by the charter provisions applicable to liquidations which are not "voluntary". This argument closely parallels the reasoning of the vigorous dissenting opinions of Commissioner Healy and of Chief Justice Stone in the *Otis* case. It was rejected by the majority of the Commission and of this Court in the Otis case, in view of their conclusions that the charter was not adopted in contemplation of the reorganization provisions of Section 11. It was also concluded that the Congress in requiring the simplification of holding company systems, including the liquidation of uneconomic holding companies, did not intend to permit the reorganization to destroy legitimate investment values by causing a shift in the relative rights of the various classes of security holders in the going concern. Maturing the liquidation preferences of solvent companies would, of course, result in such a shift of values. As the opinion of this Court states (323 U. S. 638):

> * * * Where pre-existing contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate * * *.

The Engineers charter was adopted in 1925 (four years earlier than the United Light and

Power charter involved in the *Otis* case), yet Central-Illinois argues (pp. 42–43) that because of the then current agitation concerning the "power trusts" the security holders are to be taken as having contemplated the adoption, some ten years later, of the reorganization provisions of Section 11. A significant answer to this argument is the statement of William E. Tucker, counsel for Engineers and a draftsman of the charter. This statement, made in an earlier proceeding when it appeared that application of the *Otis* test might place a going-concern value on the preferred of less than $100 a share, was that a Section 11 type of liquidation was not contemplated at the time of the drafting of the charter. See R. 256 (a), 1211 (a), 1731 (a).[22]

B. ALLEGED INCONSISTENCY OF THE COMMISSION

1. *The Federal Water case*

Central Illinois' argument that consistency with the Commission's holdings in other cases required the Commission to treat Engineers' involuntary liquidation preference as the sole measure of the preferred stockholders' claim is largely an argument made and rejected in the *Otis* case itself. Central Illinois notes (p. 50, n. 1) that "the Commission itself early recognized that the distinction between 'liquidation' of the enterprise * * * and a mere alteration in the senior security hold-

[22] See *Streeter* brief, p. 96.

ers' investment in a continuing enterprise", referring to the allocation aspects of *Federal Water Service Corp., et al.*, 8 S. E. C. 893, 907–912 (decided March 24, 1941). This case involved what was in substance a recapitalization, substituting a single class of common stock for the previously outstanding stocks of Federal Water Service Corp., and took the form of a merger with a wholly-owned subsidiary. It contains the first rationalization of the approach followed by the Commission in the *Otis* case, as well as of the contrary views of Commissioner Healy. The majority opinion did contain a dictum, squarely rejected in the *Otis* case, that if Section 11 had required liquidation of the holding company, as distinguished from a simplification of its corporate structure, then, as in bankruptcy, the Commission should treat the liquidation preference as matured by the Act. The fact is, however, that this dictum was rejected both by the Commission and this court in the *Otis* case.

2. *The New York Trust case and the theory of frustration*

Central Illinois' major example of alleged inconsistency on the Commission's part is its decision in the *United Light and Power* debt retirement case (10 S. E. C. 1215), decided February 25, 1942, affirmed *sub nom. New York Trust Co.* v. *S. E. C.*, 131 F. 2d 274 (C. A. 2), or slightly more than two years prior to the later *United Light*

and Power decision upheld by this Court in the *Otis* case. As in its brief in opposition, Central Illinois distorts the problem which this debt retirement presented to the Commission in an effort to convey the impression that application of the approach followed by the Commission in the instant case would have resulted in payments to United Light's bondholders in excess of face amount. Central-Illinois refers (p. 54) to "interest rates of 6% and 6½%, rates so lucrative that the debentures had been selling at a premium above par." The footnote upon which Central Illinois bases this statement clearly indicates that the premium of a maximum of 1½ points above par, which was being paid shortly prior to the Commission's decision, after the necessity for the liquidation of Power had been established by a prior unchallenged order and when there was a claim to a 9-point premium at stake in the proceeding, was attributable to the pendency of the plan and was not a measure of the going-concern value of the debentures. The footnote reads as follows (10 Sec. 1227, n. 27):

> All the debentures were originally sold to the public during the years 1923 to 1925 at prices ranging between 90 and 95. From 1931 to 1940 market quotations were constantly below par reaching as low as 25 for a time in 1933. Since 1940 and especially since our order of March 20, 1941, for the liquidation and dissolution of

Power, market quotations have been close to and sometimes as much as 1½ points above par.

Central-Illinois quotes frequently, and extensively, from the brief of the Commission in *New York Trust Company* v. *S. E. C.*, in which the Commission's decision was rationalized in terms of the legal theory of frustration, but neglects to refer to an alternative point in the Commission's argument that "there is, however, ample indication in the record that the debenture holders have not suffered any loss of investment value, but have indeed been benefited by the liquidation proceedings and the proposed retirement of the debentures as an incident thereto." This argument was premised upon a concession on the part of the New York Trust Company, indenture trustee, that the 9% redemption premium was claimed "because 'there is not in the record a factual basis for any other measure' (Pet. Br. 33)", and was followed by an argument based upon indicia in the record that the debenture holders had a position of substantial risk. (Commission brief in C. A. 2, pp. 30–33).

It may be conceded that the reasoning of the Commission in the *New York Trust* case has not been precisely followed thereafter. That was a unanimous decision despite the cleavage in point of view between Commissioner Healy and the other Commissioners which had already developed, as indicated by the dissent in the *Federal Water*

case—and both Commisioner Healy and the majority were able to cite the case thereafter as upholding their respective positions. See the subsequent *United Light and Power* allocation case, 13 S. E. C. 1, 9, n. 15, and for the dissenting view, p. 28.[23] Cases subsequent to the *United Light and Power* debt retirement case, in which debt claims have been retired at their face value or preferred stocks have been paid off at amounts equal to their involuntary liquidation preferences, have expressly rested on an analysis of the investment position of the security being retired and a finding that face amount or involuntary liquidating preference amounts to full compensation for that going concern value.[24] If, as Central-Illinois

[23] As we note in our main brief (p. 82, n. 50), the alleged inconsistency of the earlier decision, and of the decision of the Second Circuit affirming the Commission in *New York Trust Company* v. *S. E. C.* was fully dealt with in the Government's brief in the *Otis* case and it was then recognized that the Commission's approach might result in appropriate cases in payments in excess of liquidation preferences.

[24] See the cases cited in our main brief, pp. 80–81. That this approach had developed even prior to the *Otis* case is illustrated by the statement in the Government's brief in that case (pp. 52–53) that in decisions since the *New York Trust* case approving prepayment of debt without a premium the Commission predicated its decision upon "an appraisal taking into account interest rate, maturity date, and risk factor incident to the particular debt security," citing (in n. 37) the following: *North Continent Utilities Corporation*, Holding Company Act Release No. 4686, p. 12 (November 18, 1943), plan enforced in *In re North Continent Utilities Corporation*, 54 F. Supp. 527 (D. Del. 1944) (emphasizing meager

asserts (p. 64, n. 1), arguments made by the senior security holders in the cases subsequent to United Light and Power for realization of going concern values in excess of liquidation preferences, those contentions were rejected, not as irrelevant, but as unsubstantiated on the facts. This view of Commission precedents was recognized by the district court (R. 288a, 292a). In fact, contrary to the statement in Central Illinois brief (p. 17), the district court did not conclude on the basis of the cases denying premiums that the Commission's approach here "contravened firmly rooted decisions of at least four circuit courts of appeals and many district courts, as well as a long line of decisions of the Commission itself."[25]

The doctrine, upon which Central Illinois places so much emphasis (pp. 55, 66, 122), that frustration by operation of law excuses performance in accordance with the letter of a contract, appears to us to be helpful, only to a limited extent, in arriving at a fair and equitable solution of problems under Section 11 (e). The doctrine is rele-

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earnings coverage, unfavorable market history and doubts as to ability to meet maturity five years hence); *Consolidated Electric and Gas Company*, Holding Company Act Release No. 4900, pp. 4–7 (February 21, 1944), plan enforced in *In re Consolidated Electric and Gas Company*, 55 F. Supp. 211 (D. Del. 1944)."

[25] As Central Illinois points out (p. 17, n. 2), the district judge in upholding prior Commission determinations that premiums were not payable had expressly envisaged a contrary result upon proof of "a different fact situation." See *In re North Continent Utilities Corp.*, 54 F. Supp. 527.

vant in showing that junior security holders should not be required to compensate senior security holders, or vice versa for the "disappointed expectation" of not receiving the letter of their contract rights, where to do so would make the process of compliance with the statute result in a windfall to one class of security holders at the expense of another. Thus, the Commission supports the common stockholders and disagrees with the argument in the Streeter brief (pp. 147–154) concerning the alleged unfairness of terminating the preferred stockholders' dividend claims upon a payment (or tender) of $100 on account of their claims while leaving to future litigation the determination as to whether anything in excess of $100 a share might be held fair and equitable.[26]

[26] The Streeter argument as advanced in support of motions for a stay and pressed to a more limited extent in the brief in this Court is that the preferred stockholders were entitled to retain their investment and to continue to accrue preferential dividends at the full charter rate, although concededly in excess of what was fair compensation for the risk, pending a definitive determination by Commission and Court as to the amount of the preferred stockholders' claim. Acceptance of this view would have involved either compelling the company to delay any efforts to secure the cash necessary to retire the preferred, or to keep idle cash equal to the entire amount of the preferred stockholders' claim pending resolution of the dispute. We believe that the same logic which relieves the preferred stockholders of the literal application of the liquidation preference, relieves the common stockholders of the literal application of the preferred stockholders' dividend preference which, by the charter, continues applicable until preferred stockholders acquire the full amount necessary to discharge their claim.

But the doctrine of frustration furnishes no automatic formula for determining what is an appropriate substitute in all cases for strict performance of the letter of the contract. The formula of rescission advanced by Central Illinois would, in a case like *Otis*, require the wiping out of a common stock which has a legitimate expectation of participating in future earnings where present assets are insufficient to restore what was paid in by the preferred. In the present case it would take from preferred stockholders the excess of their going concern value over the amount paid in. Moreover, the analogy purports to be derived from the way in which the law of contracts deals with contracts which are wholly executory. The charter of Engineers can hardly be regarded as an executory contract as of the time of the plan since the preferred stockholders have had their investment subject to the risk of the enterprise for over twenty years.

C. THE ARGUMENT THAT APPLICATION OF THE COMMISSION'S RATIONALE MIGHT RESULT IN A PAYMENT TO A DEBT HOLDER OF LESS THAN FACE AMOUNT

The Commission has never had occasion to deal with the problem posed by Central Illinois of compensating in cash long-term debt carrying an interest rate lower than the current cost of money. The converse situation typically results from the fact that most of the outstanding holding company debts were issued at a time when invest-

ment yields were much higher than today. Moreover, Central Illinois' illustratic of cutting down the bond holder in proportion to the extent that the interest rate might be below the yield on comparable securities, entirely ignores the factor of the date of maturity of the debt. Insofar as the illustration poses the possibility that the interest rate would be low by reason of the risk factor, it may be noted that cash is not likely to be available to discharge a bond not secured to a substantial degree.

A corporate bond, of course, has two aspects. During its life it is an investment contract. At maturity it becomes a claim to a fixed amount of money, to wit, its face amount. During its life a valuation of such a bond must turn upon an appraisal of its investment characteristics; and preeminent among these, of course, is the fact that it will ripen into a mature debt. Therefore, whether or not the conception of a bond as a debt equal to its face amount, as distinguished from an investment contract with a number of features, may influence the Commission's thinking when it is actually confronted with the case Central Illinois poses, we do not venture to predict.[27] Conceiv-

[27] *Georgia Power & Light Company*, Holding Company Act Release No. 5568, cited by Central Illinois, page 93, is, as its statement of the case illustrates, a case where the preferred stock having a liquidation preference (including arrears) of $162.25 as of June 30, 1944, received only $150.00 as the "equitable equivalent of the preferred stockholders' rights". Central Illinois argues that this withholding was directly

ably, in dealing with a bond of relatively short maturity, with no unusual characteristics, the Commission might be more inclined to emphasize the debt concept than in dealing with a bond of long term maturity, having an unusually low interest coupon or perhaps having its interest payable only if earned. As Central-Illinois notes, the Commission has dealt with the converse situation in the American Power and Light case, where payments in excess of face amount were accorded to relatively well secured debentures having a remote maturity (See Central-Illinois brief, p. 64). See Holding Company Act Release No. 6176. Any objection to the instant decision of the Commission on the assumption that it forecasts such the result supposed by Central-Illinois and on the further assumption that the result is objectionable would apply, of course, with equal force to the decision in the *Otis* case.

D. THE ARGUMENT THAT IT IS FICTITIOUS TO COMPENSATE THE PREFERREDS FOR THEIR RIGHTS IN ENGINEERS AS A GOING CONCERN

In urging that the Commission indulged in the "baldest fiction" when it valued the preferred on a going concern basis, Central Illinois necessarily

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contrary to the instant case but, so far as we are aware, the only distinction is that in that case the preferred stock, which was in arrears with respect to dividends, was not valued by the Commission on a going concern basis at an amount equal to its liquidation preference, which, of course, was less than its redemption price.

levels the same charge at the decision of this Court in the *Otis* case. Once it is recognized that a liquidation resulting from the impact of the Holding Company Act does not mature the liquidation claims, or limitations, of the securities of the corporation, the argument that the Commission is indulging in a fiction in valuing the rights of Engineers stockholders on a going concern basis is revealed as nothing more than rhetoric. The valuation of the rights surrendered must, as in the *Otis case*, or in any reorganization, necessarily be based on a valuation of the old securities in the enterprise as it was, for those are the rights surrendered.[28] Thus, in a recapitalization it is neces-

[28] If the plan contemplates a new corporation to carry on the old business, the old securities are valued as if the old corporation continued in existence. If the plan contemplates addition or subtraction of assets the old securities are valued as if the business operations continued with the existing assets. If the plan contemplates liquidation of a holding company and distribution of its assets among existing security holders, whatever weight may be given (by reason of tax savings, for example) to the prospective disappearance of the holding company in valuing the new securities, the old securities are valued as if the holding company continued in existence. On the other hand, the process of valuing the rights surrendered by a plan does take into account, for their impact on prospective earnings, any changes which could be effected, apart from the reorganization itself: for example, the possibility of refunding at a saving in interest or dividend claims, outstanding securities of the company or its subsidiaries not affected by the plan. In some instances the very securities which are dealt with in the plan itself might have been refunded apart from the plan, and in that event this possibility is also relevant to the valuation process.

sary, in determining whether that which is received is the equitable equivalent of the rights surrendered, to value the old security for the purpose of comparing it with the new, according to what it would be worth if there were no recapitalization. Similarly, where a merger occurs the old security must necessarily be valued on the basis of what its prospects would have been if there were no merger for the purpose of comparison with the rights tendered under the merger.[28a] Similarly, in a liquidation required by Section 11, the technique of appraising the rights surrendered by the plan necessarily involves appraising them

[28a] While, as *Schwabacher* v. *United States*, 334 U. S. 182, holds, the federal test is controlling, it should be noted that the state law merger cases relied on by Central-Illinois (p. 36, n. 1) do not support its position; in fact, *Matter of Fulton*, 257 N. Y. 487, 178 N. E. 766, 769, laid down an "investment value" test quite similar to the allegedly novel test of the Commission in this case, stating:

> It will be readily appreciated that the appraisers should have considered the investment value of the stock which is largely determined by the rate of return, the security afforded that the dividends will be regularly paid, the possibility that dividends will be increased or diminished, the selling price of stocks of like character, the amount of preferred stock in comparison with the common stock, the size of the accumulated surplus applicable to the payment of dividends, the record of the corporation, and its prospects for the future.

American General Corp. v. *Camp*, 190 Atl. 225, 229 (Md.), held that there was no going concern value for the preferred stocks dealt with since "the net earnings of the corporations from dividends and interest were too scant to justify a basis for capitalization."

on a going concern basis, i. e., as if the liquidation or reorganization did not occur.[29]

E. THE EFFORTS TO DISTINGUISH THE *OTIS* CASE

In our main brief (pages 76–79), we deal with Central-Illinois' argument that the *Otis* case applies only where it is a top holding company which is liquidated and where its liquidation leaves a surviving holding company controlling the same operating companies. We there show that this court expressly rejected a rationale which would have limited its decision to such a situation. Central-Illinois makes the further argument that paying the preferred stockholders off in cash makes the present liquidation unlike that in *Otis* an "authentic one." If this distinction is sound, however, it means that the common stockholders have the power, by deciding whether to pay the preferred off in securities or in cash, to give the preferred either the full going concern value of their interest or something less.

[29] Central-Illinois notes that in an advisory report under Chapter X, the Commission has taken the position that the proper measure of participation for a non-callable 7% preferred stock is not the investment value of the security but its liquidation preference. See matter of *Childs Company* Corporate Reorganization Release No. 67, quoted by Central-Illinois, page 36, n. 2. This position, however, is entirely consistent with the distinction which the Commission made in the *United Light and Power* (Otis) allocation case to the effect that bankruptcy reorganizations, unlike those under Section 11, do result in maturing liquidation preferences. See our main brief, p. 50.

Central-Illinois attempts to escape this obvious weakness of its argument by urging further that payment in cash even at the involuntary liquidation preferences gives the preferred stockholder more than what is fair because it gives him more value than he would get under an allocation plan. This possibility is illustrated by references to instances in which the market value of securities received by bondholders or preferred stockholders under allocation plans were, at the time of distribution, substantially later than the Commission's decision, less than their liquidation preferences (pp. 89–90). Of course, inherent in an allocation plan which offers a security holder a participation in future earnings in exchange for a prior but limited preferential claim is the possibility that the security holder may acquire something the market may at some time appraise at less than his old liquidation preference. But in giving up his preferential position the preferred stockholder under such a plan acquires an opportunity to gain in return for the greater risk.

The Commission never had occasion to determine what percentage of Engineers' assets would be allocable to the preferred stock under an allocation plan for the simple reason that the management, in accordance with its conception of the interests of the common stockholders, desired to retain the assets of the enterprise exclusively for the common stockholders. We believe it obvious,

however, that the Commission, in view of the risk factor, would not have made the absurd allocation suggested by Central-Illinois (page 101). In any event, we fail to see how fairness permits the common stockholders to exclude the preferred stockholders from any participation in future earnings and, at the same time, requires the Commission to burden its cash appraisal with the risk of what they might have lost under an allocation plan. This, like so many aspects of the Central Illinois position, rests upon the wholly untenable premise that the form of the plan and the manner of satisfying the rights to be surrendered thereunder can, in some mystic and fictional manner, affect the value of the rights which are to be surrendered.[30] Once it is recognized, as this Court has so often recognized, that the rights to be surrendered must be valued, by looking at the securities embodying them, as securities in the preexisting enterprise, this like the rest of the attempted distinctions of the *Otis* case falls by its own weight.

IV. REPLY TO CENTRAL-ILLINOIS' ARGUMENTS CONCERNING SCOPE OF REVIEW

We believe that our main brief fully covers Central-Illinois' argument concerning the scope of review except for its suggestion that no prac-

[30] Thus, it is Central-Illinois which seeks to confuse "the medium of payment with the mode of determining the amount of payment." *Cf.* Central-Illinois brief p. 92.

tical difficulties would result from treating the Commission and the district court as having coordinate valuation functions. Central-Illinois urges that there could not be an enforcement proceeding in a district court after affirmance by a court of appeals. As a matter of fact, the issues which the Commission considered settled by this Court's decision in the second *Chenery* case have actually been reopened in the United States District Court for the District of Delaware in connection with a proceeding to enforce a plan for the liquidation of Federal Water and Gas Corporation. In that proceeding Chenery, et al. argue (1) that the determinations in the prior review proceeding were not a conclusive adjudication of their rights of participation, and (2) that in view of the decision of the Court of Appeals in the *Engineers* case, the district court should exercise an "independent judgment" as to the fairness of the earlier plan. Nor is it true, as Central-Illinois argues (Br. 145), that "the Commission has established the practice [in the case of Section 11 (e) plans cutting across stockholders' charter rights] of expressly conditioning its approval of such plans upon District Court enforcement."[31] The Commission does endeavor to ascertain, prior to its decision, whether enforcement will be requested, to

[31] This is not to say that the Commission would permit dissenters to exercise state law appraisal rights inconsistent with the plan whether or not enforcement is requested. *Cf. Schwabacher* v. *United States*, 334 U. S. 182.

avoid the confusion which would otherwise result in the event of simultaneous challenge to its order in a court of appeals under Section 24 (a) and in a district court in an enforcement proceeding.[32] See our main brief p. 87.

CONCLUSION

We, therefore, believe it clear that the Commission applied proper legal standards to the valuation of the preferred stocks which should not be reduced because of imaginary deprivations which the common stockholders allege they suffered from compliance with Section 11 of the Holding Company Act.

Respectfully submitted.

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JANUARY 1949.

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[32] *Cf. Application of the Securities and Exchange Commission*, 50 F. Supp. 965 (D. Del.), discussed in our main brief, p. 106, n. 63.

U. S. GOVERNMENT PRINTING OFFICE: 1949

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1948.

Nos. 226, 227, 243.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE COMPANY, et al.,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE, and FRANCIS BOEHM,

Respondents.

No. 266.

CENTRAL-ILLINOIS SECURITIES CORPORATION, and CHRISTIAN A. JOHNSON,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE COMPANY, et al.,

Respondents.

BRIEF FOR THE HOME INSURANCE COMPANY AND TRADESMENS NATIONAL BANK AND TRUST COMPANY.

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IN THE

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Respondents.

BRIEF FOR THE HOME INSURANCE COMPANY AND TRADESMENS NATIONAL BANK AND TRUST COMPANY.

OPINIONS BELOW.

The opinion and judgment of the Court of Appeals for the Third Circuit (R. 12), and the opinion denying petitions and cross-petitions for rehearing (R. 138) are

reported at 168 F. 2d 722 (C. A. 3, 1948). The opinion of the District Court is reported at 71 F. Supp. 797 (D. C. Del., 1947) (R. 283a). The findings and opinions of the Commission dated December 4, 1946, and January 8, 1947, have not yet been officially reported. They are set forth in the Commission's Holding Company Act Release Nos. 7041 (R. 25a) and 7119 (R. 128a).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835 (15 U. S. C. 79y). The judgment of the Court of Appeals for the Third Circuit was entered on March 19, 1948. Petitions and cross-petitions for rehearing were denied on June 11, 1948. The petition of The Home Insurance Company, et al. for a writ of certiorari was filed August 16, 1948, and granted on October 25, 1948.

INTEREST OF PETITIONERS.

The Home Insurance Company and five affiliated companies, namely, City of New York Insurance Company, National Liberty Insurance Company of America, The Homestead Fire Insurance Company, The New Brunswick Fire Insurance Company, and The Georgia Home Insurance Company, and Tradesmens National Bank and Trust Company, collectively, were the owners of 7400 shares (having a stated value of $740,000) of preferred stock of Engineers Public Service Company (Engineers). In June, 1946, Engineers consummated in part a plan pursuant to Section 11 (e) of the Public Utility Holding Company Act of 1935. Under the plan each of the petitioners received payment of $100. per share plus accrued dividends on account of its shares of preferred stock, and retained under the plan and accompanying escrow arrangement a claim for such additional amount as may ultimately be found payable on

its shares of preferred stock. On June 1, 1948, the four affiliates first above-named were merged into The Home Insurance Company as the surviving Corporation, and on June 30, 1948, The Home Insurance Company acquired by purchase the assets of the fifth affiliate, thereby succeeding to the surviving claims of the five affiliates as preferred stockholders of Engineers.

STATUTES INVOLVED.

The applicable provisions of the Public Utility Holding Company Act of 1935 and of Section 77 of the Bankruptcy Act are set forth in the Appendix hereto.

QUESTIONS PRESENTED.

Engineers, a solvent holding company registered under the Holding Company Act, filed a plan under Section 11 (e) of the Act providing for payment of cash amounts equal to the voluntary call prices of the several series of preferred stocks in exchange for the surrender of the preferred stocks. The plan also provided for the distribution of the remaining assets of Engineers to the common stockholders and the dissolution of Engineers. The Securities and Exchange Commission found the plan fair and equitable to all stockholders. In enforcement proceedings under Section 11 (e) the District Court found the plan inequitable and disapproved payment to the preferred stockholders of any amounts in excess of $100. per share plus accrued dividends, basing its finding in this respect on what the Court termed "colloquial equity." The Court of Appeals sustained the District Court in its disapproval of the plan, but held that the District Court erred in not remanding the case to the Commission for revaluation of the preferred stocks with due consideration for factors which the District Court found pertinent. The following questions are presented:

1. Is the charter involuntary liquidation preference of the preferred stocks controlling as a matter of law?

2. If the involuntary liquidation preference is not controlling as a matter of law, did the Commission properly apply the fair and equitable standards of Section 11 (e) of the Act in approving as part of a plan payment to preferred stockholders of cash equal to the current going concern values of their shares not exceeding the voluntary call prices therefor?

3. Where the Commission finds a plan filed under Section 11 (e) of the Act to be fair and equitable to the persons affected thereby and such finding is based on substantial evidence and has rational foundation in law, may a district court reject such finding on the basis of a discretionary weighing of equities, independent of and without regard for the generally recognized limitations upon the scope of judicial review of policy and fact finding functions of the administrative tribunal?

4. Is remand necessary under the circumstances of this case, and, if so, what are the guiding principles or criteria upon which reconsideration is to be based?

STATEMENT.

The net collective effect of the opinions and findings of the District Court and the Court of Appeals in this case is to take something of value from the preferred stockholders and give it to the common stockholders on the basis of irrelevant considerations and in violation of equitable principles already found by this Court to be applicable to reorganizations under Section 11 (e) of the Holding Company Act. While the Court of Appeals has ordered the case remanded to the Commission for reconsideration and revaluation of the preferred stocks, it has done so upon specifications which indicate that the amounts payable to the preferred stockholders under the plan must be scaled down by some amount, if not to the level of $100. per share reached by the District Court. Furthermore, the Court of Appeals has defined the respective roles of the Commission

and the District Court in proceedings under Section 11 (e) to be virtually co-ordinate in all areas of fact-finding, regardless of the special competence of the Commission in such areas and particularly in the area of valuation. So long as the District Court does not act capriciously, it may continue to reject valuations made by the Commission until it is satisfied. Thus the stage is set for an impasse in any situation where there may be reasonable differences of opinion in the selection and evaluation of facts.

In view of the shackling effect of these conclusions on the administrative process and the valuation methods of the Commission generally and particularly in this case, a history of the steps leading up to the present awkward situation and summaries of the related portions of the opinions of the two Courts are appropriate preludes to any appraisal of the Commission's findings.

The Plan and Its History.

At the inception of the proceedings under Section 11 (e) of the Act, Engineers had outstanding three series of cumulative preferred stocks of equal rank: 143,451 shares of $5 dividend series, callable at $105 per share; 183,406 shares of $5.50 dividend series and 65,098 shares of $6 dividend series, each callable at $110 per share.

Initially Engineers filed a plan providing for the satisfaction of the claims of its preferred stockholders in cash at the rate of $100 per share plus accrued dividends, distribution in kind of its remaining assets, which consisted principally of common stocks of operating utility companies, to the common stockholders, and dissolution of Engineers. Engineers then contended that the preferred stockholders were not entitled to anything more than the involuntary liquidation preference of $100 per share as a matter of law or equity, and provided separate machinery in the plan for resolving the question of any additional payment.

After hearing and argument, the Commission found the proposed payments to preferred stockholders inadequate and disapproved the plan. The Commission held that the involuntary liquidating preference of the charter was not controlling, and that the preferred stockholders were entitled to amounts equal to the voluntary redemption prices of the preferred stocks as representing the going concern values and equitable equivalents thereof. Thereupon Engineers, acting on the recommendation of its counsel (R. 1949a—Eng. Ex. 89, Int. R. 1291a), amended its plan to provide for the cash payment of these larger amounts to the preferred stockholders. In order to obtain the balance of cash needed to pay off the preferred stockholders, the amended plan provided that Engineers would distribute to its common stockholders negotiable purchase warrants for purchase of common stock of one of its operating subsidiaries and sell in the open market the shares not purchased under the warrants. At this stage two common stockholder groups (the respondents in Nos. 226, 227, and 243) appeared in opposition to the amended plan and carried on with the contentions previously advanced and then abandoned by the management of Engineers.

The Commission approved the amended plan as fair and equitable to all stockholders and at the request of Engineers applied to the District Court for enforcement of the plan. The District Court approved the plan, except for any allowance to preferred stockholders in excess of $100 per share and accrued dividends, and entered an order enforcing the plan as amended by it. Engineers deposited in escrow an amount sufficient to pay the difference between the call prices of the preferred stocks and $100 per share plus an interest allowance on any deferred payment, and the portion of the plan so approved was consummated, subject to reservation of the disputed issue.

Summary of the Opinion, Findings of Fact and Conclusions of Law of the District Court.

Chronologically the District Court (1) filed its opinion, (2) entered specific findings of fact and conclusions of law supplementing its opinion,[1] and (3) entered its order disapproving payment to the preferred stockholders of anything in excess of $100 per share plus accrued dividends and enforcing the plan with that limitation (R. 2a, 3a). The Court expressly adopted as its findings of fact and conclusions of law the findings and conclusions of the Commission (R. 25a, 128a), except insofar as such findings and conclusions relate to or bear upon the allowance or payment to the preferred stockholders of any amounts in excess of $100 per share and accrued dividends and are inconsistent with the opinion or any of the other findings or conclusions of the Court filed with its order (R. 320a).

The rationale of the opinion is as follows: (1) under Section 11 (e) a district court has the affirmative duty to determine whether a plan approved by the Commission is fair and equitable; (2) the quantum of participation of various security holders is determined by application of

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[1] These findings and conclusions were prepared in the first instance by the common stockholders and present an approach substantially different from the approach in the opinion. In the opinion the Court used certain off-setting factors to scale down the going concern values found by the Commission, whereas in the subsequent findings the Court started with the premise that payment of the maximum amount originally contributed by the preferred stockholders or their predecessors, without deduction for any underwriting expenses or discount (approximately $100 per share), is fair and equitable, and then held that there were no special facts or circumstances in connection with the issuance of the preferred stocks or their subsequent history, or the relationships of the preferred and common stockholders, which would create any equitable circumstances warranting payment to the preferred stockholders of amounts in excess of $100. per share plus accrued dividends (R. 316a).

fair and equitable standards to particular fact situations; (3) the amount payable to preferred stockholders on an involuntary liquidation terminating the holding company enterprise is only one of several factors in determining the relative rights of security holders[2]—the inquiry is one of relative rights based on "colloquial equity"; (4) while the Court accepts the present values for the preferred stocks for the three series as given by Dr. Badger, an expert witness, these values are not controlling because the plan itself does not propose to give these amounts to the preferred stockholders[3] and this factor is offset by other factors, namely: (a) Engineers received less than $100 per share for the preferred stocks, (b) the market history of the preferred stocks shows an average price much below $100 per share, (c) in order to comply with the Act, many assets of Engineers were sold for less than the carrying value on Engineers' books and many of the securities thus disposed of subsequently increased in market value and capitalized earning power greatly in excess of amounts realized by Engineers, (d) the retention of earnings applicable to common stock, that is, earnings in excess of preferred dividend

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[2] While the Court favored this view and proposed to follow it in this case, it refrained from deciding the point and in practice appears to have given the charter provision considerable if not controlling weight. For discussion see Point 1 (a), *infra*, pp. 22, 23.

[3] Dr. Badger's opinion is that, absent the call feature, the preferreds would be worth per share $130.33, $119.57, and $108.70, respectively, for the $6, $5.50, and $5 series, which represent a 4.6% capitalization of the dividend rates, and that with the call feature, the preferreds have fair investment values of $111.50, $111.38, and $106.25, the small excess over the corresponding call prices of $110, $110, and $105 being allowed for the time required to effect a call. (R. 2118a—Pfd. St. Ex. 29-A, Int. R. 1205a). The Commission cut the fair investment values down to the exact equivalent of the call prices and the amended plan adopted the Commission's values.

requirements, is one of the reasons the preferred stocks are able to be evaluated at more than their redemption prices, (c) payment of $100 per share plus accrued dividends will give the preferred stockholders every dollar which the common contracted to pay them, approximately $190 ($100 per share plus dividends from date of issue) for every $100 which they or their predecessors initially invested in the enterprise, and the present preferred stockholders are not entitled to additional compensation for the termination of a "lucrative" dividend rate which the preferred stockholders have received and which is presently "excessive"; and (5) the payment of anything in excess of $100 per share plus dividends would not satisfy fair and equitable standards "by a wide margin" (R. 287a).

The opinion was supplemented and amended in certain particulars by fifty-four findings of fact and nine conclusions of law. The conclusions of law (R. 315a) do not materially alter the position of the Court as stated in its opinion, except for the reversal of the approach noted above (p. 7, footnote 1). The findings of fact (R. 294a) are in some instances actually conclusions of law. They are grouped according to purpose and content under captions as follows:

Nos. 1-2. *Procedural Facts* (R. 294a).

Nos. 3-16. *Background.* These findings are designed to show that the diversified enterprise represented by Engineers will be completely terminated by the plan and that the dissolution of Engineers and retirement of the preferred stocks are directly and wholly the consequence of the frustration accomplished by the Act and orders thereunder (R. 294a-295a). They underlie conclusions of law Nos. 1 to 4.

Nos. 17-21. *Charter Provisions.* These findings paraphrase the related charter provisions and state that Engineers has not called and redeemed, and does not propose to call and redeem, its preferred stocks; that the proposed

payments to the preferred stockholders are not payments in voluntary dissolution or reduction of capital, but result from the Act and the Commission's orders, which in turn effect a governmental frustration of the enterprise (R. 299a-300a). They underlie conclusions of law Nos. 4, 5, and 8, and may be used by the common stockholders as the basis for argument that the proposed liquidation is an involuntary liquidation within the meaning of the charter, although the Court avoided any conclusions of fact or law in this respect (No. 9, R. 317a).

Nos. 22-26. *Issuance and Sale of Preferred Stocks and Market History thereof.* These findings set forth the issue prices, underwriting costs, market prices, and dividend record of the preferred stock. The Court qualifies its findings on market prices by stating in effect that market prices in the early period (1928-1938) must be considered in the light of the warrants and conversion features of the preferred, and in recent years (1939-1944) in the light of the extensive market purchases of preferred by Engineers and other extrinsic factors such as the Commission's American Power & Light debenture decision (Holding Company Act Release No. 6176, — S. E. C. — 1945) wherein premiums were awarded senior security holders for the first time. The Court does not define the other extrinsic factors to be considered nor evaluate their effective candlepower for the student of colloquial equity (R. 301a-303a). These findings presumably underlie conclusions of law Nos. 5, 7, and 8.

Nos. 27-29. *Market Purchases by Engineers of Preferred Stocks and Commission's Restrictions with Respect thereto.* These findings show that Engineers purchased about 12,000 shares of its preferred stocks in the open market in 1939 and 1941 at prices ranging from $69 to $87¾ per share; that in 1943, when the preferreds were selling within a price range of $61-$74 per share, the Commission denied Engineers permission to purchase 35,000 shares of preferred; and that in 1944, when the preferreds

were selling in the nineties, the Commission authorized Engineers to use $4,000,000 for purchase of preferreds and Engineers purchased 25,560 shares at an average price of $99. The Court states that the Commission's reason for the 1943 refusal was the necessity for Engineers to file a comprehensive plan to satisfy Section 11 (b), and also cites the view of Commissioner Healy in a concurring opinion that a reduction of capital would take place within the meaning of the charter provision for involuntary reduction of capital, inferring (the Court says) that the preferred stockholders were entitled to the involuntary liquidating price of $100 per share plus accrued dividends (No. 27). The Court also cites the Commission's statement that purchases in 1944 under the circumstances, (one circumstance being that the preferreds were selling close to $100 per share) would not be unfair to the "security holders" of Engineers. These market purchases benefited both preferred and common stockholders (R. 303a-305a). The relation of these findings regarding prior Commission action to any particular conclusion of law is not apparent unless they constitute some of the factors which the Court found relevant and impelling in its conclusion No. 7.

Nos. 30-36. *Market and Dividend History of the Common Stock.* These findings set forth the net issue prices, market prices, and dividend record of the common stock; statistics regarding the amount of earnings retained in the enterprise, free earned surpluses, and effect of such retention on the financial position (R. 305a-307a). The findings on retained earnings are integrated in the Court's "colloquial equity" (R. 291a) and presumably underlie conclusions of law Nos. 5, 7 and 8.

Nos. 37-38. *Losses Sustained by Engineers in Making Divestments.* Here the Court finds that Engineers sustained substantial losses on many of the properties sold in compliance with divestment orders; that the losses were caused by the Act; and that the brunt of the losses has

fallen, and necessarily must fall, upon the residual claimants, the common stockholders, because "the preferred stockholders have received their dividends . . . at the full rate contracted for and are now to receive the full principal amount to which they are entitled." The Court also finds, by taking judicial notice of subsequent increases in the earnings of Puget Sound Power & Light Company, that the earnings estimated by the Commission for reorganization purposes and the increases in market prices for utility common stocks subsequent to 1944 make it plain that Engineers investment in Puget Sound came to have a realizable cash value substantially higher than the amount realized. The Court states that substantial book losses were also sustained on other sales, some but not all of which are designated (R. 307a-308a). These findings are a little more specific than the general finding of losses in the Opinion (R. 290a) and enter into the "colloquial equity." Presumably they also underlie conclusions of law Nos. 5, 7, and 8.

Nos. 39-40. *Additional Contributions to Be Made by Common Stockholders to Carry Out Plan.* The Court recognizes the conceded fact that Engineers needed about $26,000,000 to carry out the plan and proposed to raise $22,000,000 through the sale of common stock of Gulf States Utilities Company and $3,800,000 by advance dividends from subsidiaries payable on condition that no further dividends may be paid by the subsidiaries for certain specified periods, the longest of which ends June 15, 1948. The Court finds that the plan requires that common stockholders make up this deficiency ($26,000,000) and undergo the risk of possible declining markets.[3] The Court also found that, if its decision is sustained on appeal, the escrow fund will go to the common stockholders, less interest that might have been

[3] This is not correct. The plan provided that common stockholders could exercise their purchase warrants or sell them as they saw fit (R. 105a-107a).

earned and all fees and expenses incurred in the present litigation (R. 308a-310a). No relation of these findings to any of the conclusions of law is discernable.

Nos. 41-54. *Evidence as to "Present Investment Value of the Preferred Stock."* It is difficult to present a summary of these findings. They include principally excerpts from the testimony of Dr. Badger and citations of facts, some outside the record, and arguments in an effort to discredit his opinion on the fair investment values of the preferred stocks. The Court states that the record establishes that as of the time of Badger's testimony his investment values do not represent investment values of the preferred stocks in the past and are not determinative of the investment values thereof for any considerable period of time in the future; that there are many factors of a potentially adverse character and the extent to which the investment value of preferred stocks of the character of those here involved can decline is very great. The Court states that the extremely low money rates currently affecting investment values reflect artificial factors which are clearly subject to changes at any time and may be purely transitory (R. 310a-315a). Since the Court accepted Dr. Badger's values, assumed them to be applicable at the time, May 15, 1947, in the absence of a showing of changed circumstances (R. 290a), filed its findings of fact on May 29, 1947, and directed these findings at the potential for future change, the role, if any, of these findings in the conclusions of law is not discernable.

It should be noted that the Court did not find as a matter of fact or law that a liquidation brought about by Section 11 (b) is the kind of involuntary liquidation which the parties had in mind when the charter provision regarding involuntary liquidation was adopted in 1925.

It is not possible to discover from the Court's opinion, findings of fact and conclusions of law the extent to which the several factors deemed relevant by the Court entered

into its ultimate conclusion or how such factors were evaluated. The composite effect was to absorb exactly the excess of the going concern value of the preferred stocks over the involuntary liquidating preference of $100 per share plus accrued dividends, regardless of the differences in dividend rates and call prices of the three series. These differing basic factors presumably weigh exactly the same on the scales of colloquial equity.

Summary of Opinion of the Court of Appeals.

The gist of the opinion is that a district court in a proceeding under Section 11 (e) must exercise its independent plenary judgment as an equity reorganization tribunal in every matter relating to the fairness and equity of the plan; the court is not bound by the findings and conclusions of the Commission as an administrative tribunal, and while a district court may not substitute its valuations for those of the Commission, it may reject valuations even though based on substantial evidence; in this case the District Court Judge weighed the numerous elements involved in the case on his own scales, and in the exercise of his independent judgment, arrived at the conclusion that the plan was not fair and equitable; the charter provisions regarding involuntary liquidation are not dispositive of the issues presented (*Otis & Co. v. S. E. C.*, 323 U. S. 624, 637); the weight and emphasis applied by the District Court and the Commission to the various factors in the case go to two primary considerations on which the two tribunals differed, namely, (1) the Commission did not determine and apportion the earning power of the enterprise between the preferred and common stocks based on their respective claims as it did in the *United Light & Power Company* case (*Otis & Co. v. S. E. C.*, 323 U. S. 624), and (2) the Commission failed to consider and give effect to losses said to have been sustained by Engineers on previous divestitures compelled by the Act; conceivably under certain circumstances investment value could be the

equitable equivalent to the security holder, but the Commission has not made such a finding in this case and the Court does not believe that such a finding could be supported on the present record; the Commission must consider and weigh all pertinent factors and all substantial equities whether equitable equivalents are to be reached by an approach *ex* or *intra* the Act; the *new* doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equitable equivalents enunciated in the Otis case; the District Court did not err in disapproving the payments to the preferred stockholders, or at least its conclusion was not clearly erroneous; however, the District Court cannot amend the plan and enforce it and the record should have been remanded to the Commission for further and appropriate action; the problem is and will remain, until its disposition by the Commission, one of valuation of the securities, viz., the preferred and common stocks. (R. 13, particularly R. 33-40)

In passing the Court of Appeals recognized that its conclusion as to the function of a district court and the scope of review in proceedings under Section 11 (e) conflicts with decisions in other circuits, citing *Lahti v. New England Power Ass'n.*, 160 F. 2d 845, 858 (C. A. 1, 1947), and *Massachusetts Mutual Life Ins. Co. v. S. E. C.*, 151 F. 2d 424, 430 (C. A. 8, 1945), affirming *In re Laclede Gas Light Co.*, 57 F. Supp. 997, 1004 (D. C. Mo. E. D., 1944), cert. denied 327 U. S. 795. It distinguished its own decision in *In re Standard Gas & Electric Co.*, 151 F. 2d 326 (C. A. 3, 1945), cert. denied 327 U. S. 796, by saying the question here presented was not in focus in that case. (R. 31-32)

Assuming then, as we contend and the Commission and Court of Appeals have agreed,[4] that the involuntary liquidation preference prescribed by the charter is not controlling, the present dispute centers mainly on the difference in the standards and concepts of relevance applied by

[4] For the position of the District Court see Footnote 2, *supra*, p. 8, and the discussion under Point 1 (a), *infra*, pp. 22, 23.

the Commission on the one hand and the District Court on the other hand, with the Court of Appeals upholding the District Court in this respect apparently on the theory that it must do so if the conclusions of the District Court are not clearly erroneous. The indications are that the Commission must in some undefined way satisfy the District Court in terms of colloquial equity, and in the process weigh the losses and find a dollar value for the common stock if the valuation is to be made under the doctrine of the Otis case (R. 37).

The ultimate questions, therefore, are whether the factors which influenced the District Court to reduce the payments are relevant, whether the Courts are correct in holding or indicating that the Commission failed to consider any relevant factors or give them due weight, and finally, whether the District Court was justified in rejecting the Commission's valuation.

Summary of the Findings and Opinion of the Commission.

The findings and opinion are contained in two documents: (1) Release No. 7041, dealing with the original plan and entered December 4, 1946 (R. 25a-101a); and Release No. 7119 dealing with the amended plan and entered January 8, 1947 (R. 128a-141a).

The second release adds nothing of importance to the issues on appeal except for the findings that the amended plan removes the features in the original plan which the Commission found objectionable, that the objections to the treatment of the preferred stocks being advanced by the common stockholders was zealously presented by the company (as it was), and that the Commission saw no reason to change its previous findings (R. 133a-135a). Also Hanrahan, C., in a concurring opinion, held that the action of Engineers constituted a voluntary call, entitling the preferred stockholders to the call prices (R. 140a-141a).

In its first release, the Commission furnishes a description of Engineers' system, including plant, capital, as-

set and liability position, and earnings; the prior proceedings, including prior purchases by Engineers of its preferred stocks; and a description of the plan. The Commission found the plan necessary insofar as it provides for the disposition of El Paso Electric Company and Gulf States Utilities Company, and dissolution of Engineers, but objected to certain mechanics which would result in substantial delay in effecting compliance with the Act.

The important findings relate to the fairness of the plan (R. 59a-73a). The Commission found that the preferred stock, instead of providing valuable leverage for the common, had become a financial burden; the company had accumulated from previous property dispositions and retained earnings a large reserve of idle cash, which was yielding no return, and ordinarily a company in that position would voluntarily redeem the preferred; while the proposed dissolution was due to the Act, the preferred claim would not thereby be matured and the charter provision would not be controlling; the security holder must receive, in the order of his priority, the equitable equivalent of the rights surrendered. Consideration was then given to the applicable charter specifications, the issue prices, the dividend record, the corporate and consolidated capitalization and surplus, the market history, the earnings available for preferred dividends from 1937 to 1945, the testimony of Dr. R. A. Badger, an expert witness, and D. C. Barnes, president of Engineers, on the many economic and market factors bearing on the value of the preferred stocks. The Commission noted that the sale of Puget Sound Power and Light Company in 1943 and 1944 strengthened the earnings of the company. It noted that Badger and Engineers concurred in the view that the values or investment worths of the preferred stocks, on a going concern basis and apart from the Act, under prevailing yields applied to comparable securities, exceeded the call prices. The previous losses were considered and held irrelevant. The contention that the preferred stockholders should

share the losses was rejected as was the contention that the payment of anything in excess of $100. per share would be a windfall for the preferred stockholders.

In conclusion the Commission found that fair and equitable treatment to the preferred stockholders would require the payment of amounts equal to the call prices as representative of present value of the preferreds on a going concern basis, and that such treatment would also be fair to the common stockholders. Thus it clearly appears that the Commission regarded these investment values as the equitable equivalents of the preferred stocks and was not substituting a new doctrine for that of the Otis case as the Court of Appeals concluded.

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

1. In holding that the Commission did not apply proper standards and techniques and failed to consider and weigh all the relevant factors in its valuation of the preferred stocks.

2. In holding that the District Court may reject the findings of fact and valuations of the Commission based on substantial evidence without regard for and independent of the generally recognized limitations upon the scope of judicial review of policy and fact finding functions of the administrative tribunal.

3. In not reversing the order of the District Court insofar as it disapproved payment to the preferred stockholders of the additional amounts provided in the plan and in not directing the District Court to approve such payment in accordance with the provisions of the escrow agreement.

4. If remand was proper, in not furnishing to the Commission principles or criteria for determining the weight to be given to the colloquial equities.

OUTLINE OF ARGUMENT.

Our contentions on this appeal are:

(1) The Commission properly applied the fair and equitable standards of Section 11 (e); valuation of the preferred stocks on a going concern basis with full priority was proper; and the Commission's valuations of the preferred stock are based on the consideration and weighing of all relevant factors,

(2) The Court of Appeals erred in holding that the District Court may reject valuations of the Commission based on consideration of all relevant factors and supported by substantial evidence,

(3) Assuming that the involuntary liquidation preference in the charter is not controlling as a matter of law, the findings of the Commission are binding on the District Court, and there is no basis for remand to the Commission.

Argument.

PREFACE.

At the time of consummation of the plan in June, 1947, the preferred stocks were valuable securities carrying dividend rates ranging from $5. per share to $6. per share and call prices ranging from $105. per share and $110. per share. They had been selling in the market at prices close to their call prices (R. 1391a-1393a, Eng. Exs. Nos. 26, 27, 28, Int. R. 463a-464a), and it was conceded that they would sell slightly above the call prices were it not for the Holding Company Act and these proceedings (R. 522a, 658a-663a). It was also conceded that the present value or investment worth of the preferreds, on a going concern basis and apart from the Act, under prevailing yields applied to comparable securities, was in excess of the respective call prices (R. 67a, 1211a, 1953a). An expert witness, Dr. Badger, testified that a proper yield for the preferreds, absent a call price, would be 4.6% and that on the basis of quality and yield, the values for the three series would be $108.70, $119.57, and $130.33 respectively (R. 2118a). The Commission as an expert tribunal found that under such circumstances and were it not for the Act, a company would ordinarily redeem the preferred stocks (R. 60a), and that the investment or going concern values were at least equal to the call prices (R. 67a-68a). These findings are supported by substantial evidence and are undisputed.

The District Court would deny the preferred stockholders compensation in excess of the involuntary liquidation preference of $100. per share, although that contract provision is not controlling, and the Court of Appeals, while not affirming the District Court's valuation, has told the Commission to try again to satisfy the District Court under ground rules which give to the District Court a continuing right of veto so long as it does not act capriciously and is not clearly erroneous in its conclusions. Questions

of relevance, weight and emphasis are involved. On this basis the preferred stockholders can only win if they obtain the unanimous vote of two tribunals on the facts. The special competence of the Commission in the area of valuation is subordinated to some permissible margin of error in the District Court. This contrasts strangely with the stature of findings of the Commission on direct appeal to the Court of Appeals under Section 24 (a), in which case the Court would be bound by the findings of fact by the Commission if based on substantial evidence.

Consequences so unusual, so contradictory, so burdensome, suggest error. The errors are readily discernible. We do not mean to rest the case for the preferred stockholders solely on the doctrine of administrative finality in the area of fact-finding. We contend that the District Court's rejection of the findings of the Commission was based on non-relevant factors and that all relevant factors were properly considered and weighed by the Commission. But we also contend that when all relevant factors have been considered and weighed by the Commission and the statutory standards have been applied in a proceeding under Section 11 (e), the findings of the Commission should not be rejected because the District Court differs with the Commission as to weight and emphasis.

POINT 1.

THE COMMISSION PROPERLY APPLIED THE FAIR AND EQUITABLE STANDARDS OF SECTION 11 (e).

(a) Valuation of the Preferred Stocks on a Going Concern Basis With Full Priority Was Proper.

Basic to this proposition are the questions whether the involuntary liquidation preference in the charter is controlling as a matter of law, and if not, on what basis should the preferred stocks be valued.

The Commission undertook to value the bundles of rights represented by the preferred stocks as senior securities of equal rank, entitled to priority over the common stock. The valuations were intended to be as of the time the preferred stockholders were compelled to surrender their stocks. It valued the preferreds in relation to the enterprise at a going concern and with regard for current yields on investments of comparable risk. It treated the involuntary liquidation preference as a factor to be considered but not a controlling one.

This procedure is fully authorized by the decision in *Otis & Co. v. S. E. C.*, 323 U. S. 624, wherein this Court held that the power to simplify corporate structures under Section 11 of the Act does not mature rights; that on dissolution pursuant to the Act, the rights of stockholders of a solvent company may be evaluated on the basis of a going concern and not as though a liquidation were taking place; and that full priority shall be accorded classes of securities according to their contractual preferences. In view of the comprehensive discussion of this question in the brief filed by the Commission in its appeal (No. 226), we will not argue this legal proposition further in this brief, and instead will direct the attention of the Court to some important departures from these principles by the District Court and the Court of Appeals.

The District Court at first seems to have agreed that the charter provision was not controlling. It expressed the thought that the rule in the *Otis* case applies, and stated that it preferred to consider the charter provision as one of several factors in determining the relative rights of the various security holders (R. 288a, including footnote 2). Later, however, the Court stated that it had reached no conclusion on the point, that in any event the preferred stockholders are not entitled to receive any amount in excess of $100 per share plus accrued dividends on the basis of all relevant considerations, and that the charter provision, if taken into account, constitutes an additional factor

supporting the conclusions reached (R. 317a, Conclusion of Law 9). When, however, the Court embraced "colloquial equity" and weighed the equities as it conceived them, the involuntary liquidation preference appears to have become a ceiling for the compensation to the preferred stockholders or at least a major premise underlying Court's rejection of the findings of the Commission. Subsequently, the Court cited its decision in this case for the proposition that the charter provision is not controlling. *In re Cities Service Company*, 71 F. Supp. 1003 (D. C. Del. 1947).

Initially the District Court accepted the investment values of Dr. Badger and, in the absence of a showing of changed circumstances, assumed that they were applicable at the time the opinion was filed, May 15, 1947 (R. 290a). The Court, however, turned its back on these accepted values and held that they were not controlling because the plan did not propose to give these amounts to the preferreds (R. 290a). This does not appear a valid reason for departure since the plan did rely on the investment values as a basis for paying the call prices for the preferreds in accordance with the finding of the Commission. The high level of the investment values represented the underlying strength of the preferreds and their capacity to absorb adverse market conditions or increases in money rates.

The District Court gave another reason of great significance. It held (R. 291a) that "fairness and equity do not require that the preferred stockholders be paid an additional $3,200,000. for the theoretical future deprivation of their present excessive dividend rate, for in each case the inquiry is one of relative rights based on colloquial equity. In short, there is no reason why the preferreds should get additional compensation for the termination of the lucrative dividend rate which the preferreds have received, when this termination results wholly and directly from frustration of the enterprise by governmental edict." This can only mean that the dividend rates are high in relation to the

rates on other preferred stocks of comparable quality and to money rates generally. The Court used the current low money rates to challenge both the fairness of the preferred contracts and valuations related to them. Thus at the outset, "excessive dividend rates" in relation to low money rates and frustration of the enterprise became basic reasons for rejecting the valuations of the Commission. Thereafter the Court viewed the problem primarily as one involving "payment of a premium" (R. 288a-291a), and forthwith decided that no premium should be paid. The Court characterized the payment of a premium as "comparable to dealing cards off the top of the deck" (R. 291a). Having disavowed any priority for the preferred stocks, the Court then fell back on the gross amount received by Engineers on the original issue of its preferred stocks, viz. $100 per share, as the maximum to which the preferred stockholders are entitled (R. 289a). Since each series will be paid the same amount regardless of differences in dividend rates and call prices, it is clear that the Court was not valuing the preferred contracts in relation to asset position or earning power of the enterprise.

The Court of Appeals clearly held that the involuntary liquidation provision was not controlling and to this extent followed the Otis case (R. 34). It credited both the Commission and the District Court with having treated the charter provision as but one factor to be employed in determining the values of the preferreds (R. 34-35), overlooking the substantial effect given by the District Court to the involuntary preference through the method or approach actually used by that Court.[5]

Also, when the Court of Appeals upheld the disapproval of the District Court as not being clearly erroneous, it too abandoned the doctrine of strict priority and in effect directed the Court to give consideration and weight to factors adverse to the senior position of the preferreds.

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[5] See discussion on this point *supra*, pp. 22, 23.

What both Courts overlook is the fundamental nature of the common stock. They seem to approach the problem as if the plan involved recapitalization on the basis of a single class of common stock, whereas the objective of the plan according to the testimony of D. C. Barnes, President of Engineers, was to "preserve, as far as possible, the interests of the common stockholders in companies in which they choose to invest, leaving to them the decision as to when and if they should sell their interest. One-stock plans were considered and rejected because of the conclusion that the inevitable changes in future market values would make whatever allocation was adopted ultimately inequitable to one class or the other" (R. 627a). He believed that the management should make it possible for the common stockholders through the medium of an appropriate plan to continue their investment if they desired to do so (R. 627a). (See also R. 719a, 723a, 807a.) This was accomplished under the present plan by retiring the preferred stocks for cash and handing over to the common stockholders the Company's interest in its operating utilities. Instead of continuing to share this earning power with the preferred stockholders, the common stockholders sought to retain it for themselves on as favorable basis as they could. This was accomplished in part by company purchases of preferred stocks in the market with the cash obtained from sales of properties (R. 38a-40a), and finally by retirement of the preferred stocks under the plan. The management was willing to compensate the preferred stockholders in the amounts found equitable by the Commission to gain this advantage for the common stockholders.

The situation is comparable to the experience in *In re Standard Gas & Electric Co.*, 59 F. Supp. 274 (D. C. Del. 1945), reversed and remanded in *In re Standard Gas & Electric Co.*, 151 F. 2d 326 (C. A. 3, 1945). There, in proceedings under Section 11 (e), a plan was approved for the satisfaction of notes at par by payment partly in cash and partly by distribution of portfolio stocks in subsidiary companies. Subsequent to approval and before consumma-

tion of the plan, the portfolio stocks appreciated in value to such an extent that the company was permitted to abandon the plan and redeem the notes at voluntary call prices in excess of par. *In re Standard Gas & Electric Co.*, 63 F. Supp. 876 (D. C. Del. 1945).

In the Engineers case the combined portfolio strength as expressed in terms of senior stocks was recognized by the Commission at the outset, and the company acquiesced in payment of amounts equal to the call prices because it saw benefit to the common stockholders in so doing just as did the management of Standard Gas & Electric Company when it abandoned its plan and decided to redeem its notes. Certainly in the application of the fair and equitable standards under Section 11 (e), there is no substantial difference between filing a plan which provides for compensation of preferred stockholders at values equal to call prices as representing the equitable equivalent of senior participation in the enterprise and a voluntary exercise of a call for redemption. Under the doctrine of the Otis case, a voluntary call for redemption could not be permitted if the call price exceeded the equitable equivalent of the bundle of rights of the security being redeemed. In one way or another the senior security holders are compensated according to their priorities.

(b) The Commission's Valuations of the Preferred Stock Are Based on the Consideration and Weighing of All Relevant Factors.

The Court of Appeals' criticisms of the findings and procedures of the Commission are as follows: (1) while the selection of techniques is for the Commission in the exercise of its expert administrative judgment and it may properly approach the problem of valuation either *ex* or *intra* the Act, the Commission must employ the chosen technique, scales and measures consistently throughout the entire operation of valuation with a full view of all the pertinent fac-

tors, which it did not do (R. 37); (2) a valuation *ex* the Act requires valuation of both the preferred and common stocks based on future earning power and apportionment of earning power to the two classes of stock as was done in the *Otis* case (R. 35); (3) in any valuation *ex* the Act, losses realized on divestments compelled by the Act must be weighed in the calculation—"returned to the credit side of the enterprise's balance sheet as a matter of bookkeeping" (R. 37); (4) investment value is and can be only one of a series of factors to be used in arriving at equitable equivalents, and while conceivably investment value could be the equitable equivalent, the Commission has not made such a finding and the Court believes no such finding could be supported on the present record (R. 38).

Beyond the four elements just mentioned, the critical import of the opinion is not clear. The Court finds that the weight and emphasis applied by the District Court go to the two primary criticisms described in clauses (2) and (3) of the preceding paragraph (R. 35); and that the District Court made a "cogent finding respecting Dr. Badger's use of interest rates as an aid in fixing the valuations for the preferred deeming the interest rate used by the latter to be too low" (R. 19). Our study of the opinion reveals no other appraisal of the relevance of the various factors which entered into the "colloquial equity" or influenced the District Court in reaching its decision. One can only presume that the lack of clear error on the part of the District Court applies to the influencing factors as well as the result.

As stated above, we contend that the factors influencing the District Court in rejecting the valuations of the Commission and the factors influencing the Court of Appeals to remand for revaluation are inapplicable as a matter of law. Inapplicability turns on consideration of undisputed facts. As a beginning, we refer to the Summary of the Findings and Opinion of the Commission appearing at pages 16 to

18 in this brief for an enumeration of the many factors considered and weighed by the Commission in reaching its conclusions. The sufficiency of the evidence to support the findings of the Commission cannot be fairly disputed. We are here concerned with questions of relevance and emphasis, and, as we see it, a misconception by the Court of Appeals of the techniques employed by the Commission.

Valuation of Common Stock. The Court of Appeals holds that under the doctrine of the *Otis* case, the Commission is bound to value the entire enterprise in terms of some common denominator and then apportion that value between the preferred and common stockholders. It is difficult to see wherein such a procedure would lead to any different result in this case. There would still be the problem of compensating the preferred stockholders for their senior position in the assets and earning power. Whatever the economic strength of the senior position may be, it is nevertheless subject to the voluntary call factor, and the wisdom of imposing a ceiling on the high intrinsic values at the call price level is amply demonstrated in the experience in the *Standard Gas & Electric Company* case where the call was voluntarily exercised for the benefit of the common stockholders (*supra*, p. 26). Under these circumstances the valuation of the preferred necessarily resulted in a valuation of the common, and the Commission expressly found that the allocation of the residual assets to the common stockholders was fair and equitable.

Future Earnings. In the *Otis* case, the problems were to determine what kind of a capital structure the earning power of the enterprise would support and whether the earning power was sufficient to cover the annual dividends and dividend arrearages of the preferred stocks and leave some earning power for allocation to the common stockholders. While estimates of earnings are helpful, they are no substitute for demonstrated earning power. Here the Commission did determine earning power in terms of the

coverage of the annual dividends on the preferred stocks in the light of the risk factor. What is more important, the common stockholders could and would have refunded the preferred stocks at a much lower rate and improve their own earning power.

Low Money Rates. As previously pointed out, the District Court considered the preferred stockholders as enjoying "excessive dividend rates" and this characterization was necessarily related to the current low money rates (*supra*, pp. 23, 24). It was not related to any weakness in the earning power of the enterprise. This "equity" apparently influenced the District Court in turning away from a valuation of the preferred stock contracts. Although the District Court accepted the investment values as found by Dr. Badger, in the absence of a showing of changed circumstances, and therefore necessarily accepted the valuations made by the Commission, the Court of Appeals interprets the finding of the District Court to mean that Dr. Badger used too low an interest rate in fixing his values for the preferred stocks (R. 19, n. 9). All that the District Court found in substance was that there are some artificial factors in the current money rates and that the rates are subject to change. The important fact is that there could be a substantial increase in the then current money rates without affecting the market value or intrinsic value of preferred stocks entitled to sell on a 4.6% yield basis. Furthermore the Commission was dealing with a valuation as of the time the preferred stockholders were compelled to surrender their claims. While undoubtedly the District Court is entitled to change its mind, one is reminded that in the *Standard Gas & Electric Company* case the same District Court allowed an increase in compensation to noteholders on the basis of estimated improvement from $12,500,000 to $30,000,000 in the "current active market value" of the related portfolio stocks (63 F. Supp. 876, 877). If the Court of Appeals means that a District Court is entitled to reject

the valuation of the Commission because of a differing view as to the import of current money rates, such a conclusion is clearly in conflict with its conclusion that valuation is a problem for the Commission.

Previous Losses. The District Court's consideration of losses on divestment only scratched the surface, never recognized the complex elements involved, ignored the gains on other divestments and tax savings, the effect of purchases of preferred stocks out of proceeds of sales; it created an equity in favor of common stockholders on the basis of speculative assumptions. Even assuming it were possible to reconstruct such a synthetic enterprise, no one could ascertain its earning power. The Court did not evaluate this factor because it could not do so, but, nevertheless, something of value was charged to the preferred stockholders on this account.

While Engineers realized an important loss on the sale of its interest in Puget Sound Power & Light Co. in 1943-4, the Commission found that the sale strengthened the earnings of Engineers (R. 64a, 65a) and that the indications are that the carrying value on the books of Engineers was excessive and not that the sales price was low (R. 72a, n. 55). The fact is that the earnings of Puget Sound had fallen off substantially and by May, 1938, the dividend arrearages on preferred stock publicly held were approximately $12,500,000. Public power projects threatened its future. Then it was that Engineers' directors, anticipating a substantial loss in Puget Sound, established a reserve of $35,000,000 to provide for losses which they believed had accrued at that date in investments in subsidiaries, although such losses had not been taken (R. 1517a-1518a). When the total actual loss on Puget Sound ($33,320,519) became known in February, 1944, $29,297,000 of the loss was charged to the reserve created in 1938 for the purpose (R. 1608a). The Commission found these alleged losses to be an irrelevant factor, the strong implication being that the Engineers System was better off for the pruning.

Issue Prices. If net issue prices have any relevance, it could only be in the case of unseasoned securities, and the stocks in this case were seasoned. Nevertheless, the District Court used the net issue prices as a beginning point for valuation and decided to allow the preferred stockholders a bonus equal to the underwriting expenses and discount on issue as the net compensation for other factors, thereby arriving at the stated values and involuntary liquidating prices of $100 per share (R. 289a, 301a). Thus, the preferred stocks are "couriers with baggage" and the stockholders who acquired their preferred stocks after the initial seasoning inherited liabilities from years ago. Issue prices are certainly too remote to have any relevance.

Market History. The District Court holds that the market history affords affirmative support to the non-payment of premiums (R. 289a). The Commission considered the market history and the dividend record (R. 62a, n. 45). Again, while the District Court has the right to change its mind, we submit that the Court was on sounder ground when it held irrelevant the fact that the notes which were the center of controversy in the *Standard Gas & Electric* case (59 F. Supp. 274, 281) sold at discounts for long periods of time. It held that "market values (were) especially unreliable in (that) case because some of those engaged in buying and selling notes were of the view that such securities were under the cloud of the Act because they believed it created uncertainties." "A shrewd noteholder is only interested in the 'intrinsic value' behind his claim and in the amount of earnings coverage" (p. 281). Market history, of course, has a certain relevance in the valuation process, but to take something of present value away from the preferred stockholders on the strength of unrelated factors is inequitable.

Market Purchases of Preferred Stocks. The use which the District Court makes of the purchases of preferred

stocks is not evident beyond the fact that they are thrown into the hopper. The Court, as did the Commission, recognized that many factors affected the past history. Regarding purchases, the Court appears to be influenced by the fact that the Commission, in connection with past applications (1943-44) by Engineers for leave to acquire its preferred stocks, indicated that acquisitions at price levels slightly under the involuntary liquidation prices of $100 per share would not be unfair to the "security holders." The purpose of the Court's finding of facts in this respect (R. 303a, 304a) presumably is to suggest that it was not unfair in June, 1947 to limit the preferred stockholders to the involuntary liquidating prices, although the Commission in those earlier proceedings was dealing with open market purchases from stockholders who wished to sell and not with any valuation for the purposes of an equitable plan to be imposed upon all security holders. The evolution of the Commission's findings and views on this subject are to be found in its Findings and Opinions on the five successive applications of Engineers for permission to acquire blocks of its preferred stocks in the market for cash or by exchange, namely: 4 S. E. C. 615 (1939); 9 S. E. C. 84 (1941); 12 S. E. C. 804 (1943); 14 S. E. C. 237 (1943); and Holding Company Act Release, No. 4997 — S. E. C. — (1944). By February, 1942, the Commission perceived that piecemeal acquisitions of preferred stocks at a time when complete uncertainty existed as to management's policies, methods, and timing, in complying with Section 11 (b) created a potentiality for harm to preferred stockholders (12 S. E. C. 804, 813). The Commission stated that the major factors then present were absent in its 1939 and 1941 opinions (p. 810, n. 10); and that under the circumstances, it believed that at a minimum the "fair and equitable" standard requires a reasonable relation between the proposed acquisition prices and the treatment which might reasonably be accorded the preferreds under a comprehensive plan, which treatment, how-

ever, will depend on conditions existing at time the plan is approved (pp. 813-4). The Commission expressly noted Engineers' argument that even if compliance with Section 11 (b) results in a liquidation, the proper standard for the adjustment of rights of preferred stockholders is not the liquidation preference on involuntary liquidation or liquidation in bankruptcy but the fair value of their expectations in the absence of any such proceedings, taking into account their liquidation preferences as but one of many factors, and the Commission expressly refrained from answering the question pending a clearer basis for considering a purchase program. In the second 1943 opinion (14 S. E. C. 237, 244), the Commission said that as the amount receivable by the preferred stockholders in a purchase or exchange program tends to approach the maximum claim of the stock, the likelihood of unfairness is diminished, and approved an exchange program as fair and equitable at that time in the light of stated facts. Commissioner Healy dissented on the ground that re-acquisitions under the circumstances were involuntary reductions of capital and that the proceeds from the sale of assets should be applied pro rata to all preferred stockholders, but the majority of the Commission did not take that view (14 S. E. C. 237, 246; see also 12 S. E. C. 804, 816). In the 1944 opinion (Release No. 4997, p. 6) the Commission noted that the current market prices of the preferred stocks were close to the involuntary liquidation prices and stated that under the circumstances the proposed re-acquisition is not unfair to the security holders of Engineers. Engineers was free to utilize the money in other ways.

The Commission had come to realize that Engineers was in a position to take advantage of security prices far out of line by reason of uncertainties created by the management itself and found it necessary to impose some reasonable safeguards on the right of repurchase available to Engineers under the charter. The Commission only said that if was not unfair to security holders to permit Engi-

neers to make purchases at prevailing price levels which were then close to the involuntary liquidating preference. If a purchase program had been proposed under the circumstances existing after 1944 and were appropriate, presumably the Commission would have authorized purchases at prices not exceeding the voluntary redemption prices.

Retained Earnings. The retained earnings have been treated as if they represented a sacrifice on the part of the common stockholders, which was being unfairly used to the advantage of the preferred stockholders. The District Court found that as of June 30, 1945 the free earned surpluses were $2,773,000 for the subsidiaries and $7,095,000 for Engineers, a total of $9,868,000 or approximately $5 per share of common stock outstanding (R. 306a). The Commission found that Engineers' cash reserve of about $14,650,000 (estimated to be about $16,824,000 by the end of 1946) was accumulated from previous property dispositions and retained earnings; that instead of providing valuable leverage for the common stock, this cash reserve had become a financial burden; that companies in such a position ordinarily would call and redeem preferred stock; that Engineers' management pursued a policy of withholding dividends on common stock until satisfied that the system had made all the adjustments required under the Act (R. 59a-60a, 69a). The undisputed testimony is that retained earnings and proceeds of sales not reflected in the present cash reserves have been invested in the enterprise, or frozen in connection with purchases of other property or refunding operations, or used for purchases of preferred stocks (R. 306a). The use of earnings to help finance improvements and acquisitions of property is a normal and well-understood operation and one that was espoused by Engineers from the outset for the very purpose of strengthening the enterprise and improving the leverage of the common stock. The management felt from the beginning that it would be to the advantage of the stockholders to retire

the preferred stocks out of earnings. These policies inevitably improved the investment values of the surviving stocks (R. 921-922a; Annual Reports, Engs. Exs. No. 37A-37T inclusive, particularly pp. 1648-9a; 1691-2a, 1697a, 1714-5a, 1434a, 1444a, 1462a, 1481-2a; 1501a, 1517-8a, 1537a, 1552-4a, 1571-2a, 1588-89a, 1606a, 1612-3a, Int. R. 482a, 500a).

There is no evidence to sustain a contention that the management pursued an inequitable dividend policy and the Court attempts no such finding. There is considerable evidence that the management and the common stockholders were entirely satisfied with the policy of not distributing earnings for income tax reasons, particularly since the accumulation of earnings would be reflected in increased market prices (R. 98-9a, 920-1a). The Court merely argues that the distribution of those earnings would have reduced Dr. Badger's fair investment values, but it makes no attempt to show that such withdrawal would have reduced those investment values below the call prices. Furthermore, the Commission took the earned surpluses into consideration in valuing the rights of the common stockholders.

(c) Conclusion on Point 1.

Reverting to our starting point, we do not see wherein the Commission ignored or failed to weigh any relevant factors or was inconsistent in its approach or use of its scales and measures. The shares of preferred stocks which survived the purchasing program of the Company had, in June, 1947, an undisputed going concern or investment value equal to their call prices. The financial strength underlying the preferred stocks was reflected in the common stock, which was in a position to enjoy the full benefit of all appreciation, as contrasted to the preferred stocks, which were limited by their call features. We submit that the valuations of the Commission integrate all relevant factors and properly represent the equitable equivalents of the claims of the preferred stockholders as a matter of law, on the basis of the undisputed evidence and without

resort to any doctrine of administrative finality. In any event, we submit that the reasons advanced by the District Court for rejecting the valuation of the Commission are not sufficient to override its findings in the field of valuation since its findings are supported by substantial evidence and have rational foundation in law.

POINT 2.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT MAY REJECT VALUATIONS OF THE COMMISSION BASED ON CONSIDERATION OF ALL RELEVANT FACTORS AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

(a) The Statutory Duty and Stature of Findings of the Commission Under Section 11 (e) of the Act.

The Commission has the duty under Sections 11 (d) and 11 (e) of determining whether plans for compliance with Section 11 (b) are fair and equitable to the persons affected thereby. It also has the duty under Section 11 (f) of passing upon all reorganization plans for registered holding companies or subsidiaries thereof in proceedings in courts of the United States, whether under Section 11 or otherwise; and such plans may not become effective unless approved by the Commission after hearing prior to submission to the court. The phrasing of the three sections in this respect varies, but the import is the same.

Under Section 11 (e), the Commission has the further duty, *if requested by the company*,[6] to apply to a court in accordance with Section 18 (f) to enforce the plan, which the court must do if it finds the plan fair and equitable and appropriate to effectuate the provisions of Section 11. Section 11 (d) differs in this respect in that the aid of the court is necessarily invoked by the Commission to enforce its orders under Section 11 (b), and the court must find

[6] Italics supplied.

any plan for disposition of assets of the respondent company fair and equitable before using its enforcement powers.

It is desirable to note here that, while normally plans submitted under Section 11 (e) would not reach a circuit court of appeals except through enforcement proceedings in a district court under Section 18 (f) and appeal in accordance with Section 25, it is possible for a plan to reach the circuit court of appeals for review directly on appeal from the Commission under Section 24 (a). Section 24 (a) expressly provides that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive on appeal. There is nothing in the Act requiring court enforcement of a Section 11 (e) plan unless the company requests it, and such a plan may be approved by the Commission and consummated without court aid. If a plan does not provide for court enforcement or the company does not request the Commission to enforce the plan in a district court before the appeal period prescribed by Section 24 (a) has expired, an aggrieved person must take a timely appeal under Section 24 (a) to protect himself. Then, unless enforcement proceedings are subsequently taken and the circuit court sees fit to dismiss the appeal in deference to the procedure provided by Sections 11 (e) and 18 (f), the circuit court would have to determine the fairness of the plan. Such was the situation in *Phillips v. Securities and Exchange Commission*, 153 F. 2d 27 (C. A. 2, 1946), cert. denied 328 U. S. 860, where the Court of Appeals reviewed a plan of The United Corporation on direct appeal by a stockholder. The appellate court approved the plan as fair and equitable, holding that the conclusions of the Commission were justified under all the circumstances and well within the sphere of its peculiar competency.[7]

[7] For cases holding that appeals under Section 24 (a) are not proper where enforcement proceedings are pending in a district court or the plan provides for such proceedings, see *In re Securities and Exchange Commission* (*Otis & Co.*,

Since the quality of the Commission's findings of fact will not be affected by the course of the appeal and the need for expert findings is, presumably, no greater or less in the district courts than in the circuit courts of appeal, the reason for any difference in effect in the district court is not apparent. The express provision in Section 24 (a) was inserted to make certain that the established rule regarding findings of fact of administrative bodies applies in the circuit courts of appeal on direct appeals under Section 24 (a). Certainly it affords no valid basis for contending that the rule should be any different in the district courts.

While, therefore, both the Commission and the reviewing court have the duty of determining whether a plan is fair and equitable, their functions in this respect differ. Congress could not properly require a district court as a court of equity to lend its processes to enforce a plan which is unfair and inequitable, but, on the other hand, Congress recognized that the problems presented by such plans are complex and require a division of labor and special competence to evaluate the fairness of a plan in its several aspects.

What would be an appropriate division of labor between the Commission and a district court in Section 11 (e) proceedings? We venture to state it simply in the face of the volumes that have been written about the respective functions of administrative tribunals and courts.

The special competence of the Commission lies in comprehending the problems, investigating the facts, selecting facts according to their relevance and importance, evaluating facts, and reaching ultimate conclusions in accordance with applicable equitable principles. The Commission has the front line problem of discerning whether any fact or combination of facts invoke any special principles of law

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Intervenor), 142 F. 2d 411 (C. A. 3, 1944); *Okin v. Securities and Exchange Commission*, 145 F. 2d 206 (C. A. 2, 1944); *Lounsbury et al. v. Securities and Exchange Commission et al.*, 151 F. 2d 217 (C. A. 3, 1945).

or equitable considerations and then applying such principles and considerations with due weight and with regard for the inter-play of factors in complex situations, exercising its discretion where it has a choice. It has the duty of making an equitable valuation of the whole according to its judgment. Whatever this process is labeled, it is basically within the competence of the Commission and the function of the court in this instance should be defined with regard for the wide powers granted the Commission to do the job.

The special competence of the courts lies in determining whether applicable principles of law have been violated or disregarded by the Commission in the equitable evaluation of a plan and whether the facts found by the Commission are supported by substantial evidence. While Section 11 (e) gives the court the independent duty of determining whether plans are fair and equitable before lending its aid to enforcement, its function in this respect is necessarily circumscribed. In the division of labor Congress never intended that the court should reach over into the area reserved for the skills of the Commission and substitute its judgment for that of the Commission, provided the Commission's findings and conclusions have a rational basis in fact. A problem of attitudes is involved; the function of the court is invested with the attitude which it should have toward the findings and conclusions of the Commission in its field. There are many definitions of proper attitudes of courts toward findings of administrative bodies or agencies. They range from the most liberal to the skittish, depending, perhaps, upon the field of activity and the particular type of administrative unit involved. However that may be, we are here concerned with the proper attitude of the court in relation to the findings of an expert commission operating in a highly specialized economic field.

The Court of Appeals for the Third Circuit had occasion to consider this question in *In re Standard Gas &*

Electric Co., 151 F. 2d 326 (C. A. 3, 1945), wherein the District Court had overruled the decision of the Commission approving payment of notes partly by exchange of portfolio stocks. The immediate question was whether payment in property rather than cash was fair and equitable. The Court of Appeals commented as follows (p. 331):

> "It can be set out as a well established rule of administrative law that the action of an expert administrative body in determining the particular remedial measures demanded in an individual case is not to be overturned by court action unless the administrative body has lost sight of the law. The more technical the subject matter before the administrative tribunal, the more reluctant the court should be, we think, in disagreeing with it on a matter which is a question of judgment. The subject matter of this Act is highly technical. It seems to us that it is unlikely that Congress, in vesting authority to handle reorganizations of great public utility empires under the statute, would give the expert less power than bodies for easier and less complicated pieces of work unquestionably have. In other words, we think the wide grant of power given by Congress to the Commission carries with it the authority to the Commission to fix the form of reorganizations, subject to court control if the Commission departs from the law. We do not think that the District Court or appellate court is to substitute its notion of practical expediency for that of the Commission."

The foregoing appears to be the minimum of reluctance applicable here. Other cases hold that a finding by the Commission that a plan is fair and equitable cannot be upset by the court unless it is shown to be without rational basis in fact or predicated on a clear-cut error of law. *Massachusetts Mutual Life Insurance Co. v. Securities and Exchange Commission*, 151 F. 2d 424, 430 (C. A. 8, 1945);

Lahti v. New England Power Ass'n., 160 F. 2d 845, 850 (C. A. 1, 1947); *American Power & Light Co. v. Securities and Exchange Commission*, 329 U. S. 90, at 112-3.

While this Court was not passing on the powers and duties of a Section 11 (e) court in the second Chenery case, *Securities and Exchange Commission v. Chenery Corp.*, 332 U. S. 194, the matters under consideration expressly related back to the application of the "fair and equitable" standards of Section 11 (e) and the standards of "what is detrimental to the public interest or the interest of investors or consumers" under Section 7 (d) (6) and 7 (e). The case had gone to the Court of Appeals on direct appeal from the Commission under Section 24 (a) of the Act. This Court did not expressly allude in its opinion to the provisions of Section 24 (a) regarding the binding effect of the findings of the Commission as to the facts, if supported by substantial evidence. In general terms this Court held that the very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in the matters under consideration. The Court hold that its duty was at an end when it became evident that the Commission's action was based upon substantial evidence and was consistent with the authority granted by Congress; that the facts being undisputed, it was free to disturb the Commission's conclusion only if it lacked rational and statutory foundation (pp. 207, 208).

(b) The Statutory Duty and Powers of the District Court Under Section 11 (e) of the Act.

Section 11 (e) of the Act authorizes the Commission, at the request of a company, to apply to a district court in accordance with Section 18 (f) to enforce and carry out the terms and provisions of the plan. If upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and appropriate to effectuate the provisions of Section 11, the court

as a court of equity may take exclusive jurisdiction and possession of the company and the assets.

The Court of Appeals interpreted this to mean that a Section 1, (e) court must exercise its full and independent judgment as to the fairness and equity of a plan (R. 33). "The judicial process is brigaded with the administrative process of the Commission, but this does not mean that the (district) court in the field allocated to it by Congress is not to exercise its independent plenary judgment as an equity reorganization tribunal upon every matter relating to the fairness and equity of the reorganization. . . . It was the duty of the (district court) to function as an equity reorganization tribunal within the limitations prescribed by the Act" (R. 34). "Any question which goes to the issue of what is fair and equitable may be raised and must be passed upon" (R. 32). The district court may not act capriciously or substitute its valuations for those of the Commission, but, in the performance of its statutory duty, it may reject valuations made by the Commission (R. 34).

In reaching this conclusion the Court of Appeals relied on what it conceived to be the role of a district court in proceedings under Chapter X and Section 77 of the Bankruptcy Act, citations from the legislative history of the Holding Company Act, and the traditional role of an equity reorganization tribunal. It is frequently easy to find in legislative debates statements which seem to support a particular interpretation of proposed statutory language. Also, it is easy to fall into error when the debates have been prolonged and voluminous as they were in the case of the adoption of the Holding Company Act. The Commission in its brief has thoroughly covered the subject and we believe fully demonstrated wherein the Court of Appeals erred in these three respects. We will not attempt here to cover the ground again and will confine our effort to a supplementary observation.

At the time of the adoption of the Holding Company Act in 1935 the substantial evidence rule was firmly estab-

lished in law, and it is reasonable to suppose that the proponents of the Act had it in mind. It is unreasonable to suppose that they intended to brigade the administrative and judicial processes in such a way as to give the court a veto power in all areas or sterilize the special competence of the Commission. Normally the respective roles of the administrative tribunal and court are independent, but, nevertheless complementary. These principles are recognized in the decisions of this Court respecting reorganization proceedings under Section 77 of the Bankruptcy Act and roles of the Interstate Commerce Commission and the courts thereunder. See *Ecker v. Western Pacific R. Corp.*, 318 U. S. 448; *Group of Investors v. Milwaukee R. Co.*, 318 U. S. 523; *Old Colony Boudholders, et al. v. N. Y. N. H. & H. R. Co.*, 161 F 2d 413 (C A. 2, 194.). We submit that in 1935 the substantial evidence rule had beconie a normal incident to statutory designs such as the Holding Company Act and that application of the rule should be denied only upon the clearest mandate. There is no such mandate in that Act.

As a corollary, it is the Commission and not the Court which should be given the benefit of any doubt in resolving questions of techniques, relevance, feasibility, weight and emphasis. Suppose a case where neither the Court nor the Commission was "clearly erroneous" in its conclusions in such areas. Which tribunal should prevail? Suppose consideration of losses were relevant and feasible and there is evidence warranting a finding by the Commission that a particular loss was irrelevant as in the case of the Puget Sound loss. Should the Court prevail because its discretion might reasonably lead to the opposite conclusion? Seldom will one find complete concurrence in such complex problems. From time to time the Commission would have to appease reasonable doubts of a considerable number of judicial minds, and every objector will have two chances, two days in court on the same level. The Commission

would never know where it stood until the last doubt were resolved.

(c) Assuming That the Involuntary Liquidation Preference in the Charter Is Not Controlling as a Matter of Law, the Findings of the Commission Are Binding on the District Court.

This, we think, is self-evident. There is substantial evidence to support the findings. Insofar as the considerations of the District Court have any relevance to valuation, they have been considered and weighed. Under these circumstances the Court of Appeals would be bound by the findings of the Commission had the case gone to it on direct appeal under Section 24 (a) of the Act and we submit that in this case "respect" for the findings of the Commission means acceptance by the District Court.

CONCLUSION.

The Court of Appeals should be reversed, and the District Court should be directed to approve and enforce the plan as approved by the Commission and in accordance with the escrow agreement.

Respectfully submitted,

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December 22, 1948.

APPENDIX.

Section 11 (d), (e) and (f) of the Public Utility Holding Company Act of 1935 (15 U. S. C. § 79k (d), (e) and (f) provides as follows:

"(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this chapter, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b) the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

"(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

"(f) In any proceeding in a court of the United States, whether under this section or otherwise, in

which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order, as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission."

Section 18 (f) of said Act (15 U. S. C. § 79r (f)) provides as follows:

"(f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the district court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this chapter."

Section 24 (a) of the same Act (15 U. S. C. § 79x) provides as follows:

"Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commisison be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the

Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. *The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.*[1] If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. *The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive,*[2] and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

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[1] Italics supplied.

[2] Italics supplied.

Section 77 (e) of the Bankruptcy Act (11 U. S. C. § 205 (e)) provides as follows:

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securi-

ties provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such

class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtors' estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf

of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further*, That if in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not con-

firm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

LIBRARY
SUPREME COURT, U.S.

Nos. 226, 227, 243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 226

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 227

THOMAS W. STREETER, et al.,
Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 243

THE HOME INSURANCE COMPANY and TRADESMAN'S NATIONAL BANK AND TRUST COMPANY,
Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 226

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 227

THOMAS W. STREETER, et al.,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION; C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 243

THE HOME INSURANCE COMPANY and TRADESMAN'S NATIONAL BANK AND TRUST COMPANY,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, IN OPPOSITION

Opinions Below

The opinion and judgment of the Court below (R. 12) and the opinion denying petitions and cross-petitions for rehearings (R. 138) are reported at 168 F. 2d 722. The

opinion of the District Court is reported at 71 F. Supp. 797 (R. 283a), but its detailed Findings of Fact and Conclusions of Law (R. 293a-317a) are not reported. The Findings and Opinions of the Commission dated December 4, 1946 and January 8, 1947 have not yet been officially reported but are set forth in the Commission's Holding Company Act Releases Nos. 7041 (R. 25a) and 7119 (R. 128a).

Jurisdiction

The judgment of the Circuit Court of Appeals for the Third Circuit was entered March 19, 1948, and its judgment denying petitions and cross-petitions for rehearing was entered June 11, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 803 (15 U. S. C. 79 *et seq.*).

Statute Involved

The provisions of Sections 11(e) and 24(a) of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79a, *et seq.*, are set forth in the Appendix, *infra*, pp. 37-38.

Questions Presented

1. Where a federal statute compels the complete and final termination of a holding company system and of the investments of all security holders therein, are the common stockholders required to indemnify the preferred stockholders against the possibility that upon reinvestment of their funds elsewhere the latter may receive dividends at the somewhat lower rates then current?

2. Was the District Court, in performing its statutory duties under Section 11(e) of the Public Utility Holding Company Act, required to accept the Securities and Exchange Commission's interpretative legal conclusions: (a) disregarding well-settled judicial principles held applicable by the Commission and numerous courts to forced retirement under the Act of senior securities, and (b) fictionally "measuring the rights" of the preferred stockholders (but not of the common stockholders) "as though in a continuing enterprise", even though incontrovertibly the entire enterprise has come to an end?

3. Were the District Court and the Circuit Court of Appeals, in performing their respective functions, required to accept as conclusive of the rights of all security holders in a final liquidation a finding by the Commission of the "value" of the preferred stocks based merely on their hypothetical market price as of a given moment "apart from the impact of liquidation under Section 11", and in disregard of all the other impacts of the statute and their vital bearing on such "value"?

Statement

In our cross-petition heretofore filed,[1] there is set forth a comprehensive Statement of the Case, which we respectfully request be deemed incorporated herein by reference in order to avoid unnecessary duplication.

Notwithstanding the hardship which the additional delay and expense will impose on the common stockholders,[2] we

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[1] *Central-Illinois Securities Corporation and Christian A. Johnson, Petitioners* v. *Securities and Exchange Commission, Thomas W. Streeter, et al., The Home Insurance Co., et al.*, No. 266, October Term, 1948. The earlier date required for filing of the cross-petition rendered unfeasible its joinder with this brief, but the two documents are intended to be supplementary to one another.

[2] Under the Commission's decision, all expenses and costs in connection with all phases of the proceedings and litigation relating to the plan must be borne by the common stockholders (R. 72a-82a).

would not question the desirability of review by this Court if the Commission's decision in this case threatened to set a pattern for future decisions in dissolutions under the Holding Company Act; but we venture to suggest that as a practical matter the sharp upward revisions in money rates generally and in public utility preferred stock yields in particular have rendered the principal questions raised by the petitions virtually moot, not alone for the time being but for the foreseeable future.

However reluctant the Commission may be to face the fact, the "investment value ex the Act" doctrine has been swept away with the temporary war's-end stock market boom which engendered it. This factor, even apart from the basic fallacies in the doctrine pointed out by the two Courts below, which respectively have had more judicial experience with orders and plans under Section 11 than any other District and Circuit Courts in the country,[3] and which have hitherto consistently upheld the Commission's determinations, strongly supports the view that the issues precipitated by the Commission's decision in this case are not likely to prove recurrent, and certainly not in the form here presented.

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[3] See Circuit Court's opinion (R. 30, 39) for compilation of more than twenty-seven Section 11 decisions by District Judge Leahy. See also the following Section 11 decisions by the Third Circuit Court of Appeals:

Commonwealth & Southern Corp. v. S. E. C., 134 F. 2d 747; *United Gas Improvement Co.* v. *S. E. C.*, 138 F. 2d 1010; *In re Securities & Exchange Commission (Otis & Co.)*, 142 F. 2d 411, aff'd *sub nom. Otis & Co.* v. *S. E. C.*, 323 U. S. 624; *Lownsbury* v. *S. E. C.*, 151 F. 2d 217, *cert. den.* 326 U. S. 782; *In the Matter of Standard Gas & Electric Co.*, 151 F. 2d 326; *In the Matter of United Gas Corp.*, 162 F. 2d 409; *In the Matter of Community Gas & Power*, 168 F. 2d 741, *cert. den.* 334 U. S. 846. See also decision of Judge Biggs in *Re Midland United Co.*, 58 F. Supp. 667.

ARGUMENT

I. REVIEW OF THE CIRCUIT COURT'S ORDER AS REQUESTED BY PETITIONERS IS NOT PRESENTLY APPROPRIATE.

We are confronted at the outset with the crucial and authoritative data presented to the Circuit Court and included in the present record (R. 122-123) which establishes that the Engineers preferred stocks if presently outstanding would have an "investment value" (employing this term in the very sense used by the Commission) not in excess of $90-$95 per share. In its application to the instant case, therefore, this changed "value" *of itself* is decisive of the only ultimate issue; viz., whether the preferred stockholders are entitled to receive amounts in excess of the $100 per share plus dividends already paid to them. Consequently, even if this Court found it possible to uphold the Commission's "investment ex the Act" doctrine as applied in this case, and were also to hold that the Courts below were wrong on every issue, no additional amounts could be found payable to the preferred stockholders on the basis of the Commission's own rationale and formula for which Petitioners here contend.[4]

[4] It is beyond dispute that the changes in applicable money rates and yields which occurred subsequent to the issuance of the Commission's opinions have a crucial bearing on "investment values" as determined in this case by the Commission. A final decree cannot be entered without consideration of these vital changed factors, since the decree of a court of equity speaks "as of the date of entry" and must therefore take account of all material changes which have occurred since the commencement of the proceedings: *Randel* v. *Brown*, 2 How. 405, 422; *McCabe* v. *Guaranty Trust Co.*, 243 Fed. 845, 849; *Brooks Bros.* v. *Brooks Clothing Co. of California*, 60 F. Supp. 442, 456; *Knight* v. *Wertheim & Co.*, 158 F. 2d 883, *cert. den. sub. nom. McGuire* v. *Equitable Office Bldg. Corp.*, 331 U. S. 818. Nor is there any basis for a contention that these changes had been envisaged and taken into account by the Commission; concurrent findings of both Courts below incontrovertibly establish that the Commission's determination was based merely on "values" as of May, 1946 and that

If this vital factor does not render the case technically moot, it at least renders it "unripe" for review here in the light of the character of the Circuit Court's order. That order did not, by its terms, finally determine the rights of any of the parties to these proceedings, but instead remanded the proceedings to the Commission for further consideration of factors relating to the valuation of the preferreds and the common (R. 39-40). The remand will also afford opportunity for appropriate consideration of the impact of the changed money rates. These are questions which properly should be determined before this Court is called upon to pass on underlying issues of law which, we submit, will become academic in the light of such factual determinations; cf. *Republic Natural Gas Co.* v. *State of Oklahoma*, 334 U. S. 62.[5]

Apart from the untimeliness of review now, we also submit that on the merits the decision below is entirely correct, except in requiring remand of the proceedings to the Commission. This latter requirement, although fraught

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no consideration whatever was given to future trends or possible changes (Circuit Court, R. 17; District Court, R. 310a-315a).

In a more recent opinion the Commission itself stated concerning "investment values" determined as of this very period:

> "* * * the Commission's findings were issued in May of 1946 *in what has since proven to be the peak of the post-war market.* The market has declined substantially from the highs reached at that time and there has been a material firming of interest and preferred yields. It is apparent that insofar as investment value is derived from an analysis of the current yields of comparable securities, *the investment value of American's preferred has been substantially affected in the interim.* In addition, there have of course been changes in the financial and business aspects of the company which have a direct bearing on the value of the security" *(United Light and Railways Co.—American Light & Traction Co.*, Holding Company Act Release No. 7951, p. 33, Dec. 31, 1947; emphasis supplied.

[5] This decision, though dealing with "finality" of the judgment of a state court, contains reasoning wholly applicable to the instant case. See also *Robertson and Kirkham, Jurisdiction of the Supreme Court* [1936], Section 116, for the proposition that ordinarily the writ will not issue to review a judgment of the Circuit Court of Appeals unless it is final.

with substantial prejudice to respondents for the reasons set forth in our cross-petition, represents in essence an act of deference to Petitioner Securities and Exchange Commission, of which surely Petitioners have no valid cause to complain, since under the circumstances of this case the Circuit Court should have wholly affirmed the District Court's decree.[6] The threat of complexities and uncertainties in the administration of the Act which Petitioners profess to find lurking in certain phrases of the opinion below will be found, upon examination, to reflect primarily subtle exaggerations of portions of the Circuit Court's language. Similarly, the asserted conflict among the Circuits will be found actually non-existent.

II. THE CIRCUIT COURT CORRECTLY HELD THAT THE DISTRICT COURT UNDER SECTION 11(e) IS NOT A MERE "REVIEW COURT". THERE IS NO CONFLICT AMONG THE CIRCUITS:

Despite their emphatic assertions that the Circuit Court erred in interpreting the functions of the District Court under Section 11(e), it is significant that Petitioners have not even ventured to join issue with the Court's detailed and searching analysis of the pertinent statutory provisions (R. 24-34). Nor have Petitioners found it possible to throw any different light on the legislative history, painstakingly marshalled and set forth by the Court (R. 21-24), establishing beyond doubt that Congress intended with respect to Section 11(e) plans affecting stockholders' rights that the traditional powers of the District Court as an equity reorganization tribunal should not be materially "diminished or encroached upon by the functions allotted to the Commission under the law" (R. 22); and that the role of the Commission with respect to plans requiring judicial enforcement under Section 11(e) was envisaged primarily as

[6] See discussion at pp. 24-30 of our cross-petition (No. 266).

that of "expert economic adviser and administrative assistant" to the Courts (R. 22), as compared with the broader role confided to the Commission under the numerous other provisions of the Act.[7]

Indeed the Commission's petition asserts (p. 22) that the Commission is in agreement with much of what the Circuit Court stated as to the independent role of the District Court, a position markedly different from that which it took before the Circuit Court, but more consistent with the views which it has repeatedly expressed in its reports to Congress and testimony before Congressional Committees to which the Court's opinion makes pointed reference (R. 23, 30). But having made this strategic obeisance to its own recorded statements, the Commission proceeds to urge in effect that the District Court's "independent" judgment may be employed to approve, but never to disapprove, the Commission's conclusions; in short, the District Court's "independence" must always end at the precise point where disagreement with the Commission begins.

The Commission seeks to accomplish this result by requesting this Court to drastically amend the statute in order to *ingraft* the substantial evidence rule embodied in Section 24(a) upon Section 11(e), so as to make the findings of the Commission binding upon the District Court if supported by evidence. Even if it were possible to disregard the violence to the statutory scheme and fixed Congressional purpose pointed to by the Circuit Court, such an

[7] There is an obvious and clear distinction in the statutory scheme between Sections 11(d) and (e) and the remaining sections of the Act. The latter embody the fundamental regulatory and administrative functions of the Commission; as to which its judgment was intended to have the full scope normally confided to administrative agencies. Sections 11(d) and (e), on the other hand, constitute in effect a "self-contained reorganization statute" (as the Commission itself has stated, note 11, *infra*) which is merely *ancillary* to effectuation of the primary statutory objectives embodied in Section 11(b), and which relies on the traditional powers and expert techniques of the District Courts as equity reorganization and anti-trust tribunals (Cf. Circuit Court Opinion, R. 21-23).

amendment would not aid Petitioners' position in the instant case. For the findings of the Commission which Section 24(a) states shall be conclusive if supported by substantial evidence, are "findings *as to the facts*". There is no contention here, and there could not be, that the factual findings of the Commission were contravened by those of the District Judge, particularly since almost all the facts recited by the latter (and fully affirmed by the Circuit Court[8]) are also referred to in the Commission's findings and opinions. The conflict between the District Court and the Commission related primarily to the *legal conclusions* to be drawn from those facts.[9]

Recognizing this, Petitioners are compelled to the further and even more drastic contention that the enforcement court must similarly be bound by the Commission's *legal conclusions*. But even this extreme position would not enable Petitioners to prevail in the instant case because the "essence of the holdings of both Courts below was that the Commission's *conclusions* are without substantial evidentiary or legal basis; or, stated in the restrictive terms for which Petitioners contend, that they "lack rational or statutory foundation".

That such holdings of the Courts are correct, and in fact unassailable, will be demonstrated in subsequent portions of this brief. Initially, however, it must be observed how feeble is the reed on which Petitioners are obliged to hang their momentous argument for judicially fusing Sections 11(e) and 24(a). It is significant that the sole deci-

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[8] With respect to the weight which attaches in this Court to the concurrent findings of two Courts below, see *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214, and decisions there collated.

[9] We assume that questions of nomenclature are not properly to be deemed questions of fact. Thus, although the District Judge accepted the Commission's finding that the preferred stocks had a "value" as of May, 1946, as found by the Commission, he was unable to accept the descriptive title "investment value ex the Act" for values which were primarily transient *market* values as of a particular moment. (See discussion *infra*, pp. 21-24.)

sion to which the Commission refers for support of this proposition is an unreported case in the District Court of Delaware dating back to the early stages of Section 11(e) programs, and that the Commission has failed to explain why this is, as it admits, "the only instance" of its kind.[10] Moreover, the Commission has not called to the Court's attention the more recent and authoritative decisions throwing a very different light on the subject. We refer to *Okin* v. *S. E. C.*, 145 F. 2d 206 (C. C. A. 2, 1944), remanded 325 U. S. 840, and *Lownsbury* v. *S. E. C.*, 151 F. 217 (C. C. A. 3, 1945), *cert. den.* 326 U. S. 872, where the Commission urged upon the Courts that "the statutory scheme renders inapplicable the general review provisions of Section 24(a)" with respect to Section 11(e) plans cutting across stockholders' charter rights; that in recognition of this statutory scheme the Commission has established the practice of expressly conditioning its approval of such plans upon District Court enforcement; and that Circuit Courts of Appeal wholly lack jurisdiction under Section 24(a) to review such Commission orders.[11]

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[10] See Commission Petition, p. 24, note 11. In its brief in this Court in *Okin* v. *S. E. C.*, 325 U. S. 840 (No. 601, October Term, 1945), the Commission had occasion to explain (p. 14, note 9) the extraordinary circumstances under which this case arose.

[11] Thus, in its brief in this Court in opposition to certiorari in the *Lownsbury* case, *supra* (No. 1245, October Term, 1944), the Commission stated:

> "Congress contemplated that reorganization techniques should be available for compliance with Section 11(b) orders, and subsections (d) and (e) are in many respects a self-contained reorganization statute with provisions defining the respective reorganization functions of court and agency which are comparable to the relationship between the Interstate Commerce Commission and the courts prescribed in the previously enacted Section 77 of the Bankruptcy Act. Section 11(f) provides for a similar allocation of function as between the Commission and a reorganization court where the court's reorganization jurisdiction stems from sources other than the Holding Company Act" (p. 7).
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> * * * * * *
>
> "An order of the Commission approving the plan, which is to be operative only if subsequently approved by a district

Having successfully urged these views upon the Second and Third Circuits, and upon this Court in its briefs in opposition to certiorari, it scarcely seems admissible for the Commission to now argue that Sections 24(a) and 11(e) are merely "alternative ways" of reviewing Section 11(e) plans expressly conditioned, as was Engineers', upon District Court approval and enforcement; and that "the substantial evidence rule" of Section 24(a) should be forcibly propelled into Section 11(e), which the Commission previously urged is "a *self-contained* reorganization statute", and orders of the Commission thereunder "stand on an entirely different footing from the ordinary order of the Commission for which the review provisions of Section 24(a) were evidently intended".[12]

Even wholly apart from these inconsistencies, the Commission's argument is clearly devoid of merit. A Circuit Court of Appeals reviewing a Commission order under Section 24(a) is not called upon to enter its own decree as a court of equity enforcing a plan upon all security holders without their consent. A District Court under Section 77(e) of the Bankruptcy Act (which the Commission's petition *asserts* performs a statutory role "in general similar" to that of a Section 11(e) Court[13]) can scarcely be thought to function as a mere "review" court. Certainly, support for such a view cannot be derived from the decisions of this Court under Section 77(e) of the Bankruptcy Act, in which the Court has distinguished carefully between its own role as a review court and the wholly different role of the District Court, stating, for example:

> "* * * Since such a determination rests in the realm of judgment rather than mathematics, there

court pursuant to subsections (d) and (e) or under some independent source of jurisdiction recognized in subsection (f), stands on an entirely different footing from the ordinary order of the Commission for which the review provisions of Section 24(a) were evidently intended. * * *" (p. 9).

[12] Cf. note 11, *supra*.

[13] Commission petition, p. 22.

> is an area for disagreement. *But we are not performing the functions of the District Court under Section 77(e). Our role on review is a limited one.* It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end."[14] (Emphasis supplied.)

The spectre which Petitioners seek to conjure up with respect to the possibility of "stalemates" between the Commission and the District Courts (a spectre even more applicable to other reorganization statutes)[15] derives no substance from the Commission's experience with Section 11(e) plans in the Courts either prior to or subsequent to the decision in the instant case.[16] On the contrary, it

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[14] *Group of Institutional Investors* v. *Milwaukee R. R. Co.*, 318 U. S. 523, 564. See also the recognition accorded in *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, in both the majority opinion (p. 227) and that of the minority (p. 236) to the special functions of the district courts under Section 77(e).

[15] Thus, plans under Section 77 of the Bankruptcy Act not only require the approval of the Interstate Commerce Commission and the District Court, but also of every class of security holders affected. Such security holder approval is also required with respect to plans under Section X of the Bankruptcy Act, where the Commission also plays an active role and frequently carries to the appellate courts for review decisions of the district courts in conflict with the Commission's views. Cf. *S. E. C.* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434.

[16] It is pointed out in the opinion of the Circuit Court that the Commission had submitted some sixty-three Section 11(e) plans to the District Courts for enforcement, all of which have been carried out, and that Judge Leahy had passed upon twenty-seven of those plans. Subsequent to the Circuit Court's decision in the instant case Judge Leahy has passed on nine additional Section 11(e) plans, all of which he has approved and enforced. Prior to the *Engineers* decision, in fulfilling his "independent duty" Judge Leahy had concurred in the conclusions of the Commission in every plan presented to him with the sole exception of a single phase of one plan. The Third Circuit reversed, holding that since the question related to the "appropriateness" of the "particular remedial measures" required to effectuate Section 11(b), the Commission's judgment

is very plain that the danger is less that the District Courts will seek to usurp the Commission's functions than that they will tend to abdicate their own.

This is demonstrated by the very decisions to which Petitioners point as establishing a "conflict among the circuits" in relation to the instant case.[17] Such conflict does not in fact exist. Those decisions involved appeals to Circuit Courts from decrees of district courts which *approved and enforced* Section 11(e) plans previously also approved by the Commission. Thus, the Circuit Courts were in each instance reviewing plans bearing the *concurrent approval of both* the District Court and the Commission, and the Circuit Courts' opinions refer repeatedly to the findings of the Court below as well as to those of the Commission. The specific language in the opinions as to the weight to be attributed to the Commission's findings[18] has reference to the complaints of the appellants that the District Judges had "abdicated" their statutory duties by accepting the Commission's findings and determinations without according them an adequate independent check. The holdings of the appellate courts that the district courts were *entitled* in the exercise of their discretion to attach great weight to the Commission's findings obviously cannot be construed as holdings that the district courts are *required* in performing their statutory functions to ap-

should prevail (*In re Standard Gas & Electric Co.*, 151 F. 2d 326, 331). However, subsequent events established the correctness of the District Judge's fears that fluctuating markets would render the plan unfair; and as a result the Commission itself concurred in the view that the claims of the senior security holders should be discharged in cash. (See *In re Standard Gas & Electric Co.*, 63 F. Supp. 876.)

[17] Commission petition, p. 21; Streeter petition, pp. 17-20.

[18] Petitioners place great emphasis on the statement of the Circuit Court in the instant case that the cited decisions "look the other way" (R. 31). It is evident that the Circuit Court's statement was made on the basis of the quotations from the cited opinions set forth in Petitioners' briefs, rather than an independent analysis of the decisions themselves.

prove and enforce determinations of the Commission which they deem erroneous.[19]

In the instant case the Circuit Court went very far in enjoining upon the district courts the limitations of their statutory role, emphasizing that such courts may not substitute their own values or estimates for those of the Commission, nor "act capriciously in rejecting valuations made by the Commission" (R. 34, 39).[20] Indeed, as is indicated by our cross-petition, we believe it went too far in applying these principles in the particular context of this case. Subject only to this exception, we submit that the Circuit Court's conclusions as to the respective functions of the district courts and the Commission are not only unassailable on the basis of statutory analysis and legislative history, but, contrary to Petitioners' suggestions, their effects will prove highly salutary.[21] By contrast,

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[19] Moreover, it is to be noted that in the cases referred to by Petitioners the determinations accepted by the District Court, and of which appellants complained, related largely to such involved factual issues as the normal prospective earning power for the reorganized enterprise, and were thus questions of entirely different import from those on which the District Court and the Commission differed in the instant case.

[20] Cf. *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 279, quoted at p. 19 (note 18) of our cross-petition.

[21] The beneficial effect of this decision in its practical operation is evidenced by the recent decision of the District Court of Minnesota, *In the Matter of Northern States Power Company*, decided August 30, 1948. Holding that the Circuit Court's decision in the *Engineers* case did not preclude him from attaching great weight to the Commission's determinations as to earning power and allocation, the District Judge fully upheld them; but only after making a careful check of their correctness in the exercise of his "independent duty". The same course was followed, and the same result was reached, by the District Court of Maine, *In the Matter of American & Foreign Power Company*, decided September 16, 1948.

The fact is that there has not been a single instance of a refusal by a District Court to approve and enforce a Section 11(e) plan, or any portion thereof, since the decision in the instant case.

Petitioners' contentions would effectually strip security holders of a highly important portion of the protection which this Court has asserted they are assured under the statute, stating:

> "Any plan of divestment or reorganization, moreover, must be carefully scrutinized by *both* the Commission and the enforcing court, *thus enabling the assertion and protection of all shareholders' rights.*" *North American Co.* v. *S. E. C.*, 327 U. S. 686, 709. (Emphasis supplied.)

III. THE DECISION BELOW WAS WHOLLY CORRECT ON THE MERITS.

A. The Commission's rationale lacked legal, equitable or rational foundation.

(1) It is important at the outset to fix firmly in mind the Commission's rationale in holding that the Engineers' preferred stockholders were entitled to receive the redemption prices, aggregating $3,200,000 in excess of the liquidation preferences specified in the corporate charter. The Commission did not find, or even suggest, that the retirement of the preferred stocks constituted in letter or spirit a call and redemption within the purview of the redemption provisions of the charter. Instead, it found that the complete and final liquidation of the Engineers' enterprise was necessitated by the Act, and was involuntary. This is conceded by the Commission's petition (p. 9), which further concedes that a long line of Commission and court decisions uniformly hold that redemption premiums may not be claimed or paid under such circumstances in consonance with the "fair and equitable" standard of Section 11(e) (see cases cited at p. 9, note 2, of Commission's petition).

The Commission held that the redemption premiums should be paid on the Engineers' preferreds solely because the dividend rates of these stocks were in excess of the

then prevailing preferred stock yields and money rates and for that reason the stocks would have had a "value" approximating the redemption prices *if* the Act had not compelled the retirement of the preferred stocks and the dissolution of the enterprise. We defer for the moment discussion of the significance of this admittedly fictional hypothesis in order to examine the asserted "values". Initially it is to be observed that the very same "value" factor was also present in most of the non-premium cases cited by the Commission at page 9 of its petition, and was invariably held irrelevant by the Commission and the courts. Thus, in the leading case in which the non-premium principle was enunciated, the Commission had squarely before it the contention of debenture holders that wholly apart from any contractual rights to the redemption premiums [22] they should as a matter of "fairness and equity" receive amounts in excess of the face amount of their bonds because they were being deprived prematurely of a valuable investment bearing interest rates of 6% and 6½%, rates so lucrative that the debentures had been selling at *a premium above par* despite the imminence of retirement. The Commission replied to this contention as follows:

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[22] In rejecting the claim of the debenture holders that they were entitled to the redemption premiums under the terms of the indenture, the Commission stated:

> "We believe that the obligation to pay a premium was intended to arise only when the company was to continue as a going concern, for the payment thereof is in the nature of compensation payable by the company (i.e., its stockholders) to the debenture holders for depriving the latter of their investment. In a going concern, the stockholders may be deemed to benefit from the elimination or reduction of the debt effected by the redemption, and the premium may be regarded as the prearranged amount payable by them for such benefit.
>
> "But here the company does not continue as a going concern. There is no question of free choice or election. The company by virtue of congressional mandate is to terminate its existence. Power must liquidate not only its debt but its stock. The rights of debenture holders and stockholders alike to retain their respective investments, are cut off" (*The United Light & Power Company*, 10 S. E. C. 1215, 1221).

"It seems to us *a complete answer* to this argument that the termination of the investments of debenture holders and stockholders alike has been brought about by the act of a sovereign power—in this case a congressional mandate. We think the debenture holders have established no right to receive such compensation here at the expense of the stockholders, whose rights we must also consider." *The United Light & Power Co.*, 10 S. E. C. 1215, 1228. (Emphasis supplied.)

On appeal, the Second Circuit affirmed the Commission's order, holding that the doctrine of frustration of the enterprise was applicable.[23] Thereafter, this doctrine was consistently applied by the Commission and the courts in the numerous cases involving retirements of bonds and preferred stocks of holding companies required to liquidate in whole, or merely in part.[24] In virtually all these cases the securities had dividend or interest rates and an investment caliber as high or higher than those of the Engineers' preferreds. It was similarly contended that by reason of the prevailing low money rates these securities would have a "value" in excess of their par or stated amount if they had been permitted to remain outstanding; indeed, many had actually been selling at substantial premiums. It was found, however, "a complete answer" that the retirement of the securities was compelled "by Act of the Sovereign", and that the asserted deprivations were "consequential".[25]

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[23] *New York Trust Co.* v. *S. E. C.*, 131 F. 2d 274, cert. den. 318 U. S. 786, rehearing den. 319 U. S. 781.

[24] Not less than four different Circuit Courts of Appeals and many District Courts have passed on the question and have uniformly held the premiums not payable; the cases are collated at note 21 (p. 21) of our cross-petition.

[25] Cf. *The United Light & Power Co.*, 10 S. E. C. 1215 (quoted *supra*); *New York Trust Co. v. S. E. C.*, *supra*. See also the decision of Judge Leahy approving and enforcing the Commission's decision in *Consolidated Electric & Gas Co.*, 55 F. Supp. 211, 215.

Nor can it be urged that the validity of these decisions was in any way affected by the *Otis* decision, since two of the non-premium decisions are there cited with approval (323 U. S. 624, 638), and many non-premium decisions have been rendered by the Commission and the Courts subsequent thereto.

It is a curious and anomalous circumstance that in applying the Commission's new "investment ex the Act" doctrine to require premiums to be paid to the Engineers preferreds the Commission's findings and opinions in the instant case avoided even the slightest reference to the long and deeply-rooted series of decisions discussed above. Granting *arguendo* that the Commission is not bound by the doctrine of *stare decisis* or by its consistent administrative interpretation [26] of the "fair and equitable" standard of Section 11(e) for which over a four-year period it repeatedly asked and unfailingly received full judicial approval, there remained for the Courts below at the very least (even on the basis of the restrictive "review" standard for which petitioners contend) the duty of determining whether the Commission's new "investment value ex the Act" as here applied was compatible with established legal principles and the statutory intent. The Courts' conclusions that this issue must be determined in the negative were, we submit, virtually ineluctable.

Let it be assumed for purposes of the present discussion that, contrary to our firm contention, the liquidation provisions of the Engineers charter are not "controlling" in this liquidation,[27] and indeed that they may even be ignored as completely as the Commission ignored them. The problem of what shall take place when an enterprise is frustrated by governmental action, or by other super-

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[26] We presume that the doctrine of "consistent contemporaneous construction" is invoked only to uphold statutory interpretations by administrative agencies (Cf. *U. S.* v. *American Trucking Associations*, 310 U. S. 534, 549), but not to challenge them.

[27] As is stated more fully in our cross-petition in No. 266 (p. 27, note 31), we continue to maintain that these charter provisions are in fact controlling in respect of the type of final liquidation which both Courts below have found has here taken place; that the pertinent provisions of the Engineers charter are significantly different from those considered in *Otis* and are wholly applicable to this liquidation; that their overriding is not reasonably necessary to the effectuation of the fundamental Congressional objectives in enacting the Statute, and is violative of the Fifth Amendment of the Constitution.

vening events not contemplated by the parties, had been the subject of searching inquiry and repeated adjudication in the courts for decades prior to passage of the Holding Company Act.[28] The essence of these adjudications has been authoritatively formulated as follows:

> "Since there is no fault on either side, the loss due to impossibility or frustration must lie where it falls. *Neither party can be compelled to pay for the other's disappointed expectations.*"[29] (Emphasis supplied.)

The Commission's new doctrine is the very antithesis of this principle, for it holds that the common stockholders must compensate the senior security holders for the future deprivation of the high dividend rate which the latter have been receiving, even though admittedly this termination is caused wholly and directly by an Act of Congress passed to "effectuate an overriding public policy" (*Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 637). It is not disputed that as of the moment of liquidation the preferred stockholders had received every dollar of dividends at the full rate stipulated in the charter, and that the cash payment of $100 per share returned to such holders the *maximum* amount which they or their predecessors had paid into the enterprise.[30] But it is contended (and the Commission

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[28] See 6 *Williston on Contracts* (Revised Edition, 1938), Section 1938 *et seq.*

[29] American Law Institute, *Restatement of the Law of Contracts*, Section 468 (comment on sub-section 3, p. 887).

More than forty years before enactment of the statute, the doctrine of frustration of the enterprise had been held determinative of the rights of stockholders of a corporation dissolved by compulsion of law (*Lorillard* v. *Clyde*, 142 N. Y. 446); and as has been indicated above, from the time of the earliest cases under the Holding Company Act the Commission and the courts recognized the applicability of this doctrine.

[30] Two of the issues were sold to the public at the time of issuance for $100 per share, and the third at $99.50 per share, although the company actually received on the average something less than $96 per share for all three issues. The $5 series carried the privilege of conversion until 1938 into common stock, a feature which

held) that simply because the preferred stockholders upon reinvestment in allegedly comparable preferred stocks might henceforth receive dividends at a somewhat lower rate based on the then current money rates, the common stockholders must *indemnify* the preferred for the future deprivation of their more desirable dividend rate despite the fact that this deprivation was compelled by the very federal statute which had also decreed liquidation of the entire enterprise and mandatory termination of the investments of all stockholders. Such a contention does not seem to us, any more than it did to the Courts below,[31] to rest on

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obviously had substantial value independently of the preferred (large amounts of this stock were converted into common at an average price of $52 per share in 1928-1929, a period where the common sold as high as $79¾). The $5.50 series (sold to the public at $99.50 per share) carried a warrant giving the holder a "call" on common stock over a 10-year period (District Court Finding No. 22, R. 301a). It is thus evident that in paying approximately $100 the original purchasers of these stocks were paying something *less* than $100 for the stock alone, since the conversion features and warrants had substantial value in their own right.

As to those who purchased subsequent to the initial issue, it is to be noted that the market price of all three issues from date of issuance until virtually the date of retirement ranged between $63-67, *averaged over the entire period* (Commission's opinion, R. 62a-63a). The record establishes that turnover during the period of depressed prices (particularly during the years when the preferreds were selling in the range of $10-$15 per share) was extremely heavy. Over the entire period, the turnover ratio of the $5 series was 335%; of the $5.50 series, 215%; of the $6 series, 195% (see Engineers Exs. 26-28, R. 1391a-1393a).

[31] "The preferred stockholders will receive every dollar which the common contracted to pay them, with the result that the preferred will have gotten back approximately $190 for every $100 which they, or their predecessors, initially invested in the enterprise. *But fairness and equity do not require that the preferred stockholders be paid an additional $3,200,000 for the theoretical future deprivation of their excessive dividend rate* * * *. In short, there is no reason why the preferreds should get additional compensation for the termination of the lucrative dividend rate which the preferreds have received, when the termination results wholly and directly

a foundation which is either legal, equitable or rational in any valid sense.

(2) These deficiencies are all the more apparent when it is considered that the asserted deprivation of the preferreds' "valuable" dividend rate was at best "theoretical", as Judge Leahy stated (note 31, *supra*), and in actual fact wholly *illusory*. For the "investment value ex the Act", determined by the preferreds' witness Badger and adopted by the Commission, not only did not represent values "apart from the Act" (since they depended upon and reflected such vital "Act" factors as the large retained earnings withheld from the common holders to provide for this liquidation required by the statute, as the Courts found,[32]) but neither were they in any legitimate connotation "*investment*" values at all.

Although this Court has cogently warned that "value is a word of many meanings",[33] it is difficult to conceive of a term less apt than that of "investment value" to characterize the results reached by the "valuation" process on

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from frustration of the enterprise by governmental edict" (District Court opinion, R. 291a; emphasis supplied).

Cf. Circuit Court opinion (R. 36):

"Under the plan the common stock is excluded from the holding company enterprise as effectively as are the preferred for the common under the plan will receive participation only in operating companies. *The fact is that the enterprise is at an end both for preferreds and common.* The Commission apparently has disregarded this fact which supplies the substantial differences between the instant case and the United Light & Power Company reorganization" (emphasis supplied).

[32] District Court (R. 306a, 469a-481a), Cf. Circuit Court (R. 37):

"The difficulty with the Commission's position in this connection * * * lies in the fact that while it has attempted to appraise the preferreds (as distinguished from the common) *ex* the Act, its basis for valuation, insofar as it has composed one, lies in factors which have come to existence because of the impact of the Act."

[33] Douglas, J., in *Group of Investors* v. *Milwaukee R. R.*, 318 U. S. 523, 540.

which the Commission here relied. That valuation process established nothing more than the fact that by reason of the unprecedentedly low money rates then prevailing as compared with the relatively high dividend rates which inferior grade holding company preferred stocks (such as Engineers admittedly were) have always necessarily borne, such stocks were momentarily selling at market prices in excess of their par or face amount.[34] Continuance of such market prices for any period in the future would depend predominantly upon the future level of basic money rates and yields for inferior grade preferred stocks of this type. The record of the proceedings before the Commission establishes that time and again witnesses emphasized that the then prevailing money rates primarily reflected artificial factors such as the Government's "pegging operations" which were subject to drastic revision at any time and ultimate abandonment; that the current stock market prices stood at post-war "boom" levels which could not be expected to prevail indefinitely, and especially so in the case of inferior grade preferred stocks such as those of Engineers; and that the future course of earnings of the system if permitted to remain in existence was fraught with many factors of a potentially adverse character. Finally it was emphasized that whereas developments of a favorable nature could not possibly enhance the "value" of the Engineers preferreds beyond the redemption prices, which imposed an absolute ceiling, unfavorable developments in any one of the elements above discussed would inevitably produce a decline in market price, the extent of which could be very large indeed, as the past history of the

[34] Thus, to the extent that Badger's report considered the investment characteristics of the Engineers preferreds, it showed them to be at best a low "medium grade" holding company preferred. But inasmuch as other inferior grade preferreds were currently selling at prices above par, Badger concluded that the Engineers preferreds would have a comparable market value as of that time (May, 1946). He acknowledged that such prices reflected primarily the unprecedentedly low money rates, which, in his opinion, were "permanent" (R. 1054a-1068a, 1085a-1086a). The sharp changes in money rates and preferred yields commenced shortly thereafter.

Engineers preferreds demonstrated (R. 522a-525a, 661a-674a, 1133a-1140a).[35]

The Commission completely ignored this testimony, and made no finding whatever either as to the future course of earnings or of money rates and yields relative to the Engineers preferreds if permitted to remain outstanding. Scarcely was the ink dry on the Commission's decision when market prices broke sharply, the "pegs" were lowered on Government securities, and interest rates and preferred stock yields commenced the sharp upward climb still in progress, and which has already reduced to below $100 the value the Engineers preferreds would have if outstanding (R. 122). Thus, while insisting that values must be determined "as though in a continuing enterprise" and "apart from the necessity for liquidation", the Commission *actually* valued the preferred stocks merely at the amount of their hypothetical market prices as of an assumed liquidation date. This paradoxical result not only demonstrates how misleading is the term "investment value ex the Act" to characterize the "values" determined for the Engineers preferreds, but also underscores the treacherous nature of the Commission's entire fictional doctrine. For the Commission was necessarily aware that if the Engineers plan related to the mere reorganization of a continuing enterprise, then values must be determined prospectively on a going-concern basis;[36] but although professing to adopt the fiction of a going concern *apart* from the neces-

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[35] As has been indicated, the Engineers preferreds sold as low as $10-$14 per share for all series during the depression years, and as recently as 1942 sold at $40-$47 per share (R. 1391a-1393a).

[36] Cf. *Consolidated Rock Products Co.* v. *Dubois*, 312 U. S. 510, 526; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 565-6; *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 632.

In other decisions the Commission has expressly recognized that values for reorganization purposes must be determined prospectively, and has rejected market values as a criterion. Thus in *Washington Ry. and Electric Co.*, Holding Company Act Release No. 7410 (May 1947), the Commission stated (p. 27): "However, we have never considered market values as determinative of the fairness of a Section 11(e) plan."

sity of liquidation, to the extent that it attempted to determine values (an attempt which was limited solely to the preferred stocks) the Commission contented itself with attempting to determine merely market values as of a particular moment preceding the final and complete liquidation which it recognized was in fact actually taking place.

B. Neither "the strict priority principle" nor the *Otis* decision furnish support for the Commission's rationale in the instant case.

(1) Petitioner's efforts to masquerade the Commission's "investment value ex the Act" doctrine in the guise of the strict priority principle and the *Otis* decision cannot withstand examination. *The strict priority principle is not at issue in this case.* From the outset, Engineers' plan by its very terms provided that the preferred stockholders would receive full payment of their entire claim in cash before the common stockholders would receive any participation. The basic issue at all times was the *amount* of that claim, and the mode of its determination. The Commission's view that the preferred stockholders should receive $3,200,000 in excess of the liquidation claim specified in the corporate charter surely finds no support in the bankruptcy and equity reorganization decisions which have enunciated the strict priority principle, since in such decisions the amount of the priority is invariably determined solely by reference to the contract provisions as embodied in charter or indenture. We are aware of no decisions, and Petitioners have referred to none, where it has been held that senior security holders in equity or bankruptcy reorganizations may validly receive amounts *in excess* of their contract claims.[37] By contrast, numerous are the

[37] Cf. Judge L. Hand, in *Knight* v. *Wertheim & Co.*: "We cannot agree that the debenture holders had as yet any legally protected interest in the property *beyond the principal and accrued interest of their bonds* which could be weighed against the shareholders' interest.

decisions holding that preferred stockholders are not entitled to receive their full liquidation claim where the reorganization takes the form of a merger or consolidation.[38] In *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, this Court, with specific reference to "the devices of merger or consolidation" (p. 637), held that the mere reorganization and simplification of the *continuing* United Light holding company system proposed by the plan there under review would not be permitted to "mature" liquidation preferences merely because such reorganization had "as an incident to it the dissolution of *one company in a holding company system*".[39] To have permitted the preferred holders to demand immediate payment of their liquidation preference of $164 per share would have wiped out completely the common stockholders who concededly had a measurable interest in the continuing holding company enterprise, and would have bestowed a "windfall" on the preferred at the expense of the common.[40] Clearly this decision, which was expressly limited to the "narrow legal point" there involved,[41] furnishes no support for the contention that even

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If in fact they had relied upon sharing in an equity in the property above that amount, it was without warrant of law and constituted no reason for depriving the shareholders of whatever chance might remain of realizing upon their property." 158 F. 2d 838, 843; *cert. den. sub nom. McGuire* v. *Equitable Office Bldg. Corp.*, 331 U. S. 818. (Emphasis supplied.)

[38] Cf. *Chicago Corp.* v. *Munds*, 172 Atl. 452; *Root* v. *York Corp.*, 50 Atl. 2d 52; *American General Corp.* v. *Camp*, 190 Atl. 225, 230. In the decision last named, it was squarely held that premiums were not payable; and in *Matter of Fulton*, 257 N. Y. 487, the New York Court of Appeals reduced to $100 (the par value) the only instance disclosed by our research of an award in excess thereof.

[39] 323 U. S. 637. (Emphasis supplied.)

[40] "Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders. * * * We must assume that Congress intended to exercise its power with the least possible harm to citizens" (323 U. S. 624, 637-8; emphasis supplied).

[41] 323 U. S. 624, 625.

in the case of simplification of a continuing enterprise in which retirement of preferred stocks is held necessary to comply with the Act, the preferred stockholders may demand cash payment not only of *the full matured liquidation claim* but also of substantial additional amounts.

But, above all, the *Otis* decision reflects the determination of this Court and the Courts below (the very ones which also passed on the case at bar) [42] to cut through surface technicalities and pierce to the substantive realities of the question. The very essence of the *Otis* decisions in all three Courts was the refusal to apply *liquidation* standards to a mere *simplification* and *reorganization* of a continuing holding company system.[43]. The Court's recent decision in *Schwabacher* v. *U. S.* was a reaffirmation of that same insistence upon dealing with realities by refusing to hold that matured liquidation claims were the measure of dissenting stockholders' rights in a *continuing* railroad enter-

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[42] Judge Leahy's opinion in the *United Light & Power (Otis)* case is reported at 51 F. Supp. 217, and that of the Circuit Court (per Judge Biggs) at 142 F. 2d 411.

[43] The Commission's brief in this Court in the *Otis* case strongly emphasized that a mere reorganization of a continuing holding company system was there involved, stating (p. 71):

> "Finally, in no realistic sense is there occurring *in this case* a dissolution of a business enterprise which should call for the application of a charter liquidation provision. As the opinion of the majority of the Commission discloses, the preferred and common stockholders of power have been the residual co-owners of a vast public-utility system controlled through Power, the top holding company, and Railways its principal *subholding company subsidiary*. These stockholders will continue to remain the residual owners *of the same public utility system.* * * * *In essence therefore, while Power is being dissolved the enterprise is not.*" (Emphasis supplied.)

Similarly, Professor Dodd, whose article is referred to in the majority opinion of this Court (p. 630) had repeatedly stressed the mere simplification of a continuing holding company system involved in the *United Light* case. Dodd, *Holding Company Act Recapitalizations* (1944), 57 Harv. L. Rev. 295, 308, 313.

prise augmented by merger.[44] Yet here Petitioners seek to rely on these decisions for justification in applying wholly *fictional* (and erroneous, as has been shown) *reorganization* standards to an incontestably authentic and final *liquidation*.

This Court's opinion in the *Otis* case pointed out (323 U. S. 632) that the Commission's findings there had correctly recognized and treated the United Light system as a continuing enterprise, had carefully estimated the system's future earning power, had determined that in approximately fifteen years the preferreds' dividend arrears would be entirely eliminated, and the common holders would thereafter have an interest of $2,858,000 annually in the earnings of the continuing system; and had embodied the respective claims of the preferred and common stockholders, as thus evaluated, in an allocation formula.[45] It is plain on its face that this process could have no valid application to the complete and final liquidation of the entire enterprise, as the Commission recognized in the instant case by not attempting to estimate future earning power or to evaluate the interests of the two classes of stockholders. Yet the Commission now asserts that the *Otis* decision requires the rights of the stockholders to be measured "as though the enterprise continues" *irrespec-*

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[44] "*Since the federal law clearly contemplates merger as a step in continuing the enterprise* it follows that what Michigan law might give these dissenters on *a winding up or liquidation* is irrelevant except insofar as it may be reflected in current values for which they are entitled to an equivalent. It would be inconsistent to allow state law to apply a liquidation basis to what federal law designates as a basis for continued public service" (*Schwabacher* v. *U. S.*, 334 U. S. 182, 200, emphasis supplied).

[45] It can be mathematically demonstrated that if the formula used in the *Otis* case to determine the respective rights of the preferred and common stockholders had been employed by the Commission in the instant case, the Engineers preferred stockholders would have received portfolio securities having a cash value of approximately $75 per share of preferred instead of the $100 cash actually paid to them.

tive of the fact that it does not;[46] and it further asserts that after measuring the rights of the preferred stockholders on this concededly fictional basis it need go no further because the common holders are merely entitled to receive whatever remains, *if anything*.

The cold, grim reality which confronts the common stockholders once the preferred have been generously treated on this fictional basis was recognized by both Courts below. In the instant case the existence of the redemption provision served to limit to $3,200,000 the premiums which the common holders were required to pay to the preferreds on this fictional hypothesis. But if the Engineers' preferreds were non-callable senior securities (such as are not unusual among utility holding companies),

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[46] It may be noted that certain of Petitioners apparently now seek to argue that the Engineers enterprise has not terminated because as an incident to the liquidation common stocks of three operating companies still owned by the holding company were distributed as a liquidating dividend to the Engineers common stockholders (for one of which the common stockholders paid $22,000,000 in cash). But, as this Court has had occasion to emphasize, a holding company is much more than a portfolio of securities: "North American is more than a mere investor in its subsidiaries" (*The North American Co. v. S. E. C.*, 327 U. S. 686, 701). It is axiomatic that the very essence of the holding company enterprise is concentrated control, accompanied by pyramiding and leverage (Cf. *American Power & Light Co. v. S. E. C.*, 329 U. S. 90). The dissolution of Engineers has wiped out all these along with the system, as concurrent findings of both Courts below establish.

Distribution of portfolio assets as a liquidating dividend is, of course, a normal incident of many corporate liquidations, and is in no sense distinguishable from total sale of the assets for cash and distribution of the latter. In fact, sales for cash were made by Engineers of virtually all of its assets other than the stock of these last three companies (as has been stated, the system comprised 17 electric, gas and transportation companies, in addition to holding companies, at the time the Act was passed). The substantial volume of sales on the Stock Exchange since the stocks of the three remaining subsidiaries were distributed establishes that many common stockholders have sold their stocks to obtain cash. Per contra, preferred holders who considered these stocks desirable, have been and are, in a position to purchase them freely on the Stock Exchange with the cash paid to them on retirement of the preferreds.

approximately $5,000,000 would have had to be paid on the basis of Badger's determination. And if a holding company has outstanding, as many do, bonds and several issues of non-callable preferred stocks, it is evident that virtually the entire equity of the common stockholders could be siphoned off in payment of the so-called "investment value" of the senior securities. In this way *little or nothing* might be left for common stocks possessed of substantial intrinsic value on both an asset and earning-power basis which, under all recognized reorganization principles, would ensure them large participations.

As Judge Leahy pointed out, such a doctrine is the *very antithesis* of the basic principle enunciated in the *Otis* decision, that "enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders" (323 U. S. 637).[47] The Circuit Court fully agreed that the Commission's one-sided fictional approach failed to achieve that "equitable" equivalence of the rights surrendered which is of the very essence of the *Otis* decision; but the Court bent over backwards to ensure the Commission virtually *untrammeled latitude* in the choice of techniques, so long as they are employed consistently and in a manner calculated to produce an equitable result.[48]

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[47] "The argument for payment of the premium is comparable to dealing cards off the top of a deck. When full hands (based on theoretical 'investment value') have been dealt to all the senior security holders, the common would merely get whatever happens to remain. Under the Act the interest of all investors must be considered. An emphasis on a preferred's rights must not slight the interests of the common. For if this occurs this is the direct opposite of the arguments utilized in United Light & Power *, * *" (R. 291a).

[48] "The selection of possible though varying techniques is for the Commission in the exercise of its expert administrative judgment. But whatever technique is chosen it must be employed consistently throughout the entire operation of valuation. We do not say the Commission must approach the problem of valuation *intra* the Act or *ex* the Act as the Commission purports to have done in the instant

Surely no Court could have gone further in yielding deference to the principle of administrative discretion, short of complete judicial abdication.

(2) In an effort to deflect attention from the palpable windfall which the Commission's decision bestowed upon the preferred holders at the expense of the common in contravention of the principles of the *Otis* case, Petitioners infer there are countervailing "economic benefits" which the common stockholders derived as the result of the forced retirement of the preferred.[49] The only basis suggested for this contention is a sentence in the Commission's opinion to the effect that "the retirement of the preferred stock will be of immediate benefit to the common stockholders" (R. 69a), a sentence which illuminates further the inconsistencies and paradoxes flowing from the Commission's fictional doctrine. For, examination of the context in which this statement appears makes it incontrovertibly plain that the Commission merely recognized that the impact of Section 11 on Engineers had been so severe, and the degree of governmental frustration of the enterprise so great, that the preferred stock had been transformed *as the result of the Act* into a burden for the common stockholders, instead of the valuable advantage it had formerly constituted and would at present constitute if not for the Act.[50]

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case. Either course consistently followed, could, we think, lead to just and appropriate valuations. No particular specific approach is to be nailed to the Commission's head. The Commission must, however, approach the problem of valuation with a full view of all the pertinent factors employing the same scales and the same measure throughout" (R. 37).

[49] Cf. Commission Petition, pp. 6, 17.

[50] The Commission's own words foreclose argument on this point. It stated (R. 59a):

> "The reduction of the Engineers holding company system from its previous size and diversity to a single operating company necessitates a commensurate contraction of its financial structure. Engineers' outstanding preferred instead of providing valuable leverage for the common, has become a burden."

Even in the face of the sacrifices and partial liquidation imposed on Engineers during the decade following passage of the Act, it would still have been highly advantageous to the common stockholders if they had been permitted to retain their enterprise alive and to continue the preferred stock outstanding.[51] But again the Act intervened to impose upon them the further and final requirement—the complete dissolution of the remainder of the enterprise. Under these circumstances, to refer to the "benefits" conferred by the Act upon the common by reason of the retirement of the preferred stock which the Act alone had transformed from a valuable asset into a burden (as the Commission itself stated) at best partakes of the character of an "exercise in semantics", as Judge Leahy aptly observed. [52]

IV. PETITIONERS' CONTENTIONS THAT THE COURT BELOW REQUIRED LOSSES TO BE "COMPUTED" AND "SHIFTED TO THE PREFERRED STOCKHOLDERS" ARE DEVOID OF MERIT.

Petitioners' contentions that the Commission is required by the opinions of the Court below to "compute" the losses sustained by Engineers in complying with the Commission's divestment orders and to "shift" such losses to the preferred stockholders [53] is a palpable misconstruction of

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[51] Many sound utility operating company stocks can be purchased at a price equal to 8 times current earnings, or equivalent to approximately 12½% on cost. If not for the Act, Engineers' common holders would have been free to retain the capital of the preferred holders without any limitations of time at an overall cost of approximately 5.40%, while realizing some 12½% upon this capital; or in the alternative, the common stockholders had the option of calling the preferred stock and replacing it with preferred carrying an even lower dividend rate (cf. Judge Leahy's finding, R. 311a-312a).

[52] R. 311a; quoted *in extenso* at p. 25 (note 27) of our cross-petition in No. 266.

[53] Commission Petition, p. 19; Streeter Petition, p. 35; Home Insurance Petition, p. 12.

the Court's holding on this subject. Since it was the theory of the Commission that the preferred stockholders were entitled to receive premiums based on valuations "*ex* the Act", it was unquestionably pertinent to point out that for more than ten years there *had been* such an Act, and that the common stockholders had sustained many losses and deprivations in the process of complying with it. No suggestion was made that the preferred stockholders should share these losses and deprivations, but merely that they should not be permitted to impose additional ones by demanding payment of a $3,200,000 bonus on the theory that the existence of the Act and its requirement for complete liquidation should now be ignored.

The record establishes, and the Courts found, that for the common stockholders the Act had been an unblinkable reality indeed. Yet the common stockholders had at all times safeguarded the preferred against the slightest loss, and had met their obligations to the preferred meticulously and promptly, except for a short period of dividend arrears, which was quickly thereafter compensated. In consequence, the preferred stockholders have been paid every dollar promised to them, and have received in the aggregate approximately $190 for every $100 (or less) which they or their predecessors invested in the enterprise.[54] But when it was contended that "fairness and equity" require that the contract limitations be disregarded and that the preferred stockholders be paid an additional $3,200,000 for the theoretical *future* deprivation of their lucrative dividend rate, surely it was relevant on the basis of every equitable consideration for courts of equity to insist that some consideration also be given *at this stage* to the deprivations of the common. When courts are urged to

[54] R. 303a. The common stockholders, on the other hand, after having gone without any dividends continuously for some 16 years, realized in the liquidation an amount barely approximating the average sum actually received by the Company for the common stock, and equal to only 40% of the prices paid by common stockholders who purchased at the market high in pre-depression years (R. 305a).

disregard contractual limitations in order to reach results alleged to be *more equitable*, they can scarcely be asked to function with one eye blindfolded and the other half shut. Only recently Mr. Justice Murphy had occasion to emphasize this principle in the context of a corporate reorganization, stating, "*Equity looks in all directions.* Only in that way can the various interests in the corporate community be adequately protected." [55]

In like manner, courts of equity could not countenance the appropriation for the benefit of the preferred, in valuing them allegedly *ex* the Act, of the more than $24,000,000 of earnings which accrued to the equity of the common stockholders and were left in the enterprise in order to provide for the liquidation compelled by this very Act.[56] These earnings of the common stockholders thus having accrued while Engineers was in effect in *custodia legis*, it would be even less fair and equitable to add them to the "value" of the preferred stocks upon which the common stockholders are then required to pay premiums than was the claim for double interest which was disallowed in *Vanston Bondholder's Committee* v. *Green*, where Mr. Justice Black stated for the Court: "Such a result is not consistent with equitable principles." [57]

Petitioners' arguments that the Commission is required to undertake the onerous task of "computing" losses and "reconstructing the enterprise" rest upon an overly ingenuous interpretation of the Circuit Court's language. The Court did *not* state that such items must be "computed", but merely that they must be "*weighed into the calculation*"; a phrase which, along with the term "bookkeeping", was obviously intended figuratively and not

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[55] *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 238. (Emphasis supplied.)

[56] District Court Findings Nos. 34, 35, 36, 47 (R. 306a, 307a, 312a). Cf. Circuit Court Opinion (R. 37).

[57] 329 U. S. 156, 167.

literally.[58] It is thus evident that the Court had no intention of insisting upon the exact ascertainment and computation of each loss sustained by Engineers, but merely upon giving reasonable consideration to the fact that such losses (without necessity for precise computation) had been sustained. Moreover, the Court emphasized that even this relatively simple task was not mandatory upon the Commission unless it elected to determine values "ex the impact of the Act"; in such event, the Court held,[59] logic and consistency would be violated if the Commission took into consideration in valuing only *the senior securities* "ex the impact of the Act", favorable factors created by the deprivations and sacrifices imposed upon the common stockholders by this very same Act.

It is particularly significant, in the light of Petitioners' plaints as to the legal irrelevance and administrative impracticability of according consideration to such factors as the issue price, past market history and low investment rating of the preferreds that for a period of some five years the Commission's decisions consistently accorded such factors detailed consideration; indeed, they accorded such factors virtually controlling weight.[60] Nor is there room for an argument that these decisions were superseded by the *Otis* decisions, since many of them were issued by the Commission subsequently. Thus, for example, in the *Interstate Power Company* decision, submitted to Judge Leahy for enforcement only a few weeks prior to the *Engineers* plan, the Commission held that owners of *first mortgage 5% bonds* of a public utility operating company were entitled to receive only the par value, *notwithstand-*

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[58] "* * * if the equitable equivalents for relinquished securities are to be arrived at by the Commission under the doctrine of the *Otis & Co.* case, ex the Act, losses of the sort referred to in this paragraph must *be weighed into the calculation*, i.e., such losses should be returned to the credit side of the enterprise's balance sheet as a matter of bookkeeping" (R. 37; emphasis supplied).

[59] See note 48, *supra*.

[60] See the non-premium decisions discussed *supra*, pp. 17-19.

ing that the bonds had been selling at a premium of 3½ points above par, the Commission stating:

> "The bonds were originally sold to the public in 1927, 1928 and 1931 at prices of 97½, 96 and 93 respectively. During most of the years since issuance, the bonds have sold on the market at prices substantially less than par; indeed the bonds never sold as high as par until 1945. In 1937 the bonds sold as low as 32; and as recently as 1940 they sold at a low of 51½. At original issuance and sale of the bonds in 1927, a rating A was assigned them by *Moody's Investors Service,* Standard Statistics rated them B1+. In following years, both ratings were successively lowered to a Moody's rating of B in 1938, and all subsequent years, and a Standard's rating of C1+ in 1940 and all subsequent years." [61]

Yet *the very same factors* pointing to an *even more speculative caliber for the Engineers preferreds* [62] were wholly

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[61] *Interstate Power Company,* Holding Company Act Release No. 7143 (Jan., 1947), approved and enforced 71 F. Supp. 164 (D. C., Del., 1947); cf. also recent decisions in *Republic Service Company,* Holding Company Act Release No. 8170 (April 30, 1948) and *Lehigh Valley Transit Company,* Holding Company Act Release No. 8445 (August 18, 1948), in which the Commission held that payment of par without premiums was fair and equitable to debenture holders, emphasizing their past market history and original issue prices and deeming irrelevant the 9 point premium at which the *Lehigh* bonds had sold in recent years.

[62] Thus, in order to sell the Engineers $5 and $5.50 preferreds in 1928 at prices comparable to those of the Interstate Bonds, it was necessary to attach warrants and conversion rights (since expired) having a substantial independent value. The Interstate Bonds were never in default of interest; the Engineers preferreds were in arrears of dividends over a period of four years, during most of which the dividends were not even earned. The Engineers preferreds sold as low as $10 per share in 1933, as low as $14 per share in 1935; and as recently as 1942 sold as low as $40-$47 per share (R. 1391a-1393a). They never attained par until 1944, when large scale market purchases by Engineers forced them up. Standard & Poor's Investment Service rated them C** at the end of 1944 (the last year in which it rated preferred stocks), which rating was defined as "Preferred stocks with erratic dividend records, and which can be expected to make payments only under favorable conditions" (R. 1844a).

ignored by the Commission in its decision; and Petitioners now seek to contend that the Courts below have imposed upon the Commission a legally irrelevant and administratively onerous task in requiring such factors to be considered.

CONCLUSION

The sharp upward revisions which have taken place in interest rates and preferred stock yields subsequent to the date of the testimony relied upon by the Commission in determining the so-called "investment value" of the Engineers preferred stocks foreclose the possibility that any amounts may be found payable, beyond those already paid, pursuant to the decree of the District Court, even if Petitioners were to be upheld in their contentions that the Commission's rationale was valid and the holdings of the Court below were wrong on every issue. However, the Circuit Court's decision was entirely correct on the merits, for all the reasons hereinabove stated, except in requiring the remand to the Commission. By reason of the remand, there is as yet no final determination of basic issues or of the rights of the parties.

The petitions for certiorari should be denied. If, however, the Court concludes otherwise, our cross-petition (No. 266) should also be granted.

Dated: September 20, 1948.

Respectfully submitted,

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APPENDIX

Sections 11(e) and 24(a) of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79a et seq. provide as follows:

"SECTION 11(e): In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

"SECTION 24(a): Any person or party aggrieved by an order issued by the Commission under this title may

obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the Court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

NOS. 226, 227, 243

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE COMPANY AND TRADESMAN'S NATIONAL BANK AND TRUST COMPANY,

Petitioners,

v.

CENTRAL ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM,

Respondents.

MEMORANDUM OF RESPONDENTS LUCILLE WHITE AND FRANCES BOEHM IN OPPOSITION TO THE APPELLANTS' PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Opinions Below

The opinion and judgment of the court below (R. 12) and the opinion denying petitions and cross-petitions for rehearing (R. 138) are reported at 168 F. 2nd 722. The opinion of the District Court is reported at 71 F. Supp. 797 (R. 283a). The findings and opinions of the Commission dated December 4, 1946, and January 8, 1947, have not yet been officially reported but are set forth in the Commission's Holding Company Act Release Nos. 7041 (R. 25a) and 7119 (R. 128a).

Questions Presented

1. In connection with the final liquidation of a holding company compelled by the Public Utility Holding Company Act, was the District Court under Section 11(e) of the Act required to approve as "fair and equitable" mandatory payment by the common stockholders to the preferred stockholders of $3,200,000 in excess of the latter's charter and book claim on the ground that the alleged theoretical market value of the preferred stocks at the time when certain so-called "expert" testimony was given concerning such value "absent the Holding Company Act" was the correct and sole criterion for measuring the claims of such stockholders?

2. Was the District Court, in performing its affirmative and independent duty to consider and find whether a proposed plan which has been approved by the Securities and Exchange Commission is fair and equitable, required to accept as conclusive of the rights of all security holders in a final liquidation a finding by the Commission of the "value" of the preferred stocks based merely on their alleged hypothetical market value as of the time of the giving of the aforesaid testimony "apart from the impact of liquidation under Section 11", or was the District Court justified in finding on the basis of the undisputed evidence in the record before the Commission that $100 per share plus accrued dividends was the equitable equivalent of the rights surrendered by the preferred stockholders?

3. Did the Circuit Court of Appeals properly affirm the determination of the District Court in its finding that the payment of $3,200,000 to the preferred stockholders in excess of the latter's charter and book claim was not "fair and equitable"; and that the alleged "investment value" of the preferred stock "absent the Act" was not the sole test in determining the equitable equivalent of the rights surrendered by the preferred stockholders?

Statement

Prior to the adoption of the Public Utility Holding Company Act of 1935, Engineers owned and controlled approximately fifteen electric, gas and transportation companies operating throughout the United States. The Securities and Exchange Commission ordered Engineers to dispose of all its properties except the common stock of one subsidiary, Virginia Electric and Power Company.

Engineers filed a plan under Section 11(e) of the Act proposing the complete and final liquidation of Engineers and the entire holding company system. In its opinion with respect to the plan, the Commission made the following formal finding:

> "We find that the presence of Engineers would unduly complicate the structure of the system and that it would, therefore, come within the prohibition of Section 11(b)(2). Accordingly, we find that the proposal to dissolve Engineers is 'necessary' to effectuate the provisions of Section 11(b) of the Act."[1]

Notwithstanding this square finding that the liquidation was compelled by the Statute, the Commission required the plan to be amended to provide for payment to the preferred holders of the full amount to which they would have been entitled under the Charter on a *voluntary* redemption or *voluntary* liquidation.[2] The Commission rea-

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[1] R. 48a. Chairman Caffrey, in his separate concurring opinion stated: "Engineers 'voluntary' proposal did no more than forestall the necessity for action by the Commission. * * * It is the operation of Section 11 and not mere managerial discretion that has brought about the liquidation" (R. 139a, 140a).

[2] That is, $105 per share plus accrued dividends for the $5 series and $110 per share for the $5.50 and $6.00 series. These amounts aggregate $3,200,000 in excess of the $100 per share to which the preferred stockholders are entitled in liquidation (whether whole or partial) which is not "voluntary" (See Charter, R. 1412a).

soned that the Charter provisions should be disregarded, and that the preferred holders must be paid the price at which their stock would sell on the market "ex the impact of the Act", or as though the company were not required to liquidate or dissolve.

The Commission in its opinion referred to the "value" of the preferred stock computed on the foregoing basis as the "investment value" or "fair investment value",[3] terms which are quite misleading. The Commission then went on to say that this "investment value" was not challenged, and that it was in fact "conceded" by the witnesses for the company.[4] Appellants in their briefs in this Court have similarly reiterated time and again that the values accepted by the Commission were "undisputed". Such statements draw a heavy veil over large and significant portions of the evidence contained in the record. The company witnesses did indeed agree that in the boom market then current, the preferred stocks of Engineers would probably have sold close to their redemption prices if the company were not required by Section 11 to complete its liquidation and to dissolve.

Under such circumstances, these witnesses asserted, Engineers would have taken advantage of the extraordinarily low money rates to call and redeem the preferred stocks, replacing them with others carrying a much lower dividend rate with substantial resulting benefit to the common stockholders. *But the forced liquidation of Engineers rendered such action impossible.* Moreover, they testified, on the basis of intrinsic investment qualities the Engineers preferred stocks could by no means be said to have a "fair value" equal to the redemption prices because they were essentially speculative securities which would decline sharply as soon as current "boom" economic conditions

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[3] Commission Opinion, R. 67a.

[4] *Ibid.*

fell off. In substantiation of these views, the witnesses pointed to the past market history of these preferred stocks, and they discussed in considerable detail potential adverse economic factors which cast a dark cloud over the future of the stocks if they remained outstanding for any substantial length of time.[3]

No indication of this extensive testimony and evidence is even suggested by the Commission in its Opinion or by appellants in their briefs. The assumption by the Commission and the other appellants, therefore, that the "going concern" value of the preferred stock was at least equal to the redemption price of the stock is wholly unjustified.

When the plan was presented to the District Court for enforcement, the objecting common stockholders contended that on the basis of the foregoing factors, as well as on the basis of applicable legal principles, the Commission was not justified in requiring the common stockholders to pay to the preferred any amounts in excess of $100 per share plus accrued dividends. The legal questions before the District Court were threefold: (1) whether the charter liquidation provisions limiting the preferred holders to $100 per share plus dividends in the event of a liquidation "not voluntary" could be overridden; (2) whether, even if the charter liquidation provisions were not controlling, the long line of decisions consistently holding that amounts in excess of par value were not to be paid on senior securities retired under the impact of the Statute, were now to be reversed; (3) whether, in any event, the theoretical market value at which such senior securities might have sold at the time of liquidation, assuming that liquidation had not taken place, was the sole and conclusive criterion to be employed in measuring the claims of the senior security holders, with the junior equity holders simply taking whatever happened to remain.

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[3] R. 522a-525a.

The District Court concluded that even if the charter liquidation provisions were not controlling, the preferred holders were not entitled to receive amounts in excess of $100 per share plus dividends on the basis of the same legal and equitable principles which had consistently led the courts for years to deny call premiums on senior securities retired pursuant to the statutory mandate. In those cases too it had been contended by the affected security holders that if they were not entitled to "premiums" as such, they should receive amounts "measured by the premiums" to compensate them for relinquishing securities bearing a dividend or interest rate in excess of the current "going rate", but the Commission and the Courts had consistently rejected such contention on the ground that the retirement was dictated by an Act of Congress over which the company and its stockholders had no control.

The District Court found no legal support for the view that the theoretical price at which the senior securities might sell had the enterprise continued, must be accepted as the controlling criterion; and it found that adoption of such a standard would be neither realistic nor equitable in its application to the final and complete liquidation of the enterprise which was here taking place. However, the Court envisaged that there might be cases in which valid equitable considerations would justify payment to preferred stockholders of amounts in excess of the par value of their securities. The District Court, as a court of equity, therefore carefully examined the record to ascertain whether any such factors were present, and concluded:

> "No special facts or circumstances in connection with the issuance of the preferred stocks or their subsequent history, or the relationships of the preferred and common stockholders, create any equitable

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Conclusions of Law 3-8, R. 316a-317a.

considerations warranting the payment to the preferred holders of amounts in excess of $100 per share plus accrued dividends; and careful examination of all the relevant facts impels the conclusion that payment to the preferred stockholders of such excess amounts would not be warranted or justified."[1]

The Circuit Court of Appeals, after an exhaustive and thorough analysis of the Public Utility Holding Company Act and its legislative history, held that "the district court must function as an equity reorganization tribunal with the powers and functions of such a court, and not as a mere review court" (R. 30). The Court rejected the contentions of the Commission that unless the conclusions of the Commission lack rational or statutory foundation they may not be disturbed by the Section 11(e) court, or that the District Court may not reverse the Commission's decision save where the Commission has plainly abused its discretion (R. 34). The Circuit Court held that the findings and conclusions of the Commission are not binding upon the District Judge though, as was proper, he should treat them with respect. (R. 34).

The Circuit Court found that the Commission ascribed "investment value" to the preferreds but failed to make a similar approach to the common (R. 34) and that in applying the "investment value" test to the preferreds, it has misunderstood the principle of "equitable equivalents" enunciated by the Supreme Court in the *Otis & Co.* case in that investment value is and can only be one of a series of factors to be used in arriving at equitable equivalents (R. 38). The Circuit Court stated that "the new doctrine of investment value presently urged by the Com-

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[1] Conclusions of Law No. 7, R. 316a-317a. Cf. also Opinion, R. 292a.

mission may not be substituted for the doctrine of equitable equivalents enunciated in the *Otis & Co.* decision" (R. 38) and held that the District Judge did not err when he found that the plan submitted by the Commission was unfair and inequitable (R. 39).

The Circuit Court found that the District Court erred in only one particular, *viz.*, in not remanding the record to the Commission for further and appropriate action (R. 39). The Circuit Court vacated the decree and remanded the cause with the direction to enter an order disapproving the plan as not being fair and equitable within the purview of Section 11(e) of the Act and to return the record to the Commission to the end that it may take such action as the facts and the law may require (R. 40).

Reasons for Denying the Writ

The decision of the Circuit Court of Appeals in this case is not in conflict with the case of *Otis & Co. v. S. E. C.*, 323 U. S. 624, nor with the proper application of that decision to the facts in this case.[8] No practical difficulties or administrative burdens have been created by the decision of the Court below. On the record in this case, the District Court and the Circuit Court of Appeals were justified in ruling that the plan approved by the Commission was not "fair and equitable," and that portion of the Circuit Court's opinion concerning the division of functions between the Commission and District Court is supported by legislative and judicial authority and is not in conflict with other circuit courts.

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[8] Although respondents contend that the decision of the Circuit Court in this case is not in conflict with the *Otis* case, respondents have maintained and will maintain, if certiorari is granted, that the charter provisions in this case are controlling and that the overriding of these charter provisions is a violation of the Fifth Amendment.

In contending that the plan, as approved by it, is fair and equitable, the Commission asserts that it has applied the doctrine of equitable equivalents as enunciated by the Supreme Court in the *Otis* case. Having determined that the theoretical market value or "investment value" of the preferred stocks was at least equal to the call price, the Commission proceeded to the erroneous conclusion that the call price was the equitable equivalent of the rights surrendered by the preferred stockholders, and that whatever is left is the equitable equivalent of the rights surrendered by the common stockholders.

This error is apparent throughout the argument of the Commission. For example on page 16 of its petition, Counsel for the Commission said:

> "Thus, as the court below recognized, the problem was simply to determine just recompense (in cash) for the security which he (the preferred stockholder) would give up (R. 38). To the Commission, this meant giving to the preferred stockholder in cash the current value of his stock as ascertained from undisputed evidence."

A brief analysis makes the fallacy of the Commission's position most apparent. Having determined the so-called "investment value" of the preferred stock, it has loosely applied the language of this Court in the *Otis* case to argue that it has followed the reasoning of this Court. The *Otis* case, however, did not establish the principle that the "investment value" of a stock was necessarily its equitable equivalent.

In the *Otis* case, this Court at page 633 said:

> "We reach the conclusion that the Securities and Exchange Commission applied the correct rule of law

as to the rights of the stockholders inter sese. That is to say, when the Commission proceeds in the simplification of a holding company system; the rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place."

The Commission has erroneously interpreted this to mean that value on the basis of a going concern means "investment value". In the *Otis* case, the Commission estimated the future earning power of the system and apportioned such earning powers between the preferred and common stockholders based on their respective claims to income. In Engineers, the Commission has completely failed to apply the same standards and techniques employed by it, and approved by it in the *Otis* case.

This failure on the part of the Commission and the novelty of its new "investment value" technique were so apparent as to cause the Circuit Court to remark (R. 37):

> "In conclusion upon this point we state that in our opinion the Commission in attempting to apply the 'investment value' test to the Engineer"s preferreds, even to the limited extent hereinbefore indicated, has misunderstood the principle of 'equitable equivalents' enunciated by the Supreme Court in the *Otis & Co.* case."

And again (R. 38):

> "The new doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equitable equivalents enunciated in the *Otis & Co.* decision."

The Commission in its petition (pp. 14 and 16) has unjustifiably stated that its finding of investment value or

current market value was based upon "undisputed evidence." This finding by the Commission, however; was almost exclusively based upon the testimony of one Badger whose "study" entirely omitted any consideration of the future earning power of Engineers and its subsidiaries. Furthermore, an examination of the findings of fact by Judge Leahy[9] concerning the testimony of Badger discloses not only that the statement of "undisputed value" is without factual foundation, but also that on the factual record in this case, there is no basis for a finding that the investment value of the preferred stock exceeds $100 per share.[10]

The paramount question in both the *Otis* case and the Engineers is what is the full compensation to be paid to the preferred stockholders. It is that question which the Commission has studiously avoided by insisting that it has applied the doctrine of strict priorities. Not until this question has been determined does the question of strict, full or absolute priorities apply under the Holding Company Act. If the equitable equivalent of the rights surrendered by the preferred stockholders is at least equal to the call price, as the Commission maintains, then payment of the call price to the preferred stockholders before any payment is made to the common stockholders satisfies the doctrine of full priority. But if the equitable equivalent of the rights surrendered by the preferred stockholders does not exceed $100 per share, as found by the District Court and the Circuit Court of Appeals, then payment of $100 per share to the preferred stockholders

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[9] R. 310a-315a.

[10] R. 38. "We conceive that the Commission could make a finding under certain circumstances that investment value was the equitable equivalent to the security holder. The Commission in the instant case, however, has not made such a finding and *we do not believe that such a finding could be supported on the present record.*" (Italics supplied.)

before any payment is made to the common stockholders satisfies the doctrine of full priority."

What the Commission has done was to substitute so-called "investment value" for "equitable equivalents". Had the Commission evaluated "investment value" as merely one factor and taken into consideration *all* of the factors necessary to be weighed to arrive at "equitable equivalents" it would have come to the same inescapable conclusion arrived at by the courts below, *viz.* that the "value" of the preferred stocks did not exceed $100 per share.[12]

The Commission further argues that the decision of the Court below requires the Commission to reconstitute the entire history of the Company since 1935 and would make the task of administering the Act one of constantly increasing difficulty. This argument is a misinterpretation of the decision of the Circuit Court; for no such task has been imposed upon the Commission.

All that the District Court and the Circuit Court of Appeals intended to hold, as is apparent from a reading of their opinions, was that the substantial sacrifices which the Engineers and its common stockholders had been required to make in order to comply with the determination of the Commission to divest themselves of subsidiaries which they would otherwise have held, should have been taken into consideration in determining the fairness of giving to the preferred stockholders their call premium,

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[11] Note statement of the Commission in its brief to the Circuit Court of Appeals (p. 16):

"Having found that the preferred stocks had a value equal to their call prices, the Commission *then* applied the doctrine of full priority which this Court and the Supreme Court held applicable in the *Otis* case."

[12] See footnote 10, *supra*.

as though Engineers had voluntarily redeemed the preferred stock. As the District Court aptly said (R. 290a) "Further, it is unnecessary to decide whether these values (as testified by Badger) would more than offset the other factors previously considered and consequently justify the payment of a premium, for in this case this factor is neutralized and rendered impotent by several other considerations. What the plan overlooks is that this is not a one-way argument but a two-way argument. The necessity and impact of the plan which makes the preferreds give up this present enhanced value also works to the detriment of the common. In order to comply with the divestment orders, many of the assets of Engineers were sold for less than the carrying value on Engineers' books, and many of such securities thus disposed of subsequently increased in market value or capitalized earning power greatly in excess of the amounts realized by Engineers upon their sale." The Court of Appeals (R. 38) said, "In determining equitable equivalents the Commission must weigh all pertinent factors to the end that the security holder may receive as nearly as may be the equivalent of that which he is giving up. All pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached by the approach ex the Act, or the approach intra the Act. The new doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equitable equivalents enunciated in the *Otis & Co.* decision."

It is quite clear from the above extracts of the opinions of the District Court and the Circuit Court of Appeals, that the only burden which the Courts below intended to impose on the Commission, was the obligation to take into consideration the substantial losses suffered by the common stock in the compliance by Engineers with the orders of the Commission. There was no intention on

the part of the Courts below to impose on the Commission the duty to reconstitute the financial history of Engineers for a period of years and to demonstrate with mathematical accuracy the exact impact upon each class of stock of the losses sustained as a result of the divestiture orders.

It is interesting to note that in no other case has the problem of evaluating the equitable rights of the preferred and common stocks of a public utility holding company created a serious problem or insuperable burden for the Commission. If any problem has been created in this case, it is due solely to the novel theory of "investment value" now introduced for the first time by the Commission. And in introducing this new theory, the Commission has run into conflict not only with its own past decisions and the decisions of the Courts,[13] but finds, for the first time in its history, that both a District Court and a Circuit Court of Appeals have refused to accept as "fair and equitable" a plan approved by the Commission.

II

The Commission concedes that a Section 11(e) district court has the affirmative and independent duty to consider and find whether a proposed plan is fair and equitable (p. 22 of its brief). It states:

> "The Commission agrees with much of what the court below states concerning the intention of the

[13] Payment of premiums to senior security holders at the expense of the junior holders held not required in reorganization under Section 11(e) of the Act in the following cases: *New York Trust Co. v. S. E. C.*, 131 F. 2d 274 (C. C. A. 2, 1942), cert. den. 318 U. S. 786, rehearing den. 319 U. S. 781; *City National Bank & Trust Co. v. S. E. C.*, 134 F. 2d 65 (C. C. A. 7, 1943); *Massachusetts Mutual Life Insurance Co. v. S. E. C.*, 151 F. 2d 424 (C. C. A. 8, 1945), cert. den. 327 U. S. 796; *In Re Standard Gas & Electric Co.*, 151 F. 2d, 326 (C. C. A. 3, 1945).

Congress to have the Section 11(e) court function as an independent check upon the Commission's determination that a plan is fair and equitable and also that the respective roles of Commission and enforcement court should be in general similar to the relationship under Section 77 of the Bankruptcy Act between the Interstate Commerce Commission and the reorganization court. Thus, even in uncontested proceedings the Commission has consistently taken the position that the district court must be satisfied affirmatively that the plan is 'fair and equitable'."

The Commission, however, takes issue with the Circuit Court's holding that the Section 11(e) district court is not limited in its role as is a circuit court of appeals under Section 24 of the Act. The Commission states (Petition p. 21): "* * * The court below recognized that its conception of the function of the district court was in conflict with decisions of the First and Eighth Circuits in *Lahti* v. *New England Power Ass'n*, 160 F. 2d 845, 858, and *Massachusetts Mutual Life Co.* v. *S. E. C.*, 151 F. 2nd 424, 430, respectively."

In this connection, however, the Circuit Court merely said (R. 31): "That there are decided cases which *look* the other way and these are entitled to great consideration." It is perfectly apparent that neither of these cases is in actual conflict with the opinion of the Circuit Court in this case. In both the Lahti case and the Massachusetts Mutual case, *supra*, the plan had been approved by the Commission *and by the District Court*. Under these special circumstances, the review by the Circuit Court is completely different from the review by the Circuit Court in the Engineer's case where it must consider the function of the District Court *vis-a-vis* the Commission. In the Lahti and Massachusetts cases the Circuit Court was acting only as a review court and was bound by the findings of fact of both the District Court and the Commission. In

the instant case the District Court was not merely a review court but was charged by Congress, as the Commission admits, with the obligation to act "as an independent check upon the Commission's determination that a plan is fair and equitable".

It is significant that the Commission, which now urges this Court to determine the scope of the powers vested in the district court by Section 11(e) as a matter of prime importance, had practically eliminated this issue in the Circuit Court of Appeals in its petition for rehearing (p. 36) when it said:

> "We have believed and still believe that there has been no real problem in adjusting the complementary roles of the Commission and the courts so long as both apply the same consistent and determinable legal standards of fairness and equity on the same record."

The stress of appellant's arguments concerning the substantial evidence rule is based upon that portion of Section 24(a) of the Act which provides:

> "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

Appellants seek to read this portion into Section 11(e) of the Act and to have it apply to the independent examination which the district court is required by Congress to make to satisfy itself as to the fairness of a plan which the Commission itself admits Congress intended "as an independent check upon the Commission's determination that a plan is fair and equitable (Petition, p. 22). But if a district court were not permitted to inquire into the facts upon which the Commission based its determination, how could it make an "independent check" or be "satisfied affirmatively" that the plan is fair and

equitable? This the Commission does not attempt to explain.

It should be pointed out, moreover, that there is no dispute involved in this case concerning the facts. The question always has been, and still is, on the facts in the record, what are the conclusions to be drawn from those facts? It was as to those conclusions that the District Court disagreed from the Commission, as it had a right and duty to do. The District Court's decision and findings, and the affirmance thereof by the Circuit Court, in no instance contravened any finding of fact of the Commission. They merely reached different conclusions as to the equitable and legal principles applicable with respect thereto, as has been recognized by the Commission.[14]

All references by appellants to the power of the District Court to receive evidence "aliunde the record",[15] are of course dicta, since no evidence was actually received by the District Court in this case, and this point is entitled to no consideration on [illegible] petition.

Conclusion

No confusion or uncertainty exists or has been created by the decision of the Circuit Court of Appeals concerning the functions of the Commission and the District Court in the enforcement of a Section 11(e) proceeding. The Circuit Court properly rejected the "investment value"

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[14] Reply Brief of Commission in the Circuit Court of Appeals (p. 23):

"Thus, the only basis for the rejection by the District Court of the plan as approved was its disagreement with the Commission's conclusion that fairness and equity requires that the cash received by the preferred stockholders be measured by the current value of the interests surrendered. We believe that that disagreement is upon an issue of law which this Court should determine."

[15] Petition of Thomas W. Streeter, et al., p. 23.

theory of the preferred stock as the sole criterion for determining its equitable equivalent.

The petitions for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit should be denied.

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Nos. 266, 226

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 266

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON

v.

SECURITIES AND EXCHANGE COMMISSION,
THOMAS W. STREETER, et al.,
THE HOME INSURANCE CO., et al.

No. 226

SECURITIES AND EXCHANGE COMMISSION

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, et al.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY MEMORANDUM FOR CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON.

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Nos. 266, 226

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REPLY MEMORANDUM FOR CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON

The Memorandum for the Securities and Exchange Commission dated October, 1948, does not oppose the granting

of our cross-petition, but takes issue with various contentions set forth therein and in our brief in opposition in Nos. 226, 227, and 243. We address ourselves briefly to certain of the Commission's arguments.

1. The Commission's Memorandum does not deny, nor could it, that the Commission's determination of the "value" of the Engineers' preferreds was based upon market prices and preferred stock yields as of the period March-May, 1946. It also concedes, as it must, an "admitted change" in market conditions since that time (Commission Memo., p. 6). But it characterizes as a "gross exaggeration" our statements that the Engineers' preferreds if still outstanding would have a present market value of not more than $90-$95 per share. It then goes on to state that the computations of the authors of the Memorandum "show an average yield at the present time of 4.82% for the securities used by Badger as a basis of his comparisons and now outstanding", as compared with the 4.6% yield estimated by Badger and accepted by the Commission. It is thus suggested that the total increase which has taken place in the yields of preferred stocks comparable with those of Engineers is somewhat less than 5%,[1] and that the Engineers' preferreds would therefore still have a market value in excess of $100 per share.

The utter incredibility of this contention is easily demonstrated. It will be noted that no documentation whatever is offered in support of these alleged "computations". In contrast, the authoritative data on which we relied for our statements as to the present value of the Engineers' preferreds is presented in clear and full detail (R. 122-3). The figures therein set forth are not subject to hypothesis or argument, for they are of such irrefutable and official char-

[1] An increase from the yield of 4.6% used by Badger to the 4.82% yield now suggested in the Commission's memorandum would represent an increase of approximately 4.8%.

acter that courts will unhesitatingly make them the subject of judicial notice.[2] The Federal Reserve Bulletin is used to establish the changes in public utility common stock prices and in bond yields, and Standard & Poor's "Trade & Securities Manual" the changes in preferred stock yields. These authorities attest that yields of "high grade" preferred stocks had increased from an average of 3.42% as of the period of Badger's testimony, to 4.12% as of the period of our petition for reargument in the Circuit Court, or an increase of approximately 21% (R. 122). This increase applied to the 4.6% yield basis claimed by Badger for the Engineers' preferreds, incontrovertibly establishes a 5.56% yield basis *at best* for the Engineers' preferreds and thus a market value of less than $100 per share (R. 122).[3]

The Commission's Memorandum (note 2, p. 7) points out that these figures are as of March, 1948, as though to suggest that they are not valid at the present time. In fact, the latest figures are even more conclusive. Standard & Poor's "Trade & Securities Manual" for September, 1948, shows that "high grade" preferred stock yields further increased from 4.12% as of March to 4.20% as of September, 1948.[4] Thus, the increase of 21% as of March has now increased to 22.8%, establishing a current yield basis for the Engineers' preferreds of not less than 5.65% as compared

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[2] See, for example, the extent to which this Court relied upon similar official sources in *Insurance Group* v. *The Denver & Rio Grande W. R. Co.*, 329 U. S. 607, 616-619.

[3] Since the weighted average of the dividend rate on all three series of the Engineers' preferreds was slightly under 5.40% (R. 122), a yield basis in excess thereof would necessarily mean that the stocks would have a current market value of less than $100 per share. Badger had predicated his conclusion, which the Commission adopted, that the Engineers' preferreds had a value of more than $100 per share upon his opinion that they would sell on a yield basis of *less* than 5.40% (viz., 4.6%) if the Act had not required their retirement.

[4] Standard & Poor's Trade & Securities, Current Statistics Section, September, 1948, p. 27.

with the 5.56% for the earlier month. Moreover, since the Engineers' preferreds were not "high grade" preferreds but at very best "medium grade", as the Commission's Memorandum concedes (p. 6), it is axiomatic that the extent of the increase in their case must be even greater.[5] Yet, in the face of these facts, Commission Counsel in their Memorandum offer the Court the bald assertion that their own undisclosed "computations" show an increase of *less than 5%* from the 4.6% yield basis assumed by Badger and the Commission.[6]

2. We submit that these contentions of Commission Counsel serve only to strengthen our argument that review of these causes by this Court at the present time is not appropriate,[7] when important factual questions remain to be determined which may well (and we assert assuredly *will*) render the legal issues wholly academic. Commission Counsel argue in reply that their own computations establish to *their* satisfaction that the case has not yet become academic. But a factual question of this importance is not one which at this stage should turn upon bare assertions of Counsel. If the change in the value of the Engineers' preferreds is in fact less than 5% as Commission

[5] Cf. District Court Finding No. 52 (314a): "The increase in yields on low to medium grade preferreds must necessarily be even greater than the increase on high grade preferreds and high grade bonds."

[6] Not only did Badger repeatedly and emphatically affirm the *permanence* for future years of these "values" which he attributed to the Engineers' preferreds and of the then current money rates on which they were predicated (R. 2066a, 1019a, 1085a), but the *only* possibility of change which he envisaged was the possibility of the money rates and yields going *even lower* (R. 1085a-1086a). Similarly, in adopting Badger's conclusions, the Commission neither envisaged nor allowed for the possibility of any increase whatever in money rates or preferred stock yields over those current at the time of Badger's testimony.

[7] See pages 3-7 of our brief in opposition in Nos. 226, 227 and 243.

Counsel contend rather than upwards of 20% as we have urged on the basis of official records, the Court is entitled to a determination by the Commission to that effect before embarking upon the task of reviewing extensive legal issues which authoritative figures strongly indicate have become devoid of all significance. Unsupported assertions by Counsel are scarcely an adequate substitute for the expert finding which the Commission itself is entitled to make only on the record after notice and hearing.[8]

This is particularly true in the light of the crucial bearing of the changed values which are here being disputed upon the Commission's entire case. For these changes do not go to factors which are merely tangential to the legal issues involved in this case, and which may appropriately be determined subsequent to the Court's decision on the legal issues. These values go to the *very heart of the Commission's case,* and are wholly apart from the basic fallacies in the Commission's entire *rationale* pointed out by the Courts below. If we, rather than Commission Counsel, are correct in our version of the changes, the Commission's "investment value ex the Act" doctrine is stone dead of natural causes; *and this Court in now undertaking to pass upon the legal validity of that doctrine will be performing merely a post-mortem autopsy.*

3. Although the Commission argued before the District Court and the Circuit Court that there was no necessity for a remand to the Commission, Commission Counsel now assert that "we see no escape from the requirement of a remand to the Commission" (Commission Memo., p. 4). If that contention is valid, it renders denial of the petitions

[8] As we have previously pointed out (p. 5, note 4 of our brief in opposition in Nos. 226, 227, 243), the Commission itself has already formally found in another case, after consideration of the record, that preferred stock "investment values" determined as of precisely the same period as the determination of those of Engineers, have subsequently been *substantially adversely affected.*

for the writ at the present time *all the more appropriate*, in order to permit determination of the factual questions which will definitively establish that the legal issues are moot. Cf. *Republic Natural Gas Co.* v. *State of Oklahoma*, 334 U. S. 62.

Dated, October 11, 1948.

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Nos. 226, 227, 243, 266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 226, 227, 243

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE COMPANY, et al.,
Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, et al.

No. 266

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE CO., et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, RESPONDENTS-PETITIONERS

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Nos. 226, 227, 243, 266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 226, 227, 243

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE COMPANY, et al.,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, et al.

No. 266

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE CO., et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, RESPONDENTS-PETITIONERS

Opinions Below

The opinion and judgment of the Court below (R. 12) and the opinion denying petitions and cross-petitions for

rehearings (R. 138) are reported at 168 F. 2d 722. The opinion of the District Court is reported at 71 F. Supp. 797 (R. 283a), but its detailed Findings of Fact and Conclusions of Law (R. 293a-317a) are not reported. The Findings and Opinions of the Securities and Exchange Commission dated December 4, 1946 and January 8, 1947, have not yet been officially reported, but are set forth in the Commission's Holding Company Act Releases Nos. 7041 (R. 25a) and 7119 (R. 128a).

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit (R. 41) was entered March 19, 1948, and its order denying petitions and cross-petitions for rehearing (R. 140) was entered June 11, 1948. Petitions and cross petitions for writs of certiorari were filed on August 16 (Nos. 226 and 227), August 24 (No. 243) and September 8, 1948 (No. 266), and granted October 25, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Acts of February 13, 1925, and June 25, 1948 (28 U. S. C. 1254), made applicable by Section 25 of the Public Utility Holding Company Act of 1935 ("the Act"), 49 Stat. 803 (15 U. S. C. Sec. 79a et seq.).

Statute Involved

The provisions of Section 11(e) of the Act, the statutory provision directly applicable here, are set forth in Appendix A, *infra*, pp. 159-165, together with the pertinent provisions of other sections of the Act referred to in this brief.

Questions Presented

1. Whether the "fair and equitable" standard contained in Section 11(e) of the Act authorized the Securities and Exchange Commission to award senior security holders premiums in contravention of applicable charter provisions and constitutional limitations, when under the compulsion of the Act the holding company enterprise was finally terminated and the senior security holders were paid out in cash.

2. Whether, assuming that the charter provisions were not applicable, the "fair and equitable" standard contained in Section 11(e) of the Act authorized such premiums in violation of settled legal principles repeatedly held applicable by the Commission and the Courts.

3. Whether, if the Act is found to authorize the payment to preferred stockholders, in appropriate circumstances, of sums representing the "equitable equivalent of rights surrendered", such "equitable equivalents" can be determined by appraising the "investment value" of the preferred stocks on the basis of transient market prices, and without regard to the correlative "investment value" of the common stock.

4. Whether the District Court was authorized under Section 11(e) of the Act to determine, and properly determined in this case, not only that the Securities and Exchange Commission erred in measuring the "equitable equivalents" which the preferred stockholders claim to be entitled to receive in exchange for the rights they surrendered, but that on any possible proper measure of those "equitable equivalents" on this record, $100 per share is the maximum to which the preferred stockholders are entitled.

Statement

Introductory

In essence, this litigation involves a dispute concerning the disposition of a fund of approximately $3,200,000 (plus $400,000 interest) paid into a bank in escrow by Engineers Public Service Company ("Engineers") pursuant to arrangements consummated during the proceedings before the United States District Court for the District of Delaware. The proceedings in the District Court related to a plan for the dissolution of Engineers pursuant to Section 11(e) of the Act, which dissolution has now been substantially carried out. The ultimate question at issue is whether this fund should be paid over to the former holders of the preferred stock of Engineers or should remain in the residual assets of the Company, to be distributed among the common stockholders. The Securities and Exchange Commission in effect held for the preferred stockholders; the District Court, while approving and enforcing the remainder of the plan, held for the common stockholders on this point. Upon appeal by the Commission and two groups of preferred stockholders,[1] the Court of Appeals for the Third

[1] In the District Court the Commission acts primarily as the statutory agent of the company in applying to such court for approval and enforcement of the company's plan, since Section 11(e) provides that the Commission may make such an application *only* upon the request of the company. The refusal of the company to appeal from the District Court's order therefore raised a question as to whether the Commission's statutory agency had not been revoked, and as to its right to assume the role of appellant. However, respondents advised the Court of Appeals that they did not press this question since they recognized that the issues were of importance in the administration of the Act and the Court would doubtless wish to be informed of the Commission's views.

Circuit agreed with the conclusion of the District Court that the disapproved portion of the plan was unfair and inequitable, but held that the proceedings should be remanded to the Commission. The appellants in the Court below petitioned for writs of certiorari with respect to the Court of Appeals' determination that the disapproved portion of the plan was unfair and inequitable, and this Court granted the writs (Nos. 226, 227, 243). Certain holders of common stock of Engineers who were appellees in the Court below (herein referred to as "Respondents") petitioned for a writ with respect to the Court of Appeals' requirement for the remand of the proceedings to the Commission, which petition the Court also granted (No. 266). This petition was supported by another group of common stockholders, sometimes referred to as the "Boehm-White Group".

Respondents Central-Illinois Securities Corporation and C. A. Johnson, on whose behalf this brief is submitted, are the owners of 5,000 and 1,000 shares of Engineers common stock, respectively.[1] They advised the Commission of their objections to the proposal to pay the preferred stockholders the amounts here in dispute as soon as the proposal was made (R. 2148a), and they appeared in the District Court and participated throughout the proceedings therein and the subsequent appeal, in their own behalf and in a representative capacity on behalf of all other common stockholders of Engineers (R. 153a).

[1] Central-Illinois Securities Corporation, a Delaware corporation, is a publicly owned investment company registered under the Investment Company Act of 1940. It has 200,000 shares of preferred and 309,202 shares of common stock outstanding, owned by more than 2,100 stockholders residing throughout the United States.

The Plan and Necessity Therefor

The plan filed with the Commission by Engineers in September, 1945, was submitted in order to effect final compliance with a series of mandatory orders previously issued against Engineers by the Commission under Section 11(b) of the Act. These orders required Engineers to divest itself of one after another of its subsidiaries until only one, Virginia Electric and Power Company, should remain.[1] In addition, Engineers was formally warned by the Commission that unless it filed a "comprehensive plan" for complete compliance with these Section 11(b)(1) orders as well as for "readjusting its capital structure" to conform with the standards of Section 11(b)(2), it faced the likelihood of mandatory enforcement action by the Commission under Section 11(d) of the Act.[2]

The cumulative net effect of these Section 11(b)(1) orders, when taken in combination with the provisions of Section 11(b)(2) as interpreted by the Commission in

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[1] These orders are reported in the published decisions of the Commission as follows: *Engineers Public Service Co.*, 9 S. E. C. 764 (1941); 10 S. E. C. 904 (1941); 12 S. E. C. 41, 268 (1942). The United States Court of Appeals for the District of Columbia, on Engineers' petition for review, in part affirmed and in part reversed certain of the Commission's orders (*Engineers Public Service Co.* v. *S. E. C.*, 138 F. 2d 936 [App. D. C. 1943]). This Court in 1944 granted certiorari (322 U. S. 723, 1944), but the death of Chief Justice Stone apparently left the Court without a quorum and unable to issue a decision. The case was dismissed as moot by order of this Court (332 U. S. 788) pursuant to stipulation and joint motion of counsel entered into following entry of the decree of the District Court in the instant case approving and enforcing Engineers' plan, except as to the premium payments.

[2] *The Western Public Service Company et al.*, 12 S. E. C. 804, 808 (Feb. 15, 1943).

a series of decisions upheld by the Courts, was to require the complete and final dissolution of Engineers and its entire holding company system.[1] The plan submitted by Engineers accordingly proposed that Engineers and the remaining portion of its system would be wholly liquidated and dissolved.

As of the time the plan was submitted, the Engineers' system had been reduced to only three operating companies in the course of Engineers' compliance with various of the Commission's divestment orders, as compared with the 17 electric, gas and other utility and non-utility companies which had comprised Engineers' system at the time of the enactment of the Public Utility Holding Company Act.[2] The three remaining subsidiaries were Virginia Electric and Power Company ("Virginia"), Gulf States Utilities Company ("Gulf States") and El Paso Electric Company ("El Paso"), in all of which Engineers owned merely the common stock.[3] The Commis-

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[1] Engineers as a holding company having only a single subsidiary would be devoid of economic and functional utility—or, in the Commission's parlance, "an economic monstrosity" (R. 47a). The Commission has repeatedly held that such a holding company is offensive to the standards of Section 11(b)(2), and must be dissolved. See, *National Power & Light Co.*, 9 S. E. C. 978; *North American Light & Power Co.*, 10 S. E. C. 924, discussed in *City National Bank and Trust Co. of Chicago* v. *S. E. C.*, 134 F. 2d 65 (C. C. A. 7); *Standard Power & Light Corp.*, 11 S. E. C. 689; *American Power & Light Company*, 11 S. E. C. 1146, aff'd 141 F. 2d 606 (C. C. A. 1st) and 329 U. S. 90. Cf. *Northern New England Company*, Holding Company Act Release No. 8401 (1948) at p. 6.

[2] Engineers Ex. No. 37-C, p. 67, R. 1478a. Of these seventeen companies, nine were direct subsidiaries of Engineers, and eight were indirect subsidiaries.

[3] The common stocks of these operating companies represented only 20-30% of the total capitalization of each company. All three companies have large amounts of bonds and preferred stocks outstanding with the general public.

sion's outstanding Section 11(b)(1) orders expressly required divestment of the stocks of both Gulf States and El Paso.

Engineers' capital structure consisted of common stock and preferred stock, the latter all having a stated book value of $100 per share (increased in 1938 from $96 per share, R. 301a) but being divided into three series carrying different dividend rates ($5, $3.50 and $6), and all being entitled in the event of liquidation, dissolution, winding up or any "reduction of its capital stock, resulting in any distribution of its assets to its stockholders" to $100 per share plus accrued dividends in preference to any payments to the holders of the common stock. However, if such liquidating acts were "voluntary", the preferred holders would, in addition, be entitled to the redemption premiums of each series (i.e., $5 per share for the $5 series, and $10 for the others). Under the provisions of the charter, the preferred stocks were callable at any time at the option of the company upon payment of these redemption amounts, and the company had the right at any time to repurchase shares of its preferred stock at prices "not exceeding" the redemption prices.[1]

Engineers' plan, so far as here material, provided in substance: (1) that the common stockholders of Engineers should initially pay $22,000,000 in cash into Engi-

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[1] The pertinent provisions of the charter (Engineers Ex. 33, R. 1403a *et seq.*) are set forth in Appendix B, *infra*, pp. 166-7. It is to be observed that the charter expressly provided that in the event of liquidation, dissolution, winding up, etc., upon payment of the amounts stated above, the holders of the preferred stock "shall be entitled to no further participation in such distribution", and that the holders of the the common stock "shall be entitled to receive, *pro rata*, all of the remaining assets of this corporation available for distribution to its stockholders" after paying or making provision for the aforesaid amounts payable to the holders of the preferred stock.

neers' treasury;[1] (2) that this money plus treasury cash on hand (representing the proceeds of other property sales and retained earnings), supplemented by a short-term bank loan, would be used to effect the retirement of all the preferred stock of Engineers at $100 per share, plus dividends, to the date of payment; (3) that promptly thereafter, the common stocks of El Paso and Virginia would be distributed among the 13,000 common stock holders of Engineers[2] as a final liquidating dividend; and thereupon Engineers, as well as the system's service company "Epsco", would be dissolved.

Commission Decision

In its Findings and Opinion issued December 5, 1940, the Commission found that the dissolution of Engineers was an involuntary dissolution made necessary by the mandatory provisions of Section 11 of the Act, stating:

> "We find that the presence of Engineers would unduly complicate the structure of the system and

[1] This was to be accomplished by the issuance to the common stockholders of warrants entitling such stockholders to purchase one share of Gulf States common stock at $14.50 per share, for each share of Engineers common owned. In effect, therefore, this constituted a special assessment on the common stockholders for the privilege of receiving one of their company's assets in liquidation. If the stockholder did not exercise the warrant he would forfeit his *pro rata* share of the Gulf States stock thus distributed. He might, however, realize a small amount if he sold the warrant.

[2] There are 1,999,968 shares of Engineers common stock outstanding, of which the largest single holder of record owns approximately 90,643 shares (Engineers Ex. 43; R. 1769a). The record establishes that this block of stock is actually beneficially owned by a substantial number of separate individual owners (R. 561a-570a). It may further be noted that this same record stockholder was also among the largest owners of all three series of preferred stocks (Engineers Exs. 40, 41, 42, R. 1762a, 1763a, 1767a).

that it would, therefore, come within the prohibition of Section 11(b)(2). Accordingly, we find that the proposal to dissolve Engineers is 'necessary' to effectuate the provisions of Section 11(b) of the Act" (R. 48a).

The Commission further found that the Act required the dissolution to be carried out forthwith, and disapproved one feature of the plan which would tend to delay somewhat the final step in liquidation.[1]

Despite its finding that the dissolution of Engineers and its system was not voluntary, the Commission held that the company must pay the preferred stockholders the redemption premiums which the charter provided were payable only in the event of a voluntary liquidation or redemption. The Commission refused to approve the plan until the company amended it to provide for the payment of such premiums (R. 84a-85a). These premiums totalled $3,204,795 in excess of the amounts specified by the charter as payable to the preferred holders in the event of liquidation, dissolution, winding-up or "reduction of * * * [the corporation's] capital stock, resulting in any distribution of its assets to its stockholders."

In reaching this result, which was directly contrary to a long line of Commission and Court decisions,[2] the Commission's initial postulate was that *Otis & Co. v. S. E. C.*, 323 U. S. 624, established the proposition that

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[1] "We have found that the continued existence of Engineers would unduly complicate the system. The Act requires that unnecessary entities be eliminated 'as soon as practicable'. Under these circumstances, the desire of stockholders to withhold income and thereby realize capital gains cannot justify ignoring the plain dictates of the Act" (R. 59a).

[2] See p. 55, note 3, *infra*.

charter liquidation provisions were not controlling in any liquidations under the Holding Company Act, but were merely one factor to be taken into account (R. 61a-62a). It thereupon disregarded these charter provisions entirely.

The amount which the preferred stockholders must receive, the Commission held, was "the investment value of their stock on a going-concern basis", and as though no liquidation were taking place (R. 67a-68a). The Commission noted that two witnesses (Badger, a witness on behalf of certain preferred holders, and Barnes, president of Engineers) had testified that on a "going-concern basis" and "if there were no Holding Company Act, or if the Act were to be repealed today" (R. 67a) they believed Engineers' preferred stocks would sell on the market at or about their redemption prices and would probably be called and redeemed by the company.[1] The Commission thereupon stated that it was "apparent", and "not seriously challenged", that "the preferred has an investment value at least equal to the respective redemption prices", and it held that this was the amount they must be paid (R. 67a-68a).

No mention was made by the Commission of Barnes' repeated and emphatic testimony that such "values" largely reflected the inflated stock market prices current

[1] Barnes, one of the two witnesses referred to, pointed out that "if there were no Holding Company Act, or if the Act were to be repealed today" so that Engineers were not compelled to liquidate, it would, of course, take advantage of the current low money rates to replace its outstanding preferred stock with preferred stock carrying a much lower dividend rate, thereby benefiting the common stockholders substantially (R. 522a, 663a). The Commission's opinion made no reference to this portion of Barnes' testimony.

at that moment,[1] and could by no means be deemed the "fair value" of the stock for any representative period of time in the light of its poor past record and future uncertainties (R. 522a-526a; 1138a-1140a). Despite the fact that the amounts to which the Commission held the Engineers' preferreds entitled were admittedly the maximum which could be awarded if the stock were the highest grade of "gilt-edge" security, no mention was made by the Commission of Badger's admission that the Engineers' preferreds were not "high grade" but at best "medium grade" (R. 1133a, 1185a); nor of Barnes' testimony that on the basis of the criteria customarily employed by financial analysts they are "closer to a low-grade preferred" (R. 1133a, 1140a); nor of the evidence establishing that during the period the preferreds were outstanding they were accorded by the leading independent analysts an investment rating of only C**,

[1] The testimony of Badger and Barnes was given at various times over the period December 1945 through February 1946, at which time stock market prices (including those of public utilities) stood at the highest point since 1931. Barnes warned "we are in a boom period" (R. 667a) and stressed its temporary nature. The Federal Reserve Bank Index of utility stock prices which stood at 130 in June 1946 subsequently declined to 94 by the end of 1947, indicating an average decline of about 28% (cf. Federal Reserve Bulletins: January 1947, p. 64; January 1948, p. 76).

In a more recent decision, the Commission itself stated concerning "investment values" determined as of this very period:

> "* * * the Commission's findings were issued in May of 1946 *in what has since proven to be the peak of the post-war market.* The market has declined substantially from the highs reached at that time and there has been a material firming of interest and preferred yields. It is apparent that insofar as investment value is derived from an analysis of the current yields of comparable securities, *the investment value of American's preferred has been substantially affected in the interim*" (*United Light and Railways Co.-American Light & Traction Co.*, Holding Company Act Release No. 7951, p. 33, Dec. 31, 1947; emphasis supplied).

defined as "Preferred stocks with erratic dividend records which can be expected to make payments only under favorable conditions" (R. 1844a-1845a).[1]

Although the Commission purported to be determining the "investment value" of the preferred stock on a going-concern basis", and "as though no liquidation were taking place", in fact its valuation technique departed sharply from accepted methods of valuation in reorganization proceedings and from that approved by this Court in *Otis v. S. E. C.*, 323 U. S. 624. The Commission made no effort to appraise the value of Engineers' stock, either preferred or common, in long range terms. It did not even attempt the characteristic estimate of the prospective earning power of the system[2] in an effort to establish what each class of security holders was losing by the liquidation of the company. It sought merely to de-

[1] In an earlier portion of its opinion, the Commission did summarize statistically evidence in the record establishing that the preferred stocks had been in arrears of dividends for several years and had sold for considerable periods of time as low as $10-$14 per share for all series, and that the overall market price through the entire period from the time of issuance to the date of the testimony was only $63-$67 per share for all series (R. 62a); but no reference was made to these factors at the point where the Commission discussed the so-called "investment values".

Similarly, although the Commission's computations showed that these preferreds were actually a speculative *junior security* (being junior to 66.2% of the system's capitalization, R. 64a), no allusion to the significance of this factor is to be found anywhere in the opinion; nor is allusion made to the significance of the slim coverage for charges and dividends over the past decade (R. 64a) nor of the fact that for several years continuously charges and dividends had not been fully earned.

These omissions are particularly noteworthy in view of the fact that in the long line of decisions in which the Commission theretofore had refused to approve payment of premiums upon retirement of senior securities, it had repeatedly stressed all of these very factors. (See decisions cited, p. 55, notes 3 and 4, *infra*.)

[2] Cf. *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 526; *Group of Institutional Investors v. Milwaukee R. Co.*, 318 U. S. 523, 565-6.

termine how much should be paid to the preferred stockholders as the "equitable equivalent" of their rights on a "going concern basis", and "apart from the impact of the Act", viewing the preferreds' rights as though they were something absolute, and unrelated to the correlative rights which the common stockholders would have in such a "going-concern".

Moreover, in evaluating the "rights" of the preferred stockholders on this unilateral basis, the Commission merely accepted Badger's estimate of the hypothetical market prices at which the preferred stocks would have sold at the time of his testimony, assuming liquidation were not to take place. But Badger's "expert opinion" as to the theoretical market price of the Engineers' preferred stocks "apart from the impact of the Act", which the Commission adopted, was not based on the intrinsic merit of this stock as an investment, but admittedly upon the unprecedentedly low *money rates* then prevailing. Because of these low money rates Badger contended that Engineer's high dividend preferred stocks would have an enhanced market value, if the Act did not compel their retirement.[1] The Commission's opinion accorded no con-

[1] With respect to the then prevailing money rates (which he employed without modification in "valuing" the Engineers' preferreds) Badger testified "* * * yields on preferred stocks are at the present time the lowest which they have been in the history of our country, or, conversely * * * the prices of such stocks are at the highest levels ever experienced. The permanency of this situation will depend on the permanency of low interest rates" (R. 2065a). Not only did Badger repeatedly and emphatically affirm the "permanence" of these unprecedentedly low money rates on which he predicated the "values" of the Engineers' preferreds (R. 2066a, 1019a, 1085a), *but the only possibility of change which he envisaged was the likelihood of money rates and yields going even lower* (R. 1085a-1086a). Several months from the time this testimony was given money rates and preferred stock yields commenced the sharp upward climb, and preferred stock prices the concomitant decline, which has been in progress ever since (see District Court Finding No. 52, R. 314a, and R. 122, as well as the Commission's own admission quoted *supra*, p. 12, n. 1).

sideration to the instability of those money rates, or to the question of other future developments which might affect the "value" of the preferred stocks, notwithstanding the contentions of the company and Barnes concerning the essentially artificial and transient character of the then current money rates and the various other potentially adverse factors to be taken into account in determining the actual value of those stocks on a "going concern basis".

Further, while allegedly determining values "ex the Act" (apart from the impact of liquidation compelled by the Act), neither the Commission nor Badger made allowance for the many important factors which came into existence directly as the result of this very statutory requirement for liquidation.[1] None of the other drastic impacts of the Act upon the common stockholders received consideration; nor did the Commission attempt to "find" the so-called "investment value" or any other value of the common stock on "a going-concern basis" (apart from the necessity for liquidation) or otherwise.

The District Court's Decision

After consideration of extensive oral argument and briefs by counsel for the Commission and all the other parties, the District Court (to which the Commission had applied pursuant to Section 11(e) for entry of a

[1] For example, no allowance was made for approximately $24,000,000 which had accrued to the equity of the common stockholders of Engineers and which had been withheld from them largely because of the necessity of providing *for this very liquidation* imposed upon them by the Act (R. 306a, 468a-471a; 578a; Engineers Ex. 30, R. 1395a). Instead this entire amount (equivalent to 60% of the preferreds' stated value) was credited to the preferred in determining its so-called "investment value *ex* the Act" (R. 306a, 312a).

decree approving and enforcing the plan) held that the provision of the amended plan for the payment of the amounts in excess of $100 per share (the premiums)[1] was not consonant with the "fair and equitable" standard of Section 11(e), but that in all other respects the plan met the statutory requirements. The Court thereupon followed the course strongly urged by the Commission's attorneys,[2] of not remanding the proceedings to the Commission, but instead, of approving and enforcing the plan except as to the premium payments, and requiring the latter to be deposited in an escrow fund approved by the Commission pending review of the District Court's determination. The Commission's opinions had expressly advocated this course (R. 75a, 136a), and its order of February 11, 1948 (R. 165a), had provided formal advance approval for it.

The disagreement of the District Court with the Commission as to the premium payments was basically a disagreement as to applicable legal principles. The Court regarded as erroneous and devoid of judicial support the Commission's thesis that the rights of security holders of a holding company enterprise which is being entirely and definitively liquidated pursuant to governmental edict should be approached on the purely fictional hypothesis that "the enterprise continues", and the claims of the preferred holders (but not the common) measured "on a going-concern basis", and "as though there were no Holding Company Act or as if the Act were to be repealed

[1] Following the issuance of the Commission's opinion of December 4, 1946, refusing to approve Engineers' plan unless amended to provide for payment of the premiums, the company duly amended its plan in the manner required by the Commission (R. 128a).

[2] R. 257a-261a, 281a-282a.

today." (R. 292a, 311a, 315a-316a).[1] The District Court was of the view that this recently evolved "investment value ex the Act" doctrine, as sought to be applied by the Commission in the case at bar, contravened firmly rooted decisions of at least four circuit courts of appeal and many district courts, as well as a long line of decisions of the Commission itself (R. 288a, 292a).[2]

Upon examination of the record which had been filed by the Commission with the Court, the District Judge ascertained a number of factors of which the Commission's opinion gave little or no inkling and which he found strongly corroborative of his view that payment of the premiums to the preferred would result in unfairness and inequity in a "colloquial" sense, as well as in its technical statutory sense; that Badger's "values" were largely "market" values (R. 301a) admittedly dependent upon

[1] It may be noted that the District Judge (Judge Leahy) had been the first court to pass upon and approve the United Light plan, subsequently upheld by this Court in *Otis & Co. v. S. E. C.*, 323 U. S. 624, the decision relied upon in the instant case by the Commission as support for the proposition here rejected by the District Court. Judge Leahy's cogent understanding of the issues involved in the *Otis* case is attested by his decision therein (51 F. Supp. 217, D. Del., 1943). Similarly, Judge Biggs, who wrote the Court of Appeals' opinion in the instant case, was also the author of that Court's opinion in the *Otis* case (*In re Securities and Exchange Commission [Otis & Co.]*, 142 F. 2d 411, C. C. A. 3, 1944).

[2] Decisions cited at p. 55, notes 3 and 4, *infra*. Judge Leahy had himself repeatedly and uniformly upheld the Commission's determination that such premiums were not payable, although envisaging that a contrary view might possibly be justified upon proof of "a different fact situation" (*In re North Continent Utilities Corp.*, 54 F. Supp. 527, D. Del.). As the Court of Appeals had occasion to point out (R. 30, 39) Judge Leahy, commencing with the earliest enforcement cases under the Act and continuously ever since, has had exceptionally specialized experience with Section 11(e) reorganizations, the Commission having applied to him for approval and enforcement of almost 50% of all Section 11(e) plans which have been brought to the courts for enforcement.

continuance of governmental "pegging operations" designed to hold money rates to the artificially low level considered desirable because of the exigencies of governmental war financing (R. 313a-314a); that on the basis of the inherent investment qualities of the stocks, they were admittedly not "high grade" but rather "*medium* medium grade" or "low grade" (R. 311a); that even such inherent value as they possessed was in substantial part due to the more than $24,000,000 of earnings which the common stockholders had left in the enterprise to provide for the liquidation commanded by the Act (R. 306a); that the company had sustained heavy losses and sacrifices in carrying out the Commission's Section 11(b)(1) divestment orders, and that such losses had fallen, and further deprivations incident to the liquidation would necessarily fall, on the common stockholders (R. 307a-308a); that the common stockholders had gone without dividends or return of any kind for 15 years while the preferred stockholders received full payment of their dividends over the entire period, aggregating approximately $90 per share (R. 302a, 306a); that in order to pay the preferred holders their full liquidating claim in cash the common stockholders would be required in connection with the liquidation to contribute an additional $22,000,000 cash, and to "mortgage" the assets distributable in the liquidation by advance payment of dividends (R. 308a-310a); that the common stockholders like the preferred stockholders were forced to relinquish continuance of the holding company enterprise in which they had invested (R. 311a, 312a, 316a).

The Court summed up its conclusions by formally finding that the enterprise in which the preferred and common stockholders of Engineers had invested had been frus-

trated and terminated by governmental action (R. 316a); that there was no valid basis for hypothesizing a "continuing enterprise" or "going concern" (R. 292a, 316a); that the Commission's "investment value ex the Act" doctrine as applied in this case was not only unsound and unrealistic in theory but inequitable and erroneous in application (R. 292a, 316a-317a). It held in the light of its "careful examination of all the relevant factors" that payment to the holders of the preferred stocks of Engineers of any amounts in excess of $100 per share plus accrued dividends would not be warranted or justified; would be unfair and inequitable to the holders of Engineers' common stock; and would contravene the "fair and equitable" standard of Section 11(e) of the Act (R. 317a).[1]

The Decision of the Court of Appeals[2]

The Court of Appeals rejected the Commission's contention that the District Court under Section 11(e) should be deemed a mere review court which must bow to the Commission's conclusions unless they wholly lack "any

[1] The District Judge stated that he found it unnecessary to conclude whether the charter liquidation provisions *per se* foreclosed any amounts in excess of $100 per share plus dividends, because "the conclusion is reached that the preferred stockholders are in any event not entitled to receive any such excess amounts on the basis of all the relevant considerations, even if the charter provision is not itself controlling. Said charter provision, however, if taken into account, constitutes an additional factor supporting the conclusions reached, as above stated" (R. 317a).

[2] Following the entry of the District Court's order, notice of appeal to the Third Circuit Court of Appeals was filed by the Commission and the two groups of preferred stockholders, one of which sought to stay consummation of any portion of the plan. The Commission joined in opposing the stay, which was denied in turn by the Dis-

rational or statutory foundation" (R. 21, 34),[1] and held, after careful analysis of the statute and its legislative history, that a Section 11(e) Court must exercise its independent judgment as to the fairness and equity of a plan (R. 23, 33). It found that the District Judge treated the Commission's findings "as was proper * * * with respect" (R. 34), and commended his "careful and far-reaching examination of the relevant factors" (R. 34). It held that the Commission, in failing to take these important factors into account, had reached an inequitable and erroneous result (R. 38).

With respect to the Commission's attempted reliance on the *Otis* decision, the Court of Appeals agreed with the District Court that the liquidation of the Engineers system was a complete and definitive termination of the enterprise, and thus differed materially from the mere simplification of a continuing holding company system involved in the *Otis* decisions (R. 36).[2] It held that even if it was permissible under these circumstances to measure security holders' rights on the fictional hypothesis of a "going concern" without regard to the liquidation which was in fact taking place under compulsion of the Act (i.e., "ex

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trict Court, the Circuit Court and by Mr. Justice Burton of this Court. Thereupon, the escrow fund was duly established and the other provisions of the plan were consummated, including payment to the preferred stockholders of $100 per share and accrued dividends.

[1] The Court pointed out that the Commission's demand that Section 11(e) courts should be relegated to the position of mere review courts was at sharp variance with the position which the Commission has for many years taken before the courts and before Congress, wherein the independent plenary role of the District Court with respect to 11(e) plans was heavily emphasized (R. 30-31).

[2] As was pointed out, *supra*, (p. 17, n. 1), Judge Biggs wrote the Third Circuit's opinion in the *Otis* case as well as in the case at bar.

the Act"), the so-called "investment value" formula as applied by the Commission in this case to measure only the claims of the preferred holders "ex the Act" failed to produce that "equitable equivalence" for the rights of both classes of security holders which is of the very essence of the *Otis* rationale (R. 38).

The Court of Appeals squarely affirmed the determination of the District Court that the provision of the plan for the payment of the premiums was unfair and inequitable (R. 39, 140). It also found "proper" and upheld the escrow arrangements embodied in the District Court's order (R. 30). Yet, notwithstanding its full approval of the District Court's reasoning and findings, the Court of Appeals concluded that the District Court should have remanded the proceedings to the Commission.

On the question of remand, the Court's reasoning was, in essence, that the disapproval by the District Court of the provision for payment of the premiums effected an "amendment" of the plan which, under the statute, must receive the Commission's approval as well as of that of the Court (R. 39). In addition, the Court of Appeals' opinion suggests that the District Judge engaged in a species of "valuation" in formally finding that payment to the preferred holders of $100 per share plus dividends would be fair and equitable to the preferred and that payment of any additional amounts would contravene the "fair and equitable standard" of Section 11(e), instead of merely holding the premium payments as proposed in the plan unfair and inequitable and remanding the plan to the Commission. Stating that "The problem is and will remain until its disposition by the Commission, one of valuation of the securities of Engineers, viz., the pre-

ferreds and the common" (R. 40), the Court vacated the decree of the District Court[1] and remanded the proceedings to it:

> "with directions to enter an order disapproving the plan as not being fair and equitable within the purview of Section 11(e) of the Public Utility Holding Company Act, and to return the record to the Commission to the end that it may take such action as the facts and the law may require" (R. 40, 41).

Petitions for rehearing were filed by the appellants in the Court below with respect to the Court's affirmance of the determination that the proposed payment of the premiums was unfair and inequitable. Answers thereto and cross-petitions were filed by the appellees (including petitioners) with respect to the requirement for remand to the Commission (R. 97). The Court denied the petitions and cross-petitions, stating in a short opinion its adherence to the views previously enunciated (R. 138).

Specification of Errors

That the Court of Appeals erred:

1. In finding that the District Court, by requiring the premiums to be paid into an escrow fund, had "amended" the plan without the requisite approval of the Commission;

2. In finding that the District Court engaged in a prohibited species of valuation as the result of holding that "fairness and equity" interdicted payment to the

[1] It is clear that the Court intended to vacate only so much of the District Court's decree as related to the premium payments since the remainder of the plan had already been fully consummated.

preferred stockholders of any amounts in excess of $100 per share, rather than merely holding that the plan was unfair and inequitable in proposing to pay the preferred stockholders amounts in excess of $100 per share;

3. In vacating the decree of the District Court instead of affirming it; and

4. In requiring that the proceedings be remanded by the District Court to the Securities and Exchange Commission.

Summary of Argument

I

The term "fair and equitable", as used in Section 11(e) of the Act, is a term of art with a well developed historical meaning. It commands enforcement of the contractual rights and limitations of the security holders. Although it permits transmutation of those rights into equitable equivalents when continuance of the enterprise in reorganized form renders literal compliance with the contract "impossible", it never authorizes aggrandizement of the rights of one class of security holders, or disregard of that class' limitations, for this would necessarily entail invasion of the rights of other classes.

Nothing either said or ruled by this Court in the *Otis* case alters the historical meaning of the term "fair and equitable" and its command for the observance of contract rights. In that case, it was held that the preferred stockholders were accorded their full contractual rights in the form of a carefully measured participation in the earnings of the continuing holding company enterprise.

They were found to have no contractual right to the "acceleration" or "maturing" of their full liquidation claim, since authentic liquidation within the contract contemplation was not occurring. But here the preferred stockholders have claimed, and were allowed by the Commission, $3,200,000 in excess of their full matured liquidation claim despite the fact that the liquidation of the enterprise and the retirement of the preferred stock was squarely within the purview of the charter contract.

Since the plan now being reviewed provided for a complete termination of the enterprise, both of the holding company and of its entire system, and a final distribution in liquidation of the assets to the security holders—as the Courts below found—and since the liquidation was compelled by the Act, and was therefore not "voluntary"—as both the Commission and the Courts below found—it comes squarely within the terms "liquidation, dissolution or winding up" of Engineers' charter as those terms are used in the provision limiting payment to preferred stockholders to $100 per share.

Not only was the liquidation of Engineers an authentic complete dissolution of the entire holding company enterprise as distinguished from the mere "simplification" of a continuing holding company system considered in the *Otis* case, but the Engineers' charter provisions were also significantly different from those involved in *Otis*.

The fact that the Act had not been adopted in 1925, when Engineers' charter was framed, does not detract from the conclusion that it is applicable to this liquidation. At that time legislation to dissolve public utility holding companies was in contemplation, and such proposals were widely known. The specific provision of the Engineers'

charter specifying payment of no more than $100 per share to preferred stockholders if their stock were retired pursuant to a "reduction of its capital stock, resulting in a distribution of its assets to its stockholders", plainly applies to a reduction stemming from the break-up of the "power trusts" contemplated by the Senate at that time.

II

Even if the charter liquidation provisions were deemed not to apply to the liquidation which here occurred, the "fair and equitable" standard embodied in Section 11(e) precludes payment to senior security holders whose securities are being retired by the payment of cash, under the compulsion on the statute, of more than the face amount of their claim. Not only is this the meaning of the term "fair and equitable" in Section 11(e), as construed by the Commission and enforced by the Courts in a long and deeply-rooted series of cases, but the rationale upon which the Commission and the Courts based this interpretation of the statute applies compellingly to the facts of this case.

III

If the "fair and equitable" standard is not construed either to require enforcement of contractual rights or to conform to the manifestly correct prior interpretation thereof given by the Commission and the Courts, pressing constitutional problems are presented. The Commission's claimed power to alter contract rights in this case is neither necessary nor appropriate to accomplish the legitimate congressional purpose in adopting this statute; and the resulting absence of any standards by which to measure the Commission's exercise of its claimed power to alter contractual rights would entail an unconstitutional delegation of power to the Commission.

IV

Assuming that, notwithstanding our previous contentions, the "fair and equitable" standard nevertheless authorized transmutation of the rights of the Engineers' stockholders on a "going-concern basis" into equitable equivalents as was done in *Otis*, the fact is that the determination made by the Commission failed by a wide measure to satisfy such requirements.

In the *Otis* decision the term "investment value" as employed by this Court had reference to the values on a long range basis of both classes of stockholders, predicated upon the relative rights of each class to participate in the prospective earnings of the enterprise. Here the Commission made no attempt to estimate the prospective earnings of the enterprise which it hypothesized as continuing. It accorded no consideration whatever to the correlative rights of both classes of security holders in the theoretical "going-concern". It confined itself to considering solely the "rights" of the preferred stockholders; and although purporting to consider them on a "going-concern" basis, in fact it viewed them as absolutes, wholly unrelated to the correlative rights which the common stockholders had in that going concern.

Moreover, in thus evaluating the "rights" of the preferred stockholders unilaterally, the Commission eschewed normal, long-range values and measured them solely on the basis of market prices of allegedly comparable preferred stocks, as of a specific haphazard moment. At that moment the prices of those preferred stocks avowedly stood "at the highest levels ever experienced". During the years immediately preceding they were sharply lower,

and during the period which has ensued since the valuation testimony was given they have once again dropped to substantially lower levels. They had already commenced their decline and were in the process of further revision before the District Court passed on the plan.

Both Courts below found that the Commission's "investment value ex the Act" doctrine as applied in the instant case utterly failed to produce that "equitable equivalence" for surrendered stockholders' rights which the *Otis* decision commands.

If the Commission had sought to evaluate the rights of the preferred stockholders on any normal long-range basis, whether considered in terms of the past, the future, or both, there was no possible basis for a finding in excess of $100 per share. Moreover, if the rights of both classes of stockholders had been determined on a going-concern basis as was done in *Otis*, it is indisputable that the preferred stockholders would be entitled to considerably less than $100 per share.

V

The "investment value ex the Act" doctrine as here applied by the Commission, involves a dangerous and fundamental perversion of the strict priority principle, which is firmly embedded in the "fair and equitable" standard of Section 11(e).

Applying that doctrine, the Commission held that the preferred stockholders must receive more than their contractual claim in liquidation because their dividend rates were somewhat higher than the then current going rate. It would follow that senior security holders must re-

ceive less than their contract preference if their dividend or interest rate at the date of liquidation is lower than the going rate, irrespective of the fact that more than enough assets are available to pay their contract claim in full. Thus, the holder of a $1,000 bond amply protected by assets but carrying an interest rate of 4% could be required to accept a cash payment of $800 in full satisfaction of his rights if the Commission found that bonds of allegedly comparable quality were at that time selling on a 5% yield basis.

Conversely, this same use of current market prices (for which the term "yield basis" is a synonym) to evaluate the rights of senior security holders when yields on senior securities are low, must necessarily have a drastic impact upon the junior security holders. If a holding company had outstanding (as some do) several issues of nonredeemable senior securities, a Commission order, requiring the common stockholders to pay to the senior security holders the theoretical market prices "apart from the impact of liquidation" and in disregard of prearranged contractual arrangements, might well leave little or nothing for common stocks having substantial values on both an asset and earning power basis.

VI

One of the major fallacies in the Commission's rationale is its implicit assumption that if the preferred stockholders sustained a deprivation by reason of the compulsory retirement of their preferred stock upon payment of $100 per share, the common stockholders necessarily became the beneficiaries of that deprivation. But as this Court has said, "frustration and appropriation are essentially different things."

Even if it were true that "if not for the necessity of liquidation" the market might momentarily have paid a premium for these preferred stocks because they carried dividend rates somewhat higher than the money rates current at the time of Badger's testimony, plainly the common stockholders did not gain these hypothetical premiums when the preferred was retired at par under the compulsion of the Act. Such "premiums" were exclusively a factor of money rates applicable to senior securities such as preferred stocks and bonds. The common stockholders did not receive those preferred stocks which they could reoffer on the market to realize the theoretical premiums. Nor were they or the company permitted to issue any other senior securities so that they might benefit from the retirement of the preferred stocks at a time when money rates were low. Instead, they were required to completely liquidate what remained of the company and the system. And in that dissolution they suffered serious deprivations and losses in addition to those previously sustained.

Indeed, the compulsory retirement of the preferred stock itself constituted a serious deprivation to the common. If not for the Act, the common stockholders would have been free to retain the capital of the preferred without any limitations of time at an overall cost of 5.40%, while realizing some 12% on this capital; or, in the alternative, the common stockholders had the option of calling the preferred stock and replacing it with preferred carrying a lower dividend rate.

This substantial deprivation constituted but one of the many which the common had been forced to bear in carrying out the statutory mandate to liquidate. That liquidation did not commence with the filing of the plan which

was the subject of these proceedings; it merely ended there. The common stockholders had borne the full brunt of the liquidation of the system during the preceding ten years, and had safeguarded the preferred from even the slightest loss or deprivation. The District Court's conclusion that it was not consistent with fairness and equity to require the common to now indemnify the preferred for the "theoretical loss of their disappointed *expectations*" is inescapable under this Court's ruling in *Otis* that "enforcement of an overriding public policy should not have its consequences visited on one class with a corresponding windfall to another".

VII

Even under the narrowest possible construction of the powers of the District Court under Section 11(e) of the Act—the construction contended for by the Commission but overruled by both Courts below—the District Court properly disapproved the plan, since the Commission's approval thereof lacked "rational and statutory foundation" and the Commission had "plainly abused its discretion".

But we submit that, in passing upon a plan presented to it for approval under Section 11(e), the District Court does not sit as a mere "review court" limited to determining whether the Commission's action lacked rational and statutory foundation or whether the Commission plainly abused its discretion. When asked to enter its decree approving and enforcing a plan as "fair and equitable", the District Court sits as a court of equity, clothed with all the powers traditionally exercised by a court of equity, and charged with the duty to decide for itself, independently of the Commission's decision, whether the plan is

fair and equitable. The findings and conclusions of the Commission are entitled to "respect", but they are "not binding" upon the District Court (Biggs, C. J., R. 34). That conclusion is dictated by the plain language of the Act itself; it is reinforced by a consideration of the judicial and legislative context in which the Act was passed; the Commission has repeatedly so construed the Act; and the construction is supported by the existing authorities, including the decisions of both the lower courts in this case.

VIII

The only valid grounds upon which a remand of this case to the Commission can be predicated are either that as a formal matter, even though $100 per share is the most the preferred stockholders may lawfully receive, the Commission must approve the payment of only $100 to them before that portion of the plan can be enforced; or that as a substantive matter, the Commission could, on this record and on a proper rationale, lawfully authorize the payment to the preferred of more than $100 per share. Neither ground is here present.

As a formal matter, the Commission has already given its approval to the payment of only $100 to the preferred should it be decided that this sum is the most they can lawfully receive.

As a substantive matter, $100 per share is the most the preferred stockholders may lawfully receive. This conclusion follows from our contentions that the liquidation which here occurred was within the purview of the liquidation provisions of Engineers charter, and the "fair and equitable" standard requires enforcement of those

charter provisions. It follows also from our contention that even if this is deemed not to have been a liquidation within the purview of the charter, the "fair and equitable" standard precludes payments to senior security holders who are being paid off in cash in the course of a genuine liquidation of more than the face amount of their claims.

Finally, this conclusion also follows from our contentions that, even if under some circumstances the holders of senior securities whose retirement is compelled by the Act may receive the "equitable equivalent" of rights surrendered, the Commission erred in appraising the "equitable equivalents" of the rights here surrendered, and the District Court had the authority to conclude, and properly concluded, that the "equitable equivalents" which the preferred are entitled to receive could not, on this record, exceed $100 per share.

ARGUMENT

PART ONE

IN A GENUINE LIQUIDATION SUCH AS TOOK PLACE HERE, THE "FAIR AND EQUITABLE" STANDARD REQUIRED THAT THE PREFERRED STOCKHOLDERS BE LIMITED TO $100 PER SHARE, PURSUANT TO THE CHARTER PROVISIONS, CONTROLLING PRECEDENTS, AND CONSTITUTIONAL LIMITATIONS.

I. Where a genuine liquidation has taken place, as here, the "fair and equitable" standard of Section 11(e) does not permit payment to stockholders in excess of the amounts authorized by the provisions of the corporate charter specifically applicable to such liquidation.

Both Courts below ruled that the Commission had misconstrued the doctrine of "equitable equivalents" which this Court in *Otis & Co. v. S. E. C.*, 323 U. S. 624, had deemed applicable in measuring the rights of security holders in the particular corporate dissolution there compelled by the Act. The District Court, therefore, did not deem it necessary to pass on the question whether, in contrast to the situation presented in *Otis*, the charter liquidation provisions applied to the liquidation here occurring and should be enforced. It held that the charter liquidation provisions were "but one circumstance looking toward non-payment of premiums" (R. 288a, 317a). The Court of Appeals stated without discussion that, in the light of the *Otis* decision, it considered that the charter liquidation provisions were not "dispositive of the issues presented" (R. 34), although it regarded the liquidation which here took place as significantly different from the one dealt with in *Otis* (R. 36).

Although we are in full accord with the grounds on which both Courts below found the proposed premium payments unfair and inequitable, we urge here, as we did below, that the charter provisions are specifically applicable to this liquidation and must be enforced in deference to the principles of "fairness and equity," and when so applied are dispositive of the issues.

A. The "fair and equitable" standard of Section 11(e) is predicated upon adherence to contractual rights.

If not for the authority which the Commission professes to find in the "fair and equitable" standard of Section 11(e), there could be no question that the distribution of Engineers', assets to its security holders would be required to conform to the mandate of Engineers' charter. The forced dissolution of a corporate enterprise pursuant to an "overriding public policy" has, in no other context, been thought to require any alteration in the applicable charter claims of the security holders on dissolution. Compare *Continental Insurance Co. v. United States*, 259 U. S. 156. The question here, therefore, is whether the "fair and equitable" standard of Section 11(e) authorizes the Commission to alter the applicable charter liquidation rights of one class of security holders at the expense of another when the mandate of the Act requires the termination, rather than merely "simplification" of the holding company enterprise, and the final, rather than intermediate, distribution of its assets to its security holders.

We start with the proposition that the term "fair and equitable" in Section 11(e) of the Act is a term of art embodying the definite concepts which have been evolved for that term in the long history of equity receiverships

and reorganization statutes (*Otis & Co.* v. *S. E. C.*, 324 U. S. 624, 634). Until the *Otis* decision, that history left no doubt that "the touchstone of the 'fair and equitable' standard" was "the recognition of contractual rights" (*Federal Water Service Corp., et al.* 8 S. E. C., 893, 909). The rights of senior and junior security holders alike were held to stem from the contract defining the terms of their joint investment, and "fair and equitable" treatment required those contractual rights to be enforced "strictly" in any reconstitution of the enterprise through "receivership" or "reorganization" (*Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106; *Consolidated Rock Products Company* v. *DuBois*, 312 U. S. 510; cf. *Bailey* v. *Minsch*, 168 F. 2d 635, 637 (C. C. A. 1, 1948) *cert. den.* 69 S. Ct. 83 (1948)).

To be sure, in reorganizations of continuing enterprises —whether solvent or insolvent—the "fair and equitable" standard does not require the payment of cash in satisfaction of security holder claims. (*Case* v. *Los Angeles Lumber Co.*, *supra*, at 117). Such claims may be satisfied by the payment in new securities which are the "equitable equivalent" of the interests being surrendered (*Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 565-566). But the reason for permitting payment in new securities, rather than in the cash required by the literal language of the contract, lies in the fact that the enterprise is continuing; because "practical considerations" might make it "impossible" for the reorganized enterprise to continue if the claims of the senior security holders are paid in cash (*Case* v. *Los Angeles Lumber Co.*, *supra*, at 117), "fairness and equity" authorize the senior security holders to be awarded the "equitable equivalent", in new securities, of their contractual claims.

However, at least in reorganizations, this "equitable equivalent" can never exceed the cash amount of those claims. Compare *Knight* v. *Wertheim & Co.*, 158 F. 2d 838, 843 (C. C. A. 2, 1946), *cert den. sub. nom. McGuire* v. *Equitable Office Bldg. Corp.*, 331 U. S. 818 (1947); *Bailey* v. *Minsch, supra*. And we are not aware of any decisions which even suggest that if, in such reorganizations, security holders are being paid out in cash, they are entitled to payments greater than the amount of their contractual claims applicable to involuntary liquidation or retirement of their security.[1] On the contrary, any such intimation by a litigant has been rejected by the Courts (*Knight* v. *Wertheim & Co., supra; Bailey* v. *Minsch, supra*) and opposed by the Commission.[2]

It is not alone this Court's repeated insistence upon strict enforcement of applicable contractual rights as the core of the "fair and equitable" standard that impels the conclusion that Congress intended applicable charter liqui-

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[1] Indeed, even in appraisal proceedings incident to mergers where it is recognized that it is the voluntary act of the company which causes the retirement of the dissenting preferred stockholders from the enterprise, it has been held that their involuntary liquidation claim is the maximum which they may receive. *Matter of Fulton*, 257 N. Y. 487, 178 N. E. 766; *American General Corporation* v. *Camp*, 190 Atl. 225 (Md., 1937).

[2] Thus in rendering its advisory report to the District Court under Chapter X of the Bankruptcy Act, the Commission stated in *Matter of Childs Company*, Corporate Reorganization Release No. 67 (Sept. 30, 1946), p. 43:

> "The Trustee has taken the position that participation by the preferred stock is to be measured by its liquidation preference. The preferred stockholders are of the view that they are entitled to the investment value of their securities, which they claim is greater than the liquidation preference, primarily because of the non-callable feature of this preferred stock bearing a 7% dividend. We believe that the Trustee's position is sound."

dation provisions to control in authentic liquidations caused by the Act, although it is plain, as this Court indicated in *Otis*, that Congress intended the term "fair and equitable" as employed in Section 11(e) to carry its traditional and settled meaning. The repeated references to *Continental Insurance Company* v. *United States*, 259 U. S. 156, both in the report of the Senate Committee[1] recommending enactment of this statute and the statements of the proponents of the bill,[2] leave no doubt that at least when a genuine liquidation is compelled by the Act, the impact of this statute was intended to be no different from the impact of other legislation compelling corporate dissolution in the interest of an overriding public policy. The terms of the charter, to which junior and senior security holders bound themselves, mark the outer limits of what the senior security holders may receive in cash.

B. The liquidation of Engineers and the retirement of the preferred stocks came squarely within the purview of those provisions of the charter limiting the preferred stockholders to payment of no more than $100 per share.

The provisions of Engineers' corporate charter authorized the payment to the preferred stockholders of only $100 per share plus accrued dividends "in the event of any liquidation, dissolution, or winding-up of this corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders"; provided, however, that if such liquidation, dissolution or winding-up or reduction shall have been "voluntary", the preferred stockholders would also receive certain redemption premiums, before any "distribution of * * * [the corpora-

[1] S. Rep. No. 621 to accompany S. 2796, 74th Cong., 1st Sess., p. 33.

[2] H. R. Rep. 1318, 74th Cong., 1st Sess., pp. 49-50; 79 Cong. Rec. 4607, 8432.

tion's] assets shall be made to the holders of the common stock". The charter further provided explicitly that the preferred stockholders "shall be entitled to no further participation" in the distribution of assets upon liquidation, dissolution or winding-up or reduction of the capital stock accompanied by a distribution of assets, and that "all of the remaining assets of this corporation" are to be distributed to the common stockholders.[1]

In view of the findings of the Commission and both Courts below, there is no question that the liquidation of Engineers embodied in its Section 11(e) plan was dictated by the necessity of complying with Section 11 of the Act, and therefore was not "voluntary" within the meaning of the above charter provisions.[2] Accordingly, the preferred stockholders, having received $100 per share plus accrued dividends, are entitled under the charter to "no further participation in the distribution" of Engineers' assets unless what has taken place is not "a liquidation, dissolution, or winding-up of this corporation or * * * reduction of its capital stock, resulting in any distribution of its assets". Clearly, both in letter and spirit, not merely one of these but all of them have occurred.

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[1] Appendix B, *infra*, pp. 166-7.

[2] Commission opinion, R. 48a (quoted, *supra*, pp. 9-10) District Court conclusions, Nos. 1-2, R. 315a-316a. Court of Appeals opinion, R. 36. The Commission and Courts have consistently held that reorganizations or liquidations such as this pursuant to Section 11(e) are not voluntary, even though formally "the company * * * takes the initiative in a proceeding under § 11(e)" L. Hand, J., *Public Service Commission* v. *S. E. C.*, 166 F. 2d 784, 787 (C. C. A. 2, 1948), cert. den. 334 U. S. 838; *City National Bank & Trust Co.* v. *S. E. C.*, 134 F. 2d 65 (C. C. A. 7); *In re Standard Gas & Electric Co.*, 151 F. 2d 326, 327 (C. C. A. 3), cert. den. 327 U. S. 796; *Cities Service Power & Light Corp.*, Holding Company Act Release No. 4944; *Consolidated Electric & Gas Co.*, Holding Company Act Release No. 4900, approved and enforced 55 Fed. Supp. 211 (D. Del., 1944).

Although the Commission's opinion did not find, or even suggest, that Engineers' dissolution was not a "liquidation, dissolution or winding-up" within the meaning of the charter, in the courts the Commission's counsel have joined the other respondents in intimating that Engineers' dissolution is not really a "liquidation" because, by the distribution of common stocks of the three operating companies to Engineers' common stockholders [1], the "enterprise" continues in fact, albeit in another form.

The answer to this contention is not only that both Courts below found explicitly that the dissolution of Engineers and the distribution of its assets among its security holders is a complete and final liquidation of the entire enterprise—both of the holding company and of the system [2]—but the barest rehearsal of the facts leaves no doubt as to the correctness of these findings. Engineers, an enterprise which had owned, directly and indirectly, and controlled and managed the activities of seventeen electric and gas utility and non-utility subsidiaries operating in fifteen states, has been completely dissolved. All but three of Engineers' subsidiaries have been sold for cash or liquidated in compliance with the Commission's orders, and this cash, together with the stock of the remaining three subsidiaries, has been distributed to the thousands of security holders of Engineers.

Plainly, the vast holding company, as it existed before the Act, was not a mere formal device through which each

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[1] Actually only the stocks of Virginia and El Paso were distributed as a liquidating dividend; the common stock of Gulf States was purchased by the common stockholders by payment of $22,000,000 cash on the exercise of the Gulf States warrants. It will also be recalled that the common stocks of each company represent only a minority of the total capitalization of each company (*supra*, p. 7, n. 3).

[2] R. 316a. R. 36.

shareholder became a *pro rata* beneficial owner of shares of stock in operating companies. If all that was desired was ownership of operating utility common stocks, many excellent ones were freely available for purchase by any investor on the various stock exchanges. The stockholders who purchased shares of Engineers invested in a large holding company enterprise whose very essence was centralized control and management[1] of geographically diversified operating companies under the sponsorship of one of the world's oldest and most famous utility engineering firms;[2] that enterprise carried all the advantages associated with such a holding company: a large and expert central service organization,[3] combined mass purchasing power, favorable access to the best sources of finance, a leveraged capital structure, broad economic and geographic diversity,[4] and other significant economic benefits including tax savings resulting from consolidated tax returns.[5]

Instead of their investment in such an enterprise the security holders of Engineers, as a result of this proceeding, have received cash and/or the common stock of three isolated and unrelated operating utility companies. It requires no elaborate argument to demonstrate that termination of their investment in Engineers is no mere reorganization or formal shifting of an investment in an

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[1] See *North American Co.* v. *S. E. C.*, 327 U. S. 686, 701 (1946); see also Sections 1(b) and 2(a)(7) of the Act.

[2] See, for example, Engineers Exhibits 37-N to 37-P, R. 1650a, 1655a, 1665a.

[3] Engineers Exhibits 37-B, 37-C, R. 1446a-1448a, 1466-1468a.

[4] Engineers Exhibits 37-N, 37-O, 37-P, R. 1648a, 1654a, 1660a; Findings of Fact Nos. 3-6, R. 294a-295a.

[5] See *infra*, p. 96, n. 1.

otherwise continuing enterprise.[1] It is in fact what it is in form—a complete and final liquidation of the enterprise in which the security holders originally invested and a distribution in kind of the assets remaining in that enterprise after a substantial portion of the original assets have been sold for cash.[2] Indeed, if the present dissolution of Engineers is not a complete liquidation of the entire system, it is difficult to envisage what type of dissolution of the company and distribution of its assets—short of a piecemeal sale of the generators and power lines of the subsidiaries—would come within the charter provisions.

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[1] Cf. *In re Westerfield's Estate*, 82 N. Y. Supp. (2d) 766, — Misc. — (1948). See also, Commissioner Healy, dissenting in *United Light-American Light & Traction Co.*, Holding Company Act Release No. 6603 (1946), p. 41.

[2] Any intimation that this final distribution of portfolio assets constituted some sort of artful device for "continuing the enterprise" in the hands of "controlling" common stockholders must be set down as pure fantasy, devoid of any support either in fact, or in the findings of the Commission or the Courts below. Not only were the larger common stockholders also among the largest holders of the preferred (*supra*, p. 9, n. 2), but the fact is that large amounts of the portfolio stocks distributed in the liquidation have been sold by their original recipients and a substantial additional volume of sales is made each day on the New York Stock Exchange. A tabulation from Standard & Poor's Stock Guide establishes that approximately 800,000 shares of Virginia common and 550,000 shares of Gulf States were sold on the New York Stock Exchange subsequent to distribution and prior to November 30, 1948. These shares necessarily represent a portion of those distributed, since none were outstanding prior to the distribution.

Distribution of portfolio assets as a liquidating dividend is, of course, a common incident of many corporate liquidations. In fact, Engineers attempted to sell one of these three remaining assets for cash, but was unsuccessful in its attempt (Engineers Ex. 37-K, R. 1609a). Under the circumstances, it was only logical for the management of Engineers to distribute the remaining stocks pro rata to the stockholders, in the manner provided by the charter, thus avoiding underwriting and selling expenses, and leaving it to each stockholder to decide whether and when to sell his pro rata share in accordance with his own financial needs and judgment (R. 644a).

It does not detract from this conclusion that the Public Utility Holding Company Act had not been enacted in 1925, at the time when Engineers' charter was drafted. In point of fact, it was widely known at that time that legislative efforts were being made to bring about the curtailment and dissolution of the "power trusts" and "power monopoly" represented by public utility holding companies. By 1924 the halls of Congress and the pages of many sections of the public press resounded to almost continuous attacks upon "the power trust" and the "power monopoly" and demands for remedial action against utility holding companies.[1] Under the pressure of a group of "anti-power trust Senators", led by Senators Walsh of Montana and Norris of Nebraska, the United States Senate in December, 1924, launched the first of a series of sweeping congressional investigations of utility holding companies which culminated directly and proximately in the adoption of the Act.[2] These investigations were ac-

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[1] Cf. Bonbright & Means, The Holding Company (1932):

"It was in the field of local public utilities that the holding company has reached its highest stage of development, and *it is in this field also that this corporate device has been subject to the most severe criticisms from spokesmen for the public interest*" (p. 190; emphasis supplied).

[2] See Senate Resolution 329, 68th Cong., 2d Sess.; Senate Resolution 83, 70th Cong., 1st Sess.; see, also, recitals in Section 1(b) of the Act.

During the Congressional debates on the Holding Company Act, Senator Wheeler stated:

"* * * let me call the Senate's attention to the fact that this bill is not something new. It is the outgrowth of an investigation which was started in Congress a great many years ago when my colleague, the late Senator Walsh, one of the greatest lawyers who ever served in this body, started the investigation into the holding companies which was continued before the Federal Trade Commission, where for 6 or 7 or 8 years they have been conducting the investigation" (79 Cong. Rec. 8384; 74th Cong., 1st Sess.).

companied by startling events and disclosures whose reverberations were featured almost continuously in the public press of the time.[1]

It is in the light of these widespread public attacks on the power trusts that the language of Engineers' charter assumes particular significance. The charter expressly contemplates a "reduction of * * * [the corporation's] capital stock, resulting in any distribution of its assets to its stockholders". Whatever else such a provision may embrace, it certainly covers both the distribution of portfolio assets pursuant to the compulsion of the anti-trust or other relevant laws curtailing or dissolving the "power trusts" and the sale of subsidiaries under such legal compulsion and distribution to the stockholders of the cash proceeds of such sales. While those who drafted this clause could not have known of the precise form of curtailment of holding company operations ultimately to be embodied in the Public Utility Holding Company Act, it is plain that the clause does cover all such types of system curtailment or liquidation, even *partial*, by force of law.

It is undisputed that Engineers has, pursuant to explicit orders of the Commission, sold a substantial portion of its assets for cash, and has in these proceedings used that cash to retire its preferred stock under the compelling impact of the statute.[2] Hence, even if it be contended that

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[1] Set forth at the end of this brief as Appendix C, *infra*, pp. 168-175, are a few representative items which appeared in the press of the period. These examples could be multiplied many fold.

[2] See the Commission's admonition to Engineers to reduce its capitalization or face the probability of mandatory action by the Commission under Section 11(d) of the Act, in *The Western Public Service Company*, 12 S. E. C. 804, 808; and the pointed references in the concurring opinion to the "reduction of capital" provision of the charter (pp. 819, 820).

In the light of the Commission's repeatedly announced policies affirmed by the Courts, reduction of the capital of a holding company such as Engineers, whose subsidiaries had large amounts of bonds and preferred stocks outstanding, necessitated the complete

the present proceedings have not produced a complete "liquidation" of the company—a contention itself devoid of all merit—it is nevertheless inescapable that they have produced at least a "reduction of its capital stock, resulting in * * * [a] distribution of its assets to its stockholders". By the explicit terms of the charter such a reduction of capital permits the preferred stockholders to be paid no more than $100 plus accrued dividends.

It is doubtless for these reasons that the Commission did not even intimate, in its opinion, that the existence of Engineers and of its holding company system was not being terminated, or that the enterprise was not being definitively "liquidated". Nor did the Commission, in its opinion, base its conclusion that the preferred stockholders should receive more than $100 per share on any finding that this was not in fact a "liquidation" within the meaning of Engineers' charter. On the contrary, what it said was merely that "the liquidation provisions of the charter" are not "conclusive". Having said that, it proceeded to ignore those provisions completely.[1]

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elimination of the holding company preferred stocks. Cf. *Commonwealth & Southern Corp.*, 9 S. E. C. 609 (1941), aff'd *Commonwealth & Southern Corp.* v. *S. E. C.*, 134 F. 2d 747 (C. C. A. 3); *Central and Southwest Utilities Co.*, 11 S. E. C. 533, aff'd *Central and Southwest Utilities Co.* v. *S. E. C.*, 136 F. 2d 273 (App. D. C.); *Consolidated Electric and Gas Company*, Holding Company Act Release No. 4900 (1944), approved and enforced, 55 F. Supp. 211 (D. Del., 1944); *Cities Service Power & Light Corp.*, Holding Company Act Release No. 4944, p. 15 (1944).

[1] Since the Commission determined the value of the preferreds solely on the basis of Badger's estimate of the price at which they would have sold on the market if their retirement had not been compelled by the Act (*infra*, pp. 74-86), the amount of their charter liquidation claim was accorded not even the slightest weight. Under the Commission's approach, the amount awarded the preferred would have been no different if the liquidation provision of the charter specified $110 per share in all dissolutions (as certain holding company charters do specify), instead of the $100 actually specified here.

C. Nothing either ruled or said by this Court in the *Otis* case alters the command of the "fair and equitable" standard that the contractual relationship be strictly enforced.

Being unable to find that the present liquidation of Engineers is not within the liquidation provisions of its charter, the Commission, in reliance on this Court's decision in the *Otis* case, and perhaps in *Schwabacher* v. *United States*, 334 U. S. 182, claims the power, on the forced liquidation of a solvent corporation or retirement of its senior securities, to award to senior security holders cash amounts in excess of their contractual claims. Respondents submit that the Commission's reliance on these cases for support of such a proposition is grossly misplaced.

The crucial fact, upon which both the Commission's opinion and this Court's decision in *Otis* rests, is that the holding company enterprise continued essentially unchanged, even though the particular corporation there involved was being dissolved pursuant to the mandate of the Act, as an incident to the simplification of the continuing system. As the Commission repeatedly pointed out, both in its opinion [1] and in its brief in this Court,[2]

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[1] See *United Light & Power Company*, 13 S. E. C. 1 (1943).

[2] See Brief of S. E. C., October Term 1944, No. 81, at pp. 78-79:

> "Finally, in no realistic sense is there occurring *in this case* a dissolution of a business enterprise which should call for the application of a charter liquidation preference. As the opinion of the majority of the Commission discloses, the preferred and common stockholders of Power have been the residual co-owners of a vast public-utility system controlled through Power, the top holding company, and Railways its principal *subholding company subsidiary*. These stockholders will continue to remain the residual owners of *the same public utility system* * * *. *In essence, therefore, while Power is being dissolved the enterprise is not*" (emphasis supplied).

Similarly, Professor Dodd, whose article is referred to in the majority opinion of this Court (p. 630) had repeatedly stressed the mere simplification of a continuing holding company system involved in the *United Light* case. Dodd, *Holding Company Act Recapitalizations* (1944), 57 Har. L. Rev. 295, 308, 313.

all that happened there was that the top company in a multi-tiered holding company system was eliminated, and its security holders were given the securities of the second holding company in the continuing system in lieu of their holdings in the top company.

Not only was it thus urged, and found, as a fact [1] that both the holding company enterprise and the participation of the preferred stockholders in it continued, but the doctrine which the Commission evolved and this Court approved in that case to measure how a "fair and equitable" distribution of assets was to be achieved, was predicated upon this continuance of the enterprise in fact. "Equitable equivalence" was computed by estimating the future earnings of the continuing enterprise available for each class of security holders—precisely the valuation technique which the continuance of the enterprise required. Cf. *Consolidated Rock Products Co.* v. *DuBois*, *supra*, at 525-526.

Because, in fact, there was no liquidation, fairness and equity did not require the Commission to enforce the charter liquidation rights of the preferred stockholders; in the absence of an authentic liquidation those rights did not come into play.[2] It would not be "fair and equitable"

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[1] See, e.g., 323 U. S. 628-629, 631-637; 142 F. 2d 411 (C. C. A. 3), 51 F. Supp. 217 (D. C. Del.).

[2] As this Court stated: "There is an argument that if the charter provision applies to this situation it cannot be disregarded and that in such a liquidation 'fair and equitable' would require the distribution of assets only to the preferred. *We do not* reach that question. *The point at issue is whether this charter provision applies*" (323 U. S. 624, 635-636; emphasis supplied).

Apart from the fact that here, unlike *Otis*, a genuine and final termination of the holding company enterprise has occurred, the provisions of Engineers' charter are significantly different from those of the charter involved in the *Otis* case. There is no room here for the argument that the term "involuntary liquidation" employed in cor-

to accelerate or "mature" the liquidation rights of the preferred stockholders at the expense of the common stockholders, since the enterprise and the participation of the preferred therein were to continue and the Commission had expressly found that " * * * the whole future program of corporate simplification and geographic integration of the system * * * will result in an improvement of the investment position of both the preferred and the common stock. That improvement we believe should be shared by the common as well as by the preferred, and the process of securing such improvement in compliance with the Act should not be permitted to destroy existing investment values." [1]

In *Schwabacher* v. *United States*, 334 U. S. 182, as in the *Otis* case, the power of a Commission to transmute preferred stockholders' rights into their "equitable equivalents" was affirmed. But this power was found to exist only because the enterprise which state law would regard as "liquidated" was in fact continuing, augmented

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porate charters as a term of art is limited to bankruptcy or creditor proceedings, or at least to the types of involuntary liquidation which were foreseeable when the term was inserted in the charter. Engineers' charter does not use the term "involuntary liquidation". It prohibits the payment of premiums on "liquidation", unless it is affirmatively shown that the liquidation was "voluntary". In the second place, as we have stated, the type of retirement of preferred stock here occurring, even without reference to the accompanying liquidation of the company, was itself within the contemplation of the liquidation clause which in addition to the provisions for "liquidation", "dissolution" and "winding-up" provided for "any reduction of [the corporation's] capital stock" resulting in any distribution of its assets to its stockholders, a provision wholly absent from the charter contained in *Otis*.

[1] 13 S. E. C. 1, 19 (1943), quoted in the Commission's brief (*supra*, p. 45, n. 2) at p. 20.

by merger, and the preferred stockholders' investment in that enterprise likewise continued.[1]

Above all, the *Otis* decision reflects the determination of this Court and the Courts below (the very ones which also passed on the case at bar) to cut through surface technicalities and pierce to the substantive realities of the question. The very essence of the *Otis* decisions in all three Courts was the refusal to apply liquidation standards to a mere simplification and reorganization of a continuing holding company system. *Schwabacher* v. *U. S.*, supra, was a reaffirmation of that same insistence upon dealing with realities by refusing to hold that matured liquidation claims were the measure of dissenting stockholders' rights in a continuing railroad enterprise augmented by merger. Yet here the Commission seeks to rely on these decisions for justification in applying wholly *fictional* (and erroneous, as will be shown) reorganization standards to an incontestably authentic and final liquidation.

In sharp contrast to *Otis* and *Schwabacher*, this case involved a genuine liquidation and distribution of assets of an entire holding company system and the final termination of the investment which the security holders had made in it. In terms and in fact, therefore, the liquidation provisions of the corporate charter applied to this situation. And here the preferred stockholders were

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[1] "*Since the federal law clearly contemplates merger as a step in continuing the enterprise* it follows that what Michigan law might give these dissenters on a *winding up or liquidation* is irrelevant except insofar as it may be reflected in current values for which they are entitled to an equivalent. It would be inconsistent to allow state law to apply a liquidation basis to what federal law designates as a basis for continued public service" (*Schwabacher* v. *U. S.*, 334 U. S. 182, 200; emphasis supplied).

repaid their full investment entirely in cash, rather than being required to accept new securities representing another form of continuing interest in the holding company system, as were the preferred stockholders in *Otis*.

Since the Act compelled the relinquishment by the preferred stockholders of their interest in an enterprise which was being liquidated, and freed them from the risks of a new enterprise, their rights were to be measured as on liquidation, not as though they remained participants in a continuing enterprise.[1] The abrupt impact upon the stockholders of the "overriding public policy" embodied in the Act may render it appropriate for the Commission to transmute the surrendered claims of senior security holders into their "equitable equivalents" when they are forced by the Act to remain part of a continuing enterprise; but nothing in the Act or its history authorizes, or makes it appropriate for, the Commission to enhance the contractual rights of senior security holders when a genuine liquidation compelled by the Act relieves them of all the risks of the continuing enterprise.[2] In those circumstances

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[1] In plain recognition of the distinction between a senior security holder's continuing interest in a continuing enterprise and his interest when severed from the enterprise by being paid out in cash, Congress, in bankruptcy and reorganization legislation, has provided that senior security holders who are paid off in cash are wholly excluded from voting on the plan of reorganization (Bankruptcy Act, Sec. 77(e); Ch. X, Secs. 179, 222). Because those being severed from the enterprise under the impact of bankruptcy receive in cash the full amount of their retirement or liquidation claim, they are no longer "affected" by the plan under which the enterprise continues, and are not permitted to vote on it.

And the amount of the cash payment is limited to the involuntary liquidation claim or face amount of the security, plus arrears of dividends or interest (cf. *Knight* v. *Wertheim, supra*, p. 36; *The United Light & Power Co.*, 10 S. E. C. 1215, 1225).

[2] Cf. Brief of S. E. C. in *N. Y. Trust Company* v. *S. E. C.*, 131 F. 2d 274 (C. C. A. 2), quoted *infra*, p. 56, n. 1.

"fairness and equity" entitle the senior security holders to no more than is provided for them in the applicable provisions of their charter.[1]

If, as has been stated, the dissolution of Engineers and paying off of its preferred stockholders is claimed not to have been a "liquidation, dissolution or winding-up" of the enterprise (and we submit that it indisputably was), it was beyond cavil at least a "reduction of its capital stock, resulting in * * * [a] distribution of its assets to its stockholders". In either event, what occurred was plainly within the provisions of the charter which limit the preferred stockholders to receiving $100 together "with all dividends accrued or in arrears thereon" and to "no further participation in * * * [the] distribution" of its assets. Under the charter the common stockholders receive "all of the remaining assets". Execution of that charter is the command of fairness and equity.

[1] Indeed, the Commission itself early recognized that the distinction between "liquidation" of the enterprise and of the senior security holders' interest in it, on the one hand, and a mere alteration in the senior security holders' investment in a continuing enterprise, on the other, was embodied in the "fair and equitable" standard of Section 11 of the Act. And the Commission unequivocally asserted that, while because of this distinction it was authorized to transmute into "equitable equivalents" the relinquished prior claims of senior security holders in a going concern in which they were obliged to remain, the "fair and equitable" standard contained no authority for such transmutation in avoidance, if not violation, of contractual liquidation provisions when the enterprise was being liquidated and its preferred stockholders paid off. *Federal Water Service Corp. et al.*, 8 S. E. C. 893, 907-911.

II. Even if Engineers' dissolution pursuant to the Plan under consideration is deemed not to have been within the purview of the charter liquidation provisions, the "fair and equitable" standard, as interpreted in a long series of Commission and Court decisions, precluded the payment to the preferred stockholders of more than $100 per share.

We have contended that because a genuine and final liquidation of Engineers has taken place, the terms of the charter liquidation provisions limit the preferred stockholders to $100 per share plus dividends, and the "fair and equitable" standard requires enforcement of those terms. If, however, notwithstanding this contention it is held that the charter liquidation provisions were not applicable to the instant liquidation, we submit that nevertheless "fairness and equity" interdicted any award to the preferred stockholders of more than $100 per share.

The instant case was not the first in which the Commission was faced with the problem of determining the rights of senior security holders to premium payments upon the forced liquidation of their enterprise or the retirement for cash of their securities, where the contractual provisions were deemed not applicable. When first this question was presented, the Commission concluded that the "fair and equitable" treatment commanded by the Act dictated the application of the established equitable doctrine of frustration—i.e., that frustration of the enterprise by governmental acts or other supervening events not provided for by the parties required "the loss * * * [to] * * * lie where it falls. Neither party can be com-

pelled to pay for the other's disappointed expectations."[1] And, on the other hand, neither party will be permitted to retain moneys paid by the other on account of an executory contract which has been frustrated. This deeply rooted principle, which some forty years before enactment of the Holding Company Act had been held applicable by the courts in determining the rights of stockholders of a corporation dissolved under the compulsion of law,[2] was found by the Commission to be part and parcel of the "fair and equitable" standard of Section 11(e)—in the very liquidation which gave rise to this Court's decision in the *Otis* case. Thereafter this principle has been repeatedly applied by the Commission and by the courts in a long and hitherto unbroken line of decisions.[3]

In the liquidation of United Light & Power Company, the Commission ruled, and was upheld by this Court in the *Otis* decision, that as between the preferred and common stockholders, since both were receiving stock in the continuing enterprise, "fairness and equity" required each to receive the "equitable equivalent" of that which he was being compelled to give up.[4] But the debenture holders, who were being retired from the enterprise by the payment of cash, were held precluded by "fairness and equity" from receiving any added compensation or "equi-

[1] American Law Institute, Restatement of the Law of Contracts, Sec. 468 (Comment on subsection 3, page 887); also see 6 Williston on Contracts (revised ed. 1938), Sec. 1938 et seq.

[2] *Lorillard* v. *Clyde*, 142 N. Y. 456 (1894). In that case the principle was held applicable to a contract in which the junior security holders exercising full control and management of the enterprise specifically guaranteed the future payment of dividends to the senior security holders.

[3] Cases collated, *infra*, p. 55, notes 3 and 4.

[4] *United Light & Power Co.*, 13 S. E. C. 1 (1943).

table equivalent" for the 6% and 6½% claims on future earnings in the form of secure interest payments which they were required to relinquish. However lucrative would have been the return on their investment if permitted to remain outstanding, they were held entitled to receive only the face amount of their securities, which represented theoretically the amount they originally had contributed to the enterprise. In denying the debenture holders' right to receive the premiums to which they were entitled upon voluntary retirement of the debentures before maturity, or added compensation of any kind for the loss of their future high interest payments, the Commission stated:

> "We believe that the obligation to pay a premium was intended to arise only when the company was to continue as a going concern, for the payment thereof is in the nature of compensation payable by the company (i.e., its stockholders) to the debenture holders for depriving the latter of their investment. In a going concern, the stockholders may be deemed to benefit from the elimination or reduction of the debt effected by the redemption, and the premium may be regarded as the prearranged amount payable by them for such benefit.
>
> "But here the company does not continue as a going concern. There is no question of free choice or election. The company by virtue of congressional mandate is to terminate its existence. Power must liquidate not only its debt but also its stock. The rights of debenture holders and stockholders alike to retain their respective investments are cut off." *The United Light & Power Co.*, 10 S. E. C., 1215, 1221 (1942).

The Commission then went on to state (p. 1223):

> "* * * we are impelled to the conclusion that the terms of the debentures and the covering agreements

create no contractual obligation on the part of Power to pay a redemption premium and no right on behalf of the debenture holders to receive such premium. *We further conclude that no such obligation or right exists by virtue of any other recognized legal or equitable principle.*" (Emphasis supplied.)

And in holding that neither legal nor equitable principles entitled the debenture holders to more than the principal amount of their securities, the Commission had squarely before it the contention of the bondholders that, wholly apart from contract rights, they should as a matter of "fairness and equity" receive additional compensation because they were being deprived prematurely of a valuable investment bearing interest rates of 6 and 6½%, rates so lucrative that the debentures had been selling at a premium above par.[1] The Commission disposed of this contention as follows:

"Lastly, counsel for the debenture trustee argues that if the redemption provisions are held inapplicable so that the debentures are treated as being in effect non-callable, some compensation must still be given to the debenture holders for the termination of their investment. The call premium of 9 percent is suggested as *an appropriate measure of such compensation.* It seems to us *a complete answer* to this argument that the termination of the investments of debenture holders and stockholders alike has been brought about by the act of a sovereign power—in this case a congressional mandate. We think the debenture holders have established no right to receive such compensation here at the expense of the

[1] *The United Light & Power Co., supra*, p. 1227, n. 27.

stockholders, whose rights we must also consider." (Emphasis supplied.)[1]

On appeal, the Second Circuit affirmed the Commission's holding and recognized that, at least where contractual provisions were not applicable, the doctrine of frustration of the enterprise was part and parcel of the "fair and equitable" standard (*New York Trust Co.* v. *S. E. C.*).[2] Thereafter, this doctrine was consistently applied by the Commission and the Courts[3] to limit preferred stockholders and bondholders to the face amount of their securities in the numerous cases involving retirements of senior securities of holding companies required to liquidate in whole, or merely *in part*.[4]

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[1] *Id.* at p. 1228.

[2] 131 F. 2d 274 (C. C. A. 2, 1942), *cert. den.* 318 U. S. 786, *rehearing den.*, 319 U. S. 781.

[3] Not less than four different circuit courts of appeal have passed on the question and have uniformly held the frustration doctrine applicable. See, in addition to the decision of the Second Circuit in the *New York Trust* case, the following:

City National Bank & Trust Co. v. *S. E. C.*, 134 F. 2d 65 (C. C. A. 7, 1943); *Massachusetts Mutual Life Insurance Co.* v. *S. E. C.*, 151 F. 2d 424 (C. C. A. 8, 1945), *cert. den.* 327 U. S. 795; *In re Standard Gas & Electric Co.*, 151 F. 2d 326 (C. C. A. 3, 1945), *cert. den.* 327 U. S. 796. Cf. *Bailey* v. *Minsch*, 168 F. 2d 635 (C. C. A. 1, 1948), *cert. den.* 69 S. Ct. —, 1948.

And in the District Courts, see: *In re Laclede Gas Light Co.*, 57 F. Supp. 997 (E. D. Mo., 1944); *In re North Continent Utilities Corp.*, 54 F. Supp. 527 (D. Del., 1944); *In the Matter of Consolidated Electric & Gas Co.*, 55 F. Supp. 211 (D. Del., 1944); *In re Central States Power & Light Corp.*, 58 F. Supp. 877 (D. Del., 1944); *In re Interstate Power Co.*, 71 F. Supp. 164 (D. Del., 1947).

With respect specifically to retirement of preferred stocks without premiums, see *Cities Service Power & Light Co.*, Holding Company Act Release No. 4944; *Georgia Power & Light Co.*, Holding Company Act Release No. 5568; *El Paso Electric Co.*, Holding Company Act Release No. 5490.

[4] Thus, in *Cities Service Company, et al.* (Holding Company Act Release No. 4944 [1944]) the Commission held the doctrine appli-

Apart from its authoritative command as a part of the texture of the "fair and equitable" standard, the doctrine of frustration offers a peculiarly apt solution for the problem created by the forced retirement of senior securities in the liquidation of an enterprise pursuant to the mandate of the Act, when the provisions of the corporate charter are deemed not to cover such a contingency. In the situation in which "the enterprise continues" so that charter liquidation claims do not come into play and the senior security holders' participation is forced also to continue, there may be sound reasons, as this Court pointed out in the *Otis* case (p. 637), for not restricting either the Commission or the parties to one form of change rather than another. And "fairness and equity" may, in such circumstances, require an equitable adjustment in the relationship of the security holders who are forced to continue as partners in a going enterprise.[1]

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cable to retirement of the debentures and preferred stocks of a holding company which had not been ordered to liquidate but merely to divest itself of a portion of its properties pursuant to Section 11(b)(1). The same is true of the retirement of the notes and debentures of *Standard Gas & Electric* (*supra*) and of the senior securities in *Consolidated Electric & Gas Company* (Holding Company Act Release No. 4900 [1944]) approved and enforced: *In the Matter of Consolidated Electric & Gas Co.*, 55 F. Supp. 211 (D. Del., 1944). It also held the same doctrine applicable in the case of at least two operating companies which are necessarily continuing enterprises. *In re Laclede Gas Light Co.*, 57 F. Supp. 997 (E. D. Mo., 1944), aff'd *Massachusetts Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. 2d 424 (C. C. A. 8, 1945); *Interstate Power Company* (Holding Company Act Release No. 7143, 1947), approved and enforced. *In the Matter of Interstate Power Co.*, 71 F. Supp. 164 (D. Del., 1947).

[1] As the Commission pointed out in its brief dated August 15, 1942, in the Second Circuit in *New York Trust Company* v. *Securities & Exchange Commission*, 131 F. 2d 274:

> "Admittedly property rights of innocent security holders should be preserved upon the liquidation of a corporation under * * * [the anti-trust laws] * * * or under the present law. The question is what those rights are. [If] * * * capital funds

But when the final termination of the enterprise, or of the senior security holders' interest in it is compelled, and both senior and junior security holders are cut loose from their partnership relationship, each group of security holders is deprived of the reciprocal advantages which its investment in the joint enterprise gave it. Neither class should be permitted to obtain compensation from the other class for the loss of its "disappointed expectations".[1]

In short, a species of rescission by operation of law has occurred[2] and the face amount of the security—which theoretically mirrors the senior security holder's contribution to the enterprise—is all that he is entitled to recover.

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obtained from the issuance of the securities affected by the dissolution were not returned to the investors but were retained for the use of the successor corporations, * * * the investors would be thus required to accept other securities in different corporations, thereby keeping their investments tied up in other enterprises. [Compensation in those cases] * * * is not given for the loss of their investments, but for the continuation of their investments in successor companies at greater risks" (p. 29).

[1] Despite the fact that the Engineers' common stockholders did not benefit in even the slightest degree, and in fact lost heavily, as the result of the liquidation (*infra*, pp. 116-119) it may be observed that in applying the principle of frustration, the courts have consistently held that "the loss must lie where it falls" as a matter of sound policy even where the other party is unquestionably a beneficiary of the frustration. See, for example:

Omnia Commercial Co. v. *U. S.*, 261 U. S. 502; *The Isle of Mull*, 278 Fed. 131 (C. C. A. 4, 1921), *cert. den.* 257 U. S. 662; *Earn Line S.S. Co.* v. *Sutherland S.S. Co.*, 254 Fed. 126, 134, aff'd *sub. nom.*; *The Claversek*, 264 Fed. 276 (C. C. A. 2, 1920); *Nitro Powder Co.* v. *Canadian C. & F. Co.*, 233 N. Y. 294, 135 N. E. 507. See, also, The Gold Clause decisions: *Norman* v. *B. & O. R. Co.*, 294 U. S. 240; *Perry* v. *U. S.*, 294 U. S. 330; *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324; *Smyth* v. *U. S.*, 302 U. S. 329; *Guaranty Trust Co.* v. *Henwood*, 307 U. S. 247.

[2] Cf. *Williston, Contracts, supra*, p. 52, n. 1, at p. 5486, n. 10.

That these are the principles which are embodied in the concept "fair and equitable" as used in the Act is made plain by the Commission's pertinent statement in its brief in the Second Circuit Court of Appeals in *New York Trust Co.* v. *S. E. C.*[1] (*supra*):

> "The petitioner's claim for compensation must, moreover, be considered in the light of *the correlative rights of Power and its stockholders.* Power had the right by contract to use the capital received from the debentures exclusively for itself, subject only to the payment of interest for its use. *The Holding Company Act and the Commission's order pursuant thereto have taken away this right. In these circumstances neither party is entitled to compensation for the loss of their correlative rights.* It is well settled that a promisee is not entitled to compensation for the loss of his bargain when the promisor has been denied his expected benefits under the contract through the impact of a supervening statute [citing cases]. (pp. 26-27).
>
> * * * Under these decisions Power must be considered free from liability to pay interest on the debentures in the future, *or compensation for the loss thereof,* because the statute has deprived Power of any benefits from the use of the capital. The debenture holders must, therefore, accept the premature termination of their rights under the agreements (p. 29).
>
> * * * * * * *
>
> In the instant case *neither Power nor a successor company is retaining, or can retain, the capital obtained from the sale of the debentures for the benefit of the system.* The debenture holders are being

[1] Brief dated August 15, 1942, on behalf of the Securities and Exchange Commission. (Emphasis supplied.)

repaid the principal of and accrued interest on their debentures, *are restored to their original position, and are not compelled to accept the risks of a new enterprise.* Under these circumstances, as we have heretofore shown, the debenture holders are not entitle to anything more" (p. 30).

This rationale, as the District Court specifically found, applies with special force to the facts of this case. Here, as in those other cases denying the payment of premiums to senior security holders, the preferred stockholders have, to be sure, relinquished a preferential claim to future dividends at a rate which they contend was attractive. But that same mandate which deprived the preferred stockholders of those future dividends simultaneously deprived the common stockholders of the valuable right to utilize the preferred stockholders' capital, which constituted the entire consideration for the payment of the dividends. Moreover, in this case, even more demonstrably than in the others, the junior security holders have suffered additional deprivations of a far-reaching character as a result of the statutory requirement to liquidate.

Thus, although throughout the history of Engineers the preferred stockholders have received their stipulated dividends in full, aggregating approximately $90 per share,[1] the common stockholders had received no dividends whatever since 1932 (and a total of less than $5 prior thereto) notwithstanding that since the enactment of the statute in 1935 more than $24,000,000 had accrued

[1] District Court Finding No. 26, R. 303a. The Court pointed out that its figures were as of December 31, 1946; thereafter the preferreds received additional dividends until June 30, 1947, which have enhanced the sum mentioned above.

to the common's interest in earnings, and almost $10,000,000 of this sum had been available for dividends on the common stock.[1] The common stockholders were required to forego all such dividends in order to provide for the adjustments required by the Act, including the statutory requirement embodied in Section 11(b)(2) that the company shrink its capital structure by retirement of the preferred stocks.[2] Since the funds thus accumulated through retained earnings and the proceeds of divestments were not sufficient to meet the contractual claims of the preferred, the common stockholders were required to supply $22,000,000 additional in cash for this purpose, through the exercise of "warrants" entitling them to receive their pro rata share of one of the company's assets in the dissolution.[3]

Moreover, the divestment of subsidiaries required by the Act had, as concurrent findings of both Courts below establish, resulted in large losses to Engineers as a company by compelling it to part with the stocks of subsidiaries at prices considerably under the prices realizable for those stocks if the company had not been required to comply with the Commission's divestment orders.[4] Even where the divestments did not produce an actual

[1] District Court Findings 33-35, R. 305a-307a; Engineers Ex. No. 30, R. 1395a; R. 470a; Cf. Commission Opinion, R. 69a.

[2] District Court Finding 37, R. 307a; Cf. Commission Opinion, R. 69a.

[3] District Court Findings 39-40, R. 308a-309a; Cf. Commission Opinion, R. 41a-43a.

[4] District Court Findings 37-38, R. 307a-308a; Court of Appeals Opinion, R. 34, 36.

book loss as of the time of divestment,[1] they deprived the company of the high earnings of the subsidiaries with which it was compelled to part.[2]

As a result, the common stockholders find themselves in the position of being deprived of the $39,000,000 of capital which the preferred stockholders had contributed for the company's use without any limitation of time,[3] losing the extremely high earnings which the enterprise had received from the investment of that sum,[4] and of having received no dividends for a period of some ten years because of the necessity for accumulating funds to retire the preferred stock under the compulsion of the statute.

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[1] The Commission recognized that these losses had occurred (R. 72a) but stated it did not "accept the hypothesis" that the Act had caused the losses, since Engineers was free "within limits" to choose the time for divestments. But those "limits" were very stringent indeed. Divestment orders not complied with within one year are subject to mandatory enforcement proceedings, including the appointment of a trustee. See Sections 11(c) and 11(d) of the Act. Although the Commission is authorized to grant an extension "for an additional period not exceeding one year", a corporation which delays in the carrying out of divestments is placed in the position of gambling on the Commission's benevolence or inaction.

The District Court's findings as to the losses were based upon uncontradicted evidence that Engineers would have been able to obtain much higher prices if it had not been compelled to carry out the divestments, or alternatively would have received higher earnings if it had retained the assets (cf. Finding 37, R. 307a-308a). The Court of Appeals having affirmed these "careful and far reaching findings" (R. 34, 36) we submit that these concurrent findings "are final here in the absence of very exceptional showing of error". *Comstock* v. *Group of Investors*, 335 U. S. 211, 214 (1948).

[2] District Court Finding 37, R. 307a, Court of Appeals, R. 36-37.

[3] Cf. Brief of S. E. C. in *New York Trust Co.* v. *S. E. C.*, *supra*, p. 56.

[4] See discussion, *infra*, pp. 117-119, for the highly profitable employment of these funds which was denied to the common stockholders by the mandate of the Act.

On the other hand, the preferred stockholders having received repayment of something more than *the maximum amount* contributed by them or their predecessors to the enterprise[1] as well as dividends at the full contract rate to the date of retirement of the preferred, now demand that the common stockholders pay them an additional $3,200,000, for the relinquishment of their future right, to assertedly high dividends. In a word, the preferred stockholders seek payment for their "disappointed expectations"; and they demand that the common stockholders become indemnifiers of this theoretical

[1] Two of the issues were sold to the public at the time of issuance for $100 per share, and the third at $99.50 per share, although the company actually received on the average something less than $96 per share for all three issues (District Court Findings Nos. 22-23, R. 301a). The $5 series carried the privilege of conversion until 1938 into common stock, a feature which obviously had substantial value independently of the preferred (large amounts of this stock were converted into common at an average price of $52 per share in 1928-1929, a period where the common sold as high as $79¾). The $5.50 series (sold to the public at $99.50 per share) carried a warrant giving the holder a "call" on common stock over a 10-year period (District Court Finding No. 22, R. 301a). It is thus evident that in paying approximately $100 the original purchasers of these stocks were paying something *less* than $100 for the stock alone, since the conversion features and warrants had substantial value in their own right.

As to those who purchased subsequent to the initial issue, it is to be noted that the market price of all three issues from date of issuance until virtually the date of retirement ranged between $63-$67, *averaged over the entire period* (Commission's Opinion, R. 62a-63a). The record establishes that turnover during the period of depressed prices (particularly during the years when the preferreds were selling in the range of $10-$15 per share) was extremely heavy. Over the entire period, the turnover ratio of the $5 series was 335%; of the $5.50 series, 215%; of the $6 series, 195% (see Engineers Exs. 26-28, R. 1391a-1393a).

future deprivation even though the common have themselves suffered great deprivations, both past and future.

If ever a case called for the tempered application of the principle that "neither party is entitled to compensation for the loss of their correlative rights",[1] we submit that this is that case.

By what process of reasoning then, did the Commission come to rule that in this case "fairness and equity" require payment by the common stockholders to the preferred stockholders of $3,200,000 in excess of the maximum capital contribution, charter and book claim of the latter? The Commission reached this result by indulging in the baldest fiction, and asserting a limitless power to determine what "fairness and equity" require. It "hypothesized" that the holding company enterprise was continuing despite the fact that it was not; and although the retirement of their securities for cash relieved the preferred stockholders of the risk of all potential unfavorable circumstances, the Commission held that the preferred stockholders should receive in cash the maximum amount which they could possibly realize under the most favorable circumstances if they remained participants in this hypothetical continuing enterprise.

Reference to the facts found by the Commission and both Courts below in this case, and a comparison of this ruling with the long line of earlier decisions denying the

[1] Brief of S. E. C. in Second Circuit Court of Appeals in *New York Trust Company* v. *S. E. C.*, *supra*, p. 58.

payment of premiums to senior security holders[1] suggests that the Commission's new fictional doctrine was designed to free the Commission not only of the limitations stemming from the contractual arrangements of the parties, but also of the settled principles found in the "fair and equitable" standard of 11(e) by the Commission and the Courts. The resultant power of the Com-

[1] The Commission first qualified its previous rulings that fairness and equity did not entitle senior security holders to the payment of premiums in *American Power & Light Company*, Holding Company Act Release No. 6176 (1945). In a vigorous and cogent dissenting opinion Commissioner Healy sharply challenged the Commission's assertion that its previous rulings were "distinguishable" on the ground that in the earlier cases "no attempt was made * * * to establish that the debenture holders' interest in the companies as continuing enterprises were worth more than the face amount of their claim". In point of fact, in virtually all the earlier cases the security holders both before the Commission [see, e.g., *United Light & Power Co., supra*, p. 54] and the courts [see, e.g., *Re Consolidated Elec. & Gas Co.*, 55 F. Supp. 211 at 215 (D. Del., 1944); *In re Standard Gas & Elec. Co.*, 151 F. 2d 326, 332 (C. C. A. 3, 1945), *cert. den.* 327 U. S. 796] had advanced precisely the same contention with respect to the value on "a going-concern basis" of the investments which they were required to relinquish, and had requested compensation for that alleged value.

The only other occasion prior to the instant case in which the Commission required premiums to be paid to the preferred stockholders was in *United Light-American Light & Traction Company*, Holding Company Act Release No. 6603 (1946), in a 3 to 2 decision; thereafter a motion for reargument was granted and decision was reserved for more than a year. While the decision was thus still pending, the company sought and obtained the Commission's approval to remain in business and to embark on a large new venture. The company thereupon made a voluntary proposal to purchase shares of its non-callable preferred stocks with funds obtained through sale of serial notes carrying a much lower rate of interest. (*United Light-American Light & Traction Co.*, Holding Company Act Release No. 7951 [1947].)

The *American Power & Light* decision, *supra*, was thus the only consummated decision prior to that of Engineers in which the Commission applied its new "investment value ex the Act" doctrine. That decision was not contested in the Courts because, as the president of the company pointed out to the stockholders in the annual report, a paradoxical tax situation arising out of the excess tax provisions then in force made it financially advantageous for the company to

mission to function wholly free of restraints and standards calls to mind Jeremy Bentham's pungent characterization of legal fictions:

> "A fiction of law may be defined—a wilful falsehood, having for its object the stealing legislative power, by and for hands which could not, or durst not, openly claim it—and, but for the delusion thus produced, could not exercise it." [1]

The vice in the Commission's fictional assumption that "the enterprise continues" is not merely in its perversion of the facts here, but in its perversion of established doctrine and the principles laid down by this Court in the *Otis* case. We believe that those principles require the application in this case of "the touchstone of the 'fair and equitable' standard"; the terms of the contract must prevail. But if those terms are deemed inapplicable, then the rationale of the *Otis* case certainly does not justify the abrupt rejection of the principle of "frustration". On the contrary, this Court held in that case that "fairness and equity" permitted the preferred stockholders to receive the "equitable equivalent" of their claim on earnings because they remained investors in a continuing enterprise; but as the reference in *Otis* (at p. 638) to

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pay the premiums. Consequently, the instant case was the first one in which the Courts were called upon to reverse the long line of non-premium decisions in favor of the Commission's "investment value ex the Act" doctrine, which was and is totally devoid of any judicial support.

Subsequent to its decision in the instant case, the Commission issued one additional decision in which it applied its "investment ex the Act" doctrine (*Pennsylvania Edison Company*, Holding Company Act Release No. 8550, Oct. 15, 1948). That decision, which has not yet been passed on by the Courts, involved a very different fact situation from the Engineers liquidation (*infra*, p. 115, n. 1).

[1] Bentham, A Fragment on Government (Historical Preface to the Second Ed.) 1 BOWRING, BENTHAM WORKS (1843) 243.

New York Trust Co. v. *Securities and Exchange Commission*, 131 F. 2d 274 (C. C. A. 2), *cert. den.* 318 U. S. 786; and *In re Laclede Gas Light Co.*, 57 F. Supp. 997, makes plain, "fairness and equity" did not permit the debenture holders, whose investment in the same company was being "liquidated" by cash payment, to receive a "windfall" in the form of premium payments to which their contract did not entitle them. The Act of the sovereign in frustrating the contract between the senior and junior security holders did not give the former the right to demand or receive added compensation because the investment they were giving up was highly profitable,[1] any more than the junior security holders could be compensated for their reciprocal deprivation of the continued use of the senior security holders' capital. Here, there is not only "no contractual obligation * * * to pay a redemption premium", but the corporate charter explicitly precludes such payment. In these circumstances, even more plainly

[1] It may be observed that the "investment values" of many of the senior securities covered by the decisions referred to above were substantially equal or superior to those of the Engineers' preferreds on the basis of the usual criteria of earnings and assets coverage, market history and dividend or interest record. In the case of the debentures of United Light, for example, bond interest had been regularly earned and paid (as compared to the failure of Engineers to earn or pay dividends on the preferreds for a period of several years). It may further be noted the Commission stated that the market prices of the debentures of United Light in the period 1940-1942 "had been close to and sometimes as much as 1½ points above par" (10 S. E. C. 1227), whereas during those same years the preferreds of Engineers sold as low as $40-$45 per share (Engineers Exs. 26, 27, 28, R. 1391a, 1392a, 1393a). The notes and debentures of Standard held not entitled to premiums *In re Standard Gas & Electric Co.*, 151 F. 2d 326, 332 (C. C. A. 3, 1945) were so well secured that Standard was able to replace them with *bank loans* bearing interest of only 2½% (see *Standard Gas & Electric Co.*, Holding Company Act Release No. 6345 [1946]).

than in that case "no such obligation * * * exists by virtue of any other recognized legal or equitable principle" (*United Light & Power Co.*, 10 S. E. C., 1215, 1223).

III. Construing the Act as the Commission has construed it—to authorize disregard of applicable charter provisions and well-established legal and equitable principles—would raise serious constitutional questions.

If the Commission is upheld either in its assertion that the "fair and equitable" standard authorized it to regard the applicable charter liquidation provisions here present as not "conclusive", or in its attempt in this case to excise the frustration doctrine from the "fair and equitable" standard, pressing constitutional objections arise.

While Congress unquestionably may cut across or sever contractual obligations in an appropriate exercise of its power to regulate commerce, such interference with freely made agreements must be appropriate, if not necessary, to the enforcement of a clearly defined public policy (*Treigle* v. *Acme Homestead Ass'n*, 297 U. S. 189; *Louisville Bank* v. *Radford*, 295 U. S. 555). If, as the Commission contends, the "fair and equitable" standard is not to be given its traditional meaning as a term of art in this statute, we are faced not only with a plainly inappropriate and unnecessary interference with the contract rights of the parties (cf. Stone, C. J., dissenting in *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 648-649), but with a delegation of power to the Commission to alter contractual rights without any standard being furnished to

guide the exercise of that power (cf. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter Corp.* v. *United States*, 295 U. S. 495).

In the first place, as we have shown the Commission's direction to pay premiums to Engineers' preferred stockholders is a command which the Commission in a long series of judicially approved rulings has indicated the "fair and equitable" standard does not authorize it to make. One may assume *arguendo* that the Commission was not rigidly bound by the doctrine of *stare decisis*, or by its own consistent administrative interpretations [1] of the "fair and equitable" standard for which over a four-year period it had repeatedly asked and unfailingly received full judicial approval. But, plainly, a delegation of power which would authorize such flatly contradictory results would not furnish that guidance which it has never been doubted Congress must furnish to administrative agencies to which it delegates powers to regulate the affairs of citizens (cf. *Panama Refining Co.* v. *Ryan; Schechter Corp.* v. *United States, supra*).

In the second place, if the historic command of the "fair and equitable" standard—that contractual rights must be enforced—is no longer binding, it is impossible to ascertain what that term means. The unconstitutional ambiguity of the "fair and equitable" standard, if that standard does not have its historically developed meaning, is demonstrated by an examination of the Commission's action in this case. Thus, a primary consideration upon

[1] With respect to the weight attributed to consistent administrative interpretation, see *U. S.* v. *American Trucking Associations*, 310 U. S. 534, 549; *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349.

which the Commission rested its valuation of the preferred stock here is the dividend rate to which the preferred was entitled by Engineers' charter, and the hypothetical "value" allegedly accorded thereto by the market (see infra, pp. 74 *et seq.*). But if, as the Commission claims, it had the authority to refuse to be bound by the liquidation provisions of Engineers' charter, and in fact, as is plain, it gave absolutely no consideration to the contractual mandate,[1] by virtue of what criterion does any other provision of the charter become entitled to the controlling significance which the Commission here gave the dividend rate?

The dividend rate constituted merely one provision of an integral contract between the stockholders. The obligation of the common stockholders to pay the stipulated dividend rate was inextricably interrelated with the numerous other contractual provisions such as those dealing with conversion, redemption, liquidation, right to issue additional preferred on a *pari passu* basis, etc. It is axiomatic that all these provisions are related to and interwoven with the dividend rate, and all interact upon one another.[2]

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[1] Compare p. 44, n. 1, *supra*.

[2] See, e.g., McDiarmid, "The Utilities Face A Big Financial Problem" (Public Utilities Fornightly, Jan. 1, 1948, pp. 8-9):

"There is a fairly good chance that utilities might reclaim the interest of institutional investors in their preferreds by concessions as to sinking funds or convertibility. * * *

* * * * * * *

* * * It is noteworthy that in recent weeks two utility preferred stock issues, roughly comparable as to quality, were brought out a day or so apart from each other. One was sold on a 4.4 per cent yield basis but was convertible into common. It was an immediate sellout. The other came on a 4.5 per cent yield basis but was not convertible. It was sold slowly and has since dropped in the market seven points below its offering price."

Thus, the inclusion of a charter provision prohibiting subsequent issuance of preferred stock having an equal claim in earnings and assets with that being issued, or other protective provisions of this type (including special provisions on liquidation) will permit the marketing of a preferred bearing a lower dividend rate; while conversely lack of such features must be compensated by a higher dividend rate. It follows that where an effort is made to alter one of these factors, correlative adjustments must be made in many others; if greater rights on liquidation are now given the Engineers' preferred holders, a retroactive adjustment on the high dividend rate paid during past years is clearly in order.

It is thus evident that attempts to tamper with the correlative rights and obligations integrated in the charter contract between the preferred and common stockholders, inevitably entail acute problems not foreseen or mentioned in the Commission's opinion.[1]

If, as it contends, the Commission is left free by the "fair and equitable" standard to assign differing significance to different "portions of the charter" in its own unguided discretion, attributing one meaning to the stand-

[1] The preceding discussion merely touches on a few of these problems. There are others equally acute. For example, if the charter liquidation provisions are nullified, we come face to face with the settled rule of law that a preferred stock has no preference in liquidation. If the charter is silent the preferred holders merely participate pro rata with the common, share for share, and on such a basis the preferred would realize something less than $50 per share in this liquidation. *Continental Insurance Co.* v. *U. S.*, 259 U. S. 156, 181; 11 *Fletcher, Cyc. Corp.*, § 5303, and 16 *Fletcher, supra*, § 8226. Cf. *Holland* v. *Nat'l Automotive*, 22 Del. Ch. 99, 194 A. 124; *Ellingwood* v. *Wolf's Head Oil Refining Co.*, 38 A. 2d 743 (Del. Sup. Ct., 1944).

and one day and precisely the opposite meaning the next day,[1] respondents submit the delegation of authority is unconstitutional. Before so unbridled a delegation of authority will be imputed to Congress, unmistakable evidence of such an intent must be shown.[2] In this case no such evidence is forthcoming. On the contrary, the legislative history and judicial decisions point to precisely the opposite conclusion.

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[1] It may further be noted that the Commission had in an earlier opinion plainly indicated that the involuntary liquidation preference of the Engineers' preferred stocks represented "the maximum claim of the stock", a statement consistent with the Commission's long line of non-premium decisions discussed above. In that decision (Holding Company Act Release No. 4997, April 15, 1944, R. 2128a-2138a) the Commission stated (R. 2135a):

> "* * * we pointed out in relation to the earlier case that as the amount to be received by the preferred stockholders tends to approach *the maximum claim* of the stock, the likelihood of any unfairness would be diminished. As noted above, the current market prices of the three series of preferred stocks which Engineers now proposes to reacquire are close to *the involuntary liquidating prices* and under the circumstances we are satisfied that the proposed reacquisition is not unfair to the security holders of Engineers." (Emphasis supplied.)

It cannot be doubted that many preferred stockholders who decided to sell their stock at that time at prices in the 90s (R. 2134a), as well as common stockholders who decided to retain their holdings, were influenced in their actions by this statement, viewed in the light of the Commission's long and unbroken line of non-premium decisions.

[2] *United States* v. *Standard Brewing Company*, 251 U. S. 210, 220; *United States* v. *Bennett*, 232 U. S. 299; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407.

PART TWO

IF THE RIGHTS OF THE STOCKHOLDERS WERE TO BE VIEWED AS "IN A CONTINUING ENTERPRISE", THE COMMISSION'S "INVESTMENT VALUE EX THE ACT" DOCTRINE AS HERE APPLIED WHOLLY FAILED TO MEASURE THE EQUITABLE EQUIVALENTS OF SUCH RIGHTS. THE COMMISSION'S DOCTRINE, MOREOVER, CONTRAVENED THE STRICT PRIORITY PRINCIPLE AND WAS OTHERWISE FALLACIOUS.

IV. The Commission did not in fact evaluate the stockholders' rights or securities on the basis of a continuing enterprise. On such basis, the preferred holders would have been entitled to no more than $100 per share, and probably less.

If, notwithstanding our contentions set forth in the preceding portions of this brief, it be nevertheless concluded that in this liquidation "fairness and equity" permitted rejection both of the charter liquidation provisions and of previously formulated and manifestly apt liquidation standards, and authorized transmutation of the rights of the Engineers' stockholders on "a going concern basis" into "equitable equivalents" as was done in *Otis*, then we contend, and propose now to demonstrate, that the determination made by the Commission failed by a wide measure to satisfy such requirements.

Our contentions may be concisely summarized as follows: (a) the "investment value" for which the Commission found the preferred stockholders were to be compensated was nothing more or less than a transient "value" based wholly on market prices as of a specific haphazard date; (b) the doctrine of "equitable equivalents" which the Commission purported to invoke in measuring the

"compensation" to which the preferred stockholders of Engineers were entitled for their stock does not authorize compensation resting upon such essentially accidental "values"; if compensation were to be awarded in terms of average long range values of the preferred stock, no more than $100 could be found as the "equitable equivalent"; and (c), apart from its erroneous reliance upon a transient market "value", the Commission's application in this case of the doctrine of "equitable equivalents" failed to take account of the correlative rights of the common stockholders, which are an essential ingredient of the doctrine of "equitable equivalents" as enunciated by this Court; upon any proper construction and application of the doctrine of "equitable equivalents", the preferred stockholders are entitled to no more than $100 per share.

A. The so-called "Investment Value" as determined by the Commission represented merely transient market value at a specific moment.

This Court has cogently admonished that "*value is a word of many meanings.*"[1] The term "investment value" as used by the Commission in this case is particularly misleading because it carries the connotation given to that term in *Otis* of representing value of a stable, long range character as distinguished from transient "values" or prices which fluctuate from day to day with the vagaries of the market place. But it is precisely the latter type of "value" and not the former, to which the Commission here applied the euphemistic title of "investment value".

It will be noted that the Commission's opinion did not at any point define "investment value" and actually em-

[1] Douglas, J., in *Group of Investors* v. *Milwaukee R. R.*, 318 U. S. 523, 540, quoting Mr. Justice Brandeis.

ployed the term in a variety of verbal combinations. However, in spite of the Commission's indiscriminate use of the varying terms "investment value" (R. 67a), "present investment value" (R. 66a), "fair investment value on a going-concern basis" (R. 67a), and "investment worth on a going-concern and apart from the Act, under prevailing yields applied to comparable securities" (R. 67a), the record makes clear beyond any doubt that the only "value" which the Commission determined was a hypothetical market value of the preferreds based on market prices as of the time when the testimony of Badger and Barnes was given (the first few months of 1946).

That portion of the Commission's opinion dealing with the "value" of the preferred stocks is confined to some six pages (R. 62a-68a) of its sixty-page opinion of December 4, 1946 (R. 25a-85a). After setting forth without comment some statistical material (R. 62a-65a), the Commission turned to a brief discussion of the report of Badger, a witness on behalf of certain preferred stockholders. Summarizing in a few short paragraphs certain of Badger's findings (R. 65a-66a), the Commission stated that Badger's conclusions were not seriously "challenged", and were in fact substantially admitted by the company's president, Barnes,[1] as well as in the company's

[1] Although the Commission's opinion states that "Company witnesses several times testified to the same effect" (R. 67a) Barnes was the only witness on behalf of the company who testified in any way on the subject of values or who discussed Badger's testimony. The testimony of Barnes, who was formally qualified as a valuation expert (R. 1138a), is discussed, *infra*, p. 82. One other company official, Benjamin, merely stated that he agreed with Barnes' statement that the company would have taken advantage of the low money rates by "refunding" the preferred stocks at lower dividend rates, if the Act had not required the company's dissolution and the retirement of the preferreds (R. 965a).

brief. It thereupon reached its conclusory finding: "it is apparent that the preferred has an investment value at least equal to the respective call prices" (R. 67a), a statement which necessarily referred to Badger's conclusions viewed in the light of the alleged admissions of the company.

Badger's evidence consisted of a written report and oral testimony with respect to it.[1] Succinctly stated, Badger's technique for evaluating the preferred stocks consisted in selecting a group of allegedly comparable utility preferred stocks, computing their yields (i.e., the ratio of their dividend rates to their market prices) as of the week ended January 4, 1946, and by applying a similar "yield" to the preferred stocks of Engineers arriving at what was variously termed "their present investment values on a going-concern basis", "fair investment value", or merely "investment value".

Although in the earlier sections of Badger's report there is to be found some analysis of so-called "investment characteristics" of the Engineers' preferreds such as asset and earning coverage (R. 2066a-2076a), it is important to note that this "analysis" did not constitute the basis for Badger's ultimate conclusion respecting "values". Those investment characteristics established, as Badger conceded, that on the basis of intrinsic merit the Engineers' preferreds were of inferior caliber, termed by

[1] Badger's report is set forth at pp. 2057a-2086a of the Record as Preferred Stockholders' Exhibit No. 29. During cross-examination he admitted certain errors and upon his request was given leave to file an amended report (Preferred Stockholders' Exhibit No. 29A, R. 2087a). For Badger's direct testimony, see R. 1009a-1039a; for cross-examination, R. 1040-1189a, Redirect and Recross, 1189a-1205a.

Badger "medium grade".[1] But the purpose for which these investment characteristics were employed by Badger was merely to afford a basis for the selection of allegedly "comparable" securities in order to determine the market prices and yields (i.e., the ratio of dividend rate to market price) at which those securities were selling at that particular moment.[2] Both comparative charts expressly state that "current prices" and "yield" figures were computed on the market prices for the week ending January 4, 1946.[3]

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[1] Badger's admission that on the basis of intrinsic quality the Engineers' preferreds were not high grade is stated somewhat obliquely as follows (R. 2079a): "The preferred stock of Engineers Public Service Company as well as the preferred stocks of the five public utility holding companies studied for comparative purposes, *must be classed as medium grade preferred stocks*, and should, therefore, sell at yields higher than the yields registered by the high grade preferred stocks." See also specific admission under cross-examination (R. 1133a), and compare Barnes' emphatically expressed view that the Engineers' preferreds were "closer to a common stock or a low grade preferred" (R. 1138a, 1140a).

[2] It may be noted that the preferred stocks employed by Badger for "comparative" purposes were proven in fact not to have been appropriate for such purpose, since all of them had investment characteristics superior to those of the Engineers' preferreds and had been accorded superior investment ratings by the recognized independent investment analysts (cf. Engineers' Exhs. 73, 77, R. 1844a, 1850a-1851a). Moreover, in addition to a list of five holding company preferreds of superior quality as aforesaid, Badger also employed a list of 9 *operating* company preferred stocks (R. 2081a) which are necessarily of superior quality to those of a holding company preferred stock such as Engineers, in view of the fact that they are not preceded by the preferred stock of operating companies and are junior to a smaller amount of senior securities. The company sharply challenged the comparability of these securities (Exhibits and testimony, *supra*); but the Commission did not pass on this issue, presumably since it rested upon the alleged "admission" of Barnes and the company hereinafter discussed.

[3] See Preferred Stockholders' Ex. No. 29, table at R. 2077a (next to last item termed "Current Market, Week Jan. 4, 1946)"; see also table at 2081a, footnote 1 "Unless otherwise marked, prices are average sale for week ending January 4, 1946 as per Commercial & Financial Chronicle".

Badger made no reference to the prices at which these same securities had sold in previous weeks or previous years; he did not suggest that it would be appropriate to employ some sort of median prices and yields computed on the basis of prices covering a representative period of time.[1] Instead he used the prices and yields for the week ending January 4, 1946, without modification or adjustment of any kind; and with respect to the level at which those prices and yields stood, he stated:

> "* * * yields on preferred stocks are at the present time, the lowest which they have ever been in the history of our country, or conversely, * * * the prices of such stocks are at the highest levels ever experienced. The permanency of this situation will depend on the permanency of low interest rates" (R. 2065a).

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[1] The following table shows the range of prices, during the preceding five years, of three of the five holding company preferred stocks used by Badger for comparative purposes (Moody's, Public Utilities, 1946, p. a66 et seq.) as compared with the prices used by Badger (R. 2077a) in computing their yields:

	Columbia Gas & Electric Moody's, *supra*, p. a69		*Pacific Public Service* Moody's, *supra*, p. a78		*Public Service of New Jersey* Moody's, *supra*, p. a79	
	High	*Low*	*High*	*Low*	*High*	*Low*
5	107½	84	27⅜	22¾	115¾	102⅝
4	93	70	23½	19	103⅞	87½
3	73	37	19¼	14⅛	96¼	75½
2	45½	29	14¼	11¾	86⅜	62
1	72	42⅛	18⅜	10⅛	110	75¾
lger R. 2077a)	105.50		26.50		114.38	

The other two holding company preferreds employed by Badger display a range of prices similar to those shown above (Moody's, *supra*, p. a76, p. a83); but see Badger's note (R. 2077a) as to the deductions which must be made for dividend arrears on the Niagara Hudson Power Preferred. The average yield of all five stocks for the five-year period 1941-1945, computed on their mean price during each year, was 6.3%. Badger used a yield of 4.6% (R. 2111a).

Far from being troubled by the fact that the market prices he was proposing to use were at "the highest levels ever experienced" and preferred yields at "the lowest * * * in the history of our country", Badger went on to express the positive view that such values were "permanent", because they were "predicated on fundamental conditions prevailing in the money markets, conditions which are of a permanent nature" (R. 2066a). Although conceding that the unprecedentedly low money rates were primarily due to the pegging of the Government bond market (R. 1060a), the only possibility of any change in money rates and preferred yields that Badger was willing to envisage was the probability that they would go still lower (R. 1085a-1086a).

Some months after Badger's testimony was given, the Government lowered the support levels at which Government securities had been "pegged", causing the start of the rise in interest rates which has been in progress ever since; and at about the same time stock market prices began to decline. The fall in prices of public utility stocks which then ensued, and thereafter continued, was much sharper than in the case of industrial stocks,[1] due to the fears of investors that the impact on the utility industry of the alternative threats of inflation and deflation might be especially severe, as had been the case following termination of the First World War. Reflecting both this

[1]

	Federal Reserve Index of Industrial Stocks	*Federal Reserve Index of Public Utility Stocks*
March 1946*	145	123
Oct. 30, 1948**	137	98
% Decline	5½%	20%

* Federal Reserve Bulletin, June, 1946, p. 642

** Federal Reserve Bulletin, November, 1948, p. 1396

adverse outlook and the increase in money rates, the decline in prices and the increase in yields has been particularly great in the case of utility holding company preferred stocks, which are necessarily much more speculative than the preferred stocks of operating companies.[1]

Except for Badger's naked statements of opinion as to the "values" of the Engineers' preferreds and the "permanence" of the then current money rates and yields, the record is entirely barren of any evidence on which the Commission could have based a judgment or finding that the "values" for the Engineers' preferred as found by Badger were of a long range character.[2]

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[1] For express recognition by the Commission of the substantial increases in public utility holding company preferred yields and declines in market prices which have taken place since the time of Badger's testimony, see quotation from the Commission's opinion in *American Light & Traction-United Light Co., supra*, p. 12, n. 1.

See also p. 95, n. 2, *infra*, for specific figures measuring the extent of the decline.

[2] Any suggestion that the Commission might have given weight *sub silentio* to factors other than the Badger and Barnes testimony discussed in its opinion, is not only negatived by the Commission's own statement that this investment value "is apparent" from the testimony which it had just discussed, but also by examination of the few other factors mentioned, *without comment* in that portion of the Commission's opinion dealing with the value of the preferreds. Only five items will be found there (R. 62a-65a):

1. A statement with respect to the dates and prices at which the preferreds were originally issued. (Cf. District Court Findings 22-23, R. 301a.)

2. Reference to the dividend history, including the fact that dividends were in arrears during a four-year period.

3. A summary of the market history of the preferreds establishing that their market price over the entire period they were outstanding was between $63-$67 per share.

4. A capitalization table establishing that on a consolidated basis common stock and surplus equalled only 16.3%, and that the preferred stock was *junior* to 66.2%, of system capitalization. The Commission's failure to comment on these figures must be considered in

If the Commission in accepting Badger's conclusions as to the "investment value" of the Engineers' preferreds rested upon his judgment as to the "permanence" of those values and the money rates on which they were predicated, then it is evident that the Commission's determination stands exposed as having been no less erroneous than Badger's judgment. Even if Badger's bare statements in this respect (which were challenged and discredited by company witnesses and counsel, see *infra*, pp. 81-82) could be said to constitute "substantial evidence" to support his conclusion, the District Court,

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light of the fact that the Commission has repeatedly stated that it regards 25% as the minimum acceptable ratio of common stock capitalization, and a 50% ratio of senior capitalization (prior to preferred stock) as the maximum. (See *Interstate Power Company*, Holding Company Act Release No. 7143, p. 18; *Western Light & Telephone Co.*, Holding Company Act Release No. 5902; cf. 13th Annual Report of S. E. C., pp. 88-90.)

5. Two tables (R. 64a-65a) establishing that for the period 1937-1945 Fixed Charges and Preferred Dividends on a consolidated basis were covered by the extremely slim margin of 1.3 times. Moreover, no explanation is offered as to why this table stops with the year 1937. During the three years immediately preceding, "Fixed Charges and Preferred Dividends" were on the average not covered even once (R. 1433a, 1443a, 1461a; cf. Moody's Public Utilities, 1940, p. 1314). Clearly the foregoing items all point in the direction of a value of less than $100 for the preferreds, and therefore cannot be deemed to have afforded a basis for the Commission's determination that the premiums should be paid.

Nor can the use by the Commission of the customary omnibus phrase "upon a full consideration of the entire record" (R. 68a) serve to bestow immunity on its finding. As has been shown, the record is barren of evidence to support the finding other than the Badger and Barnes testimony herein discussed. The use of this type of "talismanic phrase" (*City of Yonkers* v. *U. S.*, 320 U. S. 685, 698) cannot circumvent this Court's admonition that "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based" (*S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 87); Cf. Section 8(b) of The Administrative Procedure Act (5 U. S. C. 1008(b)).

having perceived and pointed out this error,[1] could not, under any view of its duties, enter its decree approving and enforcing the plan.[2]

But if the Commission did not accept Badger's views as to the permanence of the "values" set forth in his report and testimony, then it follows that the Commission merely accepted Badger's conclusions that the Engineers' preferreds had a value approximating the redemption prices based exclusively on market prices as of January 4, 1946 ("the highest they have ever been in the history of our country") and without regard to whether or how much those prices and values might decline in subsequent weeks, months or years. This would mean that not only did the Commission deem irrelevant in determining "investment value on a going concern basis" the entire past history of these stocks on a going concern basis which established an average market price of $63-$67 per share (R. 62a) but it also deemed equally irrelevant their future course if permitted to remain outstanding as part of a continuing enterprise.

That this was indeed the Commission's view is attested by its statement that "no serious challenge was made in the proceeding to Badger's conclusion that 'the fair investment value of the preferreds on a going concern basis'" approximated the redemption prices, and its refer-

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[1] District Court Findings 52-54, R. 314a-315a.

[2] The decree of a court of equity speaks "as of the date of entry" and therefore must take into account all material changes which have occurred since the commencement of the proceedings: *Randel* v. *Brown*, 2 How. 405, 422; *McCabe* v. *Guaranty Trust Co.*, 243 F. 845, 849; *Brooks Bros.* v. *Brooks Clothing of California*, 60 F. Supp. 442, 456. Cf. *Knight* v. *Wertheim & Co.*, 158 F. 2d 838 (C. C. A. 2), *cert. den. sub. nom. McGuire* v. *Equitable Office Building Corp.*, 331 U. S. 818.

ence to the statements of Barnes and the company's counsel in substantiation (R. 67a). For while Barnes and the company counsel agreed "if there were no Holding Company Act or the Act were repealed today" (R. 67a) so that Engineers were not required to go out of business, the preferreds would momentarily have sold at about the redemption prices because of the extremely low money rates, they affirmed time and again with all possible vigor that the unprecedentedly low money rates then current were primarily the result of the Government's "pegging" policies which might be revised at any time (R. 1056a-1060a, 1087a, 1136a-1146a); that the then current market prices also reflected the fact that "we are in a boom period at this time" (R. 667a); that the redemption prices could by no means be considered "a fair value which will be maintained as an average for an indefinite period of time" (R. 522a); that the Engineers' preferred stock if permitted to remain outstanding could not rise higher than the redemption prices, and would be confronted by many adverse factors (discussed with particularity) which would inevitably result in price decreases which the past market history showed were likely to be very great (R. 523a-525a).[1]

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[1] The Company's Brief to which the Commission's opinion refers is not part of this record, but the oral argument of company counsel before the Commission contains almost verbatim quotations from that brief and establishes that the following was stated by Engineer's Counsel with reference to the "investment value" of the preferreds (R. 1219a):

> "* * * I would like to point out the inequity of placing much emphasis on the so-called present investment value of the preferred stock, ex the Act. That investment value has no such permanence as to entitle it to any considerable weight. Market values are the resultant of two variables—(1) the cost of money, and (2) the risk factor determined largely from earnings. A holding company preferred stock, although a fixed income stock,

Since the Commission's finding that "it is apparent that the preferred stock has an investment value at least equal to the respective call prices" (R. 67a) rests upon the agreement which it found between Badger's evidence and the alleged admissions of Barnes and the company's counsel as to the validity of Badger's conclusions, it is plain that the Commission's findings went no further than these admissions. Consequently, it follows that contrary to petitioners' contention that the Commission evaluated "the rights of stockholders * * * on the basis of a going business and not as though a liquidation were taking place",[1] what the Commission *actually* did was to "value" the preferred stocks alone merely on the basis of market prices prevailing in January-May, 1946, "the highest in the history of our country".

Both the District Court and the Court of Appeals so found.[2] And the District Court, after pointing to various

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by its very nature is inherently about the most volatile fixed income security in the market. Dr. Badger's claim in his testimony that present market values of preferred stocks are 'as far as one can humanly predict, a permanent level' is extravagant and unrealistic.

Holding company preferred stocks are at the moment close to their all-time peak and under the circumstances of this case, since the premiums are a ceiling on the market values, the values of those preferred stocks have only one way to go and that is downward; and that they will go down and go down considerably, is inevitable. That result is only a matter of time; and it may be soon * * *."

[1] See Commission's Petition for Certiorari (No. 226), p. 14.

[2] District Court Findings 41-54, R. 310a-315a; Cf. Court of Appeals Opinion (R. 17): "We think it is apparent *on a careful examination* of the testimony of the two men that each was testifying to values as of May 1946, ex the Act". (Emphasis supplied.)

other arbitrary and inequitable assumptions by Badger and the Commission (R. 310a-312a),[1] stated:

> "The extremely low money rates which resulted in Badger's finding that the preferred stocks of Engineers have an 'investment value' greater than $100 per share, largely reflect artificial factors which are clearly subject to changes at any time and may well be of purely transitory character" (R. 314a).

After carefully noting the changes in market prices and yields which had taken place since Badger's testimony, and which showed how mistaken were his notions as to "permanence",[2] the District Court posed this cogent question which, we submit, pierces to the heart of the Commission's fallacious valuation:

> "Assuming the correctness of Badger's estimates of the investment values of the Engineers' preferred stock 'on a going concern basis', subject to all the infirmities above referred to, the question still is: *'investment values' for how long?"* (Emphasis supplied.)[3]

Pointing to the fact that the record indicated "that there are other imponderables and variables, aside from the trend of money rates alone, which might affect the future

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[1] Thus, the District Court pointed out (R. 310a-312a) that in arriving at these theoretical values allegedly "*ex* the Act" based on the then current market prices, neither Badger nor the Commission made any adjustments whatever for the important values attributable directly to the impact of liquidation; accordingly they appropriated for the benefit of the preferred stocks in thus evaluating them, the sums belonging to the common stockholders which had been laid aside specifically for the purpose of carrying out the statutory mandate to retire the preferred stocks and to liquidate (R. 470a, 578a; Engineers' Ex. 30, R. 1395a).

[2] Finding No. 52, R. 314a.

[3] R. 312a, Finding No. 48.

'investment value' of the Engineers' preferreds, measured on the theoretical going-concern basis" (R. 315a), the Court concluded:

> "The record establishes that the investment values of the Engineers preferred stocks found by Badger at the time of his testimony do not represent the investment value of these stocks in the past, and are by no means determinative of the investment value of these stocks for any considerable period of time in the future. Because the preferreds' redemption provision acts as a 'stopper', the future investment value cannot become greater than the call price, but on the other hand may very well become much less. *The record further establishes that there are present many factors of a potentially adverse character*, and that the extent to which the investment value of preferred stocks of this character can decline under adverse conditions is indeed very great" (R. 315a). (Emphasis supplied.)

The District Court thus clearly recognized that two elements, in interaction, would determine the normal, long-range value of the preferred stocks if they remained outstanding as part of a going concern: (1) the future course of earnings of the operating companies, under the impact of foreseeable economic developments; and (2) the future course of money rates applicable to holding company preferred stocks of this caliber. As we have shown, to neither of these factors did the Commission accord even the slightest consideration, notwithstanding the emphatic warnings of the company witnesses and representatives that the exceptionally high earnings and low money rates of that moment rested heavily upon temporary artificial factors incident to post-war economic and financial phenomena. Thus, while insisting that valua-

tion of stockholders' rights must be predicated on the assumption that "the enterprise continues", the Commission determined the "value" of the preferred as though economic conditions, money rates and the enterprise itself were all permanently frozen in their course as of January, 1946—a period which the Commission has itself termed "the peak of the war-time market".[1]

B. The doctrine of equitable equivalents does not permit the use of a momentary market price to measure the "rights" of the preferred stockholders. On any other than a transient basis, the Engineers' preferreds could not be valued at more than $100.

(1) It is scarcely open to question that transient values predicated on the market prices of securities as of a particular haphazard moment cannot be accepted as the measurement of their intrinsic worth, or as the appropriate standard for determining "fairness and equity" or "equitable equivalence" in reorganizations or liquidations.

It is fundamental that in valuation for reorganization purposes earning power and other relevant economic factors must be calculated *prospectively* on a normal going-concern basis, with due regard for the record of the past.[2]

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[1] Actually, the liquidation of Engineers did not take place until almost a year and a half later, July 21, 1947 (Moody's Public Utilities, 1948, p. 403) and the retirement of the preferred stocks until June 30, 1947.

[2] Cf. *Consolidated Rock Products Co.* v. *Dubois*, 312 U. S. 510, 526: "Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment *which embraces all facts relevant to future earning capacity* and hence to present worth, including, of course, the nature and condition of the properties, *the past earnings record*, and all circumstances which indicate whether or not that record is a reliable criterion of *future performance*." (Emphasis supplied.)
Cf. *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 565-6.

Consistently with that principle, the term "investment value" as employed by this Court in its *Otis* decision had reference to the values on a long-range basis of both classes of stockholders predicated upon their relative rights to participate in the prospective earnings of the enterprise. Thus, as this Court pointed out, the common stockholders' right to participate in the estimated earnings commencing some fourteen years in the future, established the "investment value" of the common which entitled it to an allocation of approximately 5% of the assets of the company being dissolved. In turn, the preferreds' right to receive all of the prospective earnings for a fourteen-year period until the arrearages of dividends had been eliminated, and a lesser portion of such earnings thereafter, established its right to an allocation of 95% of the assets. It is therefore plain that reliance on market prices as the standard for determining "investment values" on a going-concern basis is both foreign and repugnant to the *Otis* doctrine, which emphasized the traditional reorganization criteria of compensating surrendered rights in terms of prospective earning power.[1]

The Commission has itself stated many times that market values cannot be accepted as a criterion for determining values or measuring equitable equivalents in connection with Section 11(e) plans. Thus, in *Washington Railway and Electric Company*, Holding Company Act Release No. 7410 (May, 1947), the Commission stated (p. 27):

[1] *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 631-633. Cf. also detailed analysis of the valuation technique employed in *Otis* in Circuit Court opinion, *In re Securities and Exchange Comm. (Otis & Co.)*, 142 F. 2d 411, 420-421.

> "However, we have never considered market values as determinative of the fairness of a section 11(e) plan and it is therefore unnecessary for us to make an estimate of the market value either of the presently outstanding preferred stock apart from the possibility of liquidation or of the package of securities which the preferred stock is to receive under the proposed plan."

These words were directed squarely to the question of the standards applicable to evaluating on a "going concern" basis the rights of the preferred stockholders whose stock was being retired in a liquidation compelled by Section 11, only a few months following the Commission's decision in the instant case. The only difference is that the Commission in that decision, as well as in the many others where similar statements are made,[1] did not

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[1] Thus, in *Northern States Power Co.*, Holding Company Act Release No. 7950 (1948), approved and enforced 80 F. Supp. 193 (N. D. Minn., 1948), the Commission stated in its brief in the District Court (p. 25):

> "* * * current market price earnings ratios, no matter how applied, are normally irrelevant to the question of reorganization values. If it were possible to determine mathematically, on the basis of present markets, that the market value of a given number of shares of Minnesota Company common stock is exactly equivalent to the liquidation preference of the Delaware preferred stock, the equation would immediately be upset as soon as the market would go appreciably up or down. As pointed out by the Commission, to the extent that capitalization rates are important at all, *the pertinent rate to be considered is one appropriate over the long run rather than one based on the market at any given moment.*" (Emphasis supplied.)

In *Community Gas and Power Company*, Holding Company Act Release No. 7131 (January 15, 1947), the Commission replied as follows to the contention of secured debenture holders of a holding company being liquidated (p. 20):

> "In effect, their argument is that the market price on the day of distribution of the securities allocated to them is the conclusive measure of their participation and that they are entitled

use the "present investment value ex the Act" doctrine which it applied in the Engineers' case and which, it has elsewhere conceded, would make hypothetical current market prices of the senior securities "apart from liquidation" the paramount criterion in determining fairness and equity.[1]

If market values were deemed the paramount criterion for determining whether senior security holders have received the equitable equivalent of their claims in liquidations or reorganizations under Section 11(e), the Commission and the courts could hardly have found "fair and equitable" the various plans carried out as recently as during the past eighteen months. Thus the holders of the 6% debentures of Community Gas and Power Company, having a secured and well-covered claim of $1214 per debenture ($1,000 principal amount plus $214 accrued interest), received in the liquidation of the holding company 87 shares of Minneapolis Gas Light common stock, of which the current cash value at date of distribution

to receive securities with a current market value, equal to the face amount of their claim. *With that we cannot agree.*" (Emphasis supplied.).

See discussion in the text on this page of the "equitable equivaents" which these bondholders received. The plan was enforced in he Courts, and this Court denied certiorari: *Community Gas and Power*, 71 F. Supp. 171 (D. Del., 1947); aff'd 168 F. 2d 740 (C. C. A. 3); *cert. den., sub nom. Vanneck* v. *S. E. C.*, 334 U. S. 846.

[1] See quotation from the Commission's opinion in *United Light and Railways Co.-American Light & Traction Co., supra*, p. 12, n. 1, where the Commission stated: "It is apparent that insofar as *investment value is derived from an analysis of the current yields* of comparable securities, the investment value of American's preferred has been substantially affected in the interim." (Emphasis supplied.) As has previously been pointed out, "yields" are computed on the basis of the *market prices* at which the securities are selling as of the time the computation is made, and such "yields" fluctuate directly with the fluctuations in the market prices.

aggregated $1000.[1] The holders of 7% preferred stock of Northern States Power Company of Delaware, having a claim of $110 per share (entitled on redemption to $120), amply covered by assets, received in liquidation of the holding company 10 shares of Northern States of Minnesota common stock and $3.50 in cash, having a total cash value on date of distribution aggregating $88.50.[2] The holders of 6% preferred stock of Wisconsin Hydro Electric Power Co. for their claim of $176.50 received operating company common stock having a cash value of approximately $100.[3] The holders of 7% Prior Lien Preferred stock of North West Utilities Company for their claim of $203 (entitled on redemption to $213) received common stock having a cash value of $165.[4]

In all the foregoing decisions, which are typical, the Commission reached these results by insisting that market values as of the time of liquidation were not significant and that the determining factor was the earnings' claims of the security holders measured against the future earn-

[1] *Community Gas & Power Company*, Holding Company Act Release No. 7131 (1947); approved and enforced, 71 F. Supp. 171 (D. Del.); aff'd 168 F. 2d 740 (C. C. A. 3), *cert. den.* 334 U. S. 846. Market value of *Minneapolis Gas Light* common as of approximate date of distribution, Wall Street Journal, 8/31/48.

[2] *Northern States Power Company*, Holding Company Act Release No. 7950 (1947); approved and enforced 80 F. Supp. 193 (No. Dist. Minn.). Market value of *Northern States of Minnesota* common as of approximate date of distribution, National Daily Quotation Service, Oct. 7, 1948.

[3] *Eastern Minnesota Power Company*, Holding Company Act Release No. 7822 (1946). Price of common stock as of approximate distribution date, National Daily Quotation Service, Jan. 6, 1948.

[4] *Middle West Corporation*; Holding Company Act Release No. 7905 (1947); approved and enforced; *North West Utilities Co.*, 76 F. Supp. 63 (D. Del.).

Price of *Wisconsin Power & Light* common stock as of approximate distribution date, National Daily Quotation Service, March 5, 1948.

ing power of the assets to be distributed among the security holders. In each of these cases application of the "investment value ex the Act" formula as here applied would have required payment to the preferred holders of amounts in excess of their liquidation claims, but the Commission rejected such market value criteria as irrelevant and inapplicable. Yet in the instant case the Commission reached its result by insisting that current market value was of controlling significance, and wholly ignoring apportionment of future earning power in evaluating the equitable equivalent of the rights surrendered by both classes of stockholders.

Confronted with the foregoing, Commission Counsel find it necessary to execute a sharp *volte face*. After having stated that the Commission justifies its decision in the instant case on the *Otis* principle which required the rights of security holders to be evaluated on the basis of a going business and not as though a liquidation were taking place,[1] they now assert, in effect, that the Commission was entitled completely to ignore the rights of the security holders on a going-concern basis because, here, liquidation rather than reorganization is taking place and the *Otis* principle is for that reason inapplicable. Thus they state.[2]

> "The court below criticized the Commission for failure to ascertain the future earning power of the system and to apportion that earning power between the preferreds and common based on their respective claims to income 'as it did in the United Power & Light case' (R. 35). But that 'technique is appropriate only where, as under the United Light & Power

[1] Commission Petition (No. 226), p. 14.
[2] *Id.*, p. 16.

> plan, a new security is being allocated between preferred and common stockholders. The plan here involved * * * contemplates *paying off the preferred in cash.*" (Emphasis supplied.)

We freely concede that "paying off the preferred in cash"—$39,000,000 of cash raised in the process of liquidation—is indeed a plain indication that true liquidation and not mere reorganization is occurring, and that the principles applicable to such a liquidation (as discussed, *supra,* and as applied by the District Court) should here prevail. Indeed, that is our major contention in Part I of this Brief. But the Commission cannot have it both ways: it cannot urge that it was justified in ignoring liquidation principles and evaluating rights on the "basis of a going business" as in *Otis,* and at the same time argue that evaluation of rights on the basis of a going business as in *Otis* is not appropriate here because the retirement of the preferred was incident to liquidation.

The contention is specious, as well as inconsistent; for it seeks to confuse the *medium of payment* with the mode of determining the *amount of payment.* If the principle of *Otis* governs and, therefore, stockholders' rights are to be evaluated on the basis of a going business, it is obviously no justification for failing to do so that those rights, once evaluated, are to be satisfied in cash rather than in securities. To be sure, the fact that the preferred stockholders were not to receive new securities rendered unnecessary a determination of whether new securities were the equivalent of the rights surrendered. But the process of determining the value of those *rights,* on a going-concern basis, is no different merely because compensation is to be made in cash rather than securities.[1]

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[1] Cf. Court of Appeals' Opinion, R. 38.

That determination must be made, as in *Otis*, by evaluating the correlative claims of both classes of stockholders in the prospective earning power of the going concern. And we demonstrate *infra*, pp. 101-2, how different are the results reached if the rights of the Engineers' stockholders are actually evaluated on a going-concern basis in accordance with the principles of *Otis*, which the Commission purported to be following in this case.

Finally, it may be observed that this contention which Commission Counsel now press upon this Court is directly contrary to the Commission's own holding on this very subject in its *Georgia Power & Light Company* decision, approved and enforced by the District Court of Georgia. In that decision, the Commission squarely held that although the preferred stockholders were being paid off wholly in cash, determination of whether such cash payment represented the equitable equivalent of the preferred stockholders' rights must be made on a prospective going-concern basis in accordance with the principles of *Otis* precisely in the same manner as in the other decisions referred to above (*supra*, pp. 89-90) in which senior security holders received new securities rather than cash, and without regard to current market prices or redemption provisions.[1]

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[1] *Georgia Power & Light Co.*, Holding Company Act Release No. 5568 (1945) approved and enforced, Civil Act No. 133 (M. D., Ga., 1945), where holders of well covered $6 preferred stock of an operating utility company which was continuing in business received $150 cash upon the compulsory retirement of their preferred stock having a liquidation preference of $162.50 and entitled on redemption to $167.50 per share. The Commission stated:

> "* * * the plan before us differs from the plans which were the subjects of our earlier decisions in that it is here proposed, as already indicated, to accomplish the result required by Section 11(b)(2) by terminating all interests of the public holders of

Holdings to the same effect were subsequently made by the Commission in two other cases where senior security holders of *continuing companies* were paid out in cash.[1]

(2) If instead of relying solely on transient market values of a haphazard moment, the Commission had sought to appraise the Engineers' preferreds in terms of their average long-range record,[2] clearly no value in excess of $100 per share could be found, as both Courts below held.[3] Moreover, if it had sought to appraise their *prospective* value on a normal long-range basis and had adequately allowed for only such increase in money rates

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Georgia's preferred stock by means of a cash payment instead of continuing their interests in the enterprise by means of according them the fair equivalent of their existing rights in the form of new common stock (p. 17).

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"We turn now to consider whether the cash in the proposed amount of $150 per share accords the public holders of Georgia's preferred stock the equitable equivalent of their bundle of rights *approaching the problem in a manner similar to that employed by us in testing the fairness of a plan of recapitalization with a single class of stock*" (p. 20; emphasis supplied).

[1] *National Power & Light Company*, Holding Company Act Release No. 8445 (1948), p. 16; *Pennsylvania Edison Company*, Holding Company Act Release No. 8550 (1948), p. 10.

[2] Cf. *Schwabacher* v. *U. S.*, 334 U. S. 182, where the Court stated (p. 200): "The Commission considered the stock's *past yield*, present market price, *and future prospects*." (Emphasis supplied.)

The failure of the Commission in the instant case to accord any attention to the past market prices and yields of the Engineers preferreds is all the more notable in the light of the fact that the Commission has repeatedly laid strong emphasis on past market history and original issue prices in the long series of cases involving retirements of senior securities for cash, where the frustration doctrine was applied (*supra*, p. 55, notes 3 and 4).

[3] District Court Findings 48-53, R. 313a-315a; Court of Appeals, R. 38: "* * * we do not believe that such a finding could be supported on the present record".

and preferred yields as have already taken place, it is equally clear that a value in excess of $100 per share could not be found. On the basis of the increase in money rates and yields alone,[1] we submit it is indisputable that the Engineers' preferreds if still outstanding would presently have an "investment value" of less than $100 per share.[2] And *all* tangible indications emphatically point

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[1] Market prices or "yields" of preferred stocks are, of course, the product of two factors: earnings and money rates. An adverse change in *either* of these factors must adversely affect the market price and yield.

Although the Commission made no attempt to consider the future earning power of the subsidiaries, the rapidity with which changes occur in the earnings of leveraged public utility common stock such as Engineers distributed to its stockholders as a liquidating dividend, is demonstrated by the decrease in earnings of Virginia. The common stockholders of Engineers received 1.45 shares of Virginia common for each share of Engineers common owned, which represented the largest item in the distribution. In 1946 (the year in which the Commission issued its opinion), earnings available for Virginia's common stock were $5,027,740, equivalent to $1.71 per share of common (Moody's, Public Utilities, 1948, p. 745). For the 12 months ended September 30, 1948, earnings available for Virginia's common had dropped to $4,062,427, equivalent to only $1.37 per share on the number of shares then outstanding, and additional shares are now being sold which will further dilute per share earnings (Moody's, Public Utilities, Current Supp.; Vol. 20, p. 1745).

[2] There are contained in the record (R. 122-123) the authoritative figures on the basis of which the Court of Appeals was requested to judicially notice the changes which have taken place in preferred stock yields, and which established that even as of that time (May, 1947) the Engineers preferreds would have had an "investment value" of less than $100 per share. Subsequent developments make this conclusion *a fortiori*, as the following data shows:

Yields on "High Grade Preferred Stock" which stood at 3.42% as of the period of Badger's testimony, at 3.75% as of the date of the District Court's Findings, at 4.12% as of the approximate date petitions for rehearing were presented to the Court of Appeals (see R. 122 for all foregoing), had risen to 4.28% as of October, 1948 (Standard & Poor's, Trade & Securities, Current Statistics Section, November, 1948, p. 27). This represents an increase of 25% in

in the direction of substantial further reductions in the foreseeable future.[1]

It is thus plain that even appraised independently of the rights of the common stockholders, $100 per share represents the *upper limit* of the preferreds' value whether viewed in the light of the record subsequent to Engineers' dissolution or in the light of the entire record prior, as well as subsequent, to dissolution.

(3) If, however, it were to be held that value predicated on current market prices is the proper basis for determining the cash amounts to which the preferred stockholders are entitled in this liquidation, then consideration must also be given to the impact of the changes which

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the yield of high grade preferreds since the time of Badger's computations.

In recognition of the fact that the Engineers preferreds were of inferior quality, Badger had estimated a yield basis of 4.6%, as compared with the much lower yields then prevailing for high grade preferreds. Applying to this 4.6% yield merely the same 25% increase which has taken place for "high grade preferreds", the present indicated yield for the Engineers preferred would be 5.75%. Since the weighted average of the dividend rate on the three series of Engineers preferreds was slightly under 5.40% (the greater portion of the preferred having been of the $5 and $5.50 series) it is evident that on the average the Engineers preferreds would now sell for less than $100 per share, even accepting *arguendo* Badger's estimate of 4.6% for the Engineers preferreds as of the time he testified. However, the Commission did not pass on Badger's 4.6% estimate (R. 67a-68a).

Moreover, the increase in the yields of low to medium grade preferreds, such as those of Engineers, would necessarily be greater than the increase on "high grade preferreds", as Judge Leahy stated (R. 314a), thus indicating a present price for the Engineers preferreds probably less than $90 per share.

Reference may be made to Public Utilities Fortnightly (December 2, 1948, p. 816), for a list of representative holding company preferred stocks selling on an average yield basis of 6.7%; some of these preferreds are the subject of recapitalization plans currently pending before the Commission.

[1] With respect to the future course of money rates, it is to be noted that the Federal Government is still actively supporting the long-term Government bond market, and that agitation in favor of aban-

have taken place in these values since the date of the valuation evidence on which the Commission predicated its finding. By the time the District Court was called upon to approve the plan, substantial changes in those values had taken place, as the District Judge found (R. 314a). He further pointed out that these changes had not been foreseen or allowed for by Badger,[1] stating:

> "These changes occurring within approximately a year of Badger's testimony do not bear out his views as to the asserted stability and 'permanence' of the low money rates, even if 'permanent' be defined as 'two to three years'. A continuance for two or three years of the trend indicated over the past year could substantially reduce or wholly eliminate the differential in the current yield rate over dividend rate in the case of preferred stocks of the type of Engineers".[2]

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donment or modification of this policy had recently been greatly on the increase. (See, for example, "Row Over U. S. 'Pegs' in Market Grows", New York Times, December 12, 1948, p. F1, col. 8; "Parkinson Assails Pegging U. S. Bonds", New York Times, Nov. 11, 1948, col. 6, p. 45; Leffingwell, "How to Control Inflation", Fortune Magazine, October, 1948, p. 90 *et seq.*, "Change Advocated in Bond-Peg Policy", New York Times, December 10, 1948, p. L41, col. 8. If any further modification should take place in the Government's present pegging policies, a further increase in money rates and preferred yields must inevitably result.

With respect to foreseeable future changes in earnings, it may be noted that if current proposals for re-imposition of some form of excess profits taxes or for a general increase in corporate tax rates should materialize, the earnings available for the common stock of the three operating companies would immediately be sharply curtailed. Prior to Engineers' dissolution these companies had the advantage of filing consolidated tax returns, which the record establishes saved the stockholders approximately $1,900,000, during the period 1941-1945 alone (R. 611a); this advantage was irretrievably wiped out in the liquidation, along with the many others, (see, *infra*, pp. 117-119).

[1] Compare *Reconstruction Finance Co. v. Denver & R. G. R. Co.*, 328 U. S. 495, 521-522.

[2] R. 314a; and see the Court of Appeals' reference to the Trial Judge's cogent finding respecting Badger's money rates, R. 19.

As we have shown, the further changes in money rates which the District Judge envisaged have already taken place, although in a shorter period of time, with the result that as of the present time (as for some time in the past, R. 122-123) the "investment value" of the Engineers' preferreds is less than $100 per share. It is axiomatic that "the decree of a court of equity speaks as of the date of entry" [1] and a final decree has not been entered in this proceeding. That decree must take account of these material supervening changes, not foreseen or allowed for in the Commission's findings. *Knight* v. *Wertheim & Co.*, 158 F. 2d 838, 843 (C. C. A. 2, 1947), cert. den. *sub nom. McGuire* v. *Equitable Office Bldg. Corp.*, 331 U. S. 818 (1947). Cf. *R. F. C.* v. *Denver & Rio Grande W. R. Co.*, 328 U. S. 495, 521-522. It is evident that if appropriate account is taken merely of the changes which have already occurred, even on the Commission's valuation formula the preferred stockholders could not be found entitled to more than $100 per share.

C. Application of the Otis formula required an examination of the correlative rights of the preferred and common stockholders. Evaluation of these correlative rights would have resulted in payment to the Engineers preferred of less than $100 per share.

(1) Apart from its erroneous reliance upon transient market values, the Commission's determination of the equitable equivalent of the rights surrendered by Engineers' stockholders failed utterly to take account of the correlative rights of the preferred and common. Under the *Otis* formula, determination of rights on a going-concern basis requires consideration of the correlative rights of both classes of stockholders in the going con

[1] See *supra*, p. 81, n. 2.

cern; and on such basis the equitable equivalent of the rights of the Engineers' preferreds was less than $100 per share.

As has been pointed out, the Commission did not evaluate the rights of the common stockholders on the basis of a going concern or otherwise; it merely left the common to receive (upon payment of $22,000,000 additional in cash) whatever remained after paying to the preferred stockholders the amounts awarded them by "maturing" their future claim to dividends on the basis of momentary market values prevailing 1½ years prior to the liquidation, as heretofore discussed.

This process represented the antithesis of the principle enunciated in *Otis*. There the Commission and this Court refused to treat the preferreds' claim as "matured", or to measure the value of the preferred apart from the value of the common in the joint enterprise. Instead, it measured the rights of both the preferred and common in relation to one another on the basis of their proportionate rights to participate in the earnings of the continuing enterprise. As a result, although the prior claims of the preferreds to earnings were strictly maintained, the "value" of the preferred as of the time of liquidation—for which its holders were to be compensated—was carefully delimited in the light of the residual claim of the common to future earnings.

Here, the Commission wholly ignored the correlative rights of the two classes of stockholders. It simply measured the "value" for which the preferreds were to be compensated by reference to current market prices, and concluded that the common should receive whatever is left after the payment of the preferred. Consequently, the rights of the preferred were treated as though they

were "absolutes", wholly independent of and unrelated to the rights of the common. But the very essence of the "going concern" concept is that both classes of stockholders have correlative rights in that going concern. Thus, while the preferred stockholders have a right to specified dividend payments in preference to any payments to the common (a right which is itself dependent on the existence of earnings sufficient to enable the payment of dividends), the latter are entitled, upon payment of such fixed dividends to the preferred, to all the earnings of the enterprise, including the earnings resulting from the employment of the preferreds' capital in the enterprise. Consequently, evaluation of the preferreds' right to the fixed dividend payments without corresponding evaluation of the common stockholders' right to utilize the preferreds' capital which is the consideration for the dividends paid thereon, is not the evaluation of the stockholders' correlative rights "on a going concern basis" which *Otis* contemplated.

(2) It has already been shown that if the Commission had actually evaluated the Engineers' preferred stocks on a normal long range basis instead of on the basis of the peak market prices prevailing in the first few months of 1946, no value in excess of $100 per share could have been found. If, however, the Commission had evaluated the rights of both the common and the preferred stockholders in relation to one another on a going-concern basis in accordance with the formula employed by the Commission and approved by this Court in the *Otis* case, it is certain that the preferred stockholders would have received considerably *less* than $100 per share in cash value.

Here there were no arrears of dividends to delay the participation of the common stock for long years and make necessary employment of a "discount" factor such as was used in *Otis*.[1] Here the claim of the common to participate in earnings beyond the amount needed to meet the preferreds' current dividends was immediate and plenary. Assuming *arguendo* that the earnings of $10,629,724 reported by Virginia, El Paso and Gulf States for the twelve months ended June 30, 1947 (the date closest to the date of distribution of the securities and the dissolution of Engineers) are accepted as prospective "normal" earnings on a going-concern basis, the annual dividend claim of the preferreds would have entitled them to an allocation of not more than 25% of the value of the enterprise,[2] with a current cash value equivalent to approximately $70 per share of preferred stock.[3]

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[1] See *In re Securities and Exchange Comm.* (*Otis & Co.*), 142 F. 2d 411, 420-421.

[2] Total earnings available for both classes of stockholders as indicated above: $10,629,724 (Moody's Utilities, Advance Supp., Vol. 19, pp. 1904, 1921, 1910).

		Allocation	*Adjusted Allocation**
Annual dividend claim of Engineers' Preferreds (all series)	$2,119,092	20%	25%
Residual earnings for common	8,510,632	80%	75%

* There has been added to the dividend claim of the preferred 25% thereof for "loss of position" (something not considered necessary in the *United Light* decision, but approximately the percentage allowed by the Commission in *Washington Railway & Electric Co.*, Holding Company Act Release No. 7410 and *Northern States Power*, Holding Company Act Release No. 7950).

[3] As shown on the accompanying table, the approximate market value of the stocks of Virginia, Gulf States and El Paso shortly after distribution aggregated $86,768,146. Add thereto $17,000,000 of cash in Engineers treasury prior to dissolution, making total

It will be observed that such a result would have been consistent with the treatment received by senior security holders in the many plans in which the Commission has measured the rights of the security holders on a going-concern basis in accordance with the principles of the *Otis* case (supra, pp. 89-90). In addition, it is to be observed that under this formula the common stockholders would have been spared the necessity of making the $22,000,000 cash contribution through the exercise of the Gulf States warrants, and would in fact have received some $12,000,000 as their pro rata share of the treasury cash accumulated through property dispositions and retained earnings of the common.[1]

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value of Engineers' assets $103,700,000. Accordingly, the preferreds' allocation of 25% would have an aggregate value of $25,925,000, or approximately $66 for each of the 392,443 shares outstanding.

	*Price Per Share 8/1/47**	*Aggregate Market Value*
Gulf States common (N. Y. Stock Exchange)	15⅝	$29,843,250
Virginia (N. Y. Stock Exchange)	16⅝	47,279,548
El Paso ("over-the-counter")	25¼	9,645,348
(All prices from Standard & Poor's Stock Guide, Sept., 1947, pp. 82, 182, 66)		
	Total	$86,768,146
As of Nov. 30, 1948, aggregate total market value as computed from Wall St. Journal of 12/1/48 was		$83,526,524

[1] It was this treasury cash ($17,000,000) plus the $22,000,000 contributed by the common stockholders through the Gulf States warrants which primarily comprised the $39,000,000 paid to the preferred stockholders.

(3) It is asserted by petitioners that since the common stockholders are the "residual" claimants, they were entitled to receive only whatever remained after paying the preferred holders "the investment value" of their stocks, "on a going concern basis", and that there was accordingly no need for the Commission to evaluate the common's rights on a similar basis—or indeed on any basis. What has been said above points the fallacy of such a contention: to speak of "residual claimants" is to speak in terms of *liquidation*, not in terms of a going concern. It is this very inconsistency which prevades and completely distorts the Commission's rationale. The preferreds' rights were viewed as though the Act did not require liquidation—indeed, as though the Act did not exist. But the common's rights were viewed merely as those of the residual claimants in the liquidation which the Act had in fact compelled, and in consequence of which, losses and deprivations had been sustained by the company and the common stockholders for many years. The liquidation of Engineers did not commence with the plan which is the subject of the instant proceedings; it merely ended there. After having been insulated from all contact with such realities throughout these years, the preferred demanded, and were awarded by the Commission in the final stages of the liquidation, compensation for their *future* high expectations, still "as though there were no liquidation and no Act". Once again the full burden of the unpleasant realities was left for the common stockholders, the "residual claimants". It was precisely to this gross inequity that the Court of Appeals pointed in stating (R. 35-6):

> "What the Commission has done is to consider the investment values of the preferreds *ex* the Public

> Utility Holding Company Act, i.e., as if the Act had never been passed. But it considered only the preferreds on this basis. It seems to have omitted consideration of the common by a similar standard. It made no finding as to the 'value' of the common stock. * * * The result is that the Commission has attempted to value the securities of Engineers both *ex* the Act and *intra* the Act."

If the preferreds' rights are to be viewed as the Commission purported to view them, *ex* the Act—i.e., without taking into account the consequences of the Act—surely neither logic nor equity will permit the common's rights to be measured on a different basis. Consequently, as the Court of Appeals pointed out, the deprivations which the common suffered in consequence of the liquidation, including the divestment of profitable subsidiaries and the long period of withheld dividends, "must be weighed into the calculation" [1] if the rights of stockholders are to be determined apart from the impact of the Act—i.e., "ex the Act". On the other hand, if the rights of the common stockholders are viewed merely as those of residual claimants in a liquidation caused by the Act, then the rights of the preferred must at the very least also be limited as in a liquidation, and without added compensation for their "disappointed expectations"; for, as this Court has stated, "enforcement of an overriding public policy should not have its consequences visited on one class with

[1] (R. 37) The Court of Appeals' statement that such losses must be "weighed into the calculation", like the term "bookkeeping", was obviously intended figuratively, in the sense that the existence of such losses should be taken into account. Petitioners' attempts to distort this statement into a command that each loss must be specifically computed and the "enterprise reconstructed" constitute a transparent device for erecting a straw man with which to grapple.

a corresponding windfall to another". *Otis & Co. v. S. E. C.*, 324 U. S. 624, 637.

It was precisely in the light of these precepts that the District Court appraised the respective rights of the preferred and common stockholders, as its opinion discloses. It pointed out that evaluation of the rights of the preferred on the basis of "investment values ex the Act", without a similar evaluation of the common was contrary to the teaching of *Otis*, stating (R. 291a):

> "The argument for payment of the premium is comparable to dealing cards off the top of a deck. When full hands (based on theoretical 'investment value') have been dealt to all the senior security holders, the common would merely get whatever happens to remain. Under the Act the interest of all investors must be considered. An emphasis on a preferred's rights must not slight the interests of a common stockholder. For if this occurs this is the direct opposite of the arguments utilized in *United Light & Power*, D. C. Del., 51 F. Supp. 217, aff'd 3 Cir., 142 F. 2d 313, aff'd *sub. nom. Otis & Co. v. Securities and Exchange Commission*, 323 U. S. 624. * * *"

On the other hand, if the claims of the preferreds are to be measured "intra the Act", i.e., in the realistic light of the fact that the Act compelled liquidation of the investment of both classes of stockholders, then, as the District Court stated:

> "There is no reason why the preferreds should get additional compensation for the termination of the lucrative dividend rate which the preferreds have received, when this termination results wholly and directly from frustration of the enterprise by governmental edict" (R. 291a).

In short, the District Court, consistently with its statutory duty to determine independently whether the plan was "fair and equitable", appraised the proposed payment of premiums to the preferred stockholders both "intra the Act" and "ex the Act", after a "careful and far-reaching examination" of all the "relevant factors" (R. 34) and "substantial equities" (R. 38) which the Court of Appeals stated must be considered. Its conclusion that the "equitable equivalent" of the rights which the preferred stockholders have surrendered cannot exceed $100 per share plus accrued dividends was, we submit, not only sound but inescapable in the light of the considerations hereinabove discussed.

V. The Commission's "investment value ex the act" doctrine as applied in the instant case is repugnant to the strict priority principle and to every concept of fairness and equity.

A. The Commission's rationale sounds the death knell of the strict priority doctrine.

Just as the Commission's decision and rationale in this case find not support but repudiation in *Otis & Co. v. S. E. C.*, as has been shown, so too petitioners' efforts to pass them off in the guise of the strict priority principle cannot withstand examination. The Commission's doctrine, as applied in this case, involves a dangerous and fundamental perversion of that principle which this Court found to be firmly embedded in the "fair and equitable" standard of Section 11(e): *Otis & Co. v. S. E. C.*, 323 U. S. 624, 634.

This is true notwithstanding that the strict priority principle was not directly at issue in this case in its narrow

technical sense as it applies to senior security holders. Engineers' plan at all times provided that the preferred stockholders would receive full payment of their entire claim in cash before the common stockholders would receive any participation; the basic issue was the *amount* of that claim and the mode of its determination if the contract provisions were to be overridden.[1]

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[1] In the light of this factor, it is evident how misplaced were the derisive statements of petitioners in the Court below that the District Court had sought to substitute "notions of colloquial equity" for the strict priority standard.

Petitioners having contended that the charter liquidation provisions should not be deemed applicable to this liquidation, the District Court gave careful consideration to "all the factors which have actually been considered in these cases" (R. 292a) in order to determine whether there existed any equitable basis to justify the award of premiums to the preferred stockholders. Starting with the assumption that under the "fair and equitable" standard (R. 287a) the preferred stockholders should not receive less favorable treatment than had been accorded senior security holders under the long line of frustration cases (referred to in the Court's Opinion, R. 287a, 292a), the Court sought to ascertain whether there existed any special equitable factors which here entitled them to receive more favorable treatment. It found that there were not, and that indeed every consideration of fairness and equity, whether in a technical or a non-technical ("colloquial") sense, interdicted the payment of the premiums (R. 292a). Thus, instead of merely resting on the long line of non-premium decisions (*supra*, p. 55, notes 3 and 4), the District Court went out of its way to be certain of observing the basic precept that "it is the function of a court of equity to do equity." *Cf.* Mr. Justice Black: "A Chapter X or § 77B reorganization court is just as much a court of equity as were its statutory and chancery antecedents." (*Vanston Bondholders' Comm.* v. *Green*, 329 U. S. 156, 165); Mr. Justice Murphy: "Equity looks in all directions. Only in that way can the various interests in the corporate community be adequately protected." (*Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 238); Mr. Justice Frankfurter: "First and last, this is a proceeding in equity, and until a decree consummating a plan of reorganization is finally signed it is the duty of a court of equity not to make itself an instrument of inequity." (*Insurance Group* v. *Rio Grande W. R. Co.*, 329 U. S. 602, 627). *Cf.* also *Pepper* v. *Litton*, 308 U. S. 295; *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307.

The bankruptcy and equity reorganization decisions which have enunciated the strict priority principle surely afford no support for the Commission's determination that the common must pay the preferred $3,200,000 in excess of the preferreds' liquidation claim specified in the corporate charter. As has been shown (supra, pp. 35-36), in such decisions the amount of the priority is invariably determined solely by reference to the contract provisions as embodied in charter or indenture. We are aware of no decisions, and appellants have referred to none, where it has been held that senior security holders in bankruptcy or equity reorganization may validly receive payments in *excess* of their contract claims.[1]

The right of junior security holders to be secure against encroachments by senior holders is an unchallengeable corollary of the strict priority doctrine,[2] dictated not only by considerations of elementary fairness but by the necessity of preserving the integrity of that doctrine even in

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[1] *Cf.* Judge L. Hand, in *Knight* v. *Wertheim & Co.*: "We cannot agree that the debenture holders had as yet any legally protected interest in the property *beyond the principal and accrued interest of their bonds* which could be weighed against the shareholders' interest. If in fact they had relied upon sharing in an equity, in the property above that amount, it was without warrant of law and constituted no reason for depriving the shareholders of whatever chance might remain of realizing upon their property." 158 F. 2d 838, 843; *cert. den. sub nom. McGuire* v. *Equitable Office Bldg. Corp.*, 331 U. S. 818. (Emphasis supplied.)

Cf. also *The United Light and Power Co.*, 10 S. E. C. 1215, 1225, where the Commission stated: "In liquidation or reorganization proceedings either in bankruptcy or in equity * * * the amount of the claim is based on its face amount plus accrued interest, without regard to any redemption premium."

[2] "Each security holder must be compensated as exactly as he can be for that which he is giving up. *But, though his cup must be filled level to the brim, it must not run over.* This much is plain." (*In re Securities and Exchange Commission* [*Otis & Co.*], 142 F. 2d 411, 419 [C. C. A. 3]. Emphasis supplied.)

its narrow sense. For, if a device be employed to permit the senior security holders to transgress the limitations of their lawful claim on one occasion, the gate will inevitably be opened for reverse transgression of those very limits on other occasions. The "strict priority principle" must then give way to some form of "the relative priority doctrine" which this Court sought in its *Los Angeles Lumber* decision[1] to excise from the law of corporate reorganization.

This danger is not something remote or conjectural, but is the inevitable concomitant of the Commission's determination in the instant case. For here, the Commission held that preferred stockholders must receive more than their contractual claim in liquidation because their dividend rate was somewhat higher than the then current going rate. Surely it follows that senior security holders must receive less than their contract preference if their dividend or interest rate at the date of liquidation is lower than the then current going rate, irrespective of the fact that more than enough assets are available to pay their contract claim in full. Since the Commission applies this same "investment value ex the Act doctrine" to bonds no less than preferred stocks,[2] this means that the holder of a $1,000 bond amply protected by assets but carrying an interest rate of 4% would be required to accept a cash payment of $800 in full satisfaction of his rights, if the Commission found that bonds of allegedly comparable quality were at that moment selling on a 5% yield basis.

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[1] *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106.

[2] As has been pointed out (*supra*, p. 64, n. 1), the first case in which the Commission applied its new doctrine involved debentures: *American Power & Light Company*, Holding Company Act Release No. 6176 (1945). Cf. Commissioner Healy's cogent development of this point at pp. 39-41 of his vigorous dissent in that case.

And in this very case, based upon the yields presently prevailing for comparable securities, as has been indicated (supra, p. 95, n. 2), the holders of the 5% and 5½% preferred stocks of Engineers should be required to return a portion of the $100 per share they have already received if the District Court's decree is not ultimately confirmed.

It is scarcely less than a mockery to assert that a doctrine which entails such results is consistent with the strict priority principle. On the other hand, if it be suggested that the charter contract rights will be revived, if need be, to assure senior security *no less* than their contractual claim, then not only does the doctrine stand condemned as "a one way street",[1] but, in addition, all petitioners' arguments here as to the inapplicability of those charter provisions in liquidations under the Act stand revealed as invalid and insincere.

B. Impact of the "present investment value" on the equity stockholders.

The full import of the Commission's doctrine can best be apprehended by considering its application to the liquidation of a holding company having "non-callable" senior securities outstanding. Such securities are not uncommon in the case of utility holding companies,[2] and necessarily

[1] *Cf.* Commissioner Healy dissenting in *American Power & Light Co.* (*supra*, p. 109, n. 2) at p. 39, n. 11.

[2] For example, non-callable senior securities of holding companies are referred to in the following decisions by the Commission: *United Light-American Light & Traction Company*, Holding Company Act Releases Nos. 6603 (1946) and 7951 (1947); *Washington Railway and Electric Company*, Holding Company Act Release No. 7410 (1947); *Public Service Corporation of New Jersey*, Holding Company Act Release No. 8002 (1948); *Philadelphia Company*, Holding Company Act Release No. 8242 (1948). See also Moody's Public Utilities, 1948, pp. a103-a104, for an extensive list of non-callable utility bonds and preferred stocks.

have a market value much higher than senior securities (such as the preferred stocks of Engineers) which are callable at stipulated prices at whatever moment such redemption is advantageous to the company and the equity security holders.[1]

It will be recalled that in the instant case Badger concluded that the "values" of the preferred, if not limited by the charter redemption provision, would have been $107, $118 and $129 per share for the respective series.[2] Therefore, if the Engineers' preferreds were non-callable senior securities, Badger's "present investment values" would have resulted in the requirement that the common stockholders pay premiums of approximately $5,000,000, instead of the $3,200,000 here ordered. And if a holding company had outstanding, as some do, bonds and several issues of non-callable preferred stocks, it is evident that virtually the entire equity of the common stockholders could be siphoned off in payment of the "present investment value" of the senior securities. In this way, little or nothing might be left for the common stock, although

[1] Petitioners' strong emphasis upon the redemption provisions of the Engineers' preferreds might serve to convey the impression that this redemption provision enhanced the value of the preferred stock. In fact, precisely the opposite is true. If there were no redemption provision, the stock would be non-callable, and the preferred holders would have been entitled to retain their relatively high dividend rate when money rates were low, without any limitation of time so long as the company continued in business. Thus, the presence of the redemption provision—allowing as it did refunding by the company of the preferred stock at a time when money rates are low—detracted from rather than added to the value of the preferred. Plainly, as the Court pointed out in *City National Bank & Trust Co.* v. *S. E. C.*, 134 F. 2d 65, 69 (C. C. A. 7): "While it is true that the payment of premium was a form of compensation to the debenture holders, nevertheless the redemption provision was for the benefit of the corporation * * *", to be exercised at its election when money rates were low.

[2] Commission Opinion R. 65a-66a.

such stock might have a very substantial value on both an asset and earning power basis which would entitle it to a large participation under every recognized liquidation or reorganization standard.[1]

It is thus evident that the "investment value" doctrine is, as the District Judge observed, comparable to "dealing cards off the top of the deck."[2] The residual claimants (the common stockholders) might well find that through no fault of their own, and in response to a statutory command to liquidate the enterprise, all the "cards" had been dealt out, leaving no hand or a very incomplete one for them if the predetermined contract limitations are violated.

It may be argued, as it was in the Courts below, that in such circumstances the Commission would avoid this

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[1] Consider, for example, a corporation with the following relatively simply capitalization:

	Par Value	*"Investment Value"*
6% Bonds (Non-callable)	$20,000,000	(3.5% basis) $34,000,000
7% Preferred Stock (Non-callable)	15,000,000	(5% basis) 21,000,000
Common Stock (Earning power $1,000,000 per annum)	10,000,000	?
Surplus	5,000,000	
	$50,000,000	$55,000,000

In the foregoing case, under a rigid application of the investment value doctrine invoked in this case, the common would be required to pay the senior security holders their "investment value" of $55,000,000, although total assets of the corporation aggregate only $50,000,000. Even if $5,000,000 were sliced off the "investment value" of the senior securities, nothing would still remain for a common stock which had a book value of $15,000,000 and an earning power of $1,000,000 per annum. And, as was pointed out, the capital structure used in this example is relatively simple as compared with that of some holding companies which have several issues of preferreds as well as bonds outstanding.

[2] *Supra*, p. 105.

result by "valuing the enterprise on an over-all basis" and "weighting" the participations of the various claimants. We must assume that the Commission would indeed see the necessity of taking measures to avoid a result so palpably inadmissible. Yet, in the Court below Commission Counsel indicated that non-callable preferred stocks would be entitled to premiums as high as 60-75 percent of their par value.[1] And in the instant case, the Commission did *not* "value the enterprise" on an over-all basis or on any other basis.[2] It merely "valued" the claim of the preferred on the basis of momentary peak market prices and accorded no consideration whatever to the value of the common on a comparable basis or otherwise. The common was simply left to receive whatever remained after the preferred were paid out in accordance with the so-called "investment value ex the Act" formula; and as the District Court correctly apprehended, under this formula little or nothing may remain for valuable common stocks in liquidations compelled by the Act.

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[1] The Commission's Reply Brief (quoted in our petition for rehearing, R. 104, n. 7) stated:

> "For example, 6% preferred stock would be worth, if non-callable, approximately $175 on a 3.42 per cent yield basis and $160 on a 3.75 per cent yield basis."

[2] Cf. *Consolidated Rock Products Co.* v. *Dubois*, 312 U. S. 510, 520, 524.

VI. The Commission's rationale was otherwise fallacious. The liquidation of Engineers entailed no "transfer of values" to the common, but only imposition of additional losses.

A. The Commission confused "frustration" with "appropriation".

One of the greatest fallacies in the Commission's rationale is its implicit assumption that if the preferred stockholders sustained a deprivation by reason of the compulsory retirement of their stock upon payment of $100 per share, the common stockholders necessarily became the beneficiaries of that deprivation. This embodies essentially the same stark *non-sequitur* which this Court has rejected in enunciating the principle that "Frustration and appropriation are essentially different things." [1]

In concrete terms, what the Commission and the other petitioners contend is that because the market was allegedly willing to pay a premium for preferred stocks similar to those of Engineers by reason of the fact that they carried dividend rates somewhat higher than the money rates current at the time Badger and Barnes gave their testimony, it follows that the common stockholders profited to the extent of these premiums when the preferreds were retired at $100 per share upon the company's dissolution in obedience to the Act. We submit this is tantamount to arguing that if a stock which has a $100 par or stated value on a company's books thereafter attains a market value of $110, the stock-

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[1] "It is well settled in this Court that, 'Frustration and appropriation are essentially different things.' *Omnia Co.* v. *U. S.* (261 U. S. 502), p. 513" (*U. S. ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 282).

holders' potential market gain is the company's loss; or, conversely, that if the market price of the stock drops to $90 per share, the stockholders' loss is the company's gain.

Even if it be assumed *arguendo* that when the Engineers' preferreds were retired the preferred stockholders were deprived of the theoretical opportunity of realizing a premium which the market was allegedly willing to pay for preferred stock dividend rates in excess of the then going rates, no correlative benefits accrued to the common stockholders. The low "yields" on which Badger and the Commission based their determinations had relation only to the yields of preferred stocks and other senior securities. But the Engineers' common stockholders did not receive these preferred stocks which they could offer on the market in order to realize the hypothetical "premiums"; the company was required to completely retire the preferred stocks. Nor were the common stockholders permitted to put out a new issue of preferred stock or other senior securities at the low money rates then prevailing to replace the preferred stocks, and thereby to profit by the forced retirement of the preferred.[1]

[1] It is significant that in the only two decisions subsequent to the instant case in which the Commission applied the "investment value ex the Act" doctrine in connection with the retirement of senior securities, the Commission laid strong emphasis on the fact that the companies there involved were not liquidated but were continuing in business (in one instance augmented by merger), and that in both instances the companies were permitted to replace the retired preferred stocks with other senior securities carrying a much lower money cost than the preferred stocks which were retired. Thus, in *Pennsylvania Edison Company*, Holding Company Act Release No. 8550 (Oct. 16, 1948), the Commission stated (p. 42):

> "The enterprise continues with the additional betterment of closer integration with the properties of Penelec as a consequence of the merger. And Penelec accomplished the financing

On the contrary, the common stockholders were forced to liquidate what remained of their company and to dissolve, and in that dissolution they suffered serious deprivations and losses in addition to those previously sustained.[1]

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necessary to acquire Pened's assets *through the issuance of securities which in effect replaced the old preferred stock and bonds of Pened at a time when market conditions were highly satisfactory.*" (Emphasis supplied.)

And in the *United Light and Railways Company*, Holding Company Act Release No. 7951 (December 31, 1947), the Commission pointed out that the 6% non-callable preferred to be retired would be replaced by an issue of ten year serial notes carrying an interest charge of only 3⅛%, and stated (p. 37):

> "It may be noted that the common stockholders of American would realize substantial benefits from the elimination of the preferred at a price of $33 per share. To the extent that preferred shares are tendered, there will be a substantial reduction in charges, representing the difference between the present dividend of 6% and 3⅛% interest on the proposed serial notes. The use of debt instead of preferred stock, will also give the company certain tax advantages * * *. Since the payment to the preferred amounts to $8 per share over par * * * the entire excess over par would be equalled through savings in charges in just over five years."

Since the Commission found that these factors were highly significant in appraising the fairness of the premium payments in the plans referred to above, it would seem that petitioners are estopped from even suggesting that their complete absence here is not equally significant respecting the unfairness of the Commission's requirement for payment of the premiums in the instant case.

[1] Thus, in addition to the financial losses suffered in carrying out the Commission's divestment orders (*supra*, pp. 60-61) the common stockholders sustained the further deprivations attendant upon entirely giving up the holding company form of organization, the financial advantage of filing consolidated tax returns (*supra*, p. 96, n. 1), the centralized expert service organization, the leveraged capital structure and the recoupment of past losses which such structure would produce in an economic upswing. Some of these factors have been summarized as follows:

> "As Engineers was constituted prior to the passage of the Act it had * * * the advantages of diversity (which Dr. Badger, the only witness for the preferred stockholders, admits are of value [Dr. Badger, Tr. p. 1495]), the advantages of a non-profit

Indeed, the compulsory retirement of the preferred itself constituted a serious deprivation to the common. Under their contract with the preferred, the common stockholders had the absolute right to the use of the $39,000,000 of capital contributed by the preferred without limitation of time; and without obligation other than to pay the preferred the stipulated dividends when earned. The fact that the dividend rates payable to the preferred might have been somewhat higher than those temporarily current in the money markets in 1945 and 1946 did not make this contract disadvantageous to the common. The same contract gave the common the option to retire the preferred upon payment of the redemption prices whenever the condition of the money market made such a step desirable for the common.

But even apart from this right, it would have been highly advantageous to the common to have been permitted to keep Engineers in existence and to maintain the preferred stock outstanding. The dividend rates being paid to the preferred represented an annual senior money cost, or rental charge, of 5.40% which the common stockholders paid for the use of this $39,000,000 of capital. At the time of the retirement of the preferred, as well as at the present time, many sound util-

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mutual service organization furnishing services of trained experts (Dr. Badger admits that the Engineers companies have had excellent management [Dr. Badger, Tr. p. 1699]), savings from combined purchasing, sales development and other services, leverage from the inclusion of $40,000,000 of preferred stock in the capital structure (as a preferred stock having no maturity date), a pool of credit available to aid companies whose earnings are temporarily depressed and to help equalize the earnings of the system. As a result of the Act all these advantages have been or must be foregone" (Extract from brief dated August 19, 1946, filed by Engineers with the Commission).

ity operating common stocks were available for purchase at a price equal to approximately eight times current earnings,[1] or equivalent to approximately 12½% on cost. Thus, if not for the Act, Engineers' common stockholders would have been free to retain the capital of the preferred holders without any limitations of time at an overall cost of approximately 5.40% while realizing some 12½% on this capital; or, in the alternative, the common stockholders had the option of calling the preferred stock and replacing it with preferred carrying an even lower dividend rate.[2]

Not only were the common deprived of this perpetual opportunity to retain this large reservoir of capital and to employ it profitably, but, over a period of ten years, they were forced to sell off a large number of the company's assets at a loss in order to comply with the Commission divestment orders,[3] and to retain the proceeds

[1] From the figures set forth in note 3, p. 101, *supra*, it will be seen that the common stocks of the three operating companies distributed in the Engineers liquidation were themselves accorded a market price equivalent to approximately eight times their then current annual earnings (annual earnings $10,629,724, aggregate market price $86,700,000; their present market price is approximately $3,000,000 less [*Ibid.*]). See also Public Utilities Fortnightly, issue of December 2, 1948, at p. 815, for list including many representative utility common stocks purchaseable at eight times earnings and even less.

[2] Cf. District Court Finding No. 46 (R. 311a-312a).

[3] See District Court Opinion, R. 290a; Findings 37-38, R. 307a-308a; Court of Appeals Opinion, R. 36, 37.

Apart from the losses sustained on divestments, the Act put an end to the further growth of the Engineers system which would undoubtedly have resulted in additional large earnings for the common. The record establishes that Engineers was in an excellent position to resume the process of further expansion which the depression had interrupted. One instance of this growth possibility was the option it held giving it the right to acquire control of El Paso Natural Gas Company, an enterprise which was relatively in its infancy in 1930

of those sales and forego all dividend income [1] in order to attempt to accumulate the money required to retire the preferred stock. Since the sums thus realized were still not sufficient for the purpose, the common stockholders were subsequently required to contribute $22,000,000 additional in cash, and to "mortgage" the remaining assets by advance payment of dividends [2] in order to complete the formidable task of raising the money required to retire the preferreds.

Finally, as compensation for all these efforts and deprivations, the common stockholders ultimately realized in the liquidation an amount barely approximating the sum actually received by the company for the common stock,[3] as compared with the approximately $190 paid to the preferred stockholders for each $96 received by the company.[4]

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when the option was acquired (R. 508a-510a). This company has since become one of the leading natural gas pipe line companies of the country, with total assets exceeding $102,000,000 (Moody's Public Utilities, 1948, p. 661), as compared with $7,000,000 in 1930 (Moody's, 1931, p. 2362); and net income of $283,000 in 1930 had increased to $3,953,000 in 1947 (*ibid.*). Engineers was prohibited by the statute from adding this highly promising enterprise to its system, and was ordered by the Commission to divest itself of all relationship therewith (*Engineers Public Service Co.*, 12 S. E. C. 41). Although Engineers recorded a book profit on this divestment, the record establishes that it was deprived of the opportunity to realize approximately $4,000,000 (which amount has now increased to approximately $7,000,000) additional as measured simply by the market price which the stock subsequently attained (R. 509a). More important, it was forced to forego all the advantages accruing from complete control of one of the country's most dynamic growth situations.

See also Findings 37-38 (R. 307a-308a), and Court of Appeals Opinion (R. 36-37).

[1] Commission Opinion (R. 69a); District Court Findings 34-36, R. 306a-307a.

[2] Cf. District Court Findings 39-40 (R. 308a-309a).

[3] Cf. Engineers Ex. No. 54, R. 1820a, and District Court Finding No. 31, R. 305a.

[4] District Court Findings 23-26, R. 301a-303a.

B. Petitioners' contention that the common stockholders derived "economic benefit" from the retirement of the preferred is frivolous.

In the face of these facts it is understandable and significant that petitioners find it necessary to attempt an argument that the retirement of the preferred stocks resulted in countervailing "economic benefit" to the common.[1] The only basis which can be suggested for this contention is a sentence in the Commission's opinion to the effect that "the retirement of the preferred stock will be of immediate benefit to the common stockholders" (R. 69a), a sentence which merely serves to highlight the inconsistencies and paradoxes flowing from the Commission's fictional doctrine. For, examination of the context in which this statement appears, makes it incontrovertibly plain that the Commission merely recognized that the impact of Section 11 on Engineers had been so severe, and the degree of governmental frustration of the enterprise so great, that the preferred stock had been transformed *as the result of the Act* into a burden for the common stockholders, instead of the valuable advantage it had formerly constituted and would at present constitute if not for the Act.[2]

It is indisputable that the preferred stock became a "financial burden" only because the Act itself prevented the company from realizing income on the $39,000,000

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[1] Petition of the Commission in No. 266, pp. 6, 17.

[2] The Commission's own words foreclose argument on this point. It stated (R. 59a):

> "The reduction of the Engineers holding company system from its previous size and diversity to a single operating company necessitates a commensurate contraction of its financial structure. Engineers' outstanding preferred instead of providing valuable leverage for the common, has become a financial burden."

of capital which that stock represented. Even in the face of the sacrifices imposed on Engineers during the decade following passage of the Act, it would still have been greatly to the advantage of the common stockholders, as we have shown (supra, pp. 117-118), if they had been permitted, free of the Act's restraints,[1] to retain their enterprise alive, to continue the preferred stock outstanding, and to invest the $39,000,000 in the stocks of operating utilities. But again the Act intervened to impose upon them the further and final requirement—the complete dissolution of the remainder of the enterprise. Under these circumstances, to refer to the "benefits" conferred by the Act upon the common by reason of the retirement of the preferred stock which the Act alone had transformed from a valuable asset (as the Commission itself stated) into a burden, *at best* partakes of that bizarre "exercise in semantics" to which Judge Leahy referred in stating (R. 311a-312a):

> "Analysis of the value of the Engineers preferreds on a 'going concern' basis is largely an exercise in semantics, since the Act dictates the dissolution of Engineers and of the entire holding company enterprise, and thus makes impossible the 'going concern'

[1] The inability of Engineers to reinvest the proceeds realized from the sale of assets pursuant to the Commission's divestment orders was due solely to the restrictions contained in the Act. Under Sections 9 and 10, no new acquisitions may be made by a holding company except with the approval of the Commission, which may be granted only in very special circumstances. And the record establishes (R. 448a, 978a) that apart from one relatively modest acquisition in connection with Virginia, Engineers was unable to make any others within the statutory limitations. Cf. *The Western Public Service Company*, 12 S. E. C. 804, concurring opinion, at p. 818: "The management apparently has found no lawful way in which this capital can be reinvested in furtherance of the purposes for which this corporation was created. The fair course is to return it."

in which the preferred and common stockholders engaged to invest. If not for the requirements of the Act, Engineers as a 'going concern' would have been free to take advantage of the present low money markets by calling and redeeming its preferred stocks and replacing them with preferred stocks carrying a lower dividend rate than those now outstanding; it would thus continue to enjoy the leverage advantages of senior capital, but at a substantially lower cost. Under these circumstances, payment of the premiums to the preferred stockholders would have been consonant with the purposes and intent of the charter redemption provision. But the Act has made it impossible for the Company and the common stockholders to avail themselves of these benefits contemplated by the contract, along with the many other advantages which would have accrued to them as a 'going concern, exclusive of the impact of Section 11'."

As has previously been shown (supra, pp. 54-59), prior to the adoption of its "investment value ex the Act" doctrine applied in this case, the Commission had itself recognized and forcefully urged in the courts that "fairness and equity" require consideration of the correlative deprivations which the junior security holders sustain along with the senior security holders in consequence of the retirement of the latter's investments under the impact of Section 11, and that such consideration renders unfair and inequitable the payment of premiums. The Commission's pertinent statement in its brief in *New York Trust Co.* v. *S. E. C.*[1] merits repetition here:

"In the instant case neither Power nor a successor company is retaining, or can retain, the capital ob-

[1] 131 F. 2d 274 (C. C. A. 2), cert. den. 318 U. S. 786, rehearing den. 319 U. S. 781.

tained from the sale of the debentures for the benefit of the system. The debenture holders are being repaid the principal of and accrued interest on their debentures, are restored to their original position, and are not compelled to accept the risks of a new enterprise. Under these circumstances as we have heretofore shown the debenture holders are not entitled to anything more."

Although the foregoing argument was presented to the Second Circuit some years before the Commission's decision in the instant case, the Commission has again recognized the soundness of the basic reasoning therein contained in its two recent decisions referred to supra, p. 115, n. 1, in which it emphasized that payment of the premium was "fair and equitable" to the junior security holders because, *unlike the situation here*, the common stockholders in those cases were permitted to continue their enterprises in existence and to replace the retired senior securities with other senior securities at a much lower rate.

PART THREE

THE DISTRICT COURT DID NOT EXCEED ITS STATUTORY FUNCTIONS. THERE WAS NO VALID BASIS FOR REMANDING THE PROCEEDINGS TO THE COMMISSION.

VII. The District Court did not exceed its powers in subjecting to an independent examination the Commission's conclusion that the plan was fair and equitable.

The Commission contends, as it did in the court below, that unless its conclusion upon the fairness and equity of a plan under Section 11(e) lacks "any rational and statutory foundation", it may not be disturbed by the District Court, and that the Commission's judgment in these matters may not be reversed by the District Court unless "it has plainly abused its discretion". The Court below rejected that contention, and after the most careful analysis of the Act, its legislative history, the relevant authorities and other considerations (R. 20-34), concluded:

> "In the light of the foregoing we cannot hold, as the Commission contends that we must, that unless the conclusions of the Commission lack rational or statutory foundation they may not be disturbed by the Section 11(e) court, or that a reversal of the Commission's judgment by the court may not be effected save where the Commission has plainly abused its discretion. We conclude that it was the duty of the court below to function as an equity reorganization tribunal within the limitations prescribed by the Act. The findings and conclusions of the Commission were not binding upon the learned District Judge though, as was proper, he treated them with respect" (R. 34).

It is our position that even under the most restrictive view of the jurisdiction of the District Court in these matters, its judgment in the present case was correct and should be affirmed, since the conclusion of the Commission that the plan was fair and equitable was without rational and statutory foundation. To reach its determination that the plan as approved by the Commission was not fair and equitable, the District Court was not required to disturb, and did not disturb, any factual finding of the Commission. Virtually all the facts upon which the District Court rested its conclusion had been found by the Commission.[1] No attack was made in the courts below, and so far as we are aware none is made here, by any party, upon the accuracy of the facts recited in the District Court's opinion or in its findings.[1] The District Court differed with the Commission's ultimate conclusion, based upon the admitted and undisputed facts as set forth in the Court's opinion and findings. And, where the *conclusion* of the Commission upon the facts is, as here, either without rational basis or contrary to law, even a "review" court exercising the most limited review functions would have the power to set aside the conclusion.

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[1] The record establishes that at the hearing before the District Court held May 29, 1947 (R. 384a-349a) the Court invited the parties to suggest any amendments they might wish to the findings, either orally or pursuant to the procedure provided by Rule 52(b) of the Rules of Civil Procedure. Except for several very minor items suggested by Commission Counsel and accepted by the Court (R. 389a), no requests for amendment or contentions as to inaccuracy were made either at that hearing or at any time thereafter. Cf. Rule 52(b), Rules of Civil Procedure.

The Court of Appeals having affirmed the "careful and far-reaching examination of the relevant factors" made by the District Court (R. 34), these findings are "final here in the absence of a very exceptional showing of error". *Comstock* v. *Group of Investors*, 335 U. S. 211, 214.

However, we do not concede that the power of the District Court under Section 11(e) is as limited as the Commission contends it should be. On the contrary, we submit that the District Court and the Court of Appeals were clearly correct in holding that the District Court is required under Section 11(e) to exercise an independent judgment as a court of equity in determining whether a proposed plan is fair and equitable. We think this is clearly demonstrable from the language of the statute itself, from the judicial and legislative history of the words employed in the statute, from the construction which the Commission itself has heretofore placed upon the statute, and from the judicial construction the statute has heretofore received.

A. Internal evidence from the Act itself.

Section 11(e), in outlining the respective functions of the Commission and of the District Court, with respect to a plan submitted by the company, uses substantially identical language in the two instances. As to the Commission the language is:

> "If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; * * *."

As to the District Court the language is that if, upon application by the Commission at the request of the company to enforce and carry out the terms and provisions of such plan,

> "* * * the court, after notice and opportunity for hearing, shall approve such plan as fair and equi-

table and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; * * *."

As the Court of Appeals said: "The words employed respecting the respective duties of Commission and court are so alike that we must conclude that Congress intended to lay substantially the same duty on the court in the second instance as it imposed on the Commission in the first". (R. 24). "One may not presume that the same words employed in a single subsection of a statute have dissonant meanings" (R. 25).[1]

It will be observed that, in addition to the findings that the plan is fair and equitable, which both the Commission and the District Court are required to make, the Commission must also find that the plan is "necessary" to effectuate the provisions of subsection (b), and the District Court must find that the plan is "appropriate" to effectuate such provisions. This difference, in defining the respective duties of Commission and Court in relation to the *public* issues involved in the determination of whether the plan conforms to and furthers the aims of the Act, emphasizes the co-ordinate jurisdiction accorded to Commission and Court in relation to *private* interests affected by the plan, namely, whether the plan is fair and equitable to the respective security holders.[2]

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[1] See *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 150.

[2] Compare the same distinction with respect to the powers of the Interstate Commerce Commission and the district courts under Section 77 of the Bankruptcy Act, discussed, *infra*, at pp. 130-133.

Other provisions of the Act confirm the conclusion dictated by the central provisions above quoted, and serve to differentiate the character of the jurisdiction accorded to the District Court under Section 11(e) from that accorded to the Court of Appeals under Section 24(a), the section which petitioners seek to merge into 11(e). Section 24(a) prescribes that "the findings of the Commission as to facts, if supported by substantial evidence, shall be conclusive." This limitation is pointedly omitted from Section 11(e). Section 11(e), on the other hand, expressly directs that the proceedings in the District Court shall be "after notice and opportunity for hearing", which has been construed to require that notice be given to all security holders who may be affected, many, if not most of whom, will not have appeared before the Commission (R. 26).[1] There is no such requirement with respect to proceedings under Section 24(a); on the contrary, that section provides that no objection to the order of the Commission shall be considered by the Court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do.

We believe it was in recognition of this clear statutory scheme as to the plenary co-ordinate role of the District Court under Section 11(e) that this Court stated:

> "Any plan of divestment or reorganization, moreover, must be carefully scrutinized by both the Commission and the enforcing court, thus enabling the assertion and protection of all shareholders' rights." North American Co. v. S. E. C., 327 U. S. 686, 709.

[1] *In re SEC (Otis & Co.)*, 142 F. 2d 411, 422 (C. C. A. 3, 1944).

B. The function of the District Court in equity reorganizations and bankruptcies.

Passing from the Act itself to consider extrinsic evidence on the meaning of the terms employed, we find that the words "fair and equitable" were "words of art" which had long before "acquired a fixed meaning through judicial interpretations in the field of equity receivership and reorganizations".[1] Shortly prior to the passage of the Act this Court had declared, "Every important determination by the Court in receivership proceedings calls for an informed, independent judgment".[2]

The phrase "fair and equitable" with its "fixed meaning" so well established was carried over into bankruptcy reorganizations under Section 77B[3] and into railroad bankruptcies under Section 77.[4] It has the same meaning as used in the Holding Company Act.[5]

While it must be obvious from a comparison of Section 11(e) of the Holding Company Act with Section 77 of the Bankruptcy Act that the power of the District Court under the former is broader than under the latter statute, it is established that even under the latter statute the District Court is not merely a "review court" which is required to approve a plan of reorganization as fair and equitable unless it finds the determination of the Interstate Commerce Commission to that effect to be lacking in "any rational and statutory foundation".

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[1] *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115 (1939).

[2] *National Surety Co.* v. *Coriell*, 289 U. S. 426, 436 (1933); *First Nat. Bank* v. *Flershem*, 290 U. S. 504, 525 (1934).

[3] *Case* v. *Los Angeles Lumber Co.*, *supra*.

[4] *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 482 (1943); *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 542 (1943).

[5] *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 634 (1945).

Certain functions are, by Section 77, lodged exclusively in the Interstate Commerce Commission and withdrawn from the jurisdiction of the District Court. Valuation of the debtor's property is one such area where the Interstate Commerce Commission is supreme; the function of the District Court is limited to determining whether the Commission observed statutory mandates.[1] Other matters, such as abandonment of property or forfeiture of leases, where the public interest is dominant, are similarly treated.[2] But these decisions rest upon express language contained in Section 77 of the Bankruptcy Act which has no counterpart in Section 11(e) of the Holding Company Act. This Court has recognized that "the whole scheme of Section 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates".[3]

However, in the field where the district courts were granted participation with the Interstate Commerce Commission, the district courts are expected to act *independently* and not as courts of review over the action of the Commission. This is particularly true with respect to claims of priorities among security holders where the interests at stake are mainly private rather than public. In *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943), where the respective functions of the Interstate Commerce Commission and the District Court were fully considered, this Court said (p. 479):

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[1] *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 472 (1943).

[2] *Palmer* v. *Mass.*, 308 U. S. 79 (1939); *Smith* v. *Hoboken R. Co.*, 328 U. S. 123 (1946).

[3] *Palmer* v. *Mass.*, 308 U. S. 79, 87 (1939).

"For example, there may arise controversies over the priority or the validity of claims. A Commission finding involving such problems would require an independent examination and an affirmation by the court."

What this Court meant by an "independent examination" is made clear by its discussion on the question of valuation; after pointing out that the statute vests in the Interstate Commerce Commission the function of valuation "without participation by the [district] court", this Court nevertheless stated that "this valuation must be made in accordance with the direction of the statute and as to that valuation is subject to judicial review", which review is "limited in character" and "does not involve an independent examination into valuation" (p. 477).[1]

In *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523 (1943), decided with the *Ecker* case, this Court did not again discuss the respective functions of the Interstate Commerce Commission and the District Court, but the opinion is replete with references to the important functions to be exercised by the District Court in railroad bankruptcies. Repeatedly the Court adverts to and relies upon the fact that the District Court had affirmed certain relevant findings of the Commission.[2] Speaking of the difficulties inherent in bringing two divisional

[1] A similar distinction, made by the District Court in the *Ecker* case, between the review powers exercised by the District Court upon the Commission's valuations on the one hand, and the "independent judgment" exercised by the District Court upon other findings of the Commission on the other hand, was approved by this Court (p. 467).

[2] Pages 537-538, 541, 546-556 *passim*.

mortgages into a new capital structure, this Court observed that, "The question in each case is one for the informed discretion of the Commission *and the District Court*" (p. 564; emphasis supplied), and it differentiated sharply between the functions of the District Court in that respect and the "review functions" of this Court:

> "The District Court satisfied itself that the principles of priority as applied to these facts were respected. See 36 F. Supp. pp. 202-203, 211-212. Since such a determination rests in the realm of judgment rather than mathematics, there is an area for disagreement. But we are not performing the functions of the District Court under § 77(e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end" (p. 564).

Again, speaking on the question whether the plan was "fair and equitable", this Court said:

> "Whether in a given case senior creditors have been made whole or received 'full compensatory treatment' rests in the informed judgment of the Commission and the District Court on consideration of all relevant facts" (p. 566) [1]

In *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, this Court again recognized the "broad responsibility laid upon the [District] Court for the equity

[1] See also the similar statement that: "The earnings periods to be selected and the methods to be employed in allocating earnings among the various divisions are matters for the informed judgment of the Commission and the District Court" (p. 572).

and fairness of the plan as a whole" in proceedings under Section 77 of the Bankruptcy Act and declared:

> "The court will be diligent to protect itself and the public from approval of unfair plans, even by default, and may take for its own use evidence no party would have a right to force upon it" (pp. 227-228).

The legislative history of Section 77 had previously been traced in *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939). The Court recalled that, "There was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission. Congress stopped short of this remedy" (p. 87).[1]

Bearing in mind that Congress in 1933 refused to lodge with the Interstate Commerce Commission exclusive control over insolvent railroads notwithstanding the more than 40 years of experience which that administrative body had had with every detail of railroad finance and management, it would be surprising indeed if Congress should have intended in 1935, when it enacted the Holding Company Act, to vest greater control over the rights of stockholders in reorganization and liquidations of utility holding companies in the Securities and Exchange Commission, then a newly organized agency with no experience whatever in the regulation of utility holding companies or in corporate reorganizations generally.

C. Legislative history of the Act.

The legislative history of the Holding Company Act bears out the foregoing conclusions. The Senate Committee which reported out the original bill stated:

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[1] See also *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 468-470 (1943).

"Section 11 provides that plans for the voluntary readjustment of the affairs of holding companies to conform with the section may be presented to the federal courts at any time and that in such cases those courts may exercise in the furtherance of such voluntary plans *all the extraordinary powers such courts have been accustomed to exercise when called upon under the Sherman and Hepburn Acts to effect compulsory corporate readjustments required by the public policy expressed in those acts* * * *. The title provides that *during all court processes the Securities and Exchange Commission shall act as an impartial expert economic adviser and administrative assistant to the courts.* That expert assistance will enable the courts to save time and expense in the solution of essentially economic and administrative problems for which in the Sherman Act cases it had no assistance except that of opposing counsel." [1] (Emphasis supplied.)

Clearly the "extraordinary powers" exercised by the District Courts under the Sherman and Hepburn Acts were the plenary powers of a court of equity; and it was contemplated that the Commission, "as the impartial, expert, economic adviser and administrative assistant to the courts" would not diminish or encroach upon the functions to be exercised by the courts.

The sharp debate which occurred in the Senate around the provision contained in the bill (S. 2796) that would have required the District Court in proceedings under subdivisions (d), (e) and (f) of Section 11 to appoint the Commission as trustee, and which resulted in amending the bill so as to make the duty to appoint the Commission as trustee permissive and not mandatory, brought into sharp focus the Congressional intention that the

[1] Senate Report No. 621, accompanying S. 2796, 74th Cong., First Session, pages 13 and 14; emphasis supplied.

jurisdiction of the District Courts in proceedings under those subdivisions should be the traditional jurisdiction of a court of equity in reorganization proceedings.

Senator Wheeler, who had charge of the bill in the Senate, sought to assure that body that

> "* * * the provision does not oust the jurisdiction of the court at all, because the court has to approve the plan even though the Commission approves it. In other words, there is really a double check upon the plan, and final determination rests as in the past in the courts."[1]

Nevertheless a number of Senators continued to hammer the point:

> "Senator Clark: 'I say that I very violently disagree with the theory * * * that any sort of a Commission functioning from Washington through emissaries or agents, or attorneys, is to be preferred in its discretion to a federal judge appointed to one of the very highest honors in this country, appointed by the President, usually after careful and most meticulous selection and confirmed by the United States Senate * * *.[2] The Commission ought to be made a party, given the right to be heard, given a standing in court, but it should not be mandatory on the court to accept the Commission's ukase.'[3]
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> * * * * * * *
>
> Senator McKellar: 'I believe in courts. Sometimes they do wrong of course; they sometimes fail to do what they ought to do. They are not perfect; but neither are Commissions perfect. From my experience with Commissions and with courts, I believe I would rather trust the courts.'"[4]

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[1] 79th Cong. Rec. 8845, 74th Cong., First Session.
[2] p. 8939, Cong. Rec., *supra*.
[3] p. 8940, Cong. Rec., *supra*.
[4] p. 8939, Cong. Rec., *supra*.

Senator Barkley, replying to a previous statement by Senator McKellar, had stated:

> "I appreciate the force of what the Senator says. Of course, this is an administrative duty of the court. It is not like *telling the court how to decide the law, or as to equities among investors or how a reorganization shall be brought about.* The appointment of receivers is an administrative matter which is performed by the courts." [1]

And in the end, notwithstanding the repeated assurances by the proponents of the measure that there was no intention to impinge upon the traditional independence of the district courts as courts of equity in the reorganization proceedings contemplated by subsections (d), (e) and (f) of Section 11, Senator Wheeler found it necessary to agree to the amendment, which was embodied in the statute as finally enacted.[2]

D. The Commission's interpretations of the Act prior to this case.

The Commission itself, prior to this case, has not contended that the District Court in a Section 11(e) proceeding is merely a "review court" which must approve the Commission's determination "unless wholly lacking in a rational or statutory basis". On the contrary, it has constantly stressed the *co-ordinate* role of the District Court. The following examples illustrate the position of the Commission prior to the present case.

In its 10th Annual Report to Congress (dated April 21, 1945) the Commission stated, at pages 65, 66:

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[1] p. 8937, Cong. Rec., *supra;* emphasis supplied.

[2] See p. 8939, Cong. Rec., *supra.*

"Thus, security holders have the protection of findings as to the fairness and equity of plans by both the Commission and a United States District Court. * * *

* * * * * * *

As has been said, security holders are not required to accept Section 11(e) plans unless they are found fair and equitable by both the Commission and a United States District Court."

At hearings by a committee of the House of Representatives to consider whether the Act required amendment, Mr. Ganson Purcell, then Chairman of the Commission, and Mr. Milton H. Cohen, then Director of its Public Utilities Division, testified as follows:[1]

"Mr. Purcell: As I said, his new interest (the stockholder's) is gaged by his claim under the old security and his treatment must be found by the courts and the Commission to be fair and equitable.

Rep. Henshaw: You say by the courts?

Mr. Purcell: Oh, yes. In a Section 11 proceeding, which is the one most often resorted to by the companies, their plan is filed, and they ask, in almost all instances, that under the provisions of Section 11(e), the Commission seek enforcement of the plan in a district court of the United States. The district court is then required to find under Section 11(e) that the plan is fair and equitable, and proper to carry out the provisions of Section 11(e). That decision of the district court is in turn appealable, and it can be taken to the Court of Appeals and to the Supreme Court of the United States" (p. 873).

[1] Hearings before the Securities Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, on "Operations Pursuant to the Public Utility Holding Company Act of 1935", Part 3 (79th Cong., 2d Sess., 1946).

"Mr. Cohen: The machinery of Section 11(e) of the Act provides that when the Commission finds a plan fair and equitable, it may at the request of the company, apply to an appropriate Federal district court for enforcement of the plan.

Such Federal district court, on the basis of the record made before the Commission, holds full hearings on the plan, including briefs and oral argument, and then such court has the *independent duty* of determining whether the plan is fair and equitable and appropriate to effectuate the provisions of Section 11(b)" (p. 962; emphasis supplied).

Judge Leahy, who had passed on almost half of the 63 Section 11(e) plans presented to the District Courts for enforcement and had thus had the benefit of Commision counsel's presentations frequently over the past six years, stated in his opinion in *Re Interstate Power Co.*, 71 F. Supp. 164, 161 (1947):

"Since one of the earliest cases for Federal district court enforcement under the Act was brought to me for consideration and approval, it has been consistently conceded by all parties, including the various sets of attorneys for the SEC, in this and in all other cases brought to the enforcement court, that a § 11(e) court has the affirmative and independent duty to consider and find whether a proposed plan is fair and equitable * * *."

In opening the argument of the present case in the District Court, Commission counsel conceded that: "* * * it is the independent duty of the Court apart from any objections which may have been filed, to satisfy itself that the plan meets the statutory tests of necessity as well as fairness, * * *" (R. 191a).

In its memorandum submitted to the Court of Appeals in *Lowinsbury* v. *S. E. C.*, 151 F. 2d 217 (C. C. A. 3, 1945), the Commission analogized the relationship between itself and the District Courts with respect to subsections (d), (e) and (f) of Section 11, to the relationship between the Interstate Commerce Commission and the courts under Section 77 of the Bankruptcy Act, and the Commission carefully distinguished between the functions of the District Court with respect to orders made under the three enumerated subsections and the functions of the Court of Appeals in reviewing other orders pursuant to Section 24(a):

> "Congress contemplated that reorganization techniques should be available for compliance with Section 11(b) orders, and subsections (d) and (e) are in many respects a self-contained reorganization statute with provisions defining the respective reorganization functions of court and agency which are comparable to the relationship between the Interstate Commerce Commission and the courts prescribed in the previously enacted Section 77 of the Bankruptcy Act. Section 11(f) provides for a similar allocation of function as between the Commission and a reorganization court where the court's reorganization jurisdiction stems from sources other than the Holding Company Act" (p. 16).

> "An order of the Commission approving the plan, which is to be operative only if subsequently approved by a district court pursuant to subsections (d) and (e) or under some independent source of jurisdiction recognized in subsection (f), stands on an entirely different footing from the ordinary order of the Commission for which the review provisions of Section 24(a) were evidently intended * * *" (p. 17).

Virtually identical statements were made by the Commission to this Court in its brief in opposition to certiorari in the *Lownsbury* case.[1]

In the face of the foregoing, the Commission finds itself constrained to avow:

> "The Commission agrees with much of what the Court below states concerning the intention of Congress to have the Section 11(e) court function as an independent check upon the Commission's determination that a plan is fair and equitable and also that the respective roles of the Commission and enforcement court should be in general similar to the relationship under Section 77 of the Bankruptcy Act between the Interstate Commerce Commission and the reorganization court." [2]

Having thus made obeisance to its own recorded statements, the Commission thereupon nevertheless proceeds to contend that the "independent role" of the District Court under Section 11(e) is no broader than that of a review court under Section 24(a), and that the District Court is bound by the Commission's conclusions unless they wholly "lack a rational and statutory foundation".

This is to give a new and surprising meaning to the term "independent", and one which scarcely seems supported by the careful distinction drawn by this Court between the functions of a review court and the independent role of the District Court in passing on the fairness and equity of plans under Section 77 of the Bankruptcy Act (*supra*, pp. 131-2).

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[1] *Lownsbury v. S. E. C.*, No. 1245, October Term, 1944, Brief of the Securities and Exchange Commission, pp. 7, 9.

[2] Commission petition, No. 226, p. 22.

E. Other authorities.

Although the precise question here under discussion has not been authoritatively determined, probably because the Commission has never, before this case, contended for the interpretation which it now asserts, there have been expressions in the lower courts recognizing that the District Courts, in passing upon Section 11(e) plans, exercise an independent and plenary equity jurisdiction.

In *Commonwealth and Southern Corp.* v. *S. E. C.*, 134 F. 2d 747, the Court of Appeals for the Third Circuit "took the position that stockholders, whose rights were affected by an order of the Commission directing a public utility holding company to change its corporate structure had a right to a full hearing in the District Court of the United States in which the Commission was seeking approval of the reorganization plan" (R. 32). In *In re SEC (Otis & Co.)*, 142 F. 2d 411 (C. C. A. 3, 1944), the same Court, citing its former decision, again held that the hearing in the District Court under Section 11(e) is not a summary proceeding and that "any person affected by the plan shall have the right to be heard as to whether or not the plan is fair and equitable and appropriate to effectuate the provisions of Section 11" (p. 422). The Court stated further:

> "Moreover, the fact that notice is to be given to the persons affected by the plan shows that the theory of submission to the District Court is substantially similar to that required in respect to plan made pursuant to the provisions of Section 77B, or Chapter X of the Bankruptcy Act" (p. 422).

In *Okin* v. *S. E. C.*, 145 F. 2d 206 (C. C. A. 2, 1944),[1] and again in *Lownsbury* v. *S. E. C.*, 151 F. 2d 217 (C. C. A. 3, 1945), the courts upheld the contentions of the Commission that orders approving plans under Section 11(e), conditioned upon District Court approval (as was the plan in the instant case), are not reviewable by the Court of Appeals under Section 24(a) of the Act because such orders are "merely interlocutory". In the *Okin* case, the Second Circuit concluded that the legislative history of the Act evinced "a congressional intent that the relationship of the Securities and Exchange Commission and the District Court provided for in Section 11, should be 'exactly' the same as that of the Interstate Commerce Commission and the District Court in railroad reorganization under Section 77 of the Bankruptcy Act" (p. 208). And in the *Lownsbury* case, the Third Circuit quoted with approval the above expression and followed the holding of that case.

The opinion of the Court below refers to *Lahti* v. *New England Power Association*, 160 F. 2d 845, 858 (C. C. A. 1, 1947), and *Massachusetts Mutual Life Insurance Co.* v. *S. E. C.*, 151 F. 2d 424, 430 (C. C. A. 8, 1945); as "cases which look the other way, and [which] are entitled to great consideration" (R. 31). We suggest that the Court below was perhaps overstating the effect of those cases. In both of those cases the Court of Appeals was reviewing the decision of a District Court which had *approved* the findings of the Commission, and therefore what the appellate courts said had reference

[1] Remanded on another point, 325 U. S. 840 (1945).

to *concurrent* findings of the Commission and the District Court. Thus, in the *Lahti* case, the Court said:

> "Upon full consideration, within the limited scope of our review, we have concluded that we must accept the judgment of the Commission and of the District Court on this matter" (p. 858).

Neither Court was required to consider the situation where the District Court had disagreed with the conclusion of the Commission that a plan submitted under Section 11(e) was "fair and equitable", and neither Court gave any indication that it would feel itself bound in such case to accept the judgment of the Commission and to reject the judgment of the District Court.

Petitioners rely principally upon *S. E. C.* v. *Chenery Corporation*, 332 U. S. 194. The holding of the Court below that the *Chenery* decision "cannot be deemed to be controlling in the case at bar" (R. 33) is, we submit, indisputably correct. This Court had before it for review a decision of the Court of Appeals of the District of Columbia reviewing an order of the Commission under Section 24(a) of the Act. That section contains the express injunction that "the findings of the Commission as to facts, if supported by substantial evidence, shall be conclusive", a provision which is not found in Section 11(e). This Court in the *Chenery* case was not called upon to consider and did not purport to decide the extent of the powers of a District Court acting under Section 11(e). Moreover, this Court was dealing with an order of the Commission which it considered to be within the administrative discretion entrusted by Congress to the Commission, "a judgment based upon public policy,

a judgment which Congress has indicated is of the type for the Commission to make * * * [a] conclusion [which] rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. * * * the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process" (332 U. S. at p. 209). The reasoning of the second *Chenery* decision is consistent with the decisions of this Court under Section 77 of the Bankruptcy Act which emphasize that determinations upon questions wherein the public interest is paramount, are committed by Congress to the jurisdiction of the Interstate Commerce Commission,[1] but which accord to the District Court independent power in the fields where predominantly private interests are at stake.[2]

The "anomalous consequences" which the Commission suggests would flow if the construction of the powers of the District Court as laid down in this case should prevail[3] are, we believe, mere figments of imagination. Section 24(a) and Section 11(e) are not, as the Commission suggests, "alternative ways of submitting to judicial scrutiny a plan theretofore approved by the Commission"; the Commission itself has contended, and the lower

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[1] E.g., *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 468 (1943):

> "When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and appraising the general interest."

[2] *Id.* at p. 479.

[3] Commission's Petition for Certiorari, No. 226, pp. 23-24.

courts have uniformly held, that an order like the one here made by the Commission can only be presented to the District Court under Section 11(e) and cannot be reviewed by the Court of Appeals under Section 24(a) prior to the action of the District Court thereon.[1] In recognition of the fact that the statutory scheme renders inapplicable the general review provisions of Section 24(a) with respect to Section 11(e) plans cutting across stockholders' charter rights, the Commission has established the practice of expressly conditioning its approval of such plans upon District Court enforcement.[2] It follows that the two anomalies suggested by the Commission, namely, alternative applications to the District Court and the Court of Appeals or an application to the District Court for enforcement after affirmance of the Commission's order by the Court of Appeals, could not arise.

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[1] *Okin* v. *S. E. C.*, 145 F. 2d 206 (C. C. A. 2, 1944); *Lowensbury* v. *S. E. C.*, 151 F. 2d 217 (C. C. A. 3, 1945), cert. den. 326 U. S. 782.

[2] Cf. statement of Judge Goodrich in the *Lowensbury* decision, *supra*, at p. 218.

Petitioners attempt to argue that special weight is attributable to the Commission's approval of a plan because District Court enforcement is optional with the company, is also devoid of merit. Some plans do not "affect" stockholders' rights because they are carried out strictly in accordance with charter provisions or pursuant to vote of the stockholders in accordance with the provisions of state statutes. Cf. *Northern New England Company*, Holding Company Act Release No. 8401 (1948) at p. 4. But where the plan cuts across charter rights, District Court approval and enforcement is essential, as the Commission has recognized:

> "In some cases where Section 11(e) plans have been approved by the Commission, the companies are unable to carry them out without obtaining a court order. The Act permits the Commission at the request of the companies to go to court for the purpose of obtaining enforcement of such plans. * * *
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> * * * As has been said, security holders are not required to accept Section 11(e) plans unless they are found fair and equitable by both the Commission and a United States District Court." (Tenth Annual Report of the Securities and Exchange Commission, p. 66.)

The fear expressed by the Commission that the conferring of discretion on the District Court "would preclude uniform administration of the statute and make the treatment of nationwide groups of security holders depend upon accidents of venue," would, if warranted, be an argument for amending the statute rather than for not enforcing the statute as written. Congress has evidenced a clear intention that the district courts shall exercise an independent judgment in determining whether public utility holding company reorganization plans are "fair and equitable". Indeed, as has been shown, *supra*, pp. 134-5, Congress placed great reliance on the use of the techniques which the *Courts* had employed in carrying out dissolutions under the anti-trust statutes and in equity reorganizations; and had received positive assurance that "there is really a double check on the plan and final determination rests as in the past in the courts".

Like power is exercised by district courts in equity reorganizations, in corporate bankruptcies under Chapter X, and in railroad bankruptcies under Section 77, without untoward consequences to nationwide groups of security holders, and we see no reason why security holders of utility holding companies should be required to look only to the Commission for protection and should be deprived of the benefit of an independent judicial judgment, particularly when it is remembered that *this statute is the only reorganization statute which does not accord to security holders the right to vote upon a reorganization plan.*

The final fear expressed by the Commission, that a vesting of discretion in the District Court to check the Commission would lead to "a possibility of deadlock re-

sulting from conscientious disagreement", is also unfounded, judging from the experience of the district courts and the Interstate Commerce Commission in the administration of Section 77 of the Bankruptcy Act. Under that statute, as this Court has said, the judicial process "is, as it were, brigaded with the administrative process of the Commission".[1] "These reorganizations may be attained only through properly co-ordinated action between the Commission and the Court."[2] In the absence of evidence that the Commission and the courts are engaged in an irreconcilable conflict, this Court will not assume that such a situation will arise. Experience, both before[3] and since[4] the decision of the Court below, does not sug-

[1] *Palmer* v. *Massachusetts*, 308 U. S. 79, 87 (1939).

[2] *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 475 (1943).

[3] The Court below refers to the fact that the Commission had submitted some sixty-three Section 11(e) plans to the District Courts for enforcement, all of which have been carried out, and that Judge Leahy had passed upon twenty-seven of those plans (R. 30, 39). Prior to the *Engineers* decision, in fulfilling his "independent duty" Judge Leahy had concurred in the conclusions of the Commission in every plan presented to him with the sole exception of a single phase of one plan. The Third Circuit reversed, holding that since the question related to the "appropriateness" of the "particular remedial measures" required to effectuate Section 11(b), the Commission's judgment should prevail (*In re Standard Gas & Electric Co.*, 151 F. 2d 326, 331). However, subsequent events established the correctness of the District Judge's fears that fluctuating markets would render the plan unfair; and as a result the Commission itself concurred in the view that the claims of the senior security holders should be discharged in cash. (See *In re Standard Gas & Electric Co.*, 63 F. Supp. 876.)

[4] Subsequent to the Circuit Court's decision in the instant case Judge Leahy has passed on some nine additional Section 11(e) plans, all of which he has approved and enforced.

The beneficial effect of the decision in the instant case in its practical operation is evidenced by the recent decision of the District Court of Minnesota, *In the Matter of Northern States Power Company*, 80 F. Supp. 193 (N. D. Minn., 1948). Holding that the Circuit

gest that the district courts will endeavor to encroach upon the rightful province of the Commission; if anything, the tendency of the courts is all the other way.

VIII. There is no valid basis for remanding this case to the Commission.

The only valid grounds upon which a remand of this case to the Commission can be predicated are either that as a formal matter, even though $100 per share is the most the preferred stockholders may lawfully receive, the Commission must approve the payment to them of $100 (instead of $100 plus premiums) before that portion of the plan can be enforced; or that as a substantive matter the Commission could, on this record and on a proper rationale, lawfully authorize the payment to the preferred of more than $100 per share. Neither ground is here present. As a formal matter, the Commission has already given its approval to the payment of only $100 per share to the preferred if it be decided that this sum is all that the "fair and equitable" standard authorizes. As a substantive matter, $100 per share is the most that "fair and equitable" treatment permits the preferred stockholders to receive.

Court's decision in the *Engineers* case did not preclude him from attaching great weight to the Commission's determination as to earning power and allocation, the District Judge fully upheld them; but only after making a careful check of their correctness in the exercise of his "independent duty". The same course was followed, and the same result was reached, by the District Court of Maine, *In the Matter of American & Foreign Power Company*, 80 F. Supp. 514, 523 (S. D. Maine, 1948).

The fact is that there has not been a single instance of a refusal by a District Court to approve and enforce a Section 11(e) plan, or any portion thereof, since the decision in the instant case, although more than twelve such plans have been passed on by the Courts.

A. Procedural Aspects

What this Court has said as to the importance of expedition, through coordinated procedure between the District Court and the Commission in reorganizations under Section 77 of the Bankruptcy Act, is equally applicable here:

> "Not only are those who institute the proceeding and those who carry it forward bound to exercise the highest degree of diligence, but it is the duty of the Court and of the Interstate Commerce Commission to see that they do. Proceedings of this character, involving public and private interests of such magnitude, should, so far as practicable, be given the right of way both by the Court and the Commission to the end that they may be speedily determined." [1]

And in *Ecker* v. *Western Pacific R.R. Co.*, 318 U. S. 448, the Court stated (p. 475): "These reorganizations may be attained only through properly coordinated action between the Commission and the Court". The Court of Appeals' requirement for remand negates precisely such a coordinated procedure as was employed in this case.

The Commission in requiring the plan to be amended so as to pay premiums, over the objections of the company and the common stockholders, was necessarily aware that there existed no judicial sanction whatever for such premium payments, and that, on the contrary, the Commission itself and numerous Courts, including four different Circuit Courts of Appeals, had consistently and uniformly held over a period of five years that pay-

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[1] *Continental Illinois Bank* v. *C. R. I. & P. Ry. Co.*, 294 U. S. 648, 685. See also *Insurance Group* v. *Denver & Rio Grande W. R. Co.*, 329 U. S. 607, 612. Cf. *Federal Trade Commission* v. *Curtis Co.*, 260 U. S. 568, 580; *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, 297.

ment of premiums to senior security holders at the expense of the junior holders could not be required in reorganizations or liquidations under Section 11(e) of the Act in consonance with the "fair and equitable standard" of Section 11(e).[1]

Hence, in an effort to secure the expeditious execution of those portions of the plan which were separable and approved, and to avoid resubmission of the plan to the Commission if such resubmission served only the formality of having the Commission give its approval to a result which the law required, the Commission amended its order in this proceeding (R. 165a-174a). By the amendments the Commission provided for the parties to enter into an escrow arrangement under which the depositary is to pay over to Engineers the principal and interest deposited in escrow "Upon delivery * * * of an opinion of independent counsel * * * accompanied by a certified copy of the order or decree involved, to the effect that * * * an order or decree of any court having jurisdiction, has been entered, has become final and is no longer subject to appeal, which * * * court order or decree determines or finds that the holders of Preferred Stock are not entitled to receive any amounts in addition to the amount of $100 per share plus accrued dividends * * *" (R. 328a).

Underlying this escrow agreement is an important consideration of which the Commission doubtless was aware. If the plan were executed in all respects but that under dispute, $100 per share would be distributed to each preferred stockholder. It would then be impossible as a practical matter for the common stockholders to recover any amounts by which the $100 might subsequently be found to be in excess of "fair and equitable" treatment

[1] *Supra*, p. 55, notes 3 and 4.

for the preferred. It is in the light of its inability to accord the common stockholders "fair and equitable" treatment if such treatment should require the Commission, upon re-examining the rights of the parties, to award the preferred less than $100 per share, that the Commission informed the Court below: " * * * the Commission has already contingently approved an alternative allocation of cash to the preferred stockholders at the amount of the liquidation preference if as a result of the processes of review in the District Court and on appeal therefrom this should be judicially determined fair and equitable." [1]

It is thus apparent that the Commission had given its prior consideration and advance approval to the plan in the form approved and enforced by the District Court's order of May 29, 1947 (R. 318a); and indeed the record discloses that this order was actually drafted and submitted to the District Court for signature by the Commission's attorneys (R. 357a). These circumstances scarcely justify the Court of Appeals' statement that the District Court erred in entering an order approving and enforcing the plan as amended *by it*,[2] and without the Commission's prior consideration and approval.

On the contrary, the procedure followed by the District Court in every particular was that which the Com-

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[1] R. 44, n. 1, Commission's petition for rehearing in the Circuit Court.

[2] "The Court below, therefore, erred in one particular: *It entered an order approving and enforcing the plan as amended by it.* It was without power to do this. The provisions of Section 11(e) make it clear that the Commission in the first instance must approve the plan and find it to be fair and equitable. If, as here, the district court disagrees with the conclusion of the Commission that the plan is fair and equitable, it must refuse to approve the plan and 'remand' the record to the Commission for further and appropriate action by it" (R. 39). (Emphasis supplied.)

mission in its opinions and orders and by its attorneys in open court,[1] requested and urged the Court to follow, including establishment of the escrow fund and non-remand of the proceedings to the Commission by reason of the Court's disapproval of the premium payments. Although concededly these circumstances do not insulate the District Court's decree from attack if the Commission's actions were in effect "ultra vires", we submit that they do completely refute any suggestion that the Court engaged in a process of amending the plan in respects which procedurally, at least had not received the full concurrence and approval of the Commission, and, indeed, as to which the Commission had not actually been the prime mover.

Nor do we think the procedure urged upon the Court by the Commission can properly be deemed "ultra vires". If the Courts did not find the Commission's new "investment value ex the Act" doctrine consonant with established legal principles and the statutory intent, nothing further remained to be decided; for in such event the preferred holders would necessarily receive payment of only $100 per share plus dividends, in conformance with a long line of Commission and Court decisions. Accordingly, the Commission correctly recognized that the basic issue was one of legal and statutory interpretation, as to which the last word was not in the Commission but in the Courts.[2]

Therefore, in approving as fair and equitable payment of only the liquidation preference in the event the District Court held payment of the premiums unfair and inequi-

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[1] R. 257a-260a, 281a-282a.

[2] If confirmation be needed for this provision, it is amply furnished by the legislative history of the statute, to which reference was made in the Court of Appeals' opinion (R. 22, 23).

table (and such determination became final for lack of appeal or were affirmed upon appeal), it is evident the Commission was not "waiving" or "rejecting" its statutory role, but was performing it in the only way consonant with reason and the repeated admonitions of this Court for expeditious and coordinated procedure in reorganizations of this character.[1]

Accordingly, unless it is held that the Commission, on a reconsideration, could lawfully award more than $100 plus accrued dividends to the preferred stockholders, formal correctness does not require resubmitting this case to the Commission.

B. Substantive Aspects

We submit that, as we have shown, the Commission may not, on any valid basis, award the preferred stockholders more than the $100 plus accrued dividends which they have already received.

Thus, if the present liquidation comes within the charter provisions, the "fair and equitable" standard limits the preferred stockholders to receipt of no more than the terms of the corporate charter authorize, i.e., $100 per share plus accrued dividends. The same conclusion follows even if the present liquidation is deemed not to come within the terms of the corporate charter, since the judicially approved and correct interpretation of the "fair and equitable" standard precludes the payment of pre-

[1] See p. 149, *supra*. Cf. *Comstock* v. *Group of Investors*, 335 U. S. 211; majority opinion pp. 227-228, minority p. 236.

Rejection of the coordinated procedure followed in the instant case would also entail a special financial burden for the common stockholders. Under the Commission's decision, they are required to bear the entire expense of all phases of the proceedings and the litigation (R. 72a-82a).

miums on preferred stocks which are retired under compulsion of the Act, where holders are paid out in cash and freed from the risks of a new enterprise.

Decision of this case on either of the foregoing grounds would make remand to the Commission obviously unnecessary. However, if the question upon which this case is made to turn is whether the "equitable equivalent" of the rights surrendered by the preferred stockholders is more than $100 per share, the only possible answer is in the negative; and since the District Court so found, upon consideration of the very factors which the Court of Appeals held must be considered, there is no valid basis for remanding the case to the Commission.

Both the District Court and the Court of Appeals agreed that the Commission had erroneously determined the "equitable equivalent" of the rights which the preferred stockholders were here giving up. The Court of Appeals concluded, however, that the District Court had substituted its "valuations" of the "equitable equivalents" for those of the Commission and that it was powerless to do so. Accordingly, it directed the case to be remanded to the Commission. In essence, this conclusion reduces itself to a contention that the District Judge should have worded only negatively what he also worded affirmatively; that he should have held the provision for the payment of premiums "unfair and inequitable" but should not have found affirmatively that the preferred stockholders received "fair and equitable" treatment upon the receipt of only $100 per share plus dividends.

We may assume, without conceding, that had the District Court in fact substituted its "valuations" for those of the Commission and decided, for example, that the "equitable equivalent" of the rights surrendered by the

preferred stockholders was $70 per share, it would have acted beyond its authority. But that is not the case here. The District Court did not make any such "valuation" of the 'equitable equivalent" of the rights surrendered by the preferred stock or substitute any "valuation of its own" for that of the Commission.

What the District Court "valued" was not the preferred stocks but the Commission's "investment value ex the Act" doctrine. In deciding that this doctrine had no warrant in the statute or settled legal principles, it necessarily examined all the factors in this record which could be deemed relevant under any standards recognized in the statute and judicial decisions, and concluded that the "equitable equivalent" of the rights surrendered by the preferred stockholders could not exceed $100. We have shown that an examination of these factors can lead to no other conclusion. Accordingly, we submit that if the District Court had the authority to examine these relevant factors there is no valid basis for remand of this case to the Commission.

It is not necessary to explore the full breadth of the powers of the District Court in order to uphold the exercise of its authority here. The District Judge did not determine that the Commission must award a specific sum to the preferred stockholders; nor has it ruled that while the Commission might fairly and equitably award more than $100 to the preferred, a maximum of $100 was also "fair and equitable" and in its judgment sufficient. In either of those cases it might be contended that the District Court was intruding upon the Commission's legitimate function under the Act. But here the Court has decided only that the Commission could not

lawfully award more than $100; i.e., it has examined the record made before the Commission in order to determine the outer limits of permissible Commission action on that record, and concluded that no more than $100 can "fairly and equitably" be paid to the preferreds.

The District Court's power thus to appraise the Commission's action was plainly within the delegation of jurisdiction contained in Section 11(e). Under that section, as we have shown, the District Court is not a mere "review court". It has all the "extraordinary powers" it has "been accustomed to exercise when called upon under the Sherman and Hepburn Act to effect compulsory corporate readjustments" [1]—the plenary powers of a court of equity. The statute imposed upon the District Judge the "independent duty" [2] to satisfy himself that the plan here submitted was "fair and equitable". We need not insist that in "the realm of judgment", [3] which is governed by the "fair and equitable" standard, the District Court's judgment rather than the Commission's should furnish the "final determination" of what is "fair and equitable". [4] In any case, under the narrowest view, the

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[1] Senate Report No. 621, accompanying S. 2796, 74th Cong., First Session, pp. 13 and 14, quoted *supra*, p. 134.

[2] Cf. statements of the Commission's representatives before the Congressional Committee considering amendments to the Act (*supra*, pp. 136-7), as well as the statement of Commission Counsel before the District Court in the instant case (*supra*, p. 138).

[3] "Since such a determination rests in the realm of judgment rather than mathematics, there is an area for disagreement. But we are not performing the functions of the District Court under § 77(e)." *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 564; quoted *supra* at p. 132.

[4] Cf. statement of Senator Wheeler (*supra*, p. 135) "* * * there is really a double check upon the plan, and final determination rests as in the past in the courts".

District Court's "extraordinary powers" embrace the authority at least to examine the record made before the Commission and to determine the outer limits of permissible Commission action under the "fair and equitable" standard.

Accordingly, we submit that the Court of Appeals erred in ordering the case to be remanded to the Commission. Since the District Court had the authority to make the "careful and far-reaching examination of the relevant factors" which the Court of Appeals found it made, and properly concluded that the preferred stockholders could not lawfully receive more than $100 per share, there is no function left for the Commission here except formally to approve the payment of $100 to the preferred. This function, as we have shown, it has performed in approving the escrow arrangement.

CONCLUSION

The judgment of the Court below should be vacated with directions to enter an order affirming the decree of the District Court.

Dated, December 20, 1948.

Respectfully submitted,

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APPENDIX A

Pertinent Provisions of the Public Utility Holding Company Act of 1935

SIMPLIFICATION OF HOLDING-COMPANY SYSTEMS

Sec. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the

same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and

the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of sub-

section (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission

may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expense, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

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COURT REVIEW OF ORDERS

Sec. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall

be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

APPENDIX B

Excerpts from the Certificate of Incorporation of Engineers Public Service Company

The Certificate of Incorporation of Engineers provided in pertinent part as follows:

"III. *Preference on Liquidation* etc.[1] In the event of any liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock resulting in any distribution of its assets to its stockholders, the holders of the preferred stock of each series shall be entitled to receive, for each share thereof, an amount equal to $100, together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premium for such series, if any, before any distribution of the assets shall be made to the holders of the common stock; but the holders of the preferred stock shall be entitled to no further participation in such distribution. * * *"

"IV. *Redemption and Repurchase.*[2] The Corporation may, at its option, at any time or from time to time redeem the whole or any part of the preferred stock or of any series thereof, at a price for each share thereof equal to $100, plus the fixed redemption premium therefor, if any, together with the amount of any dividends accrued or in arrears thereon. * * *"[3]

* * * * * * *

[1] Engineers' Ex. No. 33, R. 1412a.

[2] Engineers' Ex. No. 33, R. 1413a.

[3] By resolutions of the Board of Directors, the fixed redemption premium of the $5 series was fixed at $10 per share for shares redeemed on or before June 30, 1938, and $5 per share for shares redeemed thereafter (R. 1428a). The fixed redemption premiums of the $5.50 and $6 series was fixed at $10 per share (R. 1430a-1431a).

"This Corporation may also from time to time repurchase shares of its preferred stock at not exceeding the price or prices at which the same may be redeemed. * * *"

* * * * * * *

"DIVISION B—THE COMMON STOCK[1]

II. *Distribution of Assets.* In the event of any liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, after there shall have been paid to or set aside for the holders of the preferred stock the full preferential amounts to which they are respectively entitled under the provisions of Paragraph III of Division A of this Article Fourth, the holders of the common stock shall be entitled to receive, *pro rata*, all of the remaining assets of this Corporation available for distribution to its stockholders."

[1] Engineers' Ex. 33, R. 1417a.

APPENDIX C

Excerpts from Typical News Stories Appearing in the Press About the Time the Charter of Engineers Was Being Drafted and the Preferred Stocks Offered for Sale *

From the New York Times, December 30, 1924

ASKS "POWER TRUST" INQUIRY.

NORRIS'S NEW MUSCLE SHOALS MOVE HELD UP BY EDGE.

WASHINGTON, Dec. 29.—The Federal Trade Commission would be directed to investigate an alleged "power trust" under a resolution introduced in the Senate today by Chairman Norris of the Agriculture Committee.

His proposal was incidental to the bitter Congressional fight over Muscle Shoals, during which it has been charged on the Senate floor that a combination of power interests was seeking to dictate the Government's final decision. Senator Norris has been active in opposing the Underwood bill for Government ownership of the Muscle Shoals property, with a provision for its lease to private concerns.

Mr. Norris asked for immediate consideration of his resolution, but Senator Edge, Republican, New Jersey, objected, and it went over for one day under the rules.

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* This material relates to the discussion at pages 41-43, *supra*, and is submitted as further documentation of our contention that the preferred and common stockholders of *Engineers* could not have been unmindful of the possibility that some form of future governmental action directed against utility holding companies might bring into play the liquidation provisions of the charter.

The charter of *Engineers* was filed and recorded June 23, 1925. The $5 and $5.50 series of preferred stocks were initially offered to the public in March and October of 1928, and the $6 preferred in September, 1930.

The resolution would require an investigation into the ownership of stocks and bonds and the directorates of power companies, and into the interest of manufacturers of electrical supplies, banks and trust companies in the business. The President would be requested to give the investigating committee access to official Treasury records bearing on the subject.

Senator Edge declared that such a far-reaching resolution should not be considered hastily. He said "millions of dollars" would be required to conduct such an inquiry.

From the New York Times, December 31, 1924 *

GENERAL ELECTRIC GIVES UP HOLDINGS IN PUBLIC UTILITIES

Relinquishes Electric Bond and Share Company, Controlling 100 Power Enterprises.

Wall Street Surprised

News Sends Stock Up to New High of 307⅜, but Heavy Selling Closes It at 297.

New Company Announced

To Take Over General Electric Interest and Distribute Its Shares to General Electric Stockholders

Directors of the General Electric Company announced yester-

NORRIS TO PRESS INQUIRY.

General Electric Action Won't Halt Power Resolution.

Special to The New York Times.

Washington, Dec. 30—Withdrawal of the General Electric Company from public utility ownership will not deter Senator Norris of Nebraska from pushing his resolution providing for an investigation of the so-called power trust. While General Electric is a part of the alleged trust, Mr. Norris and those who agree with him take the position that it is the duty of the Senate to make an inquiry to determine what influences have been at work in behalf of private operation of Muscle Shoals and other similar

* No sooner had the Senate authorized the first Federal Trade investigation of public utility Holding Companies than it was announced that General Electric Company would divest itself of control of the gigantic Electric Bond and Share system. (Cf. *Electric Bond and Share Co. et al.*, 11 S. E. C. 1146, 1163.)

day half an hour before the closing of the Stock Exchange that it would dispose of its holdings in the Electric Bond and Share Company, the common stock of which it owns entirely. The decision of General Electric to separate the public utility end of its business from the manufacturing end was distinctly a surprise to Wall Street, and General Electric stock, which had risen 100 points within the year, advanced sharply to a new high point of 307⅜. Some uncertainty developed as to the possible effect of the retirement of General Electric from the public utility field, and selling carried the quotation down to 296, closing at 297, a net loss for the day of 2⅞.

* * *

projects throughout the country.

Senator La Follette is in sympathy with Mr. Norris' proposal to examine persons who are supposed to have a knowledge of the activities of the power "trust." The Third Party platform, upon which Mr. La Follette ran as a candidate for President in the late election, contained a declaration on the subject of the development of power.

It recommended a policy of Government ownership, stating that Government ownership in Canada had resulted in lower service rates, much lower, it was stated, than provided by private corporations in the United States.

While Senator Norris did not support the Third Party movement, it is known that he is in accord with the views of Mr. La Follette, favorable to the adoption of a Government ownership policy in the handling of all potential water sites to which the Federal Government holds title. The indications are that Senator Norris will press his resolution with a view to making the investigation he has in mind the basis of a Government ownership bill.

From the New York Times, February 18, 1925

PINCHOT FOR CURB OF POWER MONOPOLY

SENDS SURVEY REPORT TO LEGISLATURE, STRESSING THE NEED OF REGULATION.

NOVEL PROPOSALS MADE

BASIC FEATURE IS PLAN TO MAKE TRANSMISSION LINES COMMON CARRIERS.

POWER EXPORT UNDER BAN

REPORT, COMPRISING 500 PAGES, IS CALLED GREATEST POWER SURVEY EVER MADE

HARRISBURG, Feb. 17.—with a declaration that the electric utilities are a gigantic monopoly without parallel, Governor Pinchot told the Legislature today that "the question is whether we shall regulate it or whether it shall regulate us." He made this statement in presenting the report of the Giant Power Survey Board, embodying the facts of a comprehensive survey, authorized by the last Legislature. With the report were presented fifteen bills designed to carry out the recommendations that are made.

* * * * * * *

The Federal Trade Commission Investigation, Which Culminated in Adoption of the Public Utility Holding Company Act, Was in Full Swing by the Time the Preferred Stocks of Engineers Were Being Offered to the Public

From the New York Times, February 16, 1928

SENATE VOTES, 46-31, FOR POWER INQUIRY BY THE TRADE BOARD

WALSH OF MONTANA, PRESSING FOR SENATE INVESTIGATION, IS BEATEN AFTER BITTER FIGHT.

HOT DEBATE FOR 9 HOURS

GLASS AND BRUCE IN SPIRITED CLASH WHEN THE LATTER ATTACKS MONTANAN.

HUNT FOR ELECTION FUNDS

VICTORIOUS GEORGE AMENDMENT AUTHORIZING COMMISSION TO DIG INTO CORPORATIONS' ACTIVITIES.

Special to The New York Times.

WASHINGTON, Feb. 15.—By a vote of 46 to 31, and over the desperate protest of Senator Walsh of Montana, the Senate tonight referred the proposed "power trust" investigation to the Federal Trade Commission instead of authorizing an inquiry by a special committee of five Senators as proposed by Mr. Walsh.

The final vote came at 9 o'clock tonight after a nine-hour session of acrimonious debate, marked by frequent clashes,

particularly between Senators Glass of Virginia and Bruce of Maryland. Senator Walsh of Montana, many of the Democrats and a large proportion of the Progressive Republicans tried to defeat the motion to hand the inquiry over to the Trade Commission, as proposed by Senator George of Georgia.

Hoping that delay might gain more votes in favor of a Senate investigation, Senator Walsh and his lieutenants endeavored three times to adjourn the Senate. They were defeated in increasingly decisive votes. Senator George and Senator Watson, Chairman of the Senate Interstate Commerce Committee, were willing to agree to give a specific time to vote, but Mr. Walsh refused to consent.

The outcome of the fight was in doubt until the vote was taken, although the advocates of the Trade Commission plan were gaining strength on the preliminary votes.

* * * * * * *

On motion of Senator George, the Senate adopted an amendment directing the Trade Commission to ascertain whether any of the alleged practices referred to in the Walsh resolution "constitute unfair methods in commerce, tend to restraint of trade and commerce or to create a monopoly, or constitute a violation of the Federal anti-trust laws."

The purpose of this, Mr. George said, was to make certain that the commission would carry out the inquiry and make a proper report on the resolution.

The Senate also accepted an amendment by Senator Black of Alabama providing that the sessions of the commission during the investigation should be open to the public. * * *

* * * * * * *

Senator Glass Attacks Bruce

Tonight Mr. Glass accused Mr. Bruce of trying to block the Teapot Dome inquiry, "just as he is trying now", to send the "power trust" investigation to the Federal Trade

Commission. Mr. Glass accused Mr. Bruce of "defending Harry M. Daugherty in glowing language."

The two Senators shouted at each other at the same time, Senator Moses meanwhile banging his gavel. Above the uproar, Mr. Glass could be heard condemning Mr. Bruce for "unkind and vitriolic excoriations" of Mr. Walsh.

Mr. Moses called Mr. Bruce to order twice, but the Maryland man sat down, expressing regret to the Senate that he had seemed to lose his temper. He said he had never defended Harry M. Daugherty, although he had said he admired him for having the courage of his convictions.

The name of Governor Smith was brought into the debate again when Mr. Wheeler asked Mr. Copeland if the New York Governor had not tried to control the power trusts in his State.

* * * * * * *

From the New York Times, July 3, 1928

SAYS UTILITIES PAID OFFICIAL IN OHIO

Companies' Agent Quoted as Asserting Secretary Took Money for Speeches.

Talk of a $400,000 Fund

"Political" Results Were Sought by Contributions of 100 Organizations.

Washington, July 2 (AP).—Groundwork laid by public utility organizations to prevent "politicians" from conducting an investigation into the industry under the Walsh Senate resolution and widespread methods to influence public opinion by obtaining free publicity in newspapers were revealed today in the **Federal Trade Commission's utility inquiry.**

Documents from the office files of Arthur F. Herwig of Milwaukee, Director of the Wisconsin Public Utility Information Bureau, for the first time disclosed preparations made by the joint committee of National Utilities Associations last year for the proposed Walsh investigation and heretofore unrevealed publicity methods of Ohio utility organizations.

* * * * * * *

The other outstanding development of today's hearing was a report of the meeting of public utility men in Atlantic City, in 1922, in which Ben E. Ling, director of the Ohio Information Bureau, was quoted as saying: "The utility men want news. That is propaganda, of course. That is what they are paying for and the only way to speed our propaganda is by means of speakers."

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Nos. 226, 227, 243, 266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE, and FRANCES BOEHM.

THOMAS W. STREETER ET AL., PETITIONERS,

v.

SAME

HOME INSURANCE COMPANY ET AL., PETITIONER,

v.

SAME

CENTRAL-ILLINOIS SECURITIES CORPORATION, and CHRISTIAN A. JOHNSON, PETITIONERS,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER ET AL., HOME INSURANCE COMPANY ET AL.

BRIEF FOR LUCILLE WHITE AND FRANCES BOEHM, COMMON STOCKHOLDERS

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In the

Supreme Court of the United States

October Term, 1948

Securities and Exchange Commission, Petitioner,

v.

Central-Illinois Securities Corporation, C. A. Johnson, Lucille White, and Frances Boehm.

Thomas W. Streeter et al., Petitioners,

v.

Same

Home Insurance Company et al., Petitioner,

v.

Same

Central-Illinois Securities Corporation, and Christian A. Johnson, Petitioners,

v.

Securities and Exchange Commission, Thomas W. Streeter et al., Home Insurance Company et al.

BRIEF FOR LUCILLE WHITE AND FRANCES BOEHM, COMMON STOCKHOLDERS

Opinions Below

The opinion and judgment of the Court below (R. 12) and the opinion denying petitions and cross-petitions for

rehearings (R. 138) are reported at 168 F. 2d 722. The opinion of the District Court is reported at 71 F. Supp. 797 (R. 283a), but its detailed Findings of Fact and Conclusions of Law (R. 293a-317a) are not reported. The Findings and Opinions of the Securities and Exchange Commission dated December 4, 1946 and January 8, 1947, have not yet been officially reported, but are set forth in the Commission's Holding Company Act Releases Nos. 7041 (R. 25a) and 7119 (R. 128a).

Statute Involved

The provisions of Section 11(e) of the Act, the statutory provision directly applicable here, are set forth in Appendix A, *infra*, pp. 65-71, together with the pertinent provisions of other sections of the Act referred to in this brief.

Statement

Lucille White and Frances Boehm own 1000 shares of common stock of Engineers. They have owned this stock for years.

Prior to the adoption of the Public Utility Holding Company Act of 1935, Engineers owned and controlled approximately seventeen electric, gas and transportation companies operating throughout the United States. The Securities and Exchange Commission ordered Engineers to dispose of all its properties except the common stock of one subsidiary, Virginia Electric and Power Company.

Engineers filed a plan under Section 11(e) of the Act proposing the complete and final liquidation of Engineers and the entire holding company system. In its opinion with respect to the plan, the Commission made the following formal finding:

> "We find that the presence of Engineers would unduly complicate the structure of the system and

that it would, therefore, come within the prohibition of Section 11(b)(2). Accordingly, we find that the proposal to dissolve Engineers is 'necessary' to effectuate the provisions of Section 11(b) of the Act."[1]

Notwithstanding this square finding that the liquidation was compelled by the Statute, the Commission required the plan to be amended to provide for payment to the preferred holders of the full amount to which they would have been entitled under the Charter on a *voluntary* redemption or *voluntary* liquidation.[2] The Commission reasoned that the Charter provisions should be disregarded, and that the preferred holders must be paid the theoretical "investment value", which in practical effect was the price at which their stock might sell on the market on a particular date (which happened to be at about the top of the bull market of 1946), "ex the impact of the Act", or as though the company were not required to liquidate or dissolve.

The Commission in its opinion referred to the "value" of the preferred stock computed on the foregoing basis as the "investment value" or "fair investment value", terms which are quite misleading. The Commission then went on to say that this "investment value" was not challenged, and that it was in fact "conceded" by the witnesses for the company.[3] Appellants in their briefs in this Court and in the Courts below have similarly reit-

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[1] R. 48a. Chairman Caffrey, in his separate concurring opinion stated: "Engineers 'voluntary' proposal did no more than forestall the necessity for action by the Commission. * * * It is the operation of Section 11 and not mere managerial discretion that has brought about the liquidation" (R. 139a, 140a).

[2] That is, $105 per share plus accrued dividends for the $5. series, and $110 per share for the $5.50 and $6.00 series. These amounts aggregate $3,200,000 in excess of the $100 per share to which the preferred stockholders were entitled in liquidation (whether whole or partial) which is not "voluntary" (See Charter, R. 1412a).

[3] Commission Opinion, R. 67a.

[4] *Ibid.*

erated time and again that the values accepted by the Commission were "uncontroverted". Such statements draw a heavy veil over large and significant portions of the evidence contained in the record. The company witnesses did indeed agree that *in the boom market then current,* the preferred stocks of Engineers would probably have sold close to their redemption prices *if the company were not required by Section 11 to complete its liquidation and to dissolve.*

Under such circumstances, these witnesses asserted, Engineers would take advantage of the extraordinarily low money rates then prevailing to call and redeem the preferred stocks, replacing them with others carrying a much lower interest rate, with substantial resulting benefit to the common stockholders. But the forced liquidation of Engineers rendered such action impossible. Moreover, they testified, on the basis of intrinsic investment qualities the Engineers preferred stocks could by no means be said to have a "fair value" equal to the redemption prices because they were essentially speculative securities which would decline sharply as soon as current "boom" economic conditions fell off. In substantiation of these views, the witnesses pointed to the past market history of these preferred stocks, and they discussed in considerable detail potential adverse economic factors which cast a dark cloud over the future of the stocks if they remained outstanding for any substantial length of time.[1]

No indication of this extensive testimony and evidence is even suggested by the Commission in its Opinion or by appellants in their briefs.

When the plan was presented to the District Court for enforcement, the objecting common stockholders contended that on the basis of the foregoing factors, as well as on the basis of applicable legal principles, the Commission was not justified in requiring the common stockholders to pay

[1] R. 522a-525a.

to the preferred any amounts in excess of $100 per share plus accrued dividends. The legal questions before the District Court were three-fold: (1) whether the Charter liquidation provisions limiting the preferred holders to $100 per share plus dividends in the event of a liquidation "not voluntary" could be overridden; (2) whether, even if the Charter liquidation provisions were not controlling, the long line of consistent decisions holding amounts in excess of par value not payable on senior securities retired under the impact of the Statute, could now be reversed or "distinguished" away; (3) whether, in any event, the theoretical market value at which such senior securities might sell at a particular time, was the sole and conclusive criterion to be employed in measuring the claims of the senior security holders, with the junior equity holders simply taking whatever happened to remain.

The District Court chose not to pass upon the question whether the Charter provisions as to redemption of the preferred stock were controlling. However, it concluded that even if the Charter liquidation provisions were not controlling, the preferred holders were not entitled to receive amounts in excess of $100 per share, plus dividends, on the basis of the same legal and equitable principles which had consistently led the courts for years to deny such additional payments on senior securities retired pursuant to the statutory mandate. In those cases too it had been contended by the affected security holders that if they were not entitled to "premiums" as such, they should receive amounts "measured by the premiums" to compensate them for relinquishing securities bearing a dividend or interest rate in excess of the current "going rate", but the Commission and the Courts had consistently rejected such contentions on the ground that the retirement was dictated by an Act of Congress over which the company and its stockholders had no control.

The District Court found no legal support for the view that the price at which the senior securities would sell,

"as though the enterprise continued", must be accepted as the controlling criterion; and it found that adoption of such a standard would be neither realistic nor equitable in its application to the final and complete liquidation of the enterprise which was here taking place.[1] However, the Court envisaged that there might be cases in which valid equitable considerations would justify payment to preferred stockholders of amounts in excess of the par value of their securities. The District Court, as a court of equity, therefore carefully examined the record to ascertain whether any such factors were present, and concluded:

> "No special facts or circumstances in connection with the issuance of the preferred stocks or their subsequent history, or the relationships of the preferred and common stockholders, create any equitable considerations warranting the payment to the preferred holders of amounts in excess of $100 per share plus accrued dividends; and careful examination of all the relevant facts impels the conclusions that payment to the preferred stockholders of such excess amounts would not be warranted or justified."[2]

The Court of Appeals held that the District Court had the independent duty of passing on the fairness of the plan, that the *Otis* case did not apply to the dissolution of Engineers for the reason that in the *Otis* case there was merely a simplification of a holding company system and not a dissolution of the enterprise, and that the "investment value ex the Act" formula of the Commission was not the proper method of valuing the rights of the preferred stock, and that the Commission had failed to give any consideration to the rights of the common stock, which the Holding Company Act required. The Court of Appeals

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[1] Conclusions of Law 3-8, R. 316a-317a.

[2] Conclusions of Law No. 7, R. 316a-317a. Cf. also Opinion, R. 292a.

held that upon the record before the Commission and the District Court the payment of call premiums to the preferred stock was unfair and inequitable. However, it directed that the case be remanded to the Commission on the ground that the question of valuation of the securities of Engineers preferred and common stocks must be made by the Commission.

Questions Presented

1. In connection with the final liquidation of a holding company compelled by the Public Utility Holding Company Act, was the District Court, under Section 11(e) of the Act, required to approve as "fair and equitable" mandatory payment by the common stockholders to the preferred stockholders of $3,200,000 in excess of the latter's charter and book claim, on the ground that the theoretical market value of the preferred stocks on a particular date, "absent the Holding Company Act", was the correct and sole criterion for measuring the claims of such stockholders?

2. Whether the District Court was authorized under Section 11(e) of the Act to determine, and properly determined, in this case, not only that the Securities and Exchange Commission erred in measuring the "equitable equivalents" which the preferred stockholders claim to be entitled to receive in exchange for the rights they surrendered, but that on any possible proper measure of those "equitable equivalents" on this record, $100 per share is the maximum to which the preferred stockholders are entitled?

3. If the answer to question 2 is in the affirmative, was it necessary to remand the case to the Commission, when the Commission had already approved the payment of $100 per share to the preferred stockholders in the event that the courts determined that payment of more than that amount would not be fair and equitable?

4. Does Section 11(e) of the Holding Company Act authorize valid Charter provisions to be overridden and cast aside, when such action is not reasonably necessary to carry out the basic objectives of the statute?

5. If an affirmative answer be given to question 3 above, does such a result violate constitutionally protected rights?

Summary of Argument

A Section 11(e) Court has the affirmative and independent duty to consider and find whether a proposed plan, which has been approved by the Commission, is fair and equitable. This principle, which has been consistently espoused by the Commission and the courts, was approved by the Circuit Court after a thorough analysis of the history of the Act. There is no actual conflict in the Circuits with respect to this principle, and no hardship will flow from the practical application of this sound and necessary doctrine.

Under Section 3 of Engineers charter, the preferred stock is entitled to $100 per share in any situation in which it is paid out upon the involuntary termination of the enterprise. Here the termination was compelled by the Public Utility Holding Company Act and the order of the Securities and Exchange Commission, and not by voluntary action of the company. The Commission has so held. The Plan is not a mere corporate simplification as the Plan was in the *Otis* case, but constitutes a complete liquidation and dissolution of Engineers. Under those circumstances, the charter is controlling. It provides without qualification that "in the event of liquidation, dissolution or winding up of this corporation, or reduction of its capital stock, resulting in any distribution of its assets to its stockholders" the preferred stock shall receive $100 per share, but that if such action is voluntary it shall receive the fixed redemption premium provided by the

charter. This provision constitutes a contract between the company and the stockholders. It may not be overridden.

Though Engineers' charter was adopted some years before the passage of the Holding Company Act agitation was already then going on for the dissolution of large public utility holding company systems on the ground that they were inimical to the public interest. It may therefore be fairly said that the possibility of such legislation being enacted was already within the contemplation of the parties. Certainly the broad and sweeping language of the charter was sufficiently comprehensive to include dissolution from any cause whatsoever. The framers of the charter intended to and did cover *all* situations in which the preferred stock might be paid out upon the termination of the enterprise, no matter how such termination may be brought about, including governmental frustration. The charter is unambiguous and covers every possible situation which might bring about the termination of the enterprise. It may not therefore be said that termination by governmental frustration was not intended to be covered by the charter.

Even should it be held that the charter provision may be overridden, we contend that the fair and equitable standard of Section 11(e) of the Holding Company Act does not require or justify the payment of more than $100 per share to the preferred stock. The past market history of the preferred stock; the slim coverage of dividends and fixed charges over a period of many years; the fact that for three years its dividends were in default, that its average market price during the entire period that it was outstanding was about $64 per share, that whatever improvement had occurred in its value had been largely due to the voluntary sacrifices of the common stockholders in foregoing the payment of dividends, though earned, in order to build up cash with which to pay out the preferred stock pursuant to the command of the statute, and the

further sacrifices of the common stock in disposing of valuable assets at great loss in order to raise additional moneys necessary to pay out the preferred stock, all conclusively indicated that under the fair and equitable standard prescribed by the Act the preferred stock was not entitled to more than $100 per share.

The theory upon which the Commission decided that the preferred stock was entitled to call premiums, which under the charter were to be paid only upon a *voluntary* dissolution, was due to a misconstruction of the decision of this Court in the *Otis* case. The Commission held that the *Otis* case does away with the charter provisions of a holding company which is being dissolved under Section 11 of the Holding Company Act and that the rights of the preferred stockholders in such liquidation must be considered without reference to the charter, except in so far as the charter places a ceiling on the amount payable to the preferred stockholders on the voluntary redemption of their stock. We respectfully submit, however, that this Court did not in that case hold that upon a true liquidation of a holding company the charter provisions do not apply. In the Otis case, United Light and Power Company was the top holding company of an extensive utility system with many subsidiaries. Directly beneath it was another holding company known as United Light and Railways Company. The plan of simplification was drawn under the so-called "great grand-father clause" of the Holding Company Act. There was no real dissolution of the business of Power as a going enterprise. The enterprise continued on as before. The only question that was involved was whether Power, the top holding company, should be succeeded by Railways, its sub-holding company, which would receive all the assets of Power. The stockholders of Power became the stockholders of Railways, so that we had in that case purely a corporate simplification which in no way affected the continuance of the enterprise. This Court in its majority opinion laid great stress on that fact,

stating that it was not the intention of Congress that under a mere simplification (when the same result could have been secured by a merger of Power and Railways), substantial rights should be destroyed, and that it was not contemplated that Power's charter should apply to such a situation.

Assuming that the *Otis* case does apply and that Engineer's charter may be overriden and disregarded, we contend that the Commission improperly applied the "fair and equitable" standard of the Holding Company Act in measuring the rights of Engineer's preferred stock. The Commission, disregarding its previous determinations and technique in determining what was the "fair and equitable" equivalent of the rights surrendered adopted a new technique which it called the "investment value ex the Act" formula. In other words, the Commission held that the fair and equitable standard of the Holding Company Act required it to assume that there was to be no dissolution of Engineers, that the enterprise was to continue and that the preferred stock must be valued upon that fictitious assumption. We contend that there is nothing either in the *Otis* case or in the Act which permits such an assumption; that such an assumption is contrary to the facts and that any alleged values based upon such assumption must necessarily be unrealistic and false.

We contend that even under its novel technique of "investment value ex the Act" theory, the Commission did not properly apply the fair and equitable standards prescribed by the Holding Company Act in that it failed to properly measure the investment value of the preferred stock and failed completely to give any consideration to the investment value of the common stock. The Commission, in appraising the so-called investment value of the preferred stock, gave consideration mainly to the testimony of a witness, Badger, who testified to the theoretical value of Engineer's preferred stock as of January, 1946, at a

time when admittedly all stocks including public utility stocks were at their highest and when interest rates were at their lowest. He arrived at his theoretical valuation by comparing Engineer's preferred stock with the current *market prices* of various other utility company stocks, which he said were comparable. His testimony as to the theoretical market value of Engineer's preferred stock is therefore based entirely upon *market prices*, which fluctuate from day to day (Finding 42, R. 310a) and which he took as of a particular day at the top of the post war boom. He gave no consideration to the market prices of the so-called comparable stocks over any substantial period of time before he gave his testimony, nor did he attempt to forecast their earnings or the earnings of Engineers for any period of time thereafter (R. 2077a). He admitted that interest rates at that time were the lowest in the history of the country, and (Finding 49, R. 313a) predicted that such rates would be permanent. He admitted that the current prices of utility preferred stocks were based upon the current low level of interest rates. Since the giving of such testimony interest rates have gone up substantially and the market prices of the "comparable" stocks has dropped considerably (Finding 52, R. 314a). It is apparent therefore that Badger's testimony had no probative force as proof of the *investment* value of Engineer's preferred stock, but that it was purely testimony as to theoretical market value, based upon the condition of the stock market at the time that he testified, which happened to be at the top of the post war stock market boom.

There is no necessity for remand. The legal effect of the proceedings before the Commission and the lower courts was that the Commission gave advance approval to a plan which contained, through the medium of an escrow agreement, alternative provisions. Under the first alternative the preferred were to get their call prices. Under the other alternative the preferred were to get such amount from $100 a share up to the call prices as was judicially approved.

The supplemental opinion and order of January 8, 1947 (R. 428a) of the Commission and its application of January 9, 1947 (R. 4a) submitted an amended plan (with provision for an escrow) to the District Court for enforcement. During the course of the proceedings before the District Court, and before its final order was issued, the Commission at the hearing before the District Court on February 17, 1947, amended its application (R. 162a, 164a). Its amended application, which was granted (R. 163a), submitted the plan in alternative form for approval and enforcement (R. 165a-174a) by the inclusion of the escrow agreement. The escrow provided for such advance approval by containing provisions making it a two-way escrow under which the funds might be awarded either to the preferred stock or to the Company. If the District Court approved the payment of the call prices and all remedies on appeal were exhausted, the escrowee would pay out the call prices to the preferred stockholders (R. 173a) or, in the alternative, the District Court might approve the payment of only $100 per share and when all rights of appeal were exhausted the escrowee would pay the fund back to the Company (R. 174a).

At this point the Commission had submitted the plan to the District Court for approval in alternative form. The Court found $100 to be fair and equitable and adopted in its order (R. 318a-330a) the escrow agreement which the *Commission* had submitted to it (R. 416a-422a).

The legal effect of the foregoing is that the Commission submitted for approval and enforcement a plan with two alternatives, one of which (payment of the call prices) it approved without qualification and the other of which it approved in advance with a condition subsequent, namely, the entry of an order by the Court, no longer subject to appeal, finding it was fair and equitable to pay an amount, from $100 to the call prices, designated in the order. If this Court affirms, there is consequently no need for remand.

POINT I

The District Court has the affirmative and independent duty to consider and find whether a proposed plan is fair and equitable.*

Section 11 (e) of the Public Utility Holding Company Act, provides that "the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of Section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after *notice* and opportunity for *hearing*, shall approve such plan as *fair and equitable* and as appropriate to effectuate the provisions of Section 11, the court as a court of equity, may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located". It will be noted that the statute provides for a *hearing* before the District Court, after *notice*. It also designates the District Court as a "court of equity" in carrying out the plan. If the District Court were limited merely to "carrying out the terms and provisions of such plan", in accordance with the findings of the Commission, there would have been no point in the provision for notice and a hearing, and that the Court may carry out the plan only if it "shall approve such plan as fair and equitable". It is perfectly clear, therefore, that Congress gave to the District Court the duty of inquiring into the fairness of the plan and of forming its own independent judgment thereon.

This conclusion is reinforced by the provisions of Section 24 (a) of the Holding Company Act, which provides for direct review by the Circuit Court of Appeals of an order issued by the Commission. This section provides that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be *conclusive*".

* Italics in all instances supplied by us.

No such limitation was placed upon the power of the District Court in connection with the application under Section 11 (e). It must be perfectly clear, therefore, that in a Section 11 (e) proceeding, it is the duty of the District Court to make an *independent* examination into the question of whether or not the plan is fair and equitable, and the cases so hold.

Okin v. *S. E. C.* (C. C. A. 2, 1944), 145 F. 2d 206;
In re S. E. C. (*Otis & Co., Intervenor*) (C. C. A. 3, 1944), 142 F. 2d 411;
Lounsbury et al., v. S. E. C. (C. C. A. 3, 1945), 151 F. 2d 217.

The foregoing principle, enunciated by Judge Leahy, that "a Sec. 11 (e) court has the affirmative and independent duty to consider and find whether a proposed plan, which has been approved by the Securities and Exchange Commission, is fair and equitable" is not objected to on the part of the appellants.[1] When the District Court, in

[1] Brief for Appellants, Streeter et al., in the C. C. A., p. 16: "We do not quarrel with Judge Leahy's statement that a Section 11(e) court has the affirmative and independent duty to consider and find whether a proposed plan, approved by the Commission, is fair and equitable."

Brief for Appellants, Home Ins. Co., et al., in the C. C. A., p. 14: "While Section 11(e) gives the court the independent duty of determining whether plans are fair and equitable before lending its aid to enforcement, its function in this respect is necessarily circumscribed." (See brief in this Court, p. 39.)

No reference to this principle is made by the S. E. C. due, undoubtedly, to the fact that it has consistently conceded this point.

See, *In re Interstate Power Co., et al.* (D. Del. 1947), 71 F. Supp. 164, where Judge Leahy said (p. 168): "Since one of the earliest cases for federal district court enforcement under the Act was brought to me for consideration and approval, it has been consistently conceded by all parties, including the various sets of attorneys for the S. E. C., in this and in all other cases brought to the enforcement court, that a Sec. 11(e) court has the affirmative and independent duty to consider and find whether a proposed plan is fair and equitable; and consequently such a court must consider whether the senior security holders are to get the 'equitable equivalent' of the rights which they are asked to surrender, *i. e.*, is the plan fair and equitable to the security holders affected by it?"

applying that principal, however, found that the proposed plan, only insofar as it proposed to pay to the preferred stockholders a premium of $3,200,000, was not fair and equitable, then charges that the District Court was trying the matter *de novo*, that the District Court was improperly asserting a greater power than the Circuit Court of Appeals possessed, and that the District Court is improperly substituting its judgment for that of the Commission, were let loose upon the head of the District Judge.

The inference that the District Court was determining this matter *de novo* finds no basis in fact in this case. No new proof was submitted by the common stockholders or considered by the Court. All of the evidence considered by the District Court in arriving at its determination of what was "fair and equitable" in this particular case is derived from the record and extensive hearings before the Commission. How could any court determine whether a plan was "fair and equitable" without an examination of the facts?

The function of the District Court in this respect was succinctly stated in *Electric Bond & Share Co.* (S. D. N. Y. 1946) 70 F. Supp. 426 (Leibel, D.J.):

> "The function of the Court is to approve and enforce the plan of reorganization submitted to it, if it finds such plan fair and equitable and appropriate to effectuate the purposes of the Act. *To do this the Court must examine the plan and the record upon which the Commission's approval of the plan was based.*"

Even in a case where the plan is considered by the Circuit Court of Appeals directly by appeal through Section 24(a), the Circuit Court, although restricted by Section 24(a), must and does consider the facts. Yet when the District Court in the instant case, examines the evidence, and fails to agree with the conclusions of

the Commission, it is charged with conducting a trial *de novo*. (See SEC brief C. C. A., p. 16, footnote 20).

The contention of appellants, Streeter, et al. and Home Insurance Company, et al. that a District Court should have no greater powers, in considering and finding whether a proposed plan is fair and equitable, than the Circuit Court of Appeals, has under Section 24a, finds no support in the decided cases and is directly contrary to the provisions of the Holding Company Act.

Thus in the case of *Okin* v. *Securities and Exchange Commission* (C. C. A. 2, 144), 145 F. 2d 206, the Commission moved to dismiss the petition of Samuel Okin for a review of a Commission order conditionally approving a plan for the reorganization of United Gas Corporation. The petitioner based his right to review on Section 24 (a). The court, in granting the motion of the Commission, said (p. 207):

> "The broad terms of review accorded by Sec. 24 (a) of the Act of course shows a general legislative intent to give parties aggrieved by Commission orders the opportunity to present their case for review to the circuit court of appeals of their own circuit, and there is no exception in terms for orders which must be brought for enforcement to a district court. Thus, the situation here presented appears to be one not directly contemplated by the lawmakers. It seems clear, however, that a rational interpretation of the entire statute must support the Commission's view if all parts of it are to be given due weight and application, and a consistent and workable scheme of enforcement, as well as of review, is to be applied. *The provisions of Sec. 11 compel full review of an order such as this in a district court* for all parties in interest, thus making limited reviews for single parties in interest in other courts quite intolerable

for the conflicts in jurisdiction which must result; and the broad scope of review stated in Sec. 24 becomes in terms inapplicable because of the interlocutory nature of the Commission's action in the circumstances."

* * * * * * * *

And at page 208:

"Which of two probably conflicting orders should prevail is, of course, not made clear; since the *district court has the ultimate responsibility for determining whether the plan is fair and equitable,* it would seem that in final analysis that court must have authority to nullify any opposing action of any other court."

In the case of *In Re Securities and Exchange Commission* (Otis & Co., Intervenor) (C. C. A. 3, 1944), 142 F. 2d 411, the Circuit Court of Appeals, 3rd Circuit, rejected the contention that the hearing before the District Court was a mere "summary proceeding". At page 421, *supra,* this Court said:

"In Commonwealth & Southern Corp. v. Securities and Exch. Com'n, 134 F. 2d 747, 753, we indicated that stockholders whose rights were affected by an order of the Commission directing a public utility holding company to change its corporate structure had a right to be heard in that District Court of the United States in which the Commission was seeking to effect its order; that otherwise those stockholders would be deprived of property without due process of law. It follows that *the proceeding before the District Court cannot be deemed to be a summary one.* Moreover, the fact that notice is to be given to the persons affected by the plan shows that the theory

of submission to the District Court is substantially similar to that required in respect to a plan made pursuant to the provisions of Section 77B or Chapter X of the Bankruptcy Act. True, the issues presented to the District Court are limited to the matters prescribed by the statute but this is the extent of the limitation.'"

In the case of *Lounsbury et al.* v. *S. E. C.* (C. C. A. 3, 1945), 151 F. 2d 217, petitioners, stockholders of the Commonwealth & Southern Corporation, asked the Court for a review of orders of the Commission and for a stay of all proceedings pending review by said Court. The petition for a review was dismissed and the motion for a stay denied. Judge Biggs, in his concurring opinion, stated (p. 219):

"The Commission takes the position that this court is without jurisdiction to review the decision of the Commission, pointing out that effectuation of Commonwealth's plan is conditioned by the terms of the Commission's order upon approval by a majority of each class of stock affected and by a district court of the United States pursuant to Section 11 (e) of the Act; that since the order is so conditioned the petitioners are not 'aggrieved' by it within the purview of Section 24 (a); that the right of the petitioners to test the question of whether the plan is fair and equitable and appropriate to effectuate the provision of Section 11 must be *tried* in a district court."

. . . . . .

"But the important factor insofar as the review machinery of Section 11 is concerned is that Congress intended that if the holding company came into a district court of the United States and jurisdiction

was acquired by that court because of the failure of the company to obey the integration or simplification orders of the Commission or by virtue of the provisions of some other federal statute or law, that court should adjudicate *all* questions relating to integration, simplification and the *fairness and equity of the plan.* In other words, it was the intention of Congress if jurisdiction was vested in a district court, that *that court* and not a circuit court, *should pass on the plan* and determine and execute the course necessary for the integration and simplification of the holding company structure."

In an effort to overcome the effect of the District Court's decision in denying a premium to the preferred stockholders, appellants have attained the height of inconsistency. While on the one hand they concede that the District Court has the affirmative and independent duty to consider and find whether a proposed plan, approved by the Commission, is fair and equitable, on the other hand, they contend that the District Court may not consider the matter *de novo;* that the District Court may not substitute its conclusions for the conclusions of the Commission; that the District Court has no greater powers than the Circuit Court of Appeals under Section 24 (a) as to facts found by the Commission.

Of course, appellants deny that the hearing before the District Court is a mere "summary proceeding" or that the enforcing court is a mere rubber stamp for administrative action—but these arguments lead to no other conclusion than that where the Commission has arrived at its decision, the District Court must blindly approve its conclusions. And to bolster their point, appellants raise the spectre of chaos haunting the administration of the Act if a District Court be permitted to disagree from its conclusions.

The answer, of course, is that when it passed the Holding Company Act, Congress presumably knew that we have District Courts in different parts of the country. Congress, however, saw fit not to give the Commission *exclusive* power to pass on the fairness of a plan of liquidation, but made that power subject to review by the District Court, after notice to the parties and a hearing. Had Congress, in the interest of "finality" and "uniformity" desired to give the Commission *exclusive* jurisdiction and make their findings and decision final, it would have said so, and would not have given to the District Court the power and the duty to hold a hearing to pass on the fairness of the plan, before issuing its enforcement order. Appellant's quarrel, therefore, is with Congress, and not with the Courts below.

Judge Biggs, writing for the Court below, made an exhaustive analysis of Section 11 (e) of the Holding Company Act, its history and interpretation as shown by the debate in the United States Senate, by the interpretation of the Commission itself and by the courts, and by the testimony of a former chairman and former head of the Public Utilities Division of the Commission (R., Vol. VI, pp. 20-35). The Court below called attention to the report of the Senate Committee which reported out the original bill, and which stated that the Federal courts to which plans are presented "may exercise in the furtherance of such voluntary plans all the extraordinary powers such courts have been accustomed to exercise when called upon under the Sherman and Hepburn Act(s) to effect compulsory corporate readjustments required by the public policy expressed in those Acts" (R., Vol. VI, pp. 21-22).

Judge Biggs further referred to the Congressional debates which attended the passage of the Act and stated that "again and again members of Congress demanded and received assurances that the plenary jurisdiction and powers of the District Courts of the United States would

not be diminished or encroached upon by the functions allotted to the Commission under the law" (R., Vol. VI, p. 22). Judge Biggs then referred to the testimony given by Ganson Purcell, a former chairman of the SEC and Milton H. Cohen, a former Director of the Public Utilities Division of the SEC, given before one of the Committees of the House of Representatives, in which Mr. Purcell stated that the security holders' "treatment must be found by the *Courts* and the Commission to be fair and equitable", and that the *District Court* is required to find under Section 11(e) that the plan is fair and equitable. Mr. Milton H. Cohen testified that the District Court "has the *independent duty* of determining whether the plan is fair and equitable. * * *" (R., Vol. VI, pp. 23-24). Judge Biggs then referred to the 10th annual report to Congress of the SEC dated April 21, 1945 in which the Commission said "Thus security holders have the protection of findings as to the fairness and equity of plans by both the Commission and a *United States district court*" (R., Vol. VI, p. 24).

Judge Biggs thereupon turned to the internal evidence contained in the Act itself as to the intent of Congress respecting the functions of a district court and of the Commission. He said "The words employed respecting the respective duties of Commission and Court are so alike that we must conclude that Congress intended to lay substantially the same duty on the Court in the second instance as it imposed on the Commission in the first. Surely, had Congress intended that the District Courts of the United States should exercise only the function of review, other and more appropriate language would have been employed" (R., Vol. VI, pp. 24-25).

The Court below thereupon discussed the phrase that "the Court as a *court of equity* may * * * take exclusive jurisdiction of the holding company's assets * * * for the

purpose of effectuating the plan * * *." It said, "We think that Congress employed the phrase 'as a court of equity' classically, intending to require the district courts in Section 11 (e) proceedings to exercise in connection with the approval or disapproval of a plan the traditional powers of a court of equity in deciding that justiciable issue; that is to say, to administer justice in the traditional manner of a court of equity" (R., Vol. 6, p. 25).

Judge Biggs then points out that the phrase "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive", contained in Section 24, which provides for direct review by the C. C. A. of orders of the Commission, have been significantly omitted from Section 11(e) (R., Vol. 6, p. 25).

Judge Biggs thereupon points out that the Section 11(e) Court may hear the application for approval of the plan only "after notice and opportunity for hearing" and states "It was the manifest intention of Congress to give all persons who might be affected by the plan a day in court in an equity proceeding" (R., Vol. VI, p. 26).

The Court below then went on to say:

> "It seems improbable to us that Congress intended that the district courts of the United States should be limited to the function of mere review under the Public Utility Holding Company Act, *the only federal reorganization statute by the terms of which security holders are not permitted to vote their approval or disapproval of a proposed plan of reorganization* and to prevent its operation if the holders of the requisite amounts of the securities affected are not in favor of it" (R., Vol. VI, pp. 26-27).

Judge Biggs thereupon exhaustively analyzed the history of the Federal law of reorganization and came to the

conclusion that the same supported his view that a Section 11(e) court must function as an equity reorganization tribunal (R., Vol. VI, pp. 27-34).

The learned Circuit Judge thereupon said:

> "We conclude that it was the duty of the court below to function as an equity reorganization tribunal within the limitations prescribed by the Act. The findings and conclusions of the Commission were not binding upon the learned District Judge though, as was proper, he treated them with respect. He weighed the numerous elements involved in the case, albeit on his own scales, and in the exercise of his independent judgment arrived at the conclusion that the plan was not fair and equitable. The examination made by the District Court of the relevant factors was careful and far-reaching" (R., Vol. VI, p. 34).

With reference to the cases of *Lahti* v. *New England Power Association*, 160 F. 2d 845, 858 (C. C. A. 1, 1947), and *Massachusetts Mutual Life Insurance Co.* v. *S. E. C.*, 151 F. 2d 424, 430 (C. C. A. 8, 1945), which the Court below referred to as looking the other way on the question of the duty of the District Court to make an independent examination of the record and findings of the Commission under Section 11(e), we respectfully submit that neither of these cases is authority for the proposition that the District Court is merely a review court with limited powers. In both of these cases the question raised here, namely, whether the District Court must make an independent examination and affirmatively find the plan to be fair and equitable was not raised. In both these cases the District Court *agreed* with the finding of the Commission that the plan was fair and equitable and the question of the extent of its review of the Commission's decision was not in issue.

POINT II

The *Otis* case does not hold that upon a true liquidation of a holding company the charter provisions do not apply.

Appellants base their case upon the contention that the *Otis*[1] case does away with the charter provisions of a holding company which is being dissolved under Section 11 of the Public Utility Holding Company Act, and that the rights of the preferred stockholders in such a liquidation must be considered without reference to the charter, except insofar as the charter places a ceiling on the amount payable to the preferred stockholders on a voluntary redemption of their stock. An analysis of the decision of this Court in the *Otis* case discloses, however, that it laid down no such rule. In that case, the facts were substantially as follows:

United Light and Power Company was the top holding company of a very extensive utility system, with many subsidiaries. Directly beneath it was another holding company known as United Light and Railways Company. The plan of simplification was drawn under the so-called "great grandfather" clause of the Public Utility Holding Company Act which provides that the Commission shall take action—

> "* * * that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. * * *"

It was pursuant to that provision of the Act that this simplification proceeding was brought.

There was no real dissolution of the business of United Power as a going enterprise. The *enterprise* continued on

[1] *Otis & Co.* v. *S. E. C.*, 323 U. S. 624.

just the same as before. The only question that was involved was whether the top holding company (namely "Power") should be succeeded by its sub-holding company (namely "Railways") which would receive all the assets of the top holding company. The stockholders of Power became the stockholders of Railways, so that we had in that case purely a corporate *simplification* proceeding which in no way affected the business of the enterprise itself.[1]

The Commission forcefully presented to the Court below its contention that the *Otis* case relates solely to a corporate simplification. In its brief, Commission counsel stated (pp. 37-38):

> "These stockholders will continue to remain the residual owners of the same public utility system, for the principal result accomplished by compliance with the Commission's order of dissolution has been to crack off one of the corporate shells through which their ownership was held, and to transform their interests into stock in the next corporate shell, Railways. Power is being dissolved, but the enterprise is not."

And the Commission before this Court again stressed the continuing nature of the enterprise when in its brief it stated (p. 78):

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[1] These points of distinction were well brought out by the District Court (held by Judge Leahy) in its opinion (*In re United Light & Power Co.*, 51 Fed. Supp. 217, 223):

> "There is no real finality to this particular dissolution. Power's shareholders simply transform themselves into holders of common stock of Railways and thus obey the demands of Congress. Power as the head of a holding company system is now declasse by Congressional mandate; the interests of all classes of stock are nevertheless still lodged in a continuing enterprise.
>
> "It is neither an exercise in semantics nor a rejection of labels to consider the present plan little more than a reclassification."

> "*Finally, in no realistic sense is there occurring in this case a dissolution of a business enterprise which should call for the application of a charter liquidation provision.* As the opinion of the majority of the Commission discloses, the preferred and common stockholders of Power have been the residual co-owners of a vast public utility system controlled through Power, the top holding company, and Railways, its principal subholding company subsidiary. These stockholders will continue to remain the residual owners of the same public utility system, for the principal result accomplished by the Commission's order is to crack off one of the corporate shells through which their residual ownership was held and to transfer their interests to the stock of the next corporate utility, Railways. In essence, therefore, while Power is being dissolved, the enterprise is not."

The majority members of this Court apparently agreed with the argument of the Commission, inasmuch as the majority opinion laid great stress on the fact that in the *Otis* case there was no true liquidation of the enterprise but merely a simplification and that under a mere simplification it was not the intention of Congress that substantial rights should be destroyed. The question in the *Otis* case was whether the common stock of "Power", which at that time had an equity in present earnings of over $2,500,000 per year, should be completely wiped out because the SEC had ordered a simplification of the capital structure of the system. That in substance is what this Court, in its majority opinion, stated the question to be. In this connection we should point out that the decision of this Court was by a sharply divided Court,—five to three,—the dissenting judges being Chief Justice Stone, and Justices Roberts and Frankfurter.

An examination of the opinion of Mr. Justice Reed, writing for the majority, will show very clearly the distinction between the *Otis* case and the case at bar. Mr. Justice Reed at page 631 said:

> "The Commission's order of March 20, 1941, for the liquidation and dissolution of Power was a step in the *simplification* of the holding company system which *simplification* was enjoined by section 11(b) (2) of the Act. Satisfaction of the great-grandfather clause might have been obtained in this or other holding company systems by an order for *merger, consolidation* or *recapitalization* between top holding companies or between associate companies in the lower tiers of the corporate hierarchy. *Such procedure would avoid the liquidation of Power.* Cf. Windhurst v. Central Leather Co., 105 N. J. Eq. 621, 149 A. 36; Porges v. Vadsco Sales Corporation, Del. Ch., 32 A. 2d 148, 151. The selection by the Commission of *one* method of system adjustment to accomplish simplification *rather than another is an incident which ought not to affect rights.* The exercise of legislative power by Congress through section 11(b) (2) to accomplish *simplification* as a matter of public policy and the Commission's administration of the Act by dissolution of this particular company results in a type of liquidation which is entirely distinct from the '*liquidation* of the corporation, whether voluntary or involuntary' envisaged by the charter provisions of Power for preferences to the senior stock. * * *"

The Court then went on to say that upon analysis of the holding company system's experience, and upon an estimate of future earnings, the Commission assumed earnings of $6,185,000 annually. Since the annual preferred dividend requirements were $3,600,000 there appeared a balance of $2,585,000 available for the reduction of preferred

stock arrearages of $38,760,000. The Court then went on to say:

> "* * * The Commission noted that if all the assumed earnings materialized and were applied to liquidating the preferred current and deferred dividends, in approximately fifteen years the arrearages would be paid and the common stockholders would be in a position to receive dividends. Furthermore, *only by forced liquidation could the common stock be deprived of its possibility for future earnings.* Only by means of forced liquidation and the receipt of all Railways common, could Power's preferred gain a right to prospective earnings *above* its guaranteed dividends. * * *" (p. 632).

The Court then quoted from the message which the President sent to Congress in connection with the pending Public Utility Holding Company bill (p. 636):

> "'Such a measure will not destroy legitimate business or wholesome and productive investment. It will not destroy a penny of actual value of those operating properties which holding companies now control and which holding company securities represent insofar as they have any value. On the contrary, it will surround the necessary reorganization of the holding company with safeguards which will in fact protect the investor. S. Rep. No. 621, 74th Cong., 1st sess., p. 2.'
>
> "That report urged the same care to investors:
>
> 'Simplification and reorganization of holding company structures, making possible within a reasonable period the practical elimination of the holding company, should be conducted under the Commission's supervision over a period of time to prevent undue losses to security holders from investment dislocations, Id., p. 60'."

The Court then added at page 636:

> "Of course, Congress would wish, in simplifying a holding company system capital structure, to preserve values to investors, not to destroy them."

This Court then went on to say that *simplification* having as an incident to it the dissolution of *one* company in a *holding company system* was not an anticipated "liquidation" within the meaning of Power's charter provision. Mr. Justice Reed said at page 637:

> "We think, however, the charter preference is inoperative in *simplification* under section 11(b) (2). The provision having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a '*simplification' under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated 'liquidation'* within the meaning of Power's charter provision. Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders. *Nor should common stock values be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the devices of merger or consolidation,* which would not run afoul of a charter provision formulated years before adoption of the Act in question. The Commission in its enforcement of the policies of the Act should not be hampered in its determination of the proper type of holding company structure by considerations of avoidance of harsh effects on various stock interests which might result from enforcement of charter provisions of doubtful applicability to the procedures undertaken."

In the *Otis* case we have the following factors present, all of which are absent here:

(1) The common stock which the preferred stockholders wanted to wipe out had a very large equity in present earnings, over $2,500,000 a year above preferred dividend requirements. In the present case we seek to wipe out no class of stock.

(2) The *Otis* case was a *simplification* pure and simple, of a holding company system, the cracking off merely of the *top* company of the corporate hierarchy. In the present case we have an actual, bona fide *liquidation* and *dissolution* of the whole *enterprise*.

(3) In the *Otis* case, the stockholders of the top holding company became stockholders of the next sub-holding company. In this case no holding company remains, the *system* is disintegrated.

(4) The *Otis* case involved merely the exchange of stock in a top holding company for stock in a sub-holding company, which had substantially the same assets. In the present case the preferred stockholders are paid out in *cash*, one hundred cents on the dollar.

(5) In the *Otis* case the method chosen by the Commission, for simplifying the holding company system was only one of several methods which might have been adopted, and the same result secured. Had one of the other methods, namely, the device of merger between the top holding company and the sub-holding company been adopted, the requirement of the statute would have been complied with, corporate simplification would have been accomplished and the rights of the common stockholders would have been preserved. We have no such situation here.

It was under those circumstances that the Supreme Court said that that kind of "liquidation" was not contemplated

when Power's charter was adopted six years before the enactment of the Holding Company Act and that, therefore, it did not apply to a mere *simplification*. The Commission had awarded to the common stockholders as their interest in Railways the modest amount of 5½% of the stock of Railways. The majority of this Court said that under those circumstances it was "fair and equitable" that the interests of the common stockholders should not be completely wiped out, but that as the top holding company was perfectly solvent, and as it had present earnings greatly in excess of the amount payable as current dividends on the preferred stock, that some recognition should be given to the common stock. We respectfully submit that this is entirely different from a holding that upon an *actual dissolution* of a holding company *where the enterprise comes to an end,* and where the preferred stockholders are being paid one hundred cents on the dollar of the principal of their claims, as provided by the charter (more than they originally contributed to the enterprise), that under those circumstances the charter provisions have no validity and that the rights of the preferred stockholders are to be considered as though the enterprise continued and no liquidation had taken place.

In their opinion in the *Otis* case this Court said (p. 636):

> "Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders."

If the call premium, amounting to $3,200,000, were to be awarded to the preferred stockholders, that is exactly what would happen here. These preferred stockholders will not receive stocks of fluctuating market value in another company, to be valued at a capitalization of so many times earnings (always a matter of opinion, the times earnings ratio fluctuating with the ups and downs of the stock market), and as to whose value there might be doubt and dispute. They are to be paid in *cash*. They are to receive

more than the amount that the company received from the original preferred stockholders at the time of the sale of the stock to them. In addition, they have received their full dividends, amounting to approximately $90 per share, while the common stockholders were getting nothing during most of this period, although the company had earnings which would have justified the payment of dividends. To require the company (*i. e.*, the common stockholders), in addition to pay to these preferred stockholders a premium of $3,200,000 would indeed be a windfall to the preferred stockholders at the expense of the holders of the common.

In the *Otis* case, the Court was protecting the rights of common stockholders who had a very substantial equity in the earnings of the company, which it was sought to wipe out. It awarded to them a very modest interest in the sub-holding company. In the present case, we have the situation of the preferred stockholders who are not satisfied with receiving everything the charter gives to them but want more than the charter provides, namely a call premium, as though the company was not being involuntarily liquidated but was continuing on as a going business enterprise, and the company had *voluntarily* called its stock. The preferred stockholders say in substance we think the *investment value* of our stock in January, 1946, would have been more than $105 or $110 a share if the company had continued in business, and we want to get that even though the company is compelled to go out of business.

It is a matter of common knowledge that the reason that a call premium is usually provided for in the case of a redemption of either bonds or preferred stock is that such redemptions are usually made in periods of low interest or dividend rates, when the called bonds or stock can be replaced with bonds or stock carrying a lower interest or dividend rate, and it is therefore considered fair, under those circumstances, that the company (which benefits by the redemption) should pay to the holders of the bonds or stock, who are deprived of a favorable investment, a bonus

or premium for the deprivation. In this case, however, no such reason exists. The preferred stock is not being replaced with other stock carrying a lower dividend rate, it is being retired because Engineers, by command of the statute and of the SEC has been required to discontinue business and dissolve. Engineers derives no benefit, but rather suffers a detriment, from the retirement of this stock.

POINT III

The District Court and the Court of Appeals properly found that payment to the preferred stockholders of $100 per share was fair and equitable.

The District Court in performing its affirmative and independent duty to consider and find whether the proposed plan was fair and equitable carefully examined the plan and the record upon which the Commission's approval of the plan was based. The District Court's findings of fact, and the record of the Commission upon which they are based, substantiate beyond any question that the plan approved by the Commission failed to satisfy "fair and equitable" standards. An examination of the record and of the findings of the District Court establishes the following facts:

Upon the sale of the preferred stocks Engineers received less than $100 per share therefrom. On the $5 stock it received only $95 per share (District Court's findings, par. 22, p. 301a).[1] Both the $5 and the $5.50 preferred stocks carried conversion privileges into common, which were apparently considered necessary to secure their purchase by the public, indicating that at the time of their issuance their investment value without the conversion privilege was not equal to the amount for which they were sold to

[1] Page references are to Record.

the public. The $5 series reached a high of $123 in 1929 and a low of $101⅛ in 1935. Its overall average since issuance was $67.16. The $5.50 series reached a high of $109 in 1929 and a low of $11 in 1933 and 1934. Its overall average since issuance was $64.54. The $6 preferred reached its highest market price of $109 in 1945 and sold at a low of $12 in 1933; its overall average since issuance is $62.77 (Finding 24, p. 302a). The District Court found that "the market prices of the preferred stocks in the earlier years must be considered in the light of the warrants and conversion features operative in that period, and in the light of the fact that Engineers common sold as high as $795/8 per share in 1929. The market prices in recent years must be considered in the light of the extensive market purchases made by Engineers, referred to below, and other extrinsic factors such as the Commission's American Power & Light debenture decision (Holding Company Act Release No. 6176) wherein premiums were awarded senior security holders for the first time" (Finding 25, p. 302a.

No dividends were paid on the preferred stock from July 1st, 1933 to July 31st, 1936, but the arrearages were paid off in 1936 and 1937. As of December 31st, 1946 Engineers had paid the following dividends on the preferred stocks:

> $5 series, $86.25 per share. $5.50 series, $93.50 per share. $6 series, $90 per share (Findings 26, pp. 302 and 303a).

There are 1,909,968 shares of Engineers common stock outstanding, owned by more than 13,000 stockholders. The aggregate consideration received by Engineers for such shares was $58,059,512.85 (Finding 30, p. 305a).

From the date of Engineers organization in 1925, down to the retirement of the preferred stock—a period of 22 years—the common stock received cash dividends of only $4.70 per share (Finding 33, p. 305a). If averaged over

this period it would amount to 21¢ per share per annum. If figured on the average price received by Engineers on the sale of the stock of $30.40 per share, it would amount to 7/10ths of 1% per annum as contrasted with the receipt by the preferred stock of from 5% to 6% per annum.

From September, 1935 to the end of 1944 earnings accrued to the interest of the common stockholders of approximately $24,500,000, none of which was distributed. Since that time this amount has necessarily increased (Finding 34, p. 306a).

As of June 30th, 1945, subsidiaries of Engineers had $2,773,000 of free earned surplus and Engineers itself had $7,095,000 of free earned surplus, or a system total of $9,868,000 which could have been declared out in dividends to the common stockholders (Finding 35, p. 306a). Since that time this amount had also increased. This deprivation on the part of the common stockholders has been of substantial benefit to the preferred sockholders (Finding 36, p. 307a).

Engineers sustained substantial losses on many of its properties sold in compliance with the Commission's divestment orders. Its interest in Puget Sound Power & Light Company, which cost Engineers $34,000,000 was sold for only $774,475. A formal offer of proof was made before the Court to establish that the equity owned by Engineers in Puget Sound would presently have a cash value of $10,000,000. Substantial book losses were also sustained by Engineers on the sale of its investment in other subsidiaries. In the case of El Paso Natural Gas Company, whose stock was sold by Engineers pursuant to the order of the Commission, the market price of the stock sold increased by more than $4,000,000 over the price realized (Finding 37, pp. 307a and 308a). The brunt of the losses and deprivations caused by the Holding Company Act has fallen upon the common stockholders (Finding 38, p. 308a).

In order to carry out the plan the common stockholders were obliged to contribute to Engineers the sum of

$22,000,000 through the exercise of warrants to purchase the common stock of Engineers' subsidiary, Gulf States Utilities. In addition, to carry out the plan $3,800,000 were received by Engineers in the form of "advance dividends", paid by Engineers remaining subsidiaries, on condition that no further dividends may be paid by such companies for specified future periods of time extending until June 15, 1948 (Finding 39, p. 309a). The common stockholders who are to receive these stocks were thereby foregoing their future dividends to the extent of $3,800,000.

The claim that the opinion testimony of R. E. Badger as to the "investment value" of Engineers preferred stock, stands uncontradicted, is not borne out by the record. Badger testified that "exclusive of the impact of the Public Utility Holding Company Act of 1935" the Engineers preferred stocks would, at the *time of his testimony* have sold at a 4.6% yield basis (or $108.70, $119.57 and $130.33 respectively ~~for~~ the $5, $5.50 and $6 series), *if the preferred stocks were not subject to call.* In view of the redemption provision he concluded that "the present fair investment values are represented (substantially) by the call price". In connection with his testimony, Badger presented a report on valuation of Engineers preferred stock "as at January 15, 1946" (Ex. 29a, p. 2088a *et seq.*). In that report Badger stated:

> "It does not require an exhaustive presentation of statistics to show that the yields on preferred stocks are, at the present time, the lowest which they have ever been in the history of our country, or conversely, that the *prices* of such stocks are at the *highest* levels ever experienced. *The permanency of this situation will depend on the permanency of low interest rates.* * * *" (p. 2096a).

It is quite apparent, therefore, from Badger's own report that he based his opinion of investment value on market prices of allegedly comparable stocks in a period (Janu-

ary, 1946) when stock prices were at their highest and interest rates were at their lowest. He coupled this with the prediction, *since proven wrong*, that the present level of preferred stock prices is a permanent level. He also based his valuation upon a capitalization of "two year average earnings of the major subsidiaries held by Engineers at December 31, 1944, on the assumption that the equities in these companies were worth 15 times two year average earnings" (R. 2104a). It is a matter of common knowledge, and the Court may take judicial notice of the fact, that since January 1946 there has been a considerable decline in the market value of public utility company stocks (as well as of stocks generally) and that the price earnings ratio at which utility stocks are now valued has declined considerably below the times earning ratio which existed in January 1946. In most instances the ratio now is 8 to 10 times earnings, and in many instances less. In addition, it should be noted that Badger based his opinion on only two years of earnings, namely 1943 and 1944. During this period the country was at war. Abnormal boom conditions prevailed throughout the country and particularly in the territory served by Engineers' important subsidiaries, as in Norfolk, Virginia, where an extensive shipbuilding program was going on. Two years' earnings in any period are insufficient to base an opinion of sound investment value, and certainly not two years of abnormal earnings during a war which caused the greatest boom period that this country had ever experienced.

While Badger termed Engineers preferred stocks as of "medium grade" D. C. Barnes, the President of Engineers, who also qualified as a financial expert, classified them as "closer to a low grade preferred stock". The District Court found that the evidence supports this view (Finding 44, p. 311a). Mr. Barnes further testified that the future price level of these securities,

> "without the impact of the Public Utility Holding Company Act, could move from its present level in

only one direction, since the voluntary redemption price acts as a stopper to prevent any material rise in price over the respective voluntary redemption price, whereas adverse conditions which we are bound to meet from time to time in the future as we have in the past would be reflected in declines in prices from this top level" (p. 523a).

Mr. Barnes then testified to four factors which, in his opinion, might adversely affect the investment value of Engineers' preferred stocks, as follows:

"The factors which might affect the future price level adversely are: (1) continued inflation. The country is now facing wide-spread demands from labor for 30 per cent increase in wages. The former chairman of the War Labor Board has indicated that in his opinion, in a five-year period, wages may be expected to go up as much as 50 per cent.

If any such inflation spiral is in store for us it will affect adversely the market prices for fixed income securities, particularly in regulated industries where there is an inevitable time lag in securing increased rates to cover increased costs.

(2) Periodic depressions. I do not believe that it is possible to develop a regulated economy which will continuously balance supply and demand. When these get out of balance to an extent that causes decreased employment, it is a characteristic of human nature which I do not believe can be changed to conserve resources and limit spending which further aggravates the dislocation of supply and demand.

We have had these cycles periodically in the past and I believe there is every reason to expect a continuance of them in the future. We have expanded our productive capacity in the last six years to provide the requirements of war and have built up a deficit in so doing of some $300,000,000,000.

During this period the supply of goods for civilian requirements has been withheld to a large extent and in the immediate future production to fill this demand may be expected to continue productive activity at a high level.

When this deferred demand has been satisfied we will be faced with the problem of readjusting supply to demand, and in my opinion it is reasonable to expect that during such readjustment we may have another of the periodic depressions.

(3) Possibilities of Government competition. There is agitation in Congress and elsewhere for substantial hydro developments by the Federal Government on rivers not only in areas adjacent to Gulf States Utilities Company, where the Southwestern Power Authority has been organized and is functioning, but also in the territories served by the Virginia Electric and Power Company, where developments have already been approved by Congress on the Roanoke River, although appropriation has not as yet been made.

Further developments have been recommended by the army engineers or studied by them for hydro plants on the James River and the Rappahannock River in Virginia. If such developments follow the pattern of those in the Northwest it will affect adversely the market prices for utility stocks in the areas affected.

(4) Adverse changes in the policy of regulatory authorities. If the principles of rate regulation advocated by some of the more radical exponents of regulation are later adopted by authorities having jurisdiction in the area served by Engineer's subsidiaries, it would also have an adverse effect on securities of companies doing business in those areas" (R. 523a and 524a).

Mr. Barnes has proven to be a far better prophet than Badger. Some of the potential factors to which Mr. Barnes referred have already become realities. Labor has already received wage increases which amount to much more than the 30% that Mr. Barnes referred to. In the light of present conditions the opinion of the former Chairman of the War Labor Board that in a five-year period wages may be expected to go up as much as 50%, has, in the light of what has happened since this testimony was given, been found to be much too conservative. Wages have already advanced more than that. It is a matter of common knowledge, and this Court may take judicial notice of the fact, that while *gross* utility company earnings have increased (owing to the present abnormally high rate of business activity), utility *net* earnings have not kept pace owing to the increases in labor costs, fuel and costs of replacement and repairs. At the present time, we are in the very midst of an acceleration of the "inflation spiral" to which Mr. Barnes referred, and which is already adversely affecting utility company earnings. Thus far we have had three rounds of wage increases granted to organized labor. Labor unions are already demanding a fourth round.

So far as the other factor upon which Badger relied is concerned, namely, low interest rates (which he assumed would be permanent), the record, since he gave his testimony, proves him to have been but a poor prophet. Between March 1946 and March 1947 yields on long term Government bonds had risen from 2.09% to 2.19%. They have since risen to 2.41% (see Weekly Outlook of Standard Statistics Co., a well recognized financial publication, dated Dec. 28, 1948). Highgrade bond yields had risen in the same period from 2.35% to 2.49%. They have since risen to 2.774% as of Dec. 28, 1948 (Weekly Outlook, Standard Statistics). On high grade preferred stocks the average yield had risen from 3.42% to 3.75%. They have since risen to 4.14% (See Weekly Outlook, Standard Statistics,

Dec. 28, 1948). The increase in yields on low to medium grade preferred stocks must necessarily be even greater (Finding 52, p. 314a). It is a matter of common knowledge, and this Court may take judicial notice of the fact, that interest rates generally since March 1947 down to the present time have steadily risen.

In contradiction of the permanence of the utility company stock prices testified to by Badger, we have the fact that the utility common stock average had dropped from $123 in March 1946 to $107 in March 1947. (Finding 52, p. 314a). It has since dropped to $104 (Standard Weekly Outlook, Dec. 28, 1948). Inasmuch as the investment value of a utility holding company's preferred stocks are necessarily dependent upon the value of the utility common stocks held by it, it necessarily follows that such an extensive drop would likewise affect the investment value of the preferred stocks.

The Court found that the investment values of Engineers preferred stocks, testified to by Badger:

> "* * * do not represent the investment value of these stocks in the past, and are by no means determinative of the investment value of these stocks for any considerable period of time in the future. * * *" (Finding 54, p. 315a).

Summarizing the various factors which go to make up the investment value of Engineers preferred stocks we find the following: Prior to the outbreak of the European war, Engineers (on a consolidated basis) barely earned its fixed charges and preferred stock dividends. The ratio was 1 1/10 times for 1937 and 1938 and 1 2/10 times for 1939 to 1942 inclusive. It was not until 1943 and 1944 (the peak of the war effort) that the ratio increased to 1.4 and 1.5 R. p. 64a). The earnings prior to 1937 do not appear to be in the record and were not considered by Badger, but undoubtedly they are unfavorable, inasmuch as En-

gineers, from 1933 to 1936 did not pay dividends on its preferred stocks. On the foregoing record we think it may fairly be said, and the Court was justified in finding, that Engineers preferred stocks were not even of medium grade, as testified by Badger, but were of low grade. That the market so rated them is evident from their violent fluctuations in market price to as low as $11. per share. Surely it can hardly be claimed that preferred stocks which sell in the market at an overall average price since issuance of from $62 to $67 per share are high grade, or even medium grade, preferred stocks. The acid test of the market place has classified them as being of distinctly low grade. The only reason that they sold at or above par recently is because the Company's plan called for their retirement at par, and the SEC required the payment of call premiums in addition.

Furthermore, it should be borne in mind that such investment value as has been attained in recent years by Engineers' preferred stocks was due in large measure to the sacrifices made by the common stockholders in foregoing dividends upon their stock for a period of nine years, although such dividends were earned and might have been paid. It was the retention of these earnings, amounting to approximately $24,500,000, and the reinvestment of a large part thereof in the properties, which increased the investment value of the preferred stocks.

It cannot be denied that the sacrifices which Engineers was compelled to make in the divestment of properties under the orders of SEC, amounting to many millions of dollars, must all necessarily be borne by the common stockholders, inasmuch as the preferred holders have already received par and all dividends, amounting to approximately $190 per share. In contrast to this, we have the meagre cash dividends which were paid to the common stockholders over a period of 22 years of the Company's existence, of $4.70 per share, amounting to an average annual return of 7/10th of 1%. In the face of all this the

preferred stockholders demand their "pound of flesh" by insisting that they must also receive a call premium of $3,200,000, as though the retirement were voluntary and the enterprise were continuing.

We respectfully submit that to grant this demand would be grossly unfair and highly inequitable and unjust. As the Court below so aptly and concisely expressed it in the *Otis* case (142 F. 2d 411, 419):

> "Each security holder must be compensated as exactly as he can be for that which he is giving up. But though his cup must be filled level to the brim, it must not run over. This much is plain."

In its Conclusions of Law, the District Court stated:

> "No special facts or circumstances in connection with the issuance of the preferred stocks or their subsequent history, or the relationships of the preferred and common stockholders, create any equitable considerations warranting the payment to the preferred stockholders of amounts in excess of $100 per share plus accrued dividends; and careful examination of all the relevant factors impels the conclusion that payment to the preferred stockholders of such excess amounts would not be warranted or justified" (R. 316a).

POINT IV

The Commission's newly adopted "investment value ex the Act" formula in valuing securities and arriving at "equitable equivalents" is unsound and leads to unjust results.

Contrary to its practice for years the Commission has in this case evolved a new "technique" in valuing securities by arriving at those values on the theory that the

Holding Company Act" does not exist, or that it had been repealed on the day of valuation, and that the enterprise would continue.[1] It called this the "investment value ex the Act" doctrine. As is illustrated in the present case in practical effect, however, this method merely boils down to valuing the securities on the basis of market prices of allegedly comparable securities as of a given date. Badger arived at his "investment values" by taking a number of allegedly comparable public utility preferred stocks, and ascertained their market prices on a particular date in January, 1946, namely January 4th. Then on the basis of those market prices he computed their yield basis. Then he applied such yield basis to Engineers' preferred stock and came to the conclusion that Engineers should sell on the same yield basis as the allegedly comparable stocks, *i. e.*, 4.6% per annum. In this manner, Badger arrived at the theoretical market values of the three issues of Engineers' preferred stocks.

He did this upon the assumption that there was no Holding Company Act and that Engineers' preferred stocks could not be redeemed. Thereupon he reduced those valuations to the call prices provided in Engineers' charter. In essence, therefore, Badger's valuations rest upon the market prices of the comparable stocks on a particular date in January, 1946. Although the Commission adopted this method of valuation in the Engineers case, it condemned the use of market values as determinative of equitable equivalents in the later case of Washington Railway and Electric Company (decided in May, 1947), H. C. A. R. [illegible] in which it stated:

> "However, we have never considered market values . . . as determinative of the fairness of a Section 11(e) plan and it is therefore unnecessary for us to make an estimate of the market value either of the pres-

[1] See C. C. A. opinion, R. 38.

> ently outstanding preferred stock apart from the possibility of liquidation or of the package of securities which the preferred stock is to receive under the proposed plan."

The learned District Judge refused to adopt the Commission's valuation technique saying:

> "I do not consider the argument advanced as to what these series of preferreds would be worth if there were no Public Utility Holding Company Act. I do not think it profitable to consider an argument based on unreality for there is a Public Utility Holding Company Act. Unless one subscribes completely to the doctrine of foreordination, things might always be different from what they are" (R. 292a).

This novel "investment value ex the Act" theory of the Commission, which in fact does nothing more than employ the market value of comparable preferred stocks at a particular time, not only finds no support in the *Otis* case but is in fact repugnant to the reasoning and basis of the *Otis* case. In that case, in addition to considering and weighing the many factors in the case, the Commission and the courts projected the earnings of the company on a long-term basis to determine the respective rights of the preferred and common stockholders. But in the *Engineers'* case, the Commission not only failed to ascertain the future earning power of the system and apportion earning power between preferred and common, but also measured the rights solely of the preferred without any adequate consideration of the rights of the common.

This failure was so obvious as to cause Judge Biggs, who also wrote the Circuit Court opinion in the *Otis* case, to state in the instant case:

> "But we think it is clear that it (Commission) did not give any substantial consideration to the future

earning power of Engineers and its subsidiaries which the Supreme Court has held is one of the fundamental tests for reorganization valuation. See *Consolidated Rock Products Co.* v. *Dubois*, 312 U. S. 510, 526, and *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 565-6. In the instant case the Commission made no attempt to ascertain the future earning power of the system nor to apportion earning power between the preferreds and common based on their respective claims to income as it did in *The United Light & Power Company* case. But if values for the securities are to be determined *ex* the Act it is clear that the Commission should have done so. What the Commission has done is to consider the investment values of the preferred *ex* the Public Utility Holding Company Act, *i. e.*, as if the Act had never been passed. But it considered only the preferreds on this basis. It seems to have omitted consideration of the common by a similar standard" (R. Vol. 6, p. 35).

The tortuous nature of the Commission's reasoning and the difficulty it has in attempting to justify its compliance with the standards laid down in the *Otis* case are apparent in its argument that it was not necessary in the *Otis* case to measure the rights of the common as well as the preferred. Thus, in its brief on page 45, footnote 30, it says:

> "It was a drawback, although we believe an unavoidable one, of the valuation technique employed in the *Otis* case that it did require the Commission to appraise the relative treatment of the United Light and Power Company preferred and common stockholders in the light of the forecast of future earnings. * * * The majority of the Commission and of this Court, however, concluded that the difficulties of the valuation process did not warrant denial of participation to a common stock which, as a matter of judgment had a legitimate investment value. See 323 U. S. 632."

It is difficult to determine from this comment by the Commission whether it is blaming itself or the courts for the valuation technique employed in that case. In fact, however, in the *Otis* case the appraisal of the rights of the preferred and common stockholders in the light of the forecast of future earnings, among other factors, was made by the *Commission* initially and approved by all the courts including this Court. And the Court of Appeals which decided the *Otis* case reminded the Commission of this when it said:

> "In the instant case the Commission made no attempt to ascertain the future earning power of the system nor to apportion earning power between the preferreds and common based on their respective claims to income as it did in the *United Light and Power Company* case" (R. Vol. 6, p. 35).

That the current market value is not the sole test and that future earning capacity must be carefully weighed was indicated by this Court in *Consolidated Rock Products Co.* v. *Dubois*, 312 U. S. 510, 526:

> "Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance."

Had the Commission applied the rationale of the *Otis* case, it would of necessity have paid the preferred stockholders *less* than $100 per share. In the *Otis* case, the substantial arrearages of dividends and the limited earnings were substantial factors which induced the Commission to

discount the participation of the common stock. But in the *Engineers'* case, there were no arrearages of dividends and the common stockholders were entitled to an immediate participation in earnings above preferred dividend requirements. But instead of applying the rationale of the *Otis* case, the Commission applied solely the new test of "investment value ex the Act" or current market value exclusively for the preferreds, and reasoned that the common stockholders were the residual claimants and therefore entitled only to what was left.

The Court of Appeals called attention to that fact, saying:

> "In the instant case the Commission made no attempt to ascertain the future earning power of the system nor to apportion earning power between the preferreds and common based on their respective claims to income as it did in *The United Light & Power Company* case. But if values for the securities are to be determined *ex* the Act it is clear that the Commission should have done so. What the Commission has done is to consider the investment values of the preferred ex the Public Utility Holding Company Act, *i. e.*, as if the Act had never been passed. But it considered only the preferreds on this basis. It seems to have omitted consideration of the common by a similar standard. It made no findings as to the 'value' of the common stock" (R., Vol. VI, p. 35).

It is perfectly plain that when the Commission valued the preferred stock "ex the Act" and then gave to the common stock merely what remained of Engineers' assets that the Commission had adopted a double standard of valuation. So far as the preferred stock was concerned it valued the same as though the enterprise were continuing. So far as the common was concerned, however, it only gave to that stock what remained after Engineers had been compelled to dispose of various of it subsidiaries at great

loss and had suffered all the other deprivations incident to the liquidation of the system properties, all of which were caused by the fact that it had been commanded by the Holding Company Act to liquidate and dissolve. As the Court of Appeals well said:

> "The fact is that the holding company enterprise is at an end, both for preferreds and common. The Commission apparently has disregarded this fact which supplies the substantial difference between the instant case and The United Light & Power Company reorganizations. In the latter case the security holder participation in the enterprise was shifted from the top holding company to a subsidiary holding company but the holding company enterprise as such continued. In the instant case the Commission ascribed 'investment value' to the preferreds but failed to make a similar approach to the common. The result is that the Commission has attempted to value the securities of Engineers both ex the Act and intra the Act" (R., Vol. VI, p. 36).

POINT V

The liquidation of Engineers provided for in the Plan is not voluntary.

The entire record of the proceedings of Engineers before the Commission establishes beyond doubt that the sale of the holdings of Engineers and the liquidation of the preferred stock is the direct result of the compulsion of the Act, and the liquidation is therefore not voluntary.

Prior to the decision by the District Court, pursuant to orders of the Commission, Engineers had disposed of all of its holdings ordered to be divested except those in Gulf States, El Paso and Virginia, and with respect to the latter two companies, it had disposed of their trans-

portation properties. Subsequent to the decision it distributed to its common stockholders all the stocks owned by it in the three subsidiaries, except a small amount of stock in Virginia, which is being held in trust pending final liquidation. That the dissolution of Engineers was the result of the impact of the Act and obviously not "voluntary" is inherent in the Finding by the SEC that the proposal to dissolve Engingers is "necessary" to effectuate the provisions of Section 11(b) of the Act. The SEC in its Findings and Opinion of December 5, 1946, said (R. 47a):

> "Enginegrs has produced an abundance of evidence showing that once it has disposed of El Paso and Gulf, it will have no reason to continue as a separate corporate entity for it would then be the parent of a single operating company, Virginia. In that situation, Engineers admits that it would be an 'economic monstrosity' and all participants in this proceeding seem to be in agreement with that conclusion. The record does not clearly indicate what it will cost to maintain Engineers after Gulf States and El Paso have been divested. Estimates range from $172,000 to $365,000 a year. The company freely admits that Engineers could in no way justify any such continuing expenditure. Virginia is able to undertake its own financing and service and is large enough to stand independently.
>
> Any functions Engineers might perform should more properly be carried out by Virginia's own management. *We find that the presence of Engineers would unduly complicate the structure of the system and that it would therefore, come within the prohibition of Section 11(b)(2). Accordingly we find that the proposal to dissolve Engineers is 'necessary' to effectuate the provisions of Section 11(b) of the Act.*" (Italics added.)

And in its Summary of Conclusions, the Commission at R. 84a stated:

> "1. We have found those provisions of the plan providing for the disposition of Gulf States and El Paso and for the dissolution of Engineers to be necessary under the requirements of the Act."

Although Commissioner Caffrey concurred in the Supplemental Findings and Opinion of January 8, 1947 on the authority of the *Otis* case, the following portion of his concurring opinion is particularly significant (Holding Company Act Release No. 7119, p. 9):

> "Our orders under Section 11(b)(1) do not preclude a careful investigation of the surviving holding company system under Section 11(b)(2) to determine what action might be necessary (including dissolution of the top company) in order to simplify the system and distribute its voting power equitably. I think that Engineers would have been subject to such a proceeding had it not come forth with a voluntary plan. Engineers' voluntary proposal did no more than forestall the necessity for action by the Commission.
>
> Further, Engineers' decision to liquidate came as a logical step following the necessity to comply with our Section 11(b)(1) orders. It is the operation of Section 11, and not mere managerial discretion that has brought about the liquidation.
>
> Under these circumstances, I do not believe that the liquidation can properly be termed voluntary."

This point was conceded by counsel to the Commission in the hearings before the District Court on February 17, 1947 when he said (R. 196a):

> "The Commission did not dispute that Section 11 impelled the discontinuance and elimination of Engineers as a corporate entity and that the proposed dissolution is involuntary in that sense; * * *"

POINT VI

Payment to the Preferred Stockholders of an amount in excess of $100 per share plus accrued dividends contravenes the charter provisions and impairs the obligation of contract.

The applicable section of the corporate charter of Engineers provides:

> "III. Preference on liquidation, etc. In the event of liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, the holders of the preferred stock of each series shall be entitled to receive, for each share thereof, an amount equal to $100, together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premium for such series, if any, before any distribution of its assets shall be made to the holders of the common stock * * *."

Such a provision for the payment of a fixed amount to the preferred stockholders in the event of dissolution constitutes a contract among the stockholders, which is entitled to constitutional protection.[1]

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[1] As was said by Mr. Chief Justice Stone in the dissenting opinion in *Otis & Co.* v. *Securities & Exchange Commission*, 323 U. S. 624, at page 645; 65 Sup. Ct. 483, at page 493:

> "Such provisions for priority in a corporate charter constitute a contract among the stockholders, which is entitled to constitutional protection. Bedford v. Eastern Building & Loan Ass'n, 181 U. S. 227, 21 S. Ct. 597, 45 L. Ed. 834; Hopkins Federal Savings & Loan Ass'n. v. Cleary, 296 U. S. 315, 56 S. Ct. 235, 80 L. Ed. 251, 100 A.L.R. 1403; Treigle v. Acme Homestead Ass'n, 297 U. S. 189, 194, 196, 56 S. Ct. 408, 80 L. Ed. 575, 101 A. L. R. 1284, impairment of which is not lightly to be attributed to Congress. No constitutional issue is raised here, but we find no provision of the statute which purports to confer on the Commission, in the exercise of its power to liquidate a corporation, any authority to set aside a lawful stipulation in which the stockholders have joined fixing their relative rights in the event of liquidation."

Bedford v. *Eastern Building & Loan Association*, 181 U. S. 227, 21 S. Ct. 597, 45 L. Ed. 834;
Hopkins Federal Savings & Loan Association v. *Cleary*, 296 U. S. 315, 56 S. Ct. 235, 80 L. Ed. 251, 100 A. L. R. 1403;
Treigle v. *Acme Homestead Association*, 297 U. S. 189, 194, 196, 56 S. Ct. 408, 80 L. Ed. 575.

The majority opinion in the *Otis* case held that the charter provisions were inoperative in "*simplification*" under Section 11(b)(2) and that "the provision having been adopted in 1929, six years prior to the enactment of the Public Utility Holding Company Act, a 'simplification' under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated 'liquidation' within the meaning of Power's Charter provision" (p. 637, *supra*).

While there may be merit to this point in its application to the facts in the *Otis* case, we have shown that under no circumstances can it be applicable to the facts in the *Engineers'* case where the charter provides that the preferred stockholders should receive a premium *only* if the liquidation was *voluntary* and where the liquidation constituted an actual dissolution of the enterprise. In this connection, the language of the minority opinion in the *Otis* case is particularly appropriate (p. 645, *supra*):

> "* * * we find no provision of the statute which purports to confer on the Commission, in the exercise of its power to liquidate a corporation, any authority to set aside a lawful stipulation in which the stockholders have joined fixing their relative rights in the event of liquidation."

And at page 647:

> "We can find no basis for saying that it is not fair and equitable, both in a technical as well as a general and non-technical sense, to require the stockholders to abide by their agreement in the very circumstances to which it was intended to apply, and there, as we

have said, there is no contention that the contract when made was or is now oppressive, unfair, inequitable or illegal."

The charter constitutes the contract between the corporation and its stockholders. It is wholly unambiguous. It covers every conceivable situation under which the corporation may be liquidated, dissolved or wound up, or its capital stock reduced, resulting in a distribution of assets to its stockholders. It provides that in that event the preferred stock shall receive $100 per share and that in case such "liquidation, dissolution or winding up or reduction shall have been voluntary" the fixed redemption premium shall be paid. We cannot imagine language more plain and unambiguous. There are no qualifications of any kind. The provision applies to any and every situation as a result of which the corporation might be liquidated or dissolved, or its capital stock reduced resulting in distribution of assets.

As we have already said, dissolution of large public utility holding company systems had already been advocated at the time of the adoption of the charter. It may therefore be fairly said that it was within the contemplation of the parties that the company might be dissolved pursuant to some statute to be passed in the future.[1] But whether the

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[1] See Senate Resolution 329, 68th Cong., 2d Sess.; see, also, recitals in Section 1(b) of the Act.

Cf. Bonbright & Means, The Holding Company, at page 49: where reference is made to the danger to holding companies generally and particularly to public utility holding companies of possible dissolution through anti-trust proceedings.

Senate Res. 83, 70th Cong., 1st Sess. (approved Feb. 15, 1928), directing the Federal Trade Commission to make an investigation and to report to the Senate with respect to "(1) the growth of the capital assets and capital liabilities of public utility corporations doing an interstate or international business * * *"

See: "Summary" Report of Federal Trade Commission to the Senate on "utility corporations", Vol. 72-A, p. 5 (Senate Doc. 92, pt. 72A, 70th Cong., 1st Sess.).

The Court is also respectfully referred to Appendix C of the Central Illinois Securities Corporation's brief in this Court, where at pages 168 through 175 Mr. Berman has collated excerpts from the New York Times during the years 1924 and 1925.

possible dissolution of this corporation pursuant to an edict of Congress was foreseen at that time or not is really of no consequence. The important point is that the charter covered any and every liquidation or dissolution of the corporation whether it was by force of law, through bankruptcy or by voluntary action of the stockholders. It is an all inclusive provision and if contracts have any force and meaning it must be applied to the dissolution of Engineers pursuant to an Act of Congress. We respectfully contend that irrespective of any other considerations heretofore discussed that this charter provision must be upheld as valid and enforcible and that it is decisive of the appeal in this case.

POINT VII

There is no necessity for remand. The legal effect of the action of the lower courts was to approve the alternative provision of the plan as to which action the Securities and Exchange Commission had given advance approval on a condition which will be fulfilled if this Court affirms the District Court.

The legal effect of the proceedings up to this point is that the Commission submitted to the District Court for approval a plan which had alternative provisions. A payment of $100 plus premiums for each share of preferred stock was approved as "fair and equitable", by the Commission; or, in the alternative, a plan paying only $100 per share to the preferred was approved as fair and equitable provided the District Court found it to be so, and thereafter there was no reversal of the findings of the District Court.

Under date of October 15, 1945, the Commission issued its notice of filing of plan under Section 11(e), together with its order for a hearing (R. 13a). The plan was divided into three parts. Part II requested the Commission to issue a separate order finding it fair and equitable that no

amount in addition to $100 per share be paid to the preferred (R. 18a). The purpose of splitting the plan into parts was to give the Commission an opportunity to pass separately on the amount to be paid to the preferred stock.

On December 4, 1946, the Commission in its findings and opinion (R. 25a) found that the plan was "necessary" (R. 26a), but that its proposal to pay only $100 per share was unfair to the preferred (R. 26a). The Commission decided that the equivalent of the call prices of $105 for the $5 preferred and $110 for the other preferred issues would be fair and equitable (R. 62a), that the call prices placed a "ceiling" on the amounts the preferred could receive (R. 67a). The Commission refused to grant the motion (R. 1203a), which the company had made to split the plan, but stated it would approve an amendment to provide an escrow arrangement as to any amount in excess of $100 per share in the event the Commission's findings were litigated (R. 75a, 76a). Part I of the plan was conditioned upon court approval and Part II of the plan was conditioned upon Part I being consummated (R. 45a).

The Commission pointed out that in the past it had approved plans where immediate payment was made of the amount conceded to be due and the question of additional amounts payable was reserved for future litigation (R. 74a). Provision was made for an escrow agreement (R. 75a, 76a). *In its summary of conclusions, the Commission said that the objective of the motion for separate orders on the two parts of the plan could be achieved by the creation of an escrow* (R. 85a). No order was entered and Engineers was given thirty days within which to file an amended plan.

Within the time allowed Engineers filed a new plan which proposed to retire the preferred at their respective call prices (R. 102a-116a). The plan had a proposal for an escrow provision in accordance with the Commission's order (R. 107a). The Commission thereupon issued a new

notice of filing of amendment and order and hearing (R. 117a). At the hearing two groups of common stockholders, of which we were one, objected to the payment to the preferred of more than $100 per share.

On January 8, 1947, the Commission issued its supplemental findings and opinion and order (R. 128a-R. 141a). The plan was approved as amended and the device of providing an escrow arrangement was found to be fair and equitable (135a). The Commission filed an application (R. 4a) on January 9, 1947 with the District Court seeking to enforce the amended plan. We filed our objections (R. 155a-157a).

On February 7, 1947 the President of Engineers wrote a letter to the Commission (R. 394a-395a) enclosing a proposed order of amendment (R. 395a-401a) containing a proposed escrow agreement (R. 402a-413a) in which he requested that the Commission amend its order of January 8, 1947 (R. 141a) so as to specify "the transactions which will take place if such escrow is established" (R. 395a) so as to bring the amended plan and the proceedings thereunder within the protection afforded by Supplement R and Section 1808(f) of the Internal Revenue Code. The tax law required that such steps be set forth in an order of the Commission which had become final in accordance with law if the protection were to be availed of.

The Commission on February 11th entered the requested order of amendment (R. 165a-174a) which, among other provisions, *approved in advance* the amendment of the plan so that it could be split and consummated by an alternative method through the use of an escrow (R. 168a-171a). It was provided that sufficient moneys be deposited in a bank pursuant to the provisions of an escrow agreement which would provide, among other things, that if the District Court approved the payment of the call prices and all remedies on appeal were exhausted, the call prices should be paid (R. 173a); or, in the alternative, if the District

Court approved the payment of some part of the escrow but less than the call prices and all rights of appeal were exhausted, then the amount specified by the District Court would be paid to the preferred stock (R. 174a), and the balance returned to the Company.

At the hearing before the District Court on February 17, 1947, the Commission made a motion (R. 162a-164a) to amend its application accordingly. The motion was granted (R. 163a).

At this point the Commission had submitted the plan to the District Court for approval in alternate form.

Engineers stated that in view of the likelihood of appeal by common stockholders, it wished to follow the alternative method (R. 278a). Engineers submitted a form of escrow agreement (R. 408a-413a).

On February 17, 1947, the District Court filed an opinion (R. 283a-292a) deciding that the payment of more than $100 per share to the preferred stock was not fair and equitable and approving the rest of the plan "including the escrow agreement" (R. 292a). In support of its opinion on May 29, 1949, the Court filed its findings of fact and conclusions of law (R. 293a-317a) and said in finding of fact 16 (R. 299a):

> "The Commission gave its advance approval to any arrangement that might be made in the District Court to establish an escrow fund for the premium payments and to permit the main body of the plan to be consummated pending final litigation of the premium question."

At the same time, the Court entered an order approving and enforcing the plan with the alternative provision as approved by it (R. 318a-330a). Annexed to the order as Exhibit 1 was the proposed escrow agreement with the Chase National Bank (R. 324a-330a).

The escrow agreement annexed to the order of the Court after providing for the deposit of sufficient funds to comply with the approved plan in its alternative form went on to describe the conditions under which the deposited funds might be released. Under paragraph 4 (R. 328a), upon delivery to the Chase Bank of an opinion of independent counsel (together with appropriate certified copies of appropriate orders), to the effect that the Commission or any Court having jurisdiction has issued an order, which is no longer subject to appeal, to the effect that the preferred stock is not entitled to more than $100, plus accrued dividends, the Chase Bank is directed to release and pay over to Engineers the sums of money deposited with it under subdivisions (a) and (b) (R. 324a) which were the principal amounts of the premiums, plus interest as provided in the order.

In accordance with this order, the plan has been carried into effect except for the distribution of this fund so deposited in escrow (R. 39-40).

On the appeal of the Commission and the preferred stock holders, the Circuit Court affirmed the District Court in its finding that the alternative plan to pay more than $100 per share to the preferred stock was unfair and inequitable, but reversed the District Court in its adoption of the other alternative of paying only $100 per share to the preferred and directed the return of the proceedings to the Commission for appropriate action.

A review of the above recital of facts together with an examination of the record, reveal beyond dispute that the Commission by its order of amendment dated February 11, 1947 (R. 165a-174a) by its motion of February 17, 1947 (R. 162a-164a) which was granted (R. 163a) in both legal effect and in actual fact sought the enforcement by the District Court of a plan with alternative provisions which the Commission *approved in advance*.

When and if this Court finally decides that the payment of the call price or in the alternative the payment of $100 per share to the preferred is fair and equitable, the function of the Commission will have been completely and properly performed.

The Commission approved one alternative without qualification, namely, the payment of the call price, and it approved the other alternative, namely, the payment of any sum between a minimum of $100 and a maximum of the call price upon a condition subsequent. The condition was the entry of a final order of the Court having jurisdiction and no longer subject to appeal to the effect that it was fair and equitable to pay a designated amount to the preferred. The Commission has said that it has engaged in similar procedure before (R. 74a) and in the interest of not shuttling a plan back and forth between the Courts to the Commission, it is sensible administrative practice.

The Commission having already approved the plan in the alternative, there is therefore no need for remand to the Commission for further proceedings. A direction to the Commission that it enter an appropriate order would suffice.

The District Court did not amend the plan. The only question before the District Court was whether the preferred stockholders were entitled to the redemption premium provided by the Engineer's charter to be paid in the event of a voluntary redemption or liquidation. The rest of the plan was not in dispute, and has already been carried out. The amount of this premium, plus expenses, was deposited in Court subject to the determination of that question. The District Court found that it would be unfair and inequitable to pay such redemption premium.

And in oral argument before the District Court in answer to the statement by Mr. Tucker, counsel for Engi-

neers, that if the District Court did not approve the plan in its entirety, it should go back to the Commission, Mr. Slater, counsel for the Commission, stated (R. 281a):

> "If your Honor please, I hesitate to do so, but we must disagree with the statement just made by Mr. Tucker. As we view this escrow, it is a two way escrow. The Commission or the preferred stockholders might appeal in the event that this Court should determine only one hundred dollars is payable. The common stockholders have indicated they would appeal if the Court agreed with the determination of the Commission. But certainly the reorganization process and equity powers of this Court can't be so inflexible that this Court can't by appropriate order approve those portions of a plan which are clearly separable and in no way impinge on the controverted portions of a plan. * * * It is just silly to upset ten-elevenths of this plan, at least that, if not ninety-nine one-hundredths, simply because there is a disagreement as to a segregated small portion in relation to the whole of what we are doing here."

That the Commission has consistently maintained this position is apparent from its petition for rehearing in the Circuit Court where the Commission stated (R. 44, note 1):

> "* * * the Commission has already contingently approved an alternative allocation of cash to preferred stockholders at the amount of the liquidation preference if as a result of the processes of review in the District Court and on appeal therefrom this should be judicially determined fair and equitable."

The District Court had before it alternative provisions of a plan to approve. It approved one of the alternative provisions.

POINT VIII

There is no merit to the contention of *Streeter, et al.* concerning the Escrow Agreement.

Petitioners Streeter, et al., contend that the escrow is unfair to the preferred stockholders in that it provided for the termination of dividends after the payment of $100 per share, and further that the escrow agreement was effectuated without notice and an opportunity to be heard.

These same contentions were advanced by these petitioners, in an application for a stay, to the District Court, the Circuit Court of Appeals and to Mr. Justice Burton of this Court, and in all cases, the applications for a stay were denied.

The contention that the preferred stockholders are entitled to their full dividend rate until a final determination as to whether or not they are entitled to the call premium is wholly without merit and would violate the "fair and equitable" standard of Section 11(e). The preferred stockholders have been paid $100 per share plus dividends to date of payment and have an interest in the escrowed premium fund with interest thereon at the rate of 4.75 per cent for the $5 preferred, 5 per cent for the $5.50 preferred and 5.45 per cent for the $6 preferred.

If this Court affirms the District Court, the escrowed fund will pass to the common stockholders; and the preferred stockholders will have been fully compensated by their receipt of $100 per share plus accrued dividends. If, on the other hand, this Court should reverse the District Court and the Court of Appeals and hold that the preferred stockholders are entitled to the premium, the preferred stockholders will receive the premium with interest calculated at a rate equivalent to the dividend yield upon the investment value of each series of preferred stock.

The contention of appellants, Streeter, et al. that they have not been afforded an opportunity to be heard on the adequacy of the Escrow Agreement is wholly without merit. Suffice it to say that all parties had a full opportunity to be heard concerning the adequacy of the Escrow Agreement at the hearing before the District Judge on February 17, 1947 and again on May 26, 1947.

It is significant that not only do the other appellants fail to advance these contentions, but in fact the Commission has strongly opposed them. Furthermore, these contentions were advanced by appellants, Streeter, et al., in an application for a stay of consummation of the plan. The application was denied by the District Court, by the Court of Appeals from the bench and by Mr. Justice Burton of this Court at the conclusion of the oral argument.

CONCLUSION

The decision of the District Court should be affirmed, and such part of the decision of the Court of Appeals as directs a remand to the Commission should be reversed.

Respectfully submitted,

LOUIS BOEHM,
Attorney for Lucille White and Frances Boehm, Common Stockholders.

LOUIS BOEHM,
RAYMOND L. WISE,
WILLIAM ESBITT,
of Counsel.

Appendix A

Pertinent provisions of the Public Utility Holding Company Act of 1935

SIMPLIFICATION OF HOLDING COMPANY SYSTEMS.

SEC. 11(a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1948:

(1) To require by order after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system; PROVIDED, *however*, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each regis-

tered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it

deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have the power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(c) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and op-

portunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under

this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expense, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

* * * * * * *

COURT REVIEW OF ORDERS

SEC. 24(a). Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the Circuit Court of Appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the

order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the Court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such Court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the Court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Appendix B

Excerpts from the Certificate of Incorporation of Engineers Public Service Company

The Certificate of Incorporation of Engineers provided in pertinent part as follows:

"11. *Preference on Liquidation etc.*[1] In the event of any liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock resulting in any distribution of its assets to its stockholders, the holders of the preferred stock of each series shall be entitled to receive, for each share thereof, an amount equal to $100, together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premium for such series, if any, before any distribution of the assets shall be made to the holders of the common stock; but the holders of the preferred stock shall be entitled to no further participation in such distribution. * * *"

"IV. *Redemption and Repurchase.*[2] The Corporation may, at its option, at any time or from time to time redeem the whole or any part of the preferred stock or of any series thereof, at a price for each share thereof equal to $100, plus the fixed redemption premium therefor, if any, together with the amount of any dividends accrued or in arrears thereof. * * *"[3]

[1] Engineers' Ex. No. 33, R. 1412a.

[2] Engineers' Ex. No. 33, R. 1413a.

[3] By resolutions of the Board of Directors, the fixed redemption premium of the $5 series was fixed at $10 per share for shares redeemed on or before June 30, 1938, and $5 per share for shares redeemed thereafter (R. 1428a). The fixed redemption premiums of the $5.50 and $6 series was fixed at $10 per share (R. 1430a-1431a).

"This Corporation may also from time to time repurchase shares of its preferred stock at not exceeding the price or prices at which the same may be redeemed. * * *"

* * * * * * *

"DIVISION B—THE COMMON STOCK[1]

II. *Distribution of Assets.* In the event of any liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, after there shall have been paid to or set aside for the holders of the preferred stock the full preferential amounts to which they are respectively entitled under the provisions of Paragraph III of Division A of this Article Fourth, the holders of the common stock shall be entitled to receive, *pro rata*, all of the remaining assets of this Corporation available for distribution to its stockholders."

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[1] Engineers' Ex. 33, R. 1417a.

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Nos. 226, 227, 243, 266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 226, 227, 243

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE COMPANY, et al.,
Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, et al.

No. 266

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE CO., et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANSWERING BRIEF OF CENTRAL-ILLINOIS SECURITIES CORPORATION AND CHRISTIAN A. JOHNSON, RESPONDENTS-PETITIONERS

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I. PETITIONERS' EFFORTS TO CONVEY THE INFERENCE THAT THE INSTANT LIQUIDATION OF ENGINEERS (A) WAS THE VOLUNTARY ACT OF A "COMMON STOCKHOLDER CONTROLLED MANAGEMENT", AND (B) WAS PROPOSED IN ORDER TO FAVOR THE COMMON STOCKHOLDERS OVER THE PREFERRED, FIND NO SUPPORT IN THE RECORD, BUT ARE IN FACT REFUTED BY THE RECORD AND THE FINDINGS OF THE COURTS AND THE COMMISSION.

In their main briefs, petitioners have, in plain defiance of the record and the findings of the Commission and both Courts below, presented an inaccurate statement of the facts from which the legal issues in this controversy have arisen.

Petitioners have sought by inference and innuendo, not always subtle,[1] to convey the impression that Engineers' plan of liquidation was voluntarily instigated by a management dominated by common stockholder interests, and was contrived primarily for the purpose of removing the preferred stockholders from "the enterprise" in a manner advantageous to the common stockholders. These contentions, and many others of similar import, rest on nothing more substantial than petitioners'

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[1] See, for example, statement in Brief for Thomas W. Streeter, p. 122:

> "The preferreds were unable to secure this participation due to the fixed attitude of the common which sought at the same time to eliminate the preferreds at a bargain price and keep for the common stockholders all the benefits of the flourishing underlying companies, using the Act as a cloak to accomplish their true objective."

Although the Brief for the Securities and Exchange Commission is somewhat more guarded, it contains a number of statements designed to convey a similar inference. Some of these are discussed *infra*.

imaginations, stimulated by advocates' zeal and motivation. They are devoid of all support in the findings of both Courts, as well as in those of the Commission; and, in fact, are affirmatively refuted by all three.

Indeed, the principal significance of these contentions is the plain demonstration they afford that petitioners deem it inadvisable to rest on the findings and opinion of the Commission in arguing their case here; and that they find it necessary, at this late date to supplement and revise the Commission's findings in an effort to counteract the decisions of the Courts below.

A. Engineers was compelled by the Act and the Commission's orders to retire the preferred stocks and to liquidate.

As we have shown in our main brief (pp. 38-44), the Commission and both Courts below found that, notwithstanding the fact that Engineers' plan was filed under Section 11(e) as a so-called plan of "voluntary" compliance, the dissolution therein proposed resulted solely from the impact of Section 11 of the Act and the Commission's orders thereunder, and was therefore truly involuntary. This accords with a long line of Commission and Court decisions.[1] However, petitioner Streeter argues that the "management and its counsel have consistently urged that the Act did not require the termination of the company's existence", and that "there is no order under 11(b)(2) requiring the liquidation of Engineers."[2] But what Streeter neglects to state is that

[1] See cases cited at note 4, p. 55, and note 2, p. 38 of our Main Brief.

[2] Streeter Brief, pp. 101-2.

the company's contention that complete liquidation of Engineers was not a certainty was advanced in 1943 when Engineers was contesting in the Courts the constitutionality of Section 11 and the validity of the Commission's divestment orders thereunder. When those issues were decided adversely to Engineers' contentions, the management perforce recognized that there was no escape from the fact that Engineers and its entire system must be dissolved wholly and definitively.[1] The Commission had repeatedly held that a holding company devoid of economic justification is offensive to the standards of Section 11(b)(2) and must be dissolved,[2] and the Commission explictly concluded in this case that after Engineers disposed of El Paso and Gulf States as required by the Commission's orders under Section 11(b)(1), the company's continued existence would come within the prohibition of Section 11(b)(2): "Accordingly we find that

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[1] While Engineers' appeal was pending undecided before this Court (see our Main Brief, p. 6, note 1) the Court upheld the constitutionality of Section 11(b)(1) of the Act in *North American Co.* v. *S. E. C.*, 327 U. S. 686, and of Section 11(b)(2) in *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90.

Engineers' inability to obtain a reversal of the decision of the Court of Appeals for the District of Columbia, made necessary disposition of all its subsidiaries other than Virginia. Even to a late date in the proceedings respecting the plan, the management continued to hope for a decision which would permit Engineers to remain in existence (R. 808a). But when it became certain that only Virginia could be retained, it was clear that in such circumstances the Act commanded Engineers' dissolution (R. 675a-676a).

[2] See cases cited in our Main Brief, p. 7, note 1.

the proposal to dissolve Engineers is 'necessary' to effectuate the provisions of Section 11(b) of the Act" (R. 48a).[1]

However, even apart from the necessity of complete dissolution, it is indisputable that the divestments which Engineers had already made by 1943 in compliance with the Commission's orders necessitated the retirement of the preferred stocks in order to comply with the provisions of Section 11(b)(2) of the Act. In its opinion in *The Western Public Service Company*, 12 S. E. C. 804, 808 (1943) the Commission admonished Engineers to file "a comprehensive plan", including provision for "the readjustment of the capital structure of Engineers to conform to the revised scope of its operations". In similar situations the Commission has repeatedly held that such "readjustment" requires the complete elimination of all senior securities from the capital structure of the holding company,[2] and that holders of senior securities thus retired under the impact of the Act may not, in consonance with the "fair and equitable standard", receive cash payment of more

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[1] See also further finding quoted at p. 10, note 1, of our Main Brief.

Cf. concurring opinion of Commissioner Caffrey (R. 139a-140a):

> "I think that Engineers would have been subject to such a proceeding [mandatory dissolution] had it not come forth with a voluntary plan. Engineers' 'voluntary' proposal did no more than forestall the necessity for action by the Commission. * * * "

Cf. also discussion in *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, 119-120, as to the propriety of the Commission's deferring entry of a mandatory order if the company tenders compliance with the statutory requirements by filing a bona fide plan under Section 11(e); and see special opinion of Mr. Justice Rutledge at pp. 123-124 concerning the Congressional intent with respect to encouraging the filing of Section 11(e) plans in preference to issuance of mandatory dissolution orders.

[2] See cases cited in our Main Brief, p. 43, note 2.

than the face amount of their securities.[1] In the light of these facts, it is evident that Streeter's contentions are wholly devoid of merit, and, as the Commission's opinion

[1] Thus, in its decision in *Cities Service Power & Light Corporation* (Holding Company Act Release No. 4944), the Commission held the "fair and equitable" standard interdicted payment of premiums upon retirement of debentures bearing an interest rate of 5½%, and three issues of preferred stock carrying dividend rates of $5, $6 and $7 respectively, even though the holding company was permitted to continue in curtailed form. The Commission stated (pp. 15 et seq.):

> "In *The United Light and Power Company, supra*, and in *North American Light and Power Company*, we concluded that similar provisions for payment of redemption premiums were inapplicable when retirement of the securities involved was made necessary by the requirements of Section 11(b). We held that satisfaction of the securities there involved, without payment of redemption premium, was fair and equitable, and in both cases our decision was affirmed on appeal. See also *The United Light and Power Company*, — S. E. C. — (1943), Holding Company Act Release No. 4215, enforced *In re The United Light and Power Co.*, 51 F. Supp. 217 (D. C. Del., 1943), Court order appealed by Otis & Co., Intervenor, to the U. S. Circuit Court of Appeals for the Third Circuit; *North Continent Utilities Corporation*, — S. E. C. — (1943), Holding Company Act Release No. 4686, enforced *In re North Continent Utilities Corp.*, — F. Supp. — (D. C. Del., 1944).
>
> "In each of the cases cited above we had entered an order that the issuer of the securities involved must be liquidated and dissolved by reason of the requirements of Section 11(b). No such order, however, had been entered in *Consolidated Electric and Gas Company*, — S. E. C. — (1944), Holding Company Act Release No. 4900. In prior findings in that proceeding we had found that disposition by Consolidated of its interest in a major subsidiary thereof was necessary to effectuate the provisions of Section 11; that compliance with Section 11(b) would involve substantially complete liquidation of that portion of the enterprise on which the Federated bonds (theretofore assumed and presently proposed to be paid by Consolidated) had a lien; that application of the proceeds of such sale to the retirement of bonds was a necessary consequence of the sale; and that simplification of the security structure of Consolidated by elimination of the Federated bonds was necessary to effectuate the provisions of Section 11(b)(2). In these circumstances,

and brief state, the "liquidation was caused by the Act and is in that sense 'involuntary' ".[1]

B. The record conclusively refutes petitioners' suggestions that the plan was formulated in order to favor the common stockholders over the preferred.

Commission Counsel, although conceding that Engineers' liquidation was compelled by the statute and there-

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we concluded that payment of the Federated bonds at their principal amount and accrued interest, as provided in the plan of Consolidated, was fair and equitable to the investors affected thereby.

"In the instant case, we have heretofore found, pursuant to Section 11(b)(1), that Power & Light must dispose of its interest in subsidiaries which then constituted over 55% of the consolidated assets of the Power & Light system. Originally controlling a widely scattered empire, Power & Light will be limited by the compulsory provisions of Section 11 to its Ohio properties. As stated above, elimination of all senior securities from the corporate structure of Power & Light is a necessary consequence of such partial liquidation, and is compelled by the provisions of Section 11(b)(2). Over $22,000,000 of the cash that Power & Light proposes to use in paying off its debentures and preferred stock consists of proceeds from the sale of its interests in three subsidiaries, disposed of as part of its program of compliance with Section 11 and our orders thereunder.

"This proceeding differs from those cited above in that a part of the money required to retire the publicly held senior securities is being raised by issuing and selling Notes to banks. We have considered the possibility that payment of premiums should be required on that portion of the publicly held debentures and preferred stock that is being so refunded. We have decided, however, that the distinction is not one of substance. Section 11 compels and the Plan proposes complete elimination of Power & Light's senior securities. Within the limits of this overall compulsion, Power & Light has some freedom of choice as to procedure and timing. We find below that the proposed Notes, which are expected to be of short duration, are an appropriate device for facilitating the required elimination of Power & Light's senior securities, and we do not believe the use of that method rather than some other makes the proposed retirement of any of its senior securities optional or voluntary." (Footnote references omitted.)

[1] S. E. C. Brief, p. 11.

fore was not voluntary, suggest in their brief that the particular form which that liquidation took—i.e., payment of cash to the preferred stockholders rather than an allocation of underlying securities—was chosen by a management "controlled by common stockholders" (p. 5) because it was regarded as "advantageous from the point of view of the common stockholders" (p. 23). Indeed, state Commission's Counsel, so "advantageous" did the management feel this form of plan to be that it was determined "to go forward with the plan irrespective of how that issue [the premiums] might be ultimately determined" (p. 7).[1] Both statements convey unwarranted and misleading implications, and are wholly inaccurate.

(1) To begin with, it must be pointed out that the record references set forth in support of the statement at page 7 and the related footnote at page 11 of the Commission's brief (R. 719a, 723a, 807a), do not in any way support the quoted statement. Examination of the cited pages discloses that in each instance a witness for the management testified that Engineers' board of directors considered it proper and appropriate to provide for the retirement of the preferred stocks by cash payment in the amount of the liquidating preference, and distribution of the residual assets to the common stockholders in dissolution. It was repeatedly testified by the company's officers that such a program was the one which the board of directors, with the exception of Streeter, felt was dictated

[1] This suggestion is reiterated in even stronger language at page 11, note 8, where it is stated: "The management has made it clear that they regarded the plan as desirable from the point of view of the common stockholders whether or not it should be held necessary to pay the preferred amounts equal to their voluntary liquidation preferences and redemption prices."

by the requirement of according the *preferred* holders fair and equitable treatment, without becoming involved in the uncertainties incident to a "one stock" plan.[1] Moreover, the company's president, who is shown by the record to have been a straightforward and candid witness, squarely testified that the common stockholder interests had expressed no desire to receive the stocks of the three underlying companies. He stated (R. 644a):

> "Q. (By Commission Counsel): But in any of your discussions with the large stockholders did they show any preference to retaining their interests in these three operating companies I have just mentioned?
>
> A. No, they did not. That question has never been suggested to me, and until you indicated by your line of questioning of Mr. Benjamin that you thought our policy in this matter may have been

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[1] Thus, Barnes, president of Engineers, testified (R. 631a):

> "On September 5, 1945, a meeting of the Board was held to authorize the filing of the present plan [providing for payment to the preferred of $100 plus accrued dividends]. At that meeting I called on each director individually to express his opinion, which they did. I do not recall now the particular points made by each director, but I do recall the statements made by Judge Wilson in substantially these words: 'The purpose for which the company was organized has been frustrated by the Holding Company Act and hence the fair thing to do is to return to the preferred stockholders the money which they put into the enterprise.'
>
> The other statements were all favorable to the approval of the plan, with the single exception of Mr. Streeter."

See, also, testimony of Benjamin (R. 724a) that the Board felt that the preferred stockholders were entitled to receive cash payment of their charter liquidating preference, "and that the common stockholders should forego any dividends until the obligation to the preferred stockholders had been satisfied"; and see his further testimony that the Board felt that paying the preferred stockholders in cash was "the clearest way" of meeting the obligation to them, without involving them in "a determination of factors now which may vary considerably in the future" (R. 714a).

> influenced by what you described as the Stone & Webster interests, it was the first time that that thought had ever been put into my mind and I can assure you that I don't think there is any substance in it in fact."

And after Commission Counsel disavowed any intention of making such an intimation (R. 644a-645-a), Barnes stated:

> "I want to make it perfectly clear, definite and emphatic that there isn't anything to the implication that might be carried by that line of questioning" (R. 645a).

As support for the proposition that "the management regarded this type of plan rather than an allocation plan as advantageous from the point of view of the common stockholders",[1] we are referred to the same record citations discussed above (*supra*) in connection with the statement appearing at page 7 and note 8, page 11 of the same brief.

These record references no more support this statement than they did the earlier one. In each of the statements referred to, Benjamin (Secretary of Engineers) stated that the board of directors recognized that the retirement of the preferred stocks might have been accomplished by allocating to the preferred stockholders stock in some of the subsidiary companies; but far from stating that this was not done because it would have been disadvantageous to the common stockholders, Benjamin affirmed that the Board felt such an allocation plan would be complicated and uncertain, and "would require a determination of factors now which may vary considerably in the future. * * * The Board wanted to give the pre-

[1] S. E. C. Brief, p. 23.

ferred stockholders the amount to which they were entitled, and they thought the clearest way of doing it was the plans that they had favored".[1]

(2) The suggestion that the Board might have felt that an allocation plan was apt to prove disadvantageous to the common stockholders is ironical in the light of the fact that, as we have plainly shown,[2] in the various allocation plans which have been consummated under Section 11(e) on a "going-concern basis" the senior security holders have received, in terms of current cash values, amounts far below their charter liquidation preferences. It is universally recognized that such allocation plans tend to favor the interests of the common stockholders, not of the preferred. Cf. *Otis & Co.* v. *S. E. C.*, 323 U. S. 624. However, such allocation plans generally involve very protracted proceedings, and on a number of occasions such plans have had to be brought back from the Courts for revision before the Commission because changed earnings figures and other material changes rendered them unfair or unworkable.[3] At a later point in their brief, Commission Counsel themselves assert the "unavoidable drawback" involved in the valuation

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[1] Benjamin further testified (R. 714a):

"It was not my understanding that they were seeking to avoid the responsibility or the work involved or the expense of making such calculations. My understanding of their feeling is that they felt that such calculations were necessarily uncertain because of the unknown factors which exist in any situation."

[2] See our Main Brief, pp. 89-90, 100-102.

[3] See *Northern States Power Company*, Holding Company Act Release No. 7950 at p. 6; *Standard Gas and Electric Company*, 63 F. Supp. 876; *Commonwealth & Southern Corp.*, Holding Company Act Release No. 8633, at p. 5; American & Foreign Power Company, New York Times, January 2, 1949, p. f-1, col. 6.

technique employed in one-stock plans which follow the principles of the *Otis* case.[1] Yet they do not hesitate to asperse Engineers' avowed desire to avoid that "unavoidable drawback", or to imply, improperly and incorrectly, that the management in fact avowed a completely different purpose. We have previously demonstrated (Main Brief, pp. 98 et seq.) how much less favorably the preferred would have fared under an allocation plan under the *Otis* formula.

In similar manner, counsel for the Commission suggest that Engineers' management at one time contemplated "a merger or consolidation", and point out that Engineers' charter provided that a merger or consolidation "should not be regarded as a liquidation, dissolution or winding up for the purposes of the paragraphs defining liquidation preferences".[2] Again the implication is that the management believed the preferred stockholders might receive more than the proposed payment of $100 per share plus dividends if the merger procedure were followed. Streeter's Counsel make explicit the suggestion which is implicit in the statement of Commission Counsel.[3] The implication is false, as the record plainly establishes. It was testified that Engineers' management had merely given consideration to the possibility that, *after* disposing of El Paso and Gulf States, Engineers might be merged with Virginia, its one remaining subsidiary, if tax ad-

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[1] S. E. C. Brief, p. 45, note 30.

[2] S. E. C. Brief, p. 78, note 46.

[3] See Streeter Brief, p. 102: "There are many ways Engineers could have chosen to comply with the Commission's divestment orders. The merger method which was an alternative originally under the plan was scrapped because of the appraisal requirements of state law."

vantages might thereby result. This possibility was abandoned because it was ascertained that no substantial tax advantages would be realized, and because the staff of the Commission urged that dissolution of Engineers itself should be effected.[1]

It scarcely needs to be pointed out that if in fact a management wished to find a way of "short-changing" the preferred stockholders,[2] the merger technique is the classic device for accomplishing that objective.[3] The cases establish that in appraisal proceedings incident to merger, the Engineers preferred stockholders would have been very fortunate if they obtained an award even approaching $100 per share.[4] And the provision in Engineers' charter

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[1] R. 651a-653a; Barnes testified (R. 653a):

"Q. Then would you say the over-riding weight, then [for abandonment of the 'merger' possibility] was the change in tax circumstances? A. I think so. That, and to meet the ideas of the staff and the Commission."

And Benjamin testified (R. 589a):

"You speak of Engineers continuing as a going concern. Even under the merger alternative there was no continuance of the business of Engineers. It is possible that it would have been merged with Virginia but there was no business of Engineers left. The business of Engineers as a public utility holding company would certainly disappear even under the merger alternative."

[2] Statement of Commission Counsel before the District Court, R. 255a.

[3] See observations by Judge Leahy to this effect in his opinion, *In re United Light & Power Co.*, 51 F. Supp. 217, 223. Cf. *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 637.

[4] It is well settled, for example, that existing market prices are not controlling (*Chicago Corp.* v. *Munds*, 20 Del. Ch. 142, 172 Atl. 452) particularly in a case such as this where the market prices reflected such extrinsic factors as Engineers' concentrated market purchases.

Our research has disclosed only *one instance* in which preferred stockholders were awarded more than the par value plus accrued dividends in an appraisal proceeding. That award was promptly

to which Commission Counsel referred, was obviously intended to *prevent* the preferred holders from receiving as much as their liquidation preference in the event of a merger, not to make possible enhancement of their claims in excess thereof.[1]

This specious "merger" issue raised by petitioners demonstrates once again the vice of their reliance upon a fictional approach to the issues here under consideration. Whatever form was adopted, the plan would have had to accomplish the statutory command for the retirement of the preferred stocks, and the effective dis-

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reduced to $100 per share by the New York Court of Appeals in the leading case of *Matter of Fulton*, 257 N. Y. 487. The Court held that the preferred stockholders, in the absence of a charter liquidation preference, should be limited to the amount originally paid for their stock, and should be denied the right to share in the corporation's accumulated surplus, all of which was held to belong to the common stockholders. See also *American General Corp.* v. *Camp*, 190 Atl. 225, where it was squarely held that premiums are not payable in appraisal proceedings. This decision was cited with approval by the Commission in *United Light & Power Co.*, 10 S. E. C. 1215, 1226.

See also: *Root* v. *New York Corporation*, 50 A. (2d) 52 (Del. Ch. 1946), in which preferred stockholders having claimed approximately $200 per share (including redemption premiums), the appraiser's award of $90 per share was upheld by the Chancellor; and in the decision of the Delaware Court of Chancery in *Re General Realty & Utilities Corp.* (52 A. 2d 6 [March, 1947]) the Chancellor allowed $108 per share against a claim of $172 (par plus dividend arrears), stating: "* * * the dreary earning and non-dividend record of this corporation cannot be minimized in valuing the shares as stock in a going concern."

[1] See Engineers' Ex. 33, R. 1413a. It will be noted that it is there provided that a consolidation or merger shall not be regarded as a "liquidation, dissolution or winding-up" within the meaning of the paragraph entitling the preferred holders to their liquidation preferences *"provided such consolidation or merger does not substantially impair the rights and preferences of the preferred stocks"*. It is thus plain that in a merger the preferred stockholders could not claim their liquidation preferences unless they could show their rights and preferences had been impaired. Only if they were successful in such a showing could they *receive* the liquidation preference.

solution of Engineers and what remained of its system. As the *Otis* decision teaches, it is less important in what form the plan is clothed than it is to ascertain what it accomplishes. In that case, this Court and the Courts below all stated in effect: You may call your plan a liquidation, but if it accomplishes essentially a mere stock reclassification incident to simplification of a continuing holding company system, we will not apply charter liquidation rights.[1] Similarly, it avails nothing to refer to the Engineers' plan as "a might have been merger", when, in fact, as well as in form, the plan accomplished the complete, authentic and final dissolution of the entire holding company enterprise which the statute commanded. It is this *substantive reality* which must be the controlling factor, and this substantive reality cannot be obscured by specious fictional arguments of the type above discussed.

Equally specious are the suggestions that the preferred stockholders were unfairly treated in being required to accept full payment of their claim in cash, and that they were unable to secure participation "in the flourishing

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[1] Thus, Judge Leahy, in approving and enforcing the United Light plan, stated:

> "* * * the Commission has caught the nuance in the present situation. There is no real finality to this particular dissolution. * * * the interests of all classes of stock are nevertheless still lodged in a continuing enterprise. * * *
>
> "It is neither an exercise in semantics nor a rejection of labels to consider the present plan little more than a reclassification. If it had donned the formal dress of reclassification by way of merger, the preferred may have been met with the issuance of a new stock with a reduced dividend rate and a wiping out of its dividend arrearage claim. * * *" (*In re United Light & Power Co.*, 51 F. Supp. 217, 223.)

Cf. *Otis & Co. v. S. E. C.*, 323 U. S. 624, 637.

underlying operating companies". The common stocks of the two operating companies distributed in the liquidation, as well as the stock of Gulf States (sold to the common stockholders for $22,000,000 through the warrants technique) were immediately made available for purchase on the leading stock exchanges; and a large volume of trading forthwith ensued.[1] Any preferred stockholder desiring to exchange the $100 per share in hard cash received by him for a participation in the "future growth possibilities" of the distributed operating companies could freely do so at "bargain prices".[2] He may do so today at

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[1] See our Main Brief, p. 41, note 2; p. 101, note 3.

[2] As we have shown in our Main Brief (p. 118, note 1) the common stocks of the operating companies distributed by Engineers were priced by the market at approximately 8 times their then current annual earnings, and are presently selling, on the average, for approximately 5% less. It may be noted that Badger assumed that they would sell for 15 times annual earnings (Engineers' Ex. No. 29, R. 2072a).

For the $100 in cash received for each share of preferred stock, the former Engineers' preferred stockholder was enabled to purchase shares of the underlying companies *earning $12.50 per annum, as compared with $5.40 average dividend rate formerly received on the preferred stock.* To be sure, the two amounts are not strictly comparable since one represents income from a holding company preferred stock, and the other from the underlying common stock. But the amount allowed by the Commission in allocation plans for such "loss of position" has generally been in the neighborhood of approximately 25%. Thus, the holders of 5% preferred stock of Washington Railway and Electric Company having investment characteristics far superior to those of the Engineers' preferreds (consolidated fixed charges and preferred dividends covered from 2.22 times to 2.96 times over previous eight years, as compared to 1.3 times in the case of the Engineers' preferreds) were held to have received fair and equitable treatment in the form of underlying securities (principally but not entirely, common stock) having an estimated earning power ranging from $6.05 to $6.69 per share of preferred (Washington Railway and Electric Company, Holding Company Act Release No. 7410, p. 26).

Similarly, the holders of well secured 7% preferred stock of Northern States Power Company of Delaware (entitled not only to dividends of $7 per year, but to accumulated arrears of $6.50 per

even lower prices.[1]

The experience of the Commission and the Courts with allocation plans conclusively establishes that senior security holders invariably strongly desire payment of their claims in cash in accordance with the provisions of their charters or indentures, and protest vigorously against an attempt to pay them out in portfolio securities. Cf. *In re Standard Gas & Electric Company*, 59 F. Supp. 274, rev'd 151 F. 2d 326 (C. C. A. 3), *cert. den.* 327 U. S. 796; *In the Matter of Community Gas & Power Company*, 71 F. Supp. 171, aff'd 168 F. 2d 740 (C. C. A. 3), *cert. den. sub. nom. Vanneck* v. *S. E. C.*, 334 U. S. 846. It cannot be doubted that similar vigorous protests would have been forthcoming from the preferred stockholders if Engineers had proposed an allocation of underlying common stocks instead of full payment of their contract claim in cash. It is understandable, however, that petitioners should now seek to imply otherwise, in an effort to justify their demand for an even larger cash payment.

(3) Not only do both the record and the Commission's findings contain nothing to support Commission Counsel's suggestion that the management favored the common stockholders over the preferred, but both the record and

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share) were held to have been accorded fair and equitable treatment when they received common stock of the underlying operating company having an estimated earning power of $8.60 per share of preferred (Northern States Power Company, Holding Company Act Release No. 7950, p. 37).

There has never been an allocation plan in the history of the Commission in which senior security holders were held entitled to anything approaching the $12.50 per share of operating company earnings which the Engineers' preferred holders were enabled to acquire in exchange for their former $5.40 dividend rate.

[1] Cf. our Main Brief, p. 101, note 3.

the conduct of the management suggest unequivocally that in fact no such favor was intended or produced. In the first place, the record establishes that the more substantial common stockholders were also among the largest holders of the various classes of preferred stocks [1] and that in some instances their direct financial interests would have been more substantially benefitted by the payment of premiums than by their non-payment.[2] In the light of these facts there is small reason to suppose, as Commission Counsel imply, that the management of Engineers would

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[1] The briefs of Streeter (p. 6) and the Commission (p. 72, n. 43) state that 338 stockholders own some 70% of the common stock, but it is not pointed out that these are *record* owners, among whom are some of the largest brokerage and investment houses in the financial community (see Exs. 43-45, R. 1769a-1770a). These record owners are merely nominees for many individual beneficiaries, and the record establishes (R. 572a, 821a) that there is no way of knowing how many beneficial owners are represented by such record ownership. In any event, it will be noted that Pratt Brothers (the largest record owner of common stock (Engineers' Ex. 43, R. 1769a) is also listed as one of the largest owners of each of the three series of preferred stock (Engineers' Exs. 40-42, R. 1761a-1768a); Brown Bros. Harriman & Co., listed as a large common stockholder, is also one of the largest owners of all three series of preferred, (Engineers' Ex. 44, R. 1772a); J. M. Forbes & Co., one of the large common stockholders, was the largest single owner of the $5.50 preferred (Engineers' Ex. 41, R. 1763a); Edwin S. Webster, Frank Jay Gould, and Brown Bros. Harriman, all large common stockholders, were the three largest holders of $5 preferred (Engineers' Ex. 42, R. 1766a). Many similar correlations will be observed.

[2] Thus, Brown Bros. Harriman & Co. owned a total of 4,557 shares of common stock, and 8,129 shares of the preferred of the various series (Engineers' Ex. 44, R. 1772a). The $3,200,000 representing the aggregate of premiums on the preferred was equivalent to approximately $1.70 per share of common stock, or a total of approximately $7,750 on the common shares owned by this stockholder; total premiums on the preferred shares owned by it would have aggregated approximately $66,500.

Similarly, J. M. Forbes & Co. (alleged to be affiliated with "the Stone & Webster interests", R. 568a) owned 19,131 shares of common, 10,295 shares of $5.50 preferred and 340 shares of $5 preferred. Payment of premiums on the preferred would have resulted in pay-

treat lightly, much less ignore, the valid claims of the preferred stockholders in the distribution of the Company's assets on liquidation.

Moreover, the conduct of the management in this proceeding discloses an attitude of complete impartiality as between the two classes of stockholders. Its failure to dispute the Commission's order in the Courts hardly reflects that bias in favor of the common stockholders which Commission Counsel seek to impute.[1] And the fact that respondents, who have been forced to shoulder the burden of this litigation, were successful in both Courts below, suggests that the issues in this case were not so plainly foreclosed that a management more favorably inclined to the views of the common stockholders would not have felt justified in assuming the burden of asserting these claims.

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ment to this stockholder of more than $100,000, whereas non-payment would result in receipt of approximately $32,500.

Similar results are shown for the holding of Amoskeag Corp., C. A. England & Co. and Sigler & Co. In the case of other large common stockholders such as Edwin S. Webster and Frank Jay Gould, although the balance is in favor of non-payment of premiums, the difference is relatively inconsequential when allowance is made for the premiums they would have received on their preferred holdings (Engineers' Ex. 40, R. 1772a *et seq.*).

[1] Engineers notified its stockholders that it did not feel warranted in contesting further the payment of the premiums to the preferred stockholders, on the advice of counsel that "courts are reluctant to override such findings by administrative Commissions" (R. 1937a). That this advice of counsel was predicated solely on his views as to the difficulties of obtaining judicial relief, and not upon any changed view as to the unfairness of the Commission's determination, is established by the record (R. 1957a-1959a).

II. PETITIONERS' CONTENTIONS THAT THE "VALUES" OF THE PREFERRED STOCKS AS DETERMINED BY THE COMMISSION WERE "ADMITTED BY THE COMPANY AND UPHELD BY THE COURTS" ARE NOT ONLY REFUTED BY THE RECORD, BUT THE COMMISSION CONCEDES THAT IT RELIED ON AN "ESTIMATE" OF STOCK MARKET PRICES AS OF A HAPHAZARD MOMENT.

(1) Throughout petitioners' briefs runs the constant refrain that "the Commission determined in accordance with the *undisputed testimony* that the current worth of the preferred, or its 'investment value' on a going concern basis, was at least equal to the respective call prices." [1] We believe we have adequately demonstrated in our main brief (pp. 11-15, 73-86) how mistaken and misleading are such contentions. The representatives of the company stated emphatically and repeatedly that the redemption prices *did not* represent the "investment value" or "fair value" of the preferred stocks on a going-concern basis.[2] The fact that the Commission chose wholly to ignore this testimony in its opinion does not accord petitioners the privilege of denying its existence in their briefs before this Court.

What is even more surprising, however, are the following statements in the Commission's brief (p. 18):

> "* * * both courts below likewise upheld the Commission's determination that the value of the preferred stocks on a going concern basis was at least equal to the amount of the redemption prices.
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> * * * * * *

[1] S. E. C. Brief, pp. 10, 28. Cf. Streeter Brief, p. 109.

[2] See testimony referred to in our Main Brief, pp. 82-3; and see statement of Engineers' Counsel quoted at p. 82, note 1.

The Commission's findings of present value, which the courts below accepted * * *."

Our examination of the opinion of the Court of Appeals discloses no such "acceptance". On the contrary, we find that Court stated (R. 38):

> "The difficulty in sustaining the Commission's position in respect to 'investment value', *even insofar as the Commission has applied that value*, lies in the fact that investment value is and can be only one of a series of factors to be used in arriving at equitable equivalents. We conceive that the Commission could make a finding under certain circumstances that investment value was the equitable equivalent to the security holder. The Commission in the instant case, however, has not made such a finding *and we do not believe that such a finding could be supported on the present record.*" (Emphasis supplied.)

Further evidence that the Court of Appeals did *not* either "accept" or "uphold" the Commission's findings as to values is its statement (R. 19):

> "The trial judge also made a *cogent finding* respecting Dr. Badger's use of interest rates as an aid in fixing values for the preferred *deeming the interest rate used by the latter to be too low.* This finding is set out in the margin." (Emphasis supplied).[1]

[1] Petitioners have made oblique attacks (see S. E. C. brief, p. 14, note 12; Home Insurance Company brief, p. 7, note 1) on the findings of the District Court by reason of the fact that a draft of proposed findings was submitted by respondents to the District Court at its request, in accordance with the customary practice of trial courts and other fact-finding tribunals. We make no comment with respect to these wholly unwarranted attacks, other than to point out that the record establishes that the findings as issued by the Court were not in the form submitted by respondents, having been extensively revised by the Court following their submission (R.

The District Court's finding which the Court of Appeals quoted in its opinion (R. 19, note 9) in turn demonstrated how far the District Court was from "upholding" the Commission's determination that "the value of the preferred stocks on a going concern basis was at least eqtual to the redemption prices". In its opinion, the District Court indicated that it was willing to assume the "values" contended for by Badger because it deemed them irrelevant in the light of the fact that such "values" necessarily reflected elements attributable solely to the liquidation, such as "the retained earnings over a period of years not paid as dividends to the common stockholders" (R. 291a). And in its findings, it again pointed to the fallacious nature of Badger's "values", stating (R. 312a):

> "Assuming the correctness of Badger's estimates of the investment values of the Engineers' preferred stocks 'on a going concern basis', *subject to all the infirmities above referred to*, the question still is: *'investment values'* for how long?"

In short, the District Court recognized Badger's "values" for what they were: estimates of hypothetical, momentary market prices based on the artificial and transient levels as of the time of Badger's study;[1] and the Court expressly *refused* to accept these "values" as the intrinsic invest-

391a), as petitioners' counsel are well aware. Moreover, the Court ordered the findings as revised by it to be exhibited to all counsel in advance of the hearing, and it accorded a hearing to all counsel who wished to be heard with respect thereto (R. 385a-391a). In addition, the Court agreed to entertain any motions which might be submitted under Rule 52(b) of the Rules of Civil Procedure requesting amendments or supplementary findings, and to hold a further hearing with respect thereto (R. 385a); but no such motions or requests were ever submitted.

[1] "It is thus primarily a market value criterion, and is subject to all the problems inherent in predicting future market values" (Finding No. 42, R. 310a).

ment value of the Engineers' preferred on a going concern basis.[1]

It is thus evident that the Commission's determination of the redemption prices as the "investment values" of the preferred stocks on a going concern basis, far from being "accepted" by the company, and "upheld" and "approved" by both Courts, was rejected by each in turn as representing no more than an irrelevant, artificial and transient market appraisal.

Indeed, the Commission's brief in effect concedes that it represented nothing more. In discussing Badger's values, the brief states (p. 37):

> "Badger reached his result by comparison of current yields of other similar preferred stocks. He concluded that a proper yield basis for the Engineers' preferred was 4.6%. This yield basis represented *his estimate* of *how the investment markets would evaluate* the risk of Engineers' stockholders not receiving their preferential dividends in perpetuity, disregarding both the impact of Section 11 and the redemption price ceilings." (Emphasis supplied.)

Reduced to its essence, what this statement concedes is that Badger did not attempt to express his own "expert" judgment as to the value of the Engineers' preferreds based on their intrinsic merit.[2] Instead, Badger allegedly gave "his estimate" of "how the investment market would evaluate" certain factors "in perpetuity". And, as we have shown,[3] he determined how the market would evaluate these factors "in perpetuity" by the market prices of certain allegedly comparable securities

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[1] Findings Nos. 51-54, R. 313a-315a.

[2] See our Main Brief, pp. 75-6.

[3] Main Brief, pp. 75-9.

on January 4, 1946, without regard to the fact that several weeks or months earlier the market had evaluated these factors very differently.[1]

Moreover, it is, of course, the sheerest nonsense to say that the market price of a stock on a particular day represents the market's evaluation of "the risk of * * * stockholders not receiving their preferential dividends in perpetuity, disregarding the impact of Section 11 and the redemption price ceilings". Market prices on any day reflect an entire congeries of extrinsic factors such as the market's appraisal of what some foreign power may do the next day in Berlin, what action the Government may take in Washington with respect to a dozen different factors (including the prices to which it will "peg" the bond markets), what labor unions will demand at their forthcoming conventions, how the electorate will vote at the polling places, and so forth. And, needless to say, the following day "the markets" may, and generally do, appraise these factors quite differently.

Indeed, it is nothing short of paradoxical that counsel for an expert administrative agency find it necessary to avow that this expert body reached its determination of the "investment value" of the Engineers' preferred stocks on the basis of the "estimate" made by a witness as to how the *markets* would "estimate", as of

[1] Thus, Badger evaluated "how the market would evaluate" the Engineers' preferreds by using a market price as of January 4, 1946 of $105.50 per share for Columbia Gas & Electric preferred stock. Some months earlier the market's "evaluation" of these factors was reflected in a market price for this very stock of $84 per share (Main Brief, p. 77, n. 1). In similar fashion, Badger used a market price of $114.38 for Public Service of New Jersey preferred which some months earlier had sold for 102⅝, and some time subsequent to Badger's testimony declined to $95 (R. 123). See also the record of sharp price fluctuations of the other securities used by Badger (Main Brief, p. 77).

a given haphazard moment, the value of the preferred stocks' theoretical right to future dividends. We venture to doubt that the "expertise" of the stock market as reflected in its day to day "valuations" is the type of "expertise" which Congress intended should be brought to bear in passing on the "fairness and equity" of plans under Section 11(e).[1]

(2) Brief mention may be made of other statements in connection with the "values" of the Engineers' preferreds which may give a misleading impression. At several points in the Commission's brief it is stated that the preferred stocks were found to have an "asset value" of approximately $200 per share, so that even if adjustment were made for the retained earnings of the common there would have remained substantial asset value for the preferred.[2] But it is not pointed out that Badger

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[1] As we have demonstrated at page 79, note 2, of our Main Brief, the Commission's findings and the record are utterly barren of any other evidence on which the Commission could have based its determination that the preferreds had a "value" equal to the redemption price; and that the few items mentioned by the Commission in its opinion *without comment* all plainly pointed in the direction of a value of less than $100 for the preferreds.

That the Commission relied solely on Badger's estimate of market prices is further demonstrated by the following additional statement in the Commission's Brief (pp. 36-7):

> "But the most workable hypothesis for finding a fair equivalent between cash received and the security surrendered under the compulsion of the plan, is that of reinvestment in a security of comparable risk. *How much money would it cost the preferred stockholders to replace their securities with comparable ones?* This equation was substantially the basis upon which the valuation witnesses testified * * *." (Emphasis supplied.)

It is thus admitted by Commission Counsel that the Commission's rationale in the instant case is predicated on the premise that in a dissolution compelled by the Act, the common stockholders must become the *indemnifiers* of the preferreds' disappointed expectations. And in this case, those expectations were measured solely by market values on *January 4, 1946*, and without regard to any other factor.

[2] S. E. C. Brief, pp. 7, 75, note 45.

calculated this "asset value" merely by taking book figures at face value, and without allowance for inflationary items which regulatory authorities require to be eliminated by amortization or charge off.[1] The record establishes that when adjustment is made for such balance sheet items, the asset value of the Engineers' preferred stocks barely approximated $100 per share.[2]

The Commission's brief admits that the Commission, like Badger, made no attempt to determine the prospective earning power of Engineers on a going concern basis, but argues that the Commission was entitled to rest upon the high earnings of 1945 and 1946.[3] Yet at a later point in this same brief, in discussing the earnings of Puget Sound for the same years to which the Courts below made reference, it is stated (p. 61):

> "* * * it would seem presumptuous to assume that earnings for those two years will represent an average for the system upon which interests in the enterprise should have been allocated."

We think this second contention is a sufficient answer to the first. If the high earnings of the war and immediate post-war period are not acceptable for determining the

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[1] R. 1096a-1102a.

[2] Engineers' Ex. No. 77, R. 1851a. It is to be observed that similar adjustments in the accounts of the five holding company preferred stocks used by Badger for "comparative" purposes established that their asset values were from 25% to 200% higher than those of the Engineers' preferreds. (Ibid.)

Cf. 10th Annual Report of the Securities and Exchange Commission, pp. 72-3: "Elimination of Inflation in Plant Accounts."

[3] S. E. C. Brief, p. 10, note 7; pp. 35-39.

fairness of an allocation plan under Section 11(e), there certainly was no valid basis for the Commission to rest on them here in determining the "rights" of the preferred stockholders unilaterally; and all the more so in the face of Barnes' warnings that "we are in a boom period" (R. 667a) and that "much of the present market value [of the Engineers' preferred stocks] was attributable to the sacrifices made by the common stock and to war earnings" (R. 630a).[1]

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[1] See our Main Brief, p. 95, n. 1, with respect to the reduction which has already taken place in the earnings of Virginia, the principal asset distributed to the common stockholders in liquidation.

Cf. *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 543:

> "We cannot assume that the figures of war earnings could serve as a reliable criterion for that 'indefinite future'. As some of the bondholders point out, the bulge of war earnings *per se* is unreliable for use as a norm unless history is to be ignored; and numerous other considerations, present here as in former periods, make them suspect as a standard for any reasonably likely future normal year."

III. PETITIONERS' CONTENTIONS AS TO THE IRRELEVANCE OF THE RETAINED EARNINGS OF THE COMMON STOCKHOLDERS, PAST MARKET HISTORY OF THE PREFERREDS AND THE LOSSES SUSTAINED ON DIVESTMENTS, ARE ERRONEOUS AND IN CONFLICT WITH THE RECORD.

A. Contentions as to the earnings of the common stockholders retained to provide for the compulsory liquidation.

In its opinion [1] and findings [2] the District Court gave consideration to the accumulated earnings of the company withheld from the common stockholders to provide for the compulsory liquidation of the enterprise and the retirement of the preferred stocks. It pointed out that these large amounts had an important bearing on the "values" of the preferred stock at the time of liquidation,[3] a factor to which neither Badger nor the Commission accorded even the slightest consideration. Petitioners now contend that this factor was entitled to no consideration, because, contrary to the District Court's findings, the withholding of dividends was motivated solely by narrow self-interest on the part of the common stockholders stemming from tax considerations. Even more, the Commission's brief states that Engineers' witnesses "freely conceded"

[1] R. 291a.

[2] Findings 35-36, R. 306a-307a; Finding 47, R. 312a.

[3] Ibid.

this to have been the case.[1] Commission Counsel's statement is contrary to the evidence, and the entire contention is devoid of merit.

(1) In the first instance, it may be observed that this contention contravenes not only the findings of the District Court as to the reasons why dividends were withheld from the common stockholders (R. 291a, 307a), but those of the Commission itself. In its findings and opinion the Commission found:

> "The management has pursued a policy of withholding dividends on the common stock until it is satisfied that the system has made all the adjustments that will be required of it under the Holding Company Act" (R. 69a).

It then added by way of a footnote:[2]

> "No dividends have been paid on the common since 1932, although earnings have been available since 1938".

It seems strange that the Commission itself should thus have found upon the record that the management withheld dividends from the common stockholders so that the system could make "all the adjustments that will be required of it under the Holding Company Act", whereas Commission Counsel now tell us that the record establishes something quite different. We shall show that the

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[1] S. E. C. Brief, p. 72:

> "In the first place, Engineers' witnesses freely conceded that they regarded it as in the interest of the common stockholders, from the point of view of minimizing Federal income taxes, to avoid receipt of dividends and instead to build up the equity value of the common stock upon which they might realize through capital gains taxable on a more advantageous basis than dividends."

[2] Note 53, R. 69a.

truth lies with the findings of the Commission and the District Court.

The alleged "concessions" of "Engineers' witnesses" to which the Commission's brief purports to make reference (*supra*, p. 29, note 1) had no relation whatever to the subject of the retained earnings and the management's dividend policy during the ten year period 1935-1945 dealt with in the findings of the Commission and the District Court. The testimony of one witness discussing a phase of the original Engineers' plan as it might affect stockholders in 1945, has been wrenched from its context and distorted.[1] This is in effect disclosed by the footnote which is appended to the text statement (S. E. C. Brief, note 43, p. 72).

This same witness, Benjamin, specifically and repeatedly testified that the management's policy of withholding dividends from the common stockholders over the eight year period antedating the final plan was impelled by the necessity of providing for the liquidation required by the Act (which at first it had been hoped would be only partial, but which later was found must be complete) including the compulsory retirement of the preferred stocks. He testified (R. 577a):

> "* * * the directors of Engineers have adopted a policy of not declaring dividends on the common stock because of the uncertainties due to the Holding Company Act.

[1] Engineers' plan as originally filed with the Commission contained a provision that the common stock of Virginia would not be distributed by Engineers until the remaining phases of the liquidation had been carried out, a period estimated not to exceed three years. Benjamin, secretary of Engineers, testified the management felt that even though this provision of the plan would delay distribution to the common stockholders of this one asset, it was not felt this delay should prove unduly prejudicial to the common stockholders, considering the high taxes on personal income then prevailing (1945, the last year of the war) as compared with the more favorable treatment which they might realize as a capital gain (R. 459a).

Q. (by Commission Counsel): What do you mean by that exactly? A. Well, the future of Engineers has been uncertain because of the requirements of the Public Utility Holding Company Act requiring divestment, and so forth, and the orders of the Commission that have been issued and pending the final work-out of the Plan, this money has been kept in the system rather than having been paid out.

Q. Are you trying to say in effect that the money was being kept in in order to pay out the preferred stockholders? A. That is what the money is going to be used for.

Q. Is that the reason why it wasn't paid out in dividends? A. Yes, I think that was one of the principal reasons".[1]

Benjamin further testified (R. 724a):

"* * * I think the directors felt that, from the discussions that I have heard among them, the preferred stockholders were entitled to receive the

[1] With respect to the manner in which these funds accruing to the interest of the common had benefited the preferred, Benjamin testified (R. 470a):

"A. This shows that the total cash accruing in the system to the interest of Engineers Common Stockholders and not distributed during this period was approximately $24,500,000. Not all of these earnings would have been available for distribution because of restrictions on dividends in some of the subsidiary companies, but the accumulation of these funds within the system because of the requirements of the Public Utility Holding Company Act has added materially to the value of the Preferred Stock because the funds, together with funds derived from the sale of properties, have been used in part to finance improvements and additions which have increased the earning power of the subsidiaries and in part to retire 60,346 shares of Preferred Stock of Engineers and El Paso of Delaware combined, at an aggregate cost of $5,894,227, thereby improving the security of the presently outstanding Preferred Stock. At June 30, 1945, Virginia, Gulf States and El Paso had $2,773,000 of free earned surplus and Engineers, the parent company, had $7,095,000 of free earned surplus or a total of $9,868,000 which could have been declared out in Common Stock dividends. If this amount had been paid out in dividends the consolidated Common Stock and Surplus ratio would have been reduced from 16.13 percent to 12.6 percent."

> amount to which we referred before [$100 plus accrued dividends] and that could be paid off in cash and *that the common stockholders should forego any dividends until the obligation to the preferred stockholders had been satisfied*". (Emphasis supplied.)

Finally, in response to a direct question as to whether tax considerations had played a significant role in the management's policies with regard to withholding dividends, he stated (R. 920a):

> "I think that the management and possibly the directors too realized what the effect would be on the large stockholders in withholding dividends; but *I think the primary reason for withholding dividends was to accumulate in the system the funds to take care of the preferred stock.*" (Emphasis supplied.).

We submit that there is nothing in the foregoing testimony which justifies Commission Counsel in implying that Engineers witnesses conceded that the withholding of dividends from the common stockholders was motivated by the purpose of "minimizing Federal income taxes to avoid the receipt of dividends * * * ".[1] And Barnes, the only other Engineers' witness who testified on this subject, likewise affirmed that the dividends were withheld "because of the uncertainties in connection with what would have to be done under the Public Utility Holding Company Act * * * " (R. 973a).

It is thus evident that in this instance once again, as in the others heretofore discussed, Commission Counsel's present attempt to write an entirely new set of "findings"

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[1] So far was the Commission itself from agreeing with the contention here advanced by its counsel, that it based its conclusion as to the "benefits" which the common would derive from the retirement of the preferred upon the fact that " * * * *it hastens the day when the common will begin receiving dividend income*" (R. 69a). (Emphasis supplied.)

in their brief cannot prevail where such proffered "facts" contravene the clear evidence in the record, as well as the formal findings made with respect thereto by the District Court and by the Commission itself.

(2) The significance of withholding earnings from the common stockholders in order to meet the command of the statute is not that the common stockholders are entitled to commendation for their forbearance. Its significance is that the District Court was warranted in ruling that basic considerations of fairness required these withheld earnings to be recognized as contributing to the "value" of the preferred stocks in determining whether the common stockholders should be required to pay premiums to the preferred.

Although the Commission had not formally prohibited Engineers from paying dividends to the common stockholders, the statutory command to retire the preferred in the course of either partial or full liquidation placed Engineers in a position such that it would have violated every sound corporate and accounting practice if dividends had been paid to the common stockholders prior to the retirement of the preferred stocks or setting aside assets to meet their claims.[1]

[1] Petitioners seek to argue that only some $10,000,000 of these retained earnings consisted of "free surplus" available for payment of dividends, and that the decision to retain these earnings was a matter of voluntary choice on the part of the common stockholders. But, viewed on any realistic basis, it is indisputable that the operation of the statute dictated retention of the entire $24,552,182 of common stock earnings. From the time of its registration under the Act, Engineers was not a free agent on major policy questions except in such matters as the Commission and its staff might see fit to permit. Thus, approximately $14,500,000 of the common stockholders' earnings referred to above, was "frozen" pursuant to accounting adjustments and indenture provisions which were necessary to meet the Commission's routine requirements as a condition precedent to its approval of various transactions, such as refinanc-

These earnings of the common stockholders thus having accrued while Engineers was in effect *in custodia legis*, it would be even less fair and equitable to add them to the "value" of the preferred stocks upon which the common stockholders are then required to pay premiums, than was the claim for double interest which this Court disallowed in *Vauston Bondholders' Protective Committee v. Green*, 329 U. S. 156, stating (pp. 165-167):

> "It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor * * *. A Chapter X or Sec. 77B reorganization court is just as much a court of equity as were its statutory and chancery antecedents * * * (p. 165).
>
> * * * first mortgage bondholders would have been enriched and subordinate creditors would have suffered a corresponding loss, because of a failure to pay when payment had been prohibited by a court order entered for the joint benefit of debtors, creditors, and the public. *Such a result is not consistent with equitable principles.* For legal suspension of an obligation to pay is an adequate reason why no added compensation or penalty should be enforced for failure to pay" (pp. 166-167) (Emphasis supplied).[1]

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ings. None of these restrictions existed prior to the Act or apart from it. Likewise, although the management of Engineers made no attempt to declare out the $10,000,000 of "free surplus" as dividends to the common stockholders, this decision resulted from the circumstance that from the date the statute became effective, Engineers was confronted with the necessity of liquidating either entirely or in substantial part (depending on how drastically the Commission construed Section 11's application to the Engineers system).

[1] Cf. statement of Commissioner Healy, dissenting in *American Power & Light Co.*, Holding Company Act Release No. 6176 (1945), at pp. 57-58:

> "It seems apparent that the strong current position which the majority opinion relies on heavily in arriving at its decision

B. Contentions respecting losses on divestments.

Commission Counsel contend that the Courts below erred in attributing relevance to the losses sustained by Engineers in carrying out those steps in the compulsory liquidation which preceded the filing of the plan for final dissolution. In addition, they unloose a broad barrage of objections[1] which run the gamut of suggesting (a) that there were not in reality any losses; (b) that in any event, such losses may have been offset by countervailing gains; (c) that giving consideration to the existence of these losses involves a "collateral attack" on the Commission's determinations in other proceedings; (d) that such consideration requires the Commission to "reconstitute the enterprise" and compute in "dollars and cents" the effect of such losses, an administratively impracticable task; (e) that in any event such a process involves "shifting to the preferred stockholders all or a portion of the losses". It is our position that these contentions are, one and all, devoid of the slightest merit, and that they constitute an attempt to throw a smoke screen over a phase of the Courts' findings which petitioners find particularly troublesome.

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mainly resulted from the retention of earnings. To whatever extent the present strong position of the debt is attributable to earnings and asset coverages that exist because of past sacrifices on the part of the stockholders, it seems to me wholly unfair and inequitable now to penalize them further for this conservatism by requiring them to pay a premium to the debtholders whose contract has been punctually observed at all times *'From him that hath not shall be taken away even that which he hath'.*". (Emphasis supplied.)

[1] See S. E. C. Brief, pp. 52-69.

(1) Petitioners' criticisms of the Courts for having found relevant the losses sustained in carrying out the liquidation required by the Act—a subject which petitioners characterize derisively as "weighing colloquial equities"—comes with poor grace from those whose entire argument for the payment of the premiums was based on the contention that the Courts should, in fairness and equity, allow the preferred stockholders to receive $3,200,000 more than their contractual claim, based on alleged values "ex the Act", or "apart from the liquidation required by the Act". When Courts are asked to disregard contractual limitations in order to reach results alleged to be *more equitable*, they can scarcely be asked to function with one eye blindfolded and the other half shut. Only recently Mr. Justice Murphy had occasion to emphasize this principle in the context of a corporate reorganization, stating: "*Equity looks in all directions.* Only in that way can the various interests in the corporate community be adequately protected".[1]

As we have shown in our main brief (103-105) the Courts below correctly grasped the inconsistency which pervaded and distorted the Commission's rationale in this case. The preferreds' rights were viewed as though the Act did not require liquidation—indeed as though the Act did not exist. However the common's rights were viewed merely as those of the residual claimants in the liquidation which the Act had in fact compelled, and in consequence of which, losses and deprivations had been sustained by the company and the common stockholders for many years.

The liquidation of Engineers did not commence with

[1] *Comstock v. Group of Institutional Investors*, 335 U. S. 211, 238 (Emphasis supplied). See also p. 107, note 1 of our Main Brief.

the filing of the plan which is the subject of the instant proceedings; it merely ended there.[1] Throughout the long period during which Engineers has, under the compulsion of the Act, divested itself of valuable subsidiaries, frozen its liquid assets, and denied its common stockholders a share in its earnings, the preferred have been insulated from all contact with such realities. The common stockholders have been forced to bear the consequences of the shocks and dislocations which enforcement of the Act has imposed upon the company. Now, in the final stages of the liquidation, the Commission has imposed upon the common stockholders an added burden—to compensate the preferred for the loss of their claimed *future* high expectations "as though there were no liquidation and no Act".

We do not suggest, nor did the Courts below, that the common stockholders should be compensated for the unhappy consequences which the compulsory liquidation of Engineers visited upon the common stockholders over the past ten years. We do submit, however, that the common stockholders should not be compelled in addition to pay premiums to the preferred for their allegedly disappointed *expectations*; and that therefore the Courts below were wholly correct in holding that fairness and equity require that there be taken into consideration the frustration of

[1] The Commission's brief (p. 48) criticizes the Court below for failing to apprehend that the "shorthand expressions 'apart from the Act', or 'ex the Act' must be read with the interpolation 'ex [the present reorganization required by Section 11(b) of] the Act'." But the Court was not under any *misapprehension* of what the Commission contended: its point was that which has been stated above in the text, namely, that there is neither logic nor equity in ignoring the stages in the compulsory liquidation of the enterprise resulting from the Commission's divestment orders under Section 11(b), which preceded the *final* dissolution embodied in the plan itself.

the common stockholders' interest, in evaluating the alleged frustration of the preferreds' expectations. To fail to do so would visit "on one class" the consequences of the Act, "with a corresponding wind-fall" to another. (*Otis & Co. v. S. E. C.*, 323 U. S. 624, 637.)

(2) That petitioners are not insensitive to the relevance of these considerations, despite their professions to the contrary, is suggested by the assiduity with which they have sought to obscure and becloud the deprivations and losses sustained by the common stockholders. It is suggested at the outset that such losses are "negatived" by the fact that Engineers' common stock had attained a higher market price in 1946, prior to liquidation, than that at which it had sold during the depression years.[1] Such an argument is as irrelevant as it is specious; for it would be very difficult to name the stock of any company, whether utility or industrial, which did not sell in the post-war boom markets of 1945-1946 at far higher prices than those prevailing during the depression of the 1930s. Not a few, indeed, sold as high or higher than they had sold in 1929, instead of at 40% of their 1929 highs as is true of Engineers.[2] Yet from that fact alone it could scarcely be argued with any validity that these companies could not have sustained financial losses in the intervening period.[3]

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[1] S. E. C. Brief, p. 55.

[2] See District Court Finding No. 31, R. 305a.

[3] The Commission's brief "concedes that it is impossible to demonstrate the relationship between this increase [in market price] and the statute" (p. 55) but nevertheless seeks to imply that there is such a relationship. It may be observed, however, that the improvement in the market price of the Engineers' common manifested a much more significant correlation with the armaments program than with the Holding Company Act. Thus, in 1942, after having had the beneficent effects of the Act for a period of years,

Petitioners next argue that the Courts below were not warranted in finding any relationship between the losses sustained by Engineers in making divestments, and the fact that such losses were sustained in the course of complying with the Commission's divestment orders.

It is asserted, for example, that the approximately $33,000,000 loss sustained by Engineers in connection with Puget Sound is attributable to the fact that this was an ill-advised investment.[1] However, the Courts did *not* base their conclusions on the mere fact that a book loss had been sustained on this divestment, but on the indisputable fact that, absent the compulsion of the Act, a drastic Section 11 reorganization of Puget Sound would not have been forced upon Engineers at a time when Puget Sound's earnings were vastly lower than they were when Engineers made its investment, and vastly

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Engineers' common sold at a low of 1¼ (Moody's Public Utilities, 1946, page a. 71) approximately the same low figure referred to in the Commission's opinion and its brief as having prevailed in 1935, prior to the operation of the Act. Its entire market increase took place during the four war years, 1942-1945, the same years in which the preferreds rose from lows in the 40's to cross $100 per share (ibid.). During the same period the Dow-Jones index of industrial stocks (not subject to the Holding Company Act) rose from a low of 92 in 1942 to a high of 195 in 1945 (Barrow's Chart of Dow-Jones averages); Dow-Jones index of utilities rose from 10.58 in 1942 to 39.15 in 1945 (ibid.), Standard & Poor's index of investment companies rose from 41.5 in 1942 to 215.7 in 1945 (Investment Weekly Index averages, Standard & Poor's Price Index Record, p. 82).

[1] It has never been questioned, and the record affirmatively establishes, that the cost to Engineers of its investment in Puget Sound was $34,000,000, and that this cost resulted from a completely *bona fide* arms-length transaction. Indeed, the record establishes that approximately $13,000,000 of Engineers' $5.50 series Preferred Stock was issued to former holders of the common stock of Puget Sound in exchange for their equity holdings in Puget Sound (Engineers' Ex. 37-P, R. 1664a). It would thus seem that these preferred stockholders speak with poor grace in reproving Engineers for this "ill-advised" investment (Cf. Streeter Brief, p. 122).

lower than they were by the time of Engineers' liquidation.[1] The District Court noted that it had before it a formal offer of proof proposing to establish "that the equity owned by Engineers in Puget Sound prior to the recapitalization would presently have a cash value of $10,000,000" [2] as compared with the mere $775,000 which Engineers realized upon the sale of its interest in compliance with the Commission's divestment order.[3]

Commission Counsel's conjecture that "it appears probable that good business management would have compelled, at some time, the recapitalization of Puget",[4] does not permit escape from the fact that, if not for

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[1] The Commission's decision is set forth in *Puget Sound Power & Light Co., et al.*, 13 S. E. C. 226 (1943). It will there be seen that the Commission allowed an allocation to Engineers of only 3% of Puget's new common stock in exchange for its surrender of ownership of 99.3% of the former common stock. This allocation was based on the Commission's determination that the foreseeable future earning power of Puget available for the stocks was somewhere between $2,657,000 and $3,083,000 (pp. 243-244 of the Opinion). As the Court below noted (R. 37), actual earnings for the stock of Puget Sound in 1946 were $5,352,000; and for the 12 months ended June 30, 1947, were $5,067,000.

[2] District Court Finding No. 37, R. 307a.

[3] In our reply brief in the District Court respondents stated (p. 42): "* * * we are impelled at this time to make, and hereby do make, *a formal offer of proof* to establish the foregoing facts by competent and authoritative evidence" (emphasis in original). It was further pointed out that "a supplemental hearing for the reception of such proof need not cause prejudicial delay * * *."

The District Court found it "unnecessary for present purposes" to determine this loss with exactitude (Finding of Fact No. 37, R. 307a) but merely judicially noticed that on the basis of the increased earnings of Puget over those estimated by the Commission, and the subsequent rise in the market prices of utility securities referred to by the Commission itself in its annual reports, Engineers' investment in Puget Sound came to have a realizable cash value substantially higher than that realized by Engineers in consequence of the reorganization and subsequent disposition dictated by the Act. We submit that such a finding is axiomatic, and errs, if at all, on the side of conservatism.

[4] S. E. C. Brief, p. 61.

the Act, Engineers would have been wholly free to retain intact its holdings in Puget Sound until such time as it deemed advantageous for recapitalization or sale; and on that basis the record establishes Engineers could have realized approximately $10,000,000 for the interest in Puget Sound which it was required under the Act's compulsion to surrender for $775,000.

Petitioners' attempts to place emphasis on the statement in the Commission opinion that "in all its divestments Engineers has been free in its choice of methods, and within limits to choose the time of divestment",[1] merely highlights the Commission's attempt to pass lightly over the significant phrase "within limits". As we pointed out in our main brief (p. 61, note 1), those "limits" are stringent indeed. Engineers was ordered by the Commission on July 22, 1941, to dispose of its entire interest in Puget Sound "within one year (see *Engineer's Public Service Company*, 9 S. E. C. 764, 797) and similar orders were issued in 1942 requiring divestment of all assets other than Virginia (12 S. E. C. 41). After one year from the date of the Commission's various divestment order, if not complied with, Engineers was subject to drastic penalties.[2]

We do not quarrel with the propriety of those various orders or with the statutory policy which engendered them. We contend, however, that the effect of those orders in the economic circumstances in which the country and the company found themselves during the years in question, was to impose upon the company losses which it would not otherwise have sustained, and that while the common stockholders must bear the burden of those frustra-

[1] S. E. C. Brief, p. 55.

[2] See Section 11(d) of the Act.

tions they should not also at the same time be saddled with the added obligation of fulfilling the most roseate expectations which the preferred might have enjoyed if the Act had not compelled liquidation. If the preferreds' frustrated "expectations" (which, in any event, as we have shown—Main Brief, pp. 72 et seq.—rested upon a wholly illusory view of continuance of the low money rates current in the early part of 1946) are to be regarded as relevant, then, as the Courts below held, consideration must also be given to the losses and deprivations which the common had sustained in carrying out the earlier phases of the liquidation and the additional ones which the final liquidation has imposed.[1]

Commission Counsel's further contention that Engineers could have distributed to the common stockholder valuable assets such as the stock of El Paso Natural Gas Company of which it was also required to divest itself,[2] is another bald conjecture which cannot withstand examination. At the time Engineers was required to dispose of the El Paso stock, it was not yet determinable whether Engineers would be required to liquidate in whole or merely in part; consequently, no distribution could be made to the common stockholders until this basic issue was determined and "a comprehensive plan" was evolved and approved by Commission and Court for meeting the claims of the senior security holders. In point of fact, Engineers offered El Paso Natural Gas stock to the *preferred* stockholders in a voluntary exchange proposal, which was unsuccessful.[3]

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[1] Main Brief, pp. 114 *et seq.*

[2] S. E. C. Brief, pp. 65-6.

[3] R. 517a.

It is also contended that the argument with respect to losses on sales of security "presupposes a management so prescient that it will sell at the peak of the market" (S. E. C. Brief, p. 65). But this is a palpable misstatement of the issue. These are not sales which the company made willingly, or in the exercise of managerial judgment. On the contrary, it was repeatedly testified that the management viewed with great optimism the future growth possibilities of the El Paso Natural Gas Company, and would not have parted with this asset or the others, if not for the compulsion of the statute.[1] In that event, the company would have had the benefit of the greatly augmented earnings so long as it retained the assets, or in the alternative it would have realized the much higher prices if it ultimately elected to sell in favorable markets, free from pressure. Invidious references to "hindsight" (S. E. C. Brief, p. 58) merely obscure the fundamental issue. The point is not that "hindsight" shows the Commission to have erred in connection with its earlier Section 11 orders such as the recapitalization of Puget Sound, but that the common have in fact sustained demonstrable losses and deprivations in consequence thereof, and that these factors must be taken into account if consideration is to be accorded to the preferreds claimed "deprivation".

(3) Petitioners attempt a further argument that the losses should be offset by nebulous "tax advantages",[2]

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[1] R. 508a-510a, 519a, see discussion of the tremendous growth of the El Paso Natural Gas Company at p. 118, note 3, Main Brief.

[2] The only "tax advantage" mentioned is a suggestion in the S. E. C. Brief (p. 62, note 39) that Engineers was able to utilize $2,000,000 of its loss in Puget Sound to realize possible tax ad-

and by the "advantages" accruing from the one acquisition (in connection with Virginia) which Engineers was permitted to make during the ten years it was under the Act.[1] But the record in no way establishes that a profit has resulted, or will result, therefrom. And even assuming *arguendo* that some gain may ultimately result, the fact is that *the Act* did not confer upon Engineers a right to purchase additional properties; that right Engineers previously had without any restrictions whatever. Indeed, the net result of the Act's operation has been to

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vantages. Assuming, *arguendo*, that this offset the loss to the full extent of the $2,000,000 deducted, this would reduce the net loss on Puget to the "inconsequential" sum of $31,000,000. Further, the record establishes that the dividends received by the preferred stockholders in 1944 were considered non-taxable to them because of the drastic capital loss sustained by Engineers on Puget (R. 1606a).

[1] Petitioners' blatant efforts to magnify this transaction by suggesting that net utility property of some $39,000,000 was acquired for "net cash contributions on Engineers' part totalling $3,835,000" (S. E. C. Brief, p. 74, note 44) must be weighed in the light of the failure to mention that Virginia was further required to issue some $32,000,000 of new bonds and notes, and approximately $10,000,000 of additional preferred stock, all of which ranked ahead of Engineers' investment as holder of Virginia's common stock. See *Virginia Electric and Power Co.*, Holding Company Act Release No. 5021, p. 15.

Similar examples of unwarranted inferences and wholly incorrect figures are to be found in Streeter's brief. For example, it is there stated (Streeter brief, p. 122) that "The company's assets as of January 3, 1945 aggregated $65,765,904 * * * as compared with assets in 1938 of only $60,909,703", for the evident purpose of implying that the Engineers system was larger after the divestments than before. The misleading nature of these figures is indicated by the fact that they fail to give effect to (a) a reserve in the amount of $35,000,000 which had been set up on the 1938 balance sheet (R. 1525a); (b) the increase in capital and earned surplus by approximately $9,000,000, representing a portion of the earnings applicable to the common stock which had been accumulated in order to provide for the liquidation of the corporation (R. 86a and R. 1525a); (c) decrease in investment account from $92,862,000 to $52,328,000 (representing assets liquidated) and corresponding increases in cash and cash items representing the proceeds of liquidated assets and retained earnings. More-

prevent Engineers from acquiring any further properties with the proceeds realized from the compulsory sale of its subsidiaries, as we have previously shown.[1]

All the foregoing arguments are plainly advanced by counsel for the Commission in an effort to impress the Court with the difficulties imposed by the alleged requirement of the Court of Appeals that "the Commission must compute in dollars and cents the extent that the over-all impact of the Holding Company Act, or at least Section 11 thereof, may have been harmful to Engineers' common stockholders * * *" (S. E. C. Brief, p. 54). This entire line of argument rests upon an overly ingenuous interpretation of the Court of Appeals' language. The Court did *not* state that such items must be "computed", but merely that they must be "weighed into the calculation", a phrase which, along with the term "bookkeeping", was obviously intended figuratively and not literally.[2] It is thus evident that the Court had no intention of insisting upon the exact ascertainment and computation of each loss sustained by Engineers, but merely upon giving

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over, reference to the *corporate* balance sheet to measure the shrinkage in the system is itself misleading, since the system picture can only be gauged on a combined or consolidated basis. As of December 31, 1935 (the year in which the Act was passed) the consolidated assets of the Engineers system totalled $363,825,581 (R. 1475a). In contrast, the combined capitalization of Virginia and El Paso (the two companies whose common stocks were distributed to the common stockholders as a liquidating dividend) aggregated $136,343,500 (R. 31a, 37a), of which the common stocks received by Engineers' common stockholders had a book value of less than $30,000,000 (*ibid.*).

[1] See note 1, p. 121 of our Main Brief.

[2] "* * * if the equitable equivalents for relinquished securities are to be arrived at by the Commission under the doctrine of the Otis & Co. case, *ex* the Act, losses of the sort referred to in this paragraph must be weighed into the calculation; i.e., such losses should be returned to the credit side of the enterprise's balance sheet as a matter of bookkeeping" (R. 37).

reasonable consideration to the fact that such losses (without necessity for precise computation) had been sustained. Moreover, the Court emphasized that even this relatively simple task was not mandatory upon the Commission unless, despite the final termination of the enterprise, it insisted upon evaluating the rights of the stockholders "ex the Act" (i.e., "apart from the impact of liquidation") in order to compensate the preferred stockholders for their theoretical "disappointed expectations".

That Commission Counsel have greatly exagerated the complexity of this task is further demonstrated by the Commission's recent decision in *Pennsylvania Edison Company*, Holding Company Act Release No. 8550 (October 16, 1948), where the Commission, although noting its disagreement with the Court of Appeals in the *Engineers* case, nevertheless gave consideration to the various factors which the Court held should be weighed. It apparently found no difficulty in discussing and evaluating these factors in several short paragraphs of its opinion (p. 42, note 45).

(4) The final contentions of Commission Counsel, to the effect that (a) according consideration to the losses imposed upon the common stockholders in carrying out the liquidation would involve a "collateral attack" upon consummated reorganization p' as such as that of Puget Sound, and (b) such considera n would result in shifting "from the common stockholders to the preferred all or a portion of the losses" (S. E. C. Brief, p. 68), seem to us so patently devoid of merit as to scarcely justify discussion. The legality of the Commission's order in the Puget Sound reorganization is in no way questioned.

To take note of the fact that the investment of Engineers in Puget Sound was virtually wiped out in a reorganization indisputably imposed solely by Section 11 of the Act, is not to make a "collateral attack" upon an "adjudicated question" [1] any more than Engineers' auditors made such a "collateral attack" when they recorded the resultant loss in notes to the corporate balance sheet.[2] To take note of the fact that for the common stockholders liquidation under the Act had been an unblinkable reality for more than ten years—when preferred stockholders demand payment of premiums aggregating $3,200,000 as the equitable equivalent of their rights "apart from the impact of liquidation"—is not to shift losses from the common to the preferred, but merely to prevent the imposition upon the common of additional burdens on the theory that the existence of the Act and its requirement for complete liquidation should now be ignored.

C. Contentions as to past market and dividend history of the preferred stocks.

Commission Counsel's airy dismissal of the past market and dividend history of the preferred stocks as bearing on their "investment value" is in sharp contrast with the Commission's decisions, both prior and subsequent to its decisions in the instant case, invariably have emphasized the past market and dividend history of the senior security being retired by payment of cash. Thus, in approving the retirement of the 5½% debentures, and the

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[1] See Streeter Brief, p. 121: "Furthermore, such re-examination is contrary to the policy underlying the doctrine of *res judicata* * * *."

[2] Cf. Engineers' Ex. 37-K, R. 1608a.

$5, $6 and $7 preferred stocks of Cities Service Power & Light Corporation, all of which had currently been selling at or above par, the Commission stated:

> "The debentures and preferred stock of Power & Light have never been high grade securities. They were issued at discounts, and between 1931 and July, 1943, the market price never reached 100. Their ratings in the financial services since their issuance indicate that they have uniformly been regarded as speculative securities. * * * "[1]

And far from indicating that there was any question as to the likelihood of these securities continuing to receive their well secured interest and dividend payments if they remained outstanding, the Commission specifically referred to the possible subordination of certain parent company claims which would "tend to diminish the risks attached to the similar securities held by the public" (Id., at p. 17). The Commission nevertheless concluded that "*the equitable doctrines involved* would not require the payment of the redemption premiums under the circumstances of this case" (Ibid.; emphasis supplied). Similar discussions of past market and dividend history are to be found in literally dozens of Commission decisions under Section 11(e),[2] and the Commission has invariably found such histories significant as bearing on the fairness and equity of the refusal to allow premiums. For example,

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[1] *Cities Service Power & Light Corp.*, Holding Company Act Release No. 4944, at p. 16; see also quotation from the same opinion set forth *supra*, p. 6, n. 1.

[2] See, for example, the decisions collated in our Main Brief, page 55, notes 3 and 4.

in the *Interstate Power Company* decision submitted to Judge Leahy for enforcement only a few weeks prior to the Engineers' plan, the Commission held that owners of *first mortgage 5% bonds* of a public utility operating company were entitled to receive only the par value, notwithstanding that the bonds had been selling at a premium of 3½ points above par, the Commission stating:

> "The bonds were originally sold to the public in 1927, 1928 and 1931 at prices of 97½, 96 and 88 respectively. During most of the years since issuance, the bonds have sold on the market at prices substantially less than par; indeed the bonds never sold as high as par until 1945. In 1937 the bonds sold as low as 32; and as recently as 1940 they sold at a low of 51½. At original issuance and sale of the bonds in 1927, a rating A was assigned them by Moody's Investors Service; Standard Statistics rated them B1+. In following years, both ratings were successively lowered to a Moody's rating of B in 1938 and all subsequent years, and a Standard's rating of C1+ in 1940 and all subsequent years." [1]

Yet the very same factors pointing to an even more speculative caliber for the Engineers' preferred [2] were wholly

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[1] *Interstate Power Company*, Holding Company Act Release No. 7143 (p. 21, n. 25) (Jan., 1947), approved and enforced 71 F. Supp. 164 (D. C., Del., 1947); cf. also *Lehigh Valley Transit Company*, Holding Company Act Release No. 8445 (August 18, 1948).

[2] Thus, in order to sell the Engineers $5 and $5.50 preferreds in 1928 at prices comparable to those of the Interstate Bonds, it was necessary to attach warrants and conversion rights (since expired) having a substantial independent value. The Interstate Bonds were never in default of interest; the Engineers preferreds were in arrears of dividends over a period of four years, during most of which the dividends were not even earned. The Engineers preferreds sold as low as $10 per share in 1933, as low as $14 per share in 1935; and as recently as 1942 sold as low as $40-47 per share (R. 1391a-1393a). They never attained par until 1944, when large scale market purchases

ignored by the Commission in its decision; and petitioners now seek to contend that the Courts below have gravely erred in deeming such factors entitled to consideration.

Finally, it may be observed that it is recognized as fundamental among authorities in the field of security analysis that the past market and dividend record of a security is entitled to great weight in determining its investment quality.[1]

IV. PETITIONERS' ATTEMPTED EVASION OF THE LONG AND UNBROKEN LINE OF DECISIONS ESTABLISHING THAT THE "FAIR AND EQUITABLE" STANDARD INTERDICTS PAYMENT OF PREMIUMS IN A DISSOLUTION COMPELLED BY THE ACT, CANNOT WITHSTAND EXAMINATION.

In their brief, counsel for the Commission apparently deem it strategic to relegate to an obscure position the long and hitherto unbroken line of decisions in which the Courts and the Commission, over a five year period, have uniformly held that the fair and equitable standard interdicts the payment of premiums upon senior securities re-

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by Engineers forced them up. Standard & Poor's Investment Service rated them C** at the end of 1944 (the last year in which it rated preferred stocks), which rating was defined as "Preferred stocks with erratic dividend records, and which can be expected to make payments only under favorable conditions" (R. 1844a).

[1] Indeed, authorities in this field point out that even in weighing the investment quality of a corporation's *bonds*, particular attention is accorded to the dividend history of that same corporation's *stocks*. See, for example, GRAHAM & DODD, SECURITY ANALYSIS (1940), pp. 123-4.

See also testimony of Barnes on this subject at R. 661a.

tired under the impact of Section 11.[1] That is, of course, their privilege; but we do not believe the same can be said of the manner in which their brief discussion of and reference to the decisions allegedly relevant, *obscures and gravely confuses the issue.*

We urge that the Court accord this discussion its careful examination. It is as follows (S. E. C. Brief, pp. 79-81):

> "Finally, common stockholders cite a number of cases in which the Commission approved plans calling for the payment of amounts equivalent only to the involuntary liquidation preferences of the securities involved, and contend that this precluded approval of the Engineers plan on the basis of what is termed the 'Commission's new views'. * * * It is true that, in many instances, the Commission has found that the equitable equivalent of a security to be surrendered was only its involuntary liquidation preference.[47] It is equally true, however, that many of these cases have stressed the absence of indication of any investment value in excess of that amount,[48] and other cases have permitted the retirement of senior securities for amounts in excess of the involuntary liquidation preference.[49]" (Original footnote numbers retained.)

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[1] See decisions in our Main Brief at pp. 51-67, and cases collated at p. 55, notes 3 and 4.

As is pointed out at p. 64, note 1 of our Main Brief, the Commission's first and only departure from this line of decisions prior to the instant case was made at the end of 1945 in the American Power & Light debenture decision (Holding Company Act Release No. 6176), but the issue was not raised in the courts for the special reasons discussed. A second decision, that in *United Light-American Light & Traction Company* (Holding Company Act Release No. 6603) was decided by a 3-2 decision, which was subsequently reconsidered and mooted under the circumstances stated in the note referred to above.

We first direct attention to the last phrase of the quoted statement, "and other cases *have permitted* the retirement of senior securities for amounts in excess of the involuntary liquidation preference", and point out that this statement and the decisions cited in the appurtenant footnote (with certain exceptions to be discussed) have no relationship whatever to the issue in this case. The decisions referred to in footnote 49, with the exceptions hereafter discussed, relate either to voluntary refundings of senior securities in connection with an 11(e) plan submitted by a company which was continuing in existence[1]; or to declarations by continuing operating or holding companies of their intention to refund outstanding senior securities in the normal course of their operations through the exercise of the Company's contractual redemption right, in order that they might replace the retired senior securities with new ones carrying lower rates of interest or dividends. This is what is meant by the obscure sentence appended at the end of note 49:

> "Most of these cases were not approved as part of a Section 11(e) plan due to their nature, for where management agrees that payment of the redemption price is fair and equitable the normal procedure simply requires a call of the security."

In short, after clearly implying in the textual discussion that in many situations analogous to that of the in-

[1] E.g. *In re United Gas Corp.*, 58 F. Supp. 501 (D. C. Del., 1944), which the Commission, in its report to Congress (11th Annual Report, p. 67, note 2), stated was a case in which it held: "that if a senior security could be left outstanding in a recapitalization of a company under Section 11(e) consistently with the requirements of Section 11(b), the retirement of such security, although provided for in a Section 11(e) plan, will be considered as a voluntary exercise of the redemption privilege rendering the call premium payable as such."

stant case, payment of premiums has been found "fair and equitable" by the Commission, buried away at the lower extremity of a long footnote is Commission Counsel's admission that "most of these cases" had nothing whatever to do with a Section 11(e) liquidation, and involved no consideration of the "fair and equitable" standard of that section because they related merely to normal *refunding operations* of continuing enterprises.

However, further confusing consideration of the issue, there have been included, without distinction, in note 49 certain decisions of a somewhat different ilk. For example, there has been included the *American Power & Light* decision (Holding Company Act Release No. 6176) which, as we have previously pointed out,[1] marked the first and only consummated decision prior to that in the instant case, where the Commission applied its new "investment value ex the Act" doctrine in holding that senior security holders were entitled to premiums in liquidations under the Act. Also included are:

> (1) the Commission's *Pennsylvania Edison Company* decision (discussed in our Main Brief[2]), in which the Commission recently ordered payment of premiums in a Section 11(e) reorganization where the Commission emphasized that the enterprise continued augmented by merger, and had been permitted to replace the retired senior securities with others carrying lower dividend rates.[3]

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[1] See *supra*, p. 51, note 1, and our Main Brief, p. 64, note 1.

[2] Main Brief, p. 115, note 1.

[3] Cf. also *Standard Gas and Electric Company*, Holding Company Act Release No. 6435, also cited in note 49, where after it had been held by the Commission and the Courts that the debenture holders were not entitled under the "fair and equitable" standard of Section

(2) *El Paso Electric Company*, 8 S. E. C. 366, where an operating company in the Engineers system (El Paso of Texas) refunded its outstanding senior securities with others carrying lower charges, and its parent holding company (El Paso of Delaware) was permitted to invite tenders of its outstanding preferred stocks at prices "not to exceed" the redemption prices. Moreover, the Court is not advised of the fact that, several years later when it was found that El Paso of Delaware must be liquidated, the Commission squarely held that it was "fair and equitable" to retire its preferred stocks at their liquidation preferences of $100 per share, rather than the redemption prices of $110 and $115 per share at which the preferred stocks had been selling in the market for some time past.[1]

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1 (e) to payment of premiums, the company was subsequently permitted to call and redeem its notes and debentures (which carried interest rates of 6%) with proceeds of notes carrying an interest rate of 2½%, when changed conditions required indefinite postponement and complete revision of the reorganization plan of the continuing holding company.

[1] *El Paso Electric Company*, Holding Company Act Release No. 5499 (1944). The Commission specifically noted that on a "going concern basis" the preferred stocks would have a value in excess of $100 per share, but deemed such considerations "unrealistic", stating (p. 89):

> "Solely on an earnings and dividend basis, the Series A preferred stock may well be worth more than $100 per share plus accrued dividends. However, *appraisal of the stock on that basis is unrealistic in view of the charter limitation provision and the non-functional character of the company.*" (Emphasis supplied.)

It may be argued by petitioners, as it was below, that the Commission deemed the liquidation provision of the charter controlling because Engineers had sufficient voting power to dissolve El Paso of Delaware "apart from the impact of Section 11." This argument merely side-steps the issue. Careful reading of the decision will establish that the dispute between the majority of the Commission and the one dissenting Commissioner centered exclusively on the

Although the cases cited in note 48 do contain discussion of the fact that the securities being retired had had a checkered career in terms of their past market and dividend history, it is pertinent to note that, as we have already shown,[1] those factors are the very ones which the Commission chose to ignore in the instant case and which petitioners berate the Courts below for not finding wholly irrelevant. Furthermore, such discussions were advanced by the Commission as subsidiary considerations in reply to the contentions of the senior security holders that the *present* value of their securities, and their *future* value if permitted to remain outstanding, entitled them to receive payment of premiums.[2] For the paramount answer of the Commission and the Courts, as we have shown, is that the "fair and equitable standard" precludes payment of compensation for the "disappointed expectations" arising from the premature termination of senior security holders' investments, when such termination results from the enforcement of the overriding public policy embodied in Section 11 of the Act; or, in the Commission's own words:

> "It seems to us a complete answer to this argument that the termination of the investments of debenture holders and stockholders alike has been brought about

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question of whether a genuine *liquidation* was taking place (as the term was employed in the charter). The dissenting Commissioner argued that this was not a "liquidation" within the charter meaning, because the underlying portfolio securities were merely transferred to the parent holding company (Engineers) and might thereafter be distributed to its own stockholders. He stressed that the preferred stocks unquestionably had a "fair value" on a going concern basis far in excess of their liquidation claim; but, as has been pointed out, the majority found that a liquidation was taking place within the charter meaning, and consideration of the theoretical "value" of the preferreds "apart from liquidation" was consequently "unrealistic".

[1] *Supra*, pp. 49-50.

[2] See discussion in our Main Brief, p. 66, note 10.

by the act of a sovereign power—in this case a congressional mandate." *The United Light & Power Company*, 10 S. E. C. 1215, 1228.[1]

And to the argument that the stockholders in that case would nevertheless continue to retain their interest in a continuing holding company system, contrary to the situation in the instant case, the Commission stated:

"* * * neither Power nor a successor company is retaining or can retain the capital obtained from the sale of the debentures for the benefit of the system. The debenture holders are being repaid the principal of and accrued interest on their debentures, are restored to their original position and are not compelled to accept the risks of a new enterprise. Under these circumstances, as we have heretofore shown, the debenture holders are not entitled to anything more." [2]

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[1] It is to be noted that in a number of the Commission's Annual Reports to Congress it called attention to its repeated invocation of this principle. Thus, in its 10th Annual Report the Commission stated (p. 87):

"As noted in the section on 'Integration and Simplification of Holding Company Systems', the Second and Seventh Circuits and the District Court of Delaware in these cases upheld orders of the Commission's determination that it would be unfair and inequitable to the other security holders of the companies to give the debenture holders a premium *or other compensation* for premature termination of their rights in the context of a reorganization or liquidation required by the Act." (Emphasis supplied.)

Cf. 9th Annual Report, p. 41; 11th Annual Report, p. 67.

These assurances were before Congress at the time hearings were conducted by a special committee of the House of Representatives to consider whether the Act required amendment: see, "Hearings before the Securities Sub-committee of the Committee on Interstate and Foreign Commerce, House of Representatives, on 'Operations pursuant to the Public Utility Holding Company Act of 1935'" (79th Cong., 2d Sess., 1946); referred to in our Main Brief at pp. 137-8.

[2] Brief of Commission in *New York Trust Co.* v. *S. E. C.*, quoted in our Main Brief, pp. 58-9.

In the light of these facts, Commission Counsel now advance the suggestion—somewhat diffidently, to be sure—that

> "In the case of a preferred stock, moreover, what is involved is an ownership interest in the enterprise—not a creditor claim * * *" (S. E. C. Brief, p. 83).

In so doing, they urge upon this Court a distinction which the Commission itself has repeatedly found to be of no significance whatever in respect of the principle here under discussion, *since the Commission has repeatedly applied it to preferred stocks as well as to debt securities.*[1] And, as we have pointed out, the only decision prior to the instant case in which the Commission departed from the frustration principle to award premiums under the "investment ex the Act doctrine" was one involving the retirement of "a creditor claim", viz., the debentures of American Power & Light Company.[2]

The two remaining contentions on this subject are equally devoid of merit. It is implied (S. E. C. Brief, p. 82) that this Court's *Otis* decision in effect overruled the principles embodied in the long line of frustration cases, a curious conclusion to draw in view of the fact that, as we have pointed out, the *Otis* decision cites the

[1] Thus, in the very first case in which the Commission squarely spelled out the frustration doctrine, the Commission pointed to its precedent in permitting the preferred stocks of National Power & Light to be retired without payment of premiums (see *The United Light & Power Co.*, 10 S. E. C. 1215, 1226-1227 [1942]); and in *Cities Service Power & Light Corp., et al.*, Holding Company Act Release No. 4944 (1944), the Commission squarely held the doctrine applicable to the retirement of debentures and *three issues of preferred stocks*, without the slightest attempt at any distinction.

[2] *American Power & Light Company*, Holding Company Act Release No. 6176.

frustration cases with approval.[1] Finally, it is in effect suggested the Commission should be permitted to determine the application and meaning of the "fair and equitable" principle as it deems appropriate "in view of the accumulated administrative experience."[2] We submit that when Congress embodied in Section 11(e) the "fair

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[1] See discussion at pp. 65-67 of our Main Brief. With reference to this same contention which Commission Counsel now advance, Commissioner Healy stated:

> "It is interesting to note that in a Commission memorandum filed in opposition to a motion made by the New York Trust Company to the Circuit Court of Appeals for the Second Circuit to vacate its decree in the *New York Trust Company* case on the ground that it was inconsistent with the *Otis* case, *supra*, the Commission stated:
>
> 'The majority opinion of the Supreme Court in the *Otis* case cites the decision of this court with approval * * *.'"

[2] "However, we believe it is entirely clear from the Commission opinions that each case involved a progressive analysis of the problems presented, and that the peculiar problems of each case were considered in view of the accumulated administrative experience" (S. E. C. Brief, p. 82).

It may be observed that at the time the Commission issued its *American Power & Light* decision applying the "investment ex the Act" doctrine for the first time, Commissioner Healy, who strongly dissented, was the only Commissioner who had been a member of the Commission from the time the Commission commenced administration of the Holding Company Act. Commissioner Healy had, in fact, been one of the persons most intimately connected with the enactment of the Holding Company Act, having been Chief Counsel to the Federal Trade Commission throughout the seven-year utility investigation which resulted in enactment of the statute (see recitals in Sec. 1(b) of the Act) and having been one of the principal witnesses in support of the proposed Act when it was under consideration before Committees of both Houses of Congress (Commissioner Healy actually carried the major burden of supporting the bill before the House Committee; see Hearings on H. R. 5423, Committee on Interstate & Foreign Commerce, House of Representatives, 70th Cong., 1st Sess.).

With respect to the legislative intent, Commissioner Healy has stated:

> "When I signed the Report of the National Power Policy Committee to President Roosevelt [which the President forwarded to Congress along with his message asking enactment of the Holding Company Act], I understood the much quoted

and equitable" standard having a well-settled meaning in the law, it did not mean to give the Commission the power to alter that principle, any more than to alter applicable contract rights, from case to case. Not only is such an intention clearly negatived by the legislative history,[1] but imputing such an intention to Congress would, as we have previously urged, raise constitutional questions of the most pressing character.[2]

V. PETITIONERS DISTORT THE LANGUAGE AND REASONING OF THIS COURT IN THE *OTIS* CASE.

Apart from this Court's decision in the *Otis* case, petitioners point to no authority for the Commission's claimed power to remold the rights of senior security holders whose interests are being retired for cash in a genuine liquidation under the compulsion of the statute. In our main brief (pp. 34 *et seq.*) we have shown that the historical meaning of the term "fair and equitable" implies enforcement of contractual terms and the payment of no more than the liquidating preference to senior

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references to preservation of investment values to refer to the values of operating company securities in holding company portfolios. I did not then and do not now believe it was intended as a basis for denying the senior security holders their full priority rights or for *compelling common stockholders to pay premiums upon the redemption or retirement of senior securities forced by federal statute. The common stockholder is not responsible for premature termination of the senior security holders' investment or for the premature termination of the common's own investment.* The responsibility for both rests upon the federal statute." (*United Light-American Light & Traction Co.*, Holding Company Act Release No. 6603, pp. 43-44; emphasis supplied.)

[1] Main Brief, pp. 36-7.

[2] *Id.*, at pp. 67-71.

security holders whose "matured" claims are being retired for cash under compulsion of law, and that this meaning was imported into Section 11(e) by Congress. We have shown further that the proponents of the Act contemplated that upon the final liquidation of a holding company system its assets would be distributed, as upon the liquidation of a combination in violation of the Hepburn and Sherman Acts. And this Court so stated in *North American Company* v. *S. E. C.*, 327 U. S. 686, 707. Such liquidations require execution of the contractual liquidation claims of the security holders. *Cf. Continental Insurance Co.* v. *U. S.*, 259 U. S. 156.

(1) In reliance on the *Otis* case, however, petitioners contend (S. E. C. Brief, pp. 22-28) that the "fair and equitable" standard of Section 11(e) entitles senior security holders of all dissolved holding companies to receive the value of their total "bundle of rights" "on a going concern basis" regardless of whether the particular dissolution is merely a reclassification of security holders' interests in a continuing enterprise or is a genuine liquidation; and regardless of whether the security holders are paid off in cash or receive new securities in the continuing enterprise. And, according to petitioners, compensation for the loss of the senior security holders' rights "on a going concern basis" must take account of both the liquidation preference and the preferred claim to earnings (S. E. C. Brief, pp. 28-34).

We have contended (Main Brief, pp. 45-50) that in the *Otis* case this Court decided only that when, in fact, the dissolution of a top holding company results in no more than a reclassification of the interests of security holders in a continuing holding company system, such

a dissolution is in effect a "reorganization" and not a liquidation within the meaning of the corporate charter. Therefore, the claims of the United Light preferred stock holders in that case, having no contractual right to maturation, and being in fact exchanged for other claims in the continuing enterprise, were properly "evaluated" on a "going concern basis", as in a reorganization. To say this, of course, is not to say, as Commission Counsel now contend, that when in fact the enterprise is completely terminated and its assets finally distributed, the rights of the security holders who receive cash payments in the full amount of their liquidation preferences must be augmented by compensation for the surrendered claim to future dividends, on the purely fictional hypothesis that "the enterprise continues".

The Commission's position rests primarily upon a single paragraph of the Court's opinion in the *Otis* case. In that case, the Commission had argued, as a justification for not treating the charter liquidation provisions as binding, that "the enterprise was continuing in an altered form and without substantial change in the total of the inherent rights of the security holders" (S. E. C. Brief, p. 76). The Commission now asserts that this Court "expressly disavowed" that "restrictive analysis" as the ground for its decision in the *Otis* case, and rested its conclusion on the broader ground that senior security holders in dissolutions under Section 11(e) must always be compensated for the loss of their total "bundle of rights" "on a going concern basis"—even though the dissolution is a final termination of the entire enterprise and the seniors are being paid off in cash.

The only evidence to which the Commission points (S. E. C. Brief, pp. 25, 77)—or can point—in support of this view is a quotation from the Court's opinion (at p. 638) reading:

> "The reason does not lie in the fact that the business of Power continues in another form. That is true of bankruptcy and equity reorganizations. It lies in the fact that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders, or, involuntarily through action of creditors. We must assume that Congress intended to exercise this power with the least possible harm to citizens" (p. 638).

A conclusive answer to petitioner's contention is furnished on the face of the Court's opinion. The Court explicitly stated:

> "There is an argument that if the charter provision applies to this situation, it cannot be disregarded, that in such a liquidation 'fair and equitable' would require the distribution of assets only to the preferred. We do not reach that question. The point at issue is whether this charter provision applies" (pp. 635-6).

In the light of this Court's explicit definition of the narrow "point at issue" in the case, the quotation upon which Commission Counsel rely can hardly have the meaning which they seek to impute. And examination of that quotation in its context[1] establishes that it has

[1] The majority's statement was plainly directed to the statement in the dissent (p. 648). "* * * the Commission in this case is liquidating and dissolving, not reorganizing United, and * * * it is without authority in such a case more than in a reorganization to alter or disregard a contract fixing the priorities of stockholders * * *."

reference solely to an interchange between the majority and the minority as to the reason why charter liquidation provisions are deemed controlling in bankruptcy reorganizations (which involve a continuing enterprise) but were not deemed controlling by the majority with reference to the United Light dissolution, although that also involved a continuing enterprise. We think it is plain beyond dispute that what the majority opinion was stating was that the reason for treating the continuing enterprise there involved differently from a continuing reorganized or bankrupt enterprise, must necessarily have lain in something other than the characteristic which both types of "reorganization" had in common, i.e., continuance of the enterprise. The reason the Court gave for such different treatment was that Congress did not intend the Act to "mature" the security holders' liquidation rights when the only circumstances upon which the security holders had agreed to have their rights matured—i.e., insolvency or final liquidation of their enterprise—had not occurred."

Indeed, an examination of the reorganization process makes this conclusion indisputable. In a reorganization, senior security holders must be compensated in full for the "bundle of rights" they surrender. If this compensation is awarded in the form of new securities in the reorganized company, the senior security holder does not receive the cash which would represent his fully matured claim. Since reorganization "matures" his claim, and he thus fails to receive what he is entitled to get on this maturity—i.e., the cash payment—he is held entitled to receive additional value, as compensation for the loss of the prior claim to earnings for which he is required to substitute a new claim to earnings. It is significant that

if, in fact, he received the cash which would represent his fully matured claim, he is not entitled, in addition, to receive compensation for the loss of his prior claim to earnings. Cf. *Knight* v. *Wertheim & Co.*, 158 F. 2d 838, 843 (C. C. A. 2), cert. den. sub nom.: *McGuire* v. *Equitable Office Bldg. Corp.*, 331 U. S. 818; *Bailey* v. *Minsch*, 168 F. 2d 635, 637 (C. C. A. 1), cert. den. 69 S. Ct. 83; cf. *The United Light & Power Co.*, 10 S. E. C. 1215, 1225.

The reason for this is as apparent as it is sound. The enterprise promised to give the senior security holder either a prior cash payment upon the maturing of his claim, or a prior claim to earnings for so long as such "maturing" did not occur. He was not promised, and in reorganizations he never receives, both priorities simultaneously. In a word, he cannot enjoy his cash maturation priority at a time when there is no maturation. By the same token, once his cash maturation priority has been fully satisfied, he can no longer enjoy, or receive compensation for the loss of, his prior claim to future earnings.

Because the problem presented by the dissolution of the top holding company in the *Otis* situation, like the problem presented by a bankruptcy or equity reorganization, involved only the redistribution of the security holders' interests in a continuing holding company enterprise, both the Commission and this Court analogized the one to the other. Since the dissolution there occurring was not a genuine liquidation and the senior security holders were not being paid out in cash, the only valid occasion for "maturing" their liquidation preference—i.e., paying them $100 per share plus accrued dividends, in cash—had not arisen. Accordingly, the senior security holders were held entitled to be compensated by receiving

the equitable equivalents of the total claims—including prior claims of liquidation and to earnings—which they were surrendering under the compulsion of the statute.

Here, however, we are faced with a wholly different situation. Not only was there a genuine liquidation, but it was a liquidation in which the preferences of the senior security holders were fully met in cash.[1] Under those circumstances, the preferred stockholders, having received their full liquidation preference, are not entitled to receive, in addition, amounts designed to compensate them for the

[1] This distinction was clearly pointed up by Judge Leahy in a decision subsequent to that in the instant case, where preferred stockholders of a continuing holding company system were accorded new securities in a face amount equal to the redemption prices of those which they surrendered. In his opinion in that case (*In re Cities Service Co.*, 71 F. Supp. 1003) Judge Leahy stated (at p. 1005):

> "Even if the 3% debentures were the equivalent of money, I think the payment in a principal amount to include the liquidating premium would be fair and equitable and that this case is readily distinguishable from the Engineers Public Service Co. case. In Engineers payment was made to the preferred stockholders in a 'true liquidation'; the charter provided for no premium in a case of an involuntary liquidation; the market history indicated that the preferred would be treated fairly without payment of the premium; and hardship had been worked on both classes of stockholders as a result of divestment orders. In the matter at bar, there was no distinction made in the charter between voluntary and involuntary liquidation. The record indicates common stockholders have achieved great advantages to the detriment of the preferred and the preferred has generally been abused from non-payment of dividends. Here, there has been no hardship worked on any stockholders as a result of divestment orders, and the preferred stockholders are receiving a lower interest rate as a result of the exchange. * * * Since this is not a true liquidation but is a pseudo-liquidation similar to that involved *In re United Light & Power Co.*, D. C., 51 F. Supp. 217, affirmed *In re Securities and Exchange Commission*, 3 Cir., 142 F. 2d 413, aff'd *sub. nom. Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 65 S. Ct. 483, 89 L. Ed. 511, the problem raised in Engineers (i.e., whether the charter provisions do not control in cases of a true liquidation) and which problem was left open in Engineers, does not arise here."

theoretical loss of future dividends at a rate claimed to have been attractive.

(2) Commission Counsel also contend (Brief, pp. 77-78) that the power to "remold" contractual rights, which it is asserted this Court found Congress had bestowed upon the Commission, can be no narrower in the final dissolution of a holding company system than in any of the initial or intermediate dissolutions which produce a continuance of the holding company system in a less complex form. But the *Otis* case, as we have shown, rested upon a finding that the dissolution there occurring was not a liquidation within the corporate charter, rather than upon a finding that the Commission had the power to remold applicable charter liquidation rights. And, in any event, it is plain that the rationale which vindicates the power equitably to adjust unmatured rights in the initial or intermediate simplification of a continuing holding company system, does not apply when the final act of termination of the system occurs and cash is being distributed to the senior security holders.

Indeed, this has been expressly recognized by the Commission itself in a recent decision in which it discussed the compensation to be accorded to preferred stockholders of a continuing enterprise, augmented by merger. Stating that under "the federal standard" of fairness and equity as embodied in Section 11(e), "primary weight in valuation must be accorded the claim to earnings and the economic position of the security in the enterprise", the Commission then added:

> "This is not to say that in certain situations of bona fide liquidation the charter liquidation prefer-

ences may not be treated as carrying *determinative weight* in applying the federal standard of fairness" [1] (Emphasis supplied.)

Here we have evidence of an awakening awareness by the Commission of the distinction which must be drawn between determining the rights of security holders in a reorganization of a continuing enterprise such as was involved in the *Otis* decision, and determining their rights in the case of a final liquidation of the entire system such as we have in the instant case. Further, this statement evidences the Commission's actual recognition, as distinguished from the arguments of its counsel here, that the *Otis* decision does *not* require or justify disregard of contractual liquidation rights in an authentic liquidation, and evaluation of rights on the fictional hypothesis of a "going concern".

The basis for the distinction now recognized by the Commission, but not by its counsel, between the determination of senior security holders' rights in a continuing holding company system as compared with their rights where final liquidation occurs, lies in considerations of an obvious and cogent nature. When the final step terminating the holding company system occurs and the senior security holders are paid out in cash, they are no longer forced to bear the risks of the continuing enterprise. To be sure, they have lost a claim to future preferential dividends; but they have acquired liquid cash and they are not being confined to an investment embodying the risks of the very system in which they had invested, at the same

[1] *Pennsylvania Edison Company*, Holding Company Act Release No. 8550, p. 37, note 40 (October 16, 1948).

time that they are required to forego the position which they previously had.

(3) Commission Counsel further suggest (pp. 77-78) that if the Commission is powerless to remold the contractual rights of senior security holders on the retirement of those securities for cash in the course of the final liquidation of the system, "the management [of a holding company] by its choice of procedure would have the power to give preferred treatment to a particular class of security holders". Therefore, they argue, the Commission must have the power to prevent the management from favoring one class of security holders over another by choosing one form of dissolution rather than another. There can be no question that the Commission and the Courts have both the power and the duty to cut through formal devices by which a management seeks improperly to favor one group over another.

However, it is one thing to prevent a management from utilizing formally correct channels to effectuate an improper purpose, and it is another to deny to the security holders the effectuation of their charter rights when no such improper purpose is found or can be found. Whatever may be the powers which the *Otis* decision confers upon the Commission to supervise the management's choice among the varied alternatives facing it at the initial or intermediate steps in the lengthy process by which holding company systems are ultimately dissolved, a different problem is presented when the final act in distributing the assets of the system occurs.

At that time there is literally no preference that the management can give. The preferences of the security holders are defined by their charter rights upon liquidation. If the senior security holders are to be paid out in cash, they are entitled to no more than their contract provides. If they are to be paid out in securities, it is the duty of the Commission and the Section 11(e) court to see that the value of the securities which they receive is no greater or less than their contract entitles them to receive on liquidation. To be sure, even then, if it is found that the management, for an improper purpose, selects one form of dissolution—such as a merger—rather than a liquidation, as the device to terminate the system, the Commission and the Section 11(e) court have ample power to frustrate the execution of such purposes. But there is no such finding here. On the contrary, as we have shown, in spite of the determined efforts of the preferred stockholders who are petitioners here to establish in the course of the hearings before the Commission an improper purpose on the part of the management, no such purpose either is suggested by the record or was found by the Commission (supra, pp. 7-19).

(4) Finally it is urged that unless the Commission has the power to remold liquidation preferences, either the preferred stockholders may receive less than the "going-concern value" of their investment or the common stockholders may be wiped out despite a finding that "the common stock has a reasonable prospect of sharing in future earnings" (S. E. C. Brief, p. 78). But in this case the Commission gave no consideration to the common stockholders' loss of their "reasonable prospect of sharing in future earning." Moreover, this contention is simply an-

other way of stating that Congress did not intend the preferences which the security holders had agreed would govern the distribution of assets upon a final liquidation, to apply when such liquidation is compelled by the Act. As we have pointed out, nothing in either the language or history of the Act or in any judicial decisions supports this contention. On the contrary, all the evidence points inexorably to the conclusion which the Commission itself has apparently lately reached (supra, p. 67) that when a bona fide and final liquidation occurs and the security holders are paid out in cash, Congress intended the assets to be distributed in accordance with the agreement of the parties.

In point of fact, the formula used by the Commission in the instant case to compute the "going concern values" for which it claims Engineers preferred should be compensated does not suggest that, if given the power to alter contractual rights, the Commission's exercise of that power will allay the fears that preferred stockholders might receive less than the going concern values which they are forced to surrender, or that the common might be wiped out. Not only would that formula produce precisely the results the Commission purports to seek to avoid, but in this case it has deprived the common of values to which they were entitled under the very reorganization standards the Commission contends should be applicable.[1]

[1] Commission Counsel state that the formula employed by the Commission in this case was based on "the Euclidian axiom that the sum of the parts equals the whole" (S. E. C. Brief, p. 43), and that the Commission was therefore justified in evaluating the rights of the preferred stockholders alone "ex the Act", leaving the common stock-

VI. THE POWERS OF THE DISTRICT COURT TO DEAL WITH A SECTION 11(e) PLAN ARE CLEARLY BROADER THAN THE REVIEW POWERS OF THE COURT OF APPEALS UNDER SECTION 24(a); THE DISTRICT COURT HERE DID NOT EXCEED ITS POWERS.

Our main brief, written before we had received the petitioners' main briefs, attributed to the Commission the contention which it had made in the Courts below that its conclusion upon the fairness and equity of a Section 11(e) plan must be accepted by the District Court unless lacking in "any rational and statutory foundation" or unless the Commission "has plainly abused its discretion" (R. 34). The petitioner Streeter still maintains that stand (Streeter Brief, p. 76). The Commission, however, has substantially abandoned that position. Its retreat, commenced in its petition for certiorari[1] is completed in

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holders to receive merely whatever might remain. We do not understand that this "Euclidian axiom", whatever its other virtues, was intended to provide an authoritative formula for measuring the relative rights of security holders in either a liquidation or a reorganization under the "fair and equitable" standard. Cf. *Jerome Frank, Mr. Justice Holmes and Non-Euclidian Legal Thinking* (1932), 17 Cornell Law Quart., 568, 573-4 (see quotation at R. 101-2).

In the *Otis* case, the demand of the preferred stockholders for 100% of the assets was entirely consonant with this "Euclidian axiom", since "the sum of the parts equalled the whole"; but the Commission and the Courts held that such a distribution was *not* consonant with the "fair and equitable" standard which governs reorganizations and liquidations under Section 11(e).

[1] "The Commission agrees with much of what the court below states concerning the intention of the Congress to have the Section 11(e) court function as an independent check upon the Commission's determination that a plan is fair and equitable and also that the respective roles of Commission and enforcement court should be in general similar to the relationship under Section 77 of the Bankruptcy Act between the Interstate Commerce Commission and the reorganization court." (Commission Petition No. 226, p. 22.)

its main brief when it agrees with the Court below that the second *Chenery* case (*S. E. C. v. Chenery Corp.*, 332 U. S. 194) is inapplicable to the present case.[1] Other concessions made in the Commission's brief will be referred to presently.

(1) However differently it may be phrased and from whatever angle it may be presented, the fundamental argument advanced by the Commission and the other petitioners on this phase of the case may be condensed as follows: a Commission order approving a Section 11(e) plan may be reviewed either by a District Court under Section 11(e) or by a Court of Appeals under Section 24(a), depending upon the whim of the company; review of Commission orders by the Court of Appeals under Section 24(a) is limited by the substantial evidence rule; there is no reason why the powers of a District Court to deal with a Section 11(e) plan presented to it for enforcement should be broader than the review powers of a Court of Appeals considering such a plan under Section 24(a), but, on the contrary, policy considerations would dictate that the same review standards be applied; therefore the limitations governing the Court of Appeals under Section 24(a) should be read into Section 11(e) and made applicable to the District Courts when they act under the latter section.

The Commission concedes that "A traditional function and responsibility" of the District Courts, as reorganization courts, "to exercise 'an informed, independent judgment' as to all matters arising in the reorganization * * *

[1] "While we believe the court below gave the wrong reason for rejecting the applicability of the *Chenery* case, acceptance of our main argument leads to the same conclusion." (Commission brief, p. 112.)

survives in part, and gives the court a broader function than the mere determination of questions of law" (S. E. C. Brief, p. 103). The examples given to illustrate the admittedly "broader function" serve to limit the concession somewhat, but it seems to us beyond question that the concession, however it is sought to be limited, destroys the argument that the powers of the District Court in passing upon a Section 11(e) plan presented to it for enforcement are no broader than the review powers of the Court of Appeals under Section 24(a) of the Act. Moreover, the Commission concedes (Id. at p. 105) that it has itself "emphasized the 'independent duty' of the Section 11(e) court", as the Court below noted (R. 23-24). Although the Commission again seeks so to limit its concession as to drain of meaning the phrase "independent duty", the concession nevertheless further underscores the divergence between the powers of the District Court under Section 11(e) and the powers of the Court of Appeals under Section 24(a).

Apart from concessions, however, there is a fundamental fallacy in the argument of the Commission and the other petitioners above set forth which destroys its validity. Section 11(e) and Section 24(a) are *not* alternative avenues for judicial review of a Commission order approving a Section 11(e) plan. The Act did not contemplate alternative avenues of review and the Commission, in practice, has not permitted such alternatives.

Subsections (d) and (e) of Section 11 constitute, as the Commission itself has phrased it, "a self-contained reorganization statute".[1] The general review procedure

[1] Commission's brief (p. 16) in *Lauraburn v. S. E. C.*, 151 F. 2d 217, quoted at page 139 of our Main Brief.

provided by Section 24(a) with respect to Commission orders is not necessarily applicable to orders made under Section 11(e). Proceedings under subsection (d) can be brought only in the District Court, and the same is true, of course, as to proceedings under subsection (f), which subsection is generally linked with (d) and (e) as part of the "self-contained reorganization statute". Indeed, since Congress admittedly had in mind the functions exercised by the District Courts under the Sherman and Hepburn Acts and under Section 77 of the Bankruptcy Act, it is evident that the congressional intent was that reorganization plans approved by the Commission under Section 11(e) should go from the Commission to the District Court rather than to the Court of Appeals.

Not only do the structure and legislative history of the Act suggest that the proper and exclusive "avenue" for judicial consideration of 11(e) plans is the District Court rather than the Court of Appeals,[1] but it seems to us that to permit alternative avenues of review would not be in accordance with the scheme of the Act.

The District Court has the facilities for giving notice and a hearing to all parties affected by the plan, whether or not they appeared or participated in the hearing before

[1] The exceptional case may arise where a reorganization proposed by the company under Section 11(e) contemplates steps which are either optional with security holders or dependent upon approval by security holders in strict accord with the provisions of the charter or applicable state statutes. Such a plan would not require District Court approval and, if reviewed at all, would be reviewed by the Court of Appeals. *Phillips v. S. E. C.*, 153 F. 2d 27 (C. C. A. 2), cert. den. 328 U. S. 860, was such a case. Cf. the sequel to this case (*United Corporation*, Holding Company Act Release No. 8396), in which the company's proposal for a *non-voluntary* exchange with its preferred stockholders was expressly conditioned upon District Court approval and enforcement, and the Commission's order of approval was also so conditioned.

the Commission; such practice is not customary in the Court of Appeals. The District Court is equipped to take additional evidence in connection with the plan or objections thereto; the Court of Appeals could not conveniently do so. The District Courts have traditionally been charged with broad responsibilities in equity and bankruptcy receiverships and reorganizations, and in reorganizations made necessary by the Sherman and Hepburn Acts; the appellate courts have never exercised such functions and are not organized to consider or decide the multitudinous administrative problems inherent in such matters. Since it seems desirable, and Congress specified, that notice and a judicial hearing be granted to all interested parties, that additional evidence be taken by the court where necessary, and that the reorganization be carried out under judicial supervision, it follows that the proper court to which Section 11(e) plans should be referred is the District Court and not the Court of Appeals.

In the early days of its administration of the Act and before the procedure thereunder had crystallized, there were some instances in which a Section 11(e) plan was permitted to be reviewed by a Court of Appeals under Section 24(a), but the Commission some years ago adopted the uniform practice of requiring that Section 11(e) plans affecting security holders' rights be conditioned upon District Court approval.[1] Such condition, as the Commission

[1] See the Commission's 10th Annual Report to Congress, and the testimony of Chairman Purcell, quoted at page 137 of our Main Brief; see also *Lownsbury* v. *S. E. C.*, 151 F. 2d 217, 218: "The conditional nature of the Commission's order is apparently a method of so framing its mandate as to avoid the seeming inconsistency involved in sections 11(e) and 24(a) of the statute. If effective, an orderly review following Commission action is provided for through District Court, Circuit Court of Appeals, and possibly Supreme Court, in proceedings in which all parties in interest may be participants."

concedes (S. E. C. Brief, p. 87), precludes direct review of the Commission's order under Section 24(a). *Okin* v. *S. E. C.*, 145 F. 2d 206 (C. C. A. 2); *Lownsbury* v. *S. E. C.*, 151 F. 2d 217 (C. C. A. 3), cert. den. 326 U. S. 782.

This practice of channeling Section 11(e) plans to the District Court, is clearly in accordance with the statutory intent. It disposes of Commission Counsel's fear that management, by dictating whether or not an 11(e) plan shall be enforced in the District Court, could determine the scope of judicial review to which the plan would be subjected (S. E. C. Brief, p. 89).

Our conclusions find support in the concurring opinion of Biggs, C. J., in *Lownsbury* v. *S. E. C.*, 151 F. 2d 217, 221.[1] They are also in accord with the views expressed

[1] After considering the provisions and interrelation of the subdivisions of Section 11, and the close analogy afforded by Section 77 of the Bankruptcy Act (p. 220), Judge Biggs concludes (p. 221):

"I can perceive no more reason for holding that a security holder may avail himself of the review provisions of Section 24(a) when the company has filed a Commission approved plan under subsection (e) of Section 11 than for holding that the security holder is entitled to such a review when a plan approved by the Commission is filed under subsections (d) or (f). It is clear that Congress did not intend that a security holder should have the right to a Section 24(a) review of an order of the Commission approving a plan submitted to a district court pursuant to the provisions of subsections (d) or (f).

"The method, technique or device adopted by the Commission in the instant case in conditioning its order as indicated seems proper and well within the procedural field allotted to the Commission by Congress. Certainly the device adopted can do no harm to the rights of a security holder. The interpretation of subsection (e) by the Commission is entitled to great weight since it is the agency charged by Congress with the administration of the Public Utility Holding Company Act. The fact that subsection (b) expressly provides for a Section 24(a) review while subsections (d), (e) and (f) do not, is also very persuasive. Cf. our decision in Marquis & Co. v. Securities and Exchange Com'n, 134 F. 2d 822, and the circumstances of the cited case."

by this Court in *North American Co. v. S. E. C.*, 327 U. S. 686, 709-710; in sustaining the constitutionality of Section 11(b)(1) as against attack under the due process clause of the Fifth Amendment, this Court relied upon the "statutory and judicial safeguards" incorporated by Congress into the Act against destruction of values through divestment or reorganization, foremost among such safeguards being the requirement that a plan of divestment or reorganization "must meet the standards of fairness and equitableness" and "must be carefully scrutinized by both the Commission *and the enforcing court*, thus enabling the assertion and protection of all shareholders' rights." (Emphasis supplied.)

(2) Apart from its contention that the presence in the Act of both Section 24(a) and Section 11(e) requires that the scope of District Court action under Section 11(e) be restricted so that it shall conform with the scope of Court of Appeals action under Section 24(a), the Commission's brief argues as follows: The power of the District Court under Section 11(e) is "similar" to the power of the District Court under Section 77 of the Bankruptcy Act (S. E. C. Brief, p. 90); the Court below "misinterpreted the scope of review of the Section 77 court, and misconceived what is meant by the exercise of an 'independent judicial judgment' to re-examine administrative findings" (Id., p. 94); the scope permitted to the District Court under § 77, and therefore under Section 11(e) is no broader than the powers given to the Court of Appeals under Section 24(a).

We believe, as we argued in our main brief (pp. 129-133), that because of restrictive language contained in Section 77 of the Bankruptcy Act, which has no counterpart in Section 11(e) of the Holding Company Act, the

power of the District Court under Section 11(e) is broader than its power under Section 77. However, even if that were not the case, we differ with Commission Counsel upon their interpretation of the powers of the District Court under Section 77 as this Court has construed such powers, and we submit that if the powers of an 11(e) court were no broader than the powers of a Section 77 court, the District Court here correctly refused to approve the plan notwithstanding the Commission's prior approval thereof.

Commission Counsel quarrel with a statement contained in our brief in the Court below that the effect of the last paragraph of subsection (e) of Section 77 is to confer upon the Interstate Commerce Commission "exclusive power over 'valuation of the debtor's property'" (S. E. C. Brief, pp. 94-95). It is true, as the Commission brief notes, that the word "exclusive" does not occur in the statute. But the interpretation of the statutory language is not ours; it is the interpretation declared by the majority of this Court in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, where the Court stated (pp. 472-473):

> "The power of the [district] court does not extend to participation in all responsibilities of the Commission. Valuation is a function limited to the Commission, without the necessity of approval by the court * * * [The court then quotes the statutory provisions.] The function of valuation thus left to the Commission is the determination of the worth of the property valued, whether stated in dollars, in securities or otherwise. One of the primary objects of the bill was the elimination of obstructive litigation on the issue of valuation and the form finally chosen approached as near to that position as seemed to the draftsmen legally possible. Judicial re-examination was not considered desirable."[1]

[1] Footnote references omitted.

Notwithstanding the evident intention of Congress to commit the function of valuation to the Interstate Commerce Commission and to withdraw that function from judicial re-examination, this Court held that the Commission's findings on valuation must nevertheless comply with legal standards and be supported by material evidence (318 U. S. at p. 473). "Another restriction on court action" which this Court cited, basing its conclusion on subsection (d) of Section 77, is "that the determination as to whether the plan is 'compatible with the public interest' rests, as valuation does, with the Commission" (Id., 473). As an example of the kind of question so committed to the Commission, this Court referred to "the amount and character of the capitalization of the reorganized corporation * * * the total amount of issuable securities and the quality of the securities to be issued" (Id., pp. 473-474). And this Court continued: "So long as legal standards are followed, the judgment of the Commission on such capitalization is final" (p. 474).

Thus it appears that even as to the two issues which rest with the Commission, as this Court held, without participation by the District Court, without necessity for District Court approval, and as to which judicial re-examination was not considered requisite by Congress—namely, valuation of the debtor's property and determination whether the plan is compatible with the public interest—this Court nevertheless assigned to the District Court the duty to determine whether the Commission's action was reached in accordance with legal standards and was supported by material evidence. Certainly, as to other issues raised by a reorganization plan, notably the issue whether the plan is "fair and equitable", and issues as to allocation

of securities among creditors and stockholders[1]—as to which issues the District Court is said to exercise an independent judgment—the function of the District Court must be something broader than the duty to determine whether the Commission's decision complies with legal standards and is supported by substantial evidence. Yet the Commission's argument on this point, if accepted, would lead to the conclusion that the District Court's functions upon all issues are limited in the same way—a conclusion directly opposite to that reached by this Court in the *Western Pacific* case.

We indicated in our main brief (p. 131) how this Court contrasted the limited review function of the District Court with respect to issues of valuation and public interest, on the one hand, with its functions of "independent examination" to be exercised on other issues. If "independent examination" means nothing more than reviewing the Commission's findings to determine whether they comply with statutory requirements and are supported by material evidence, the phrase is meaningless. Sensing this, the

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[1] The Commission's brief (p. 94) states:

> "This Court decided in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 473, that as to matters of valuation *and allocation* the Section 77 court reviews the determinations of the Interstate Commerce Commission under the substantial evidence rule." (Emphasis supplied.)

The reference to "allocation" is erroneous. This Court held that the substantial evidence rule applies to the Commission's valuation of the debtor's property (relying on subdivision (e) of Section 77), and to the Commission's determination of the total amount and quality of securities to be issued (because that is a matter of "public interest" within the meaning of subdivision (d)). But it did not hold that the substantial evidence rule applies to the Commission's *allocation* of securities among the creditors and stockholders; on the contrary it is implicit in this Court's opinion that such questions are within the area where the District Court is permitted and required to make an "independent examination", and its own finding or affirmation.

Commission struggles to assign some significance to the phrase and to indicate some respects in which a District Court reviewing a Section 77 plan may be said to exercise some degree of independence. It begins with the assertion, "The reorganization court, of course, has an independent responsibility for all issues of law" (S. E. C. Brief, p. 102). That is hardly what this Court meant by the word "independent", as shown by its statement that, "While the public interest phase of capitalization is not to be independently passed upon by the court, the court does have statutory authority to review for obedience to legal standards." (318 U. S. at p. 475).

Recognizing immediately that Section 77 "gives the court a broader function than the mere determination of questions of law" (S. E. C. Brief, p. 103), the Commission proceeds to consider how much broader that function is; but it is willing to commit itself only in two respects: that "within limits, the district judge has responsibility to take evidence to decide whether the record on which the agency acted has become stale as a result of changing economic conditions", and that, "Inquiries as to matters of law or fact may be made on the court's own motion or at the behest of objecting parties who, by ordinary appellate standards, might be precluded from raising a question" (S. E. C. Brief, p. 103). Neither of the examples cited is a true instance of "independent examination". As to the power to take additional evidence, this Court held that the District Court has such power even with respect to a Commission finding of valuation, on which clearly the District Court has only the most limited review jurisdiction:

> "Thus, while judicial review does not involve an independent examination into valuation, it does require that the court shall be satisfied, upon the record before

the Commission, *with such additional evidence as may be pertinent to the objections to the Commission's finding of value*, that the statutory requirements have been followed" (318 U. S. at p. 477; emphasis supplied).

And as to the second example cited by the Commission, even a Court of Appeals reviewing a Commission order under the restrictive provisions of Section 24(a) of the Holding Company Act would, under the provisions of the section, have power to consider objections which, or to hear parties who, by ordinary appellate standards might be precluded.

The Commission has thus failed to suggest any respect in which a District Court, acting under Section 11(e) of the Holding Company Act or Section 77 of the Bankruptcy Act, may be said to exercise "independent examination", if in doing so the Court is to be limited, as the Commission contends, to determining whether the Commission's conclusions are supported by material evidence and are in accordance with legal standards.

Charging that the quotations from the legislative history of the Act, as set forth in the opinion of the Court below, "give an incomplete picture of the legislative background" (S. E. C. Brief, p. 100), Commission Counsel have attached as "Appendix B" to their brief more complete extracts from the Senate Report and the Senate debates (Id., pp. 127-185). But the Commission does not call attention to anything in the Report or in the debates, and we find nothing that alters or qualifies the effect of the portions quoted in the opinion of the Court below or in our main brief. While the debate concerned the question whether the District Court should be required to appoint the Commission as receiver or trustee, as the Court below noted (R. 22), and as we stated in our main

brief (p. 134), it is unmistakably clear from the tenor of the debate that the Senate placed special emphasis and confidence in the role of the courts rather than that of the Commission, and intended that the District Courts should retain their traditional reorganization function. In addition to the excerpts quoted in our main brief, we have reprinted in the margin other portions of the Report and debates which further exemplify that intention.[1]

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[1] The Senate Report, after summarizing the provisions of subsections (a), (b) and (c) of Section 11, states:

> "Precedents under the Sherman Antitrust Act and under the Hepburn Act demonstrate that the necessary corporate adjustments can be made without forced liquidation or the sacrifice of legitimate investment values." (Quoted in S. E. C. Brief, p. 142.)

The Report continues:

> "Subsections (d), (e) and (f) outline the procedure whereby the reorganization plans must be approved by the Commission and carried out under the supervision of the Federal courts" (Ibid.).

With reference particularly to subsection (e), the Report states:

> "Subsection (e) expressly authorizes a holding company subject to the approval of the Commission and the court to work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization by the Commission, and the Commission and the court are authorized to approve any plan so worked out voluntarily by a holding company as the Commission and the court might order under their compulsory powers. *Thus the voluntary reorganizations of the holding companies might be facilitated by the recognized powers of a court of equity to make such equitable allocations of general liens and priorities as may be necessary to make it possible for the companies to comply with the policy of the statute* (Continental Insurance Co. v. U. S. Reading Co. et al., 259 U. S. 156)." (Id., p. 143; emphasis supplied.)

In the course of the debate, Senator Wheeler, replying to a suggestion by Senator Steiwer that the provision requiring the court to appoint the Commission receiver might be held objectionable as ousting the court of its jurisdiction, stated:

> "No; I do not think it would oust the jurisdiction of the court. * * * Furthermore, this is a mere matter of Congress providing the administrative machinery surrounding receiverships, and in no way usurping any judicial powers. *The judicial functions remain, as always, in the courts.*" (Id., pp. 151-152; emphasis supplied.)

(3) The Commission's brief concedes that if the Commission "did not apply the correct rule of law as to the rights of the stockholders, then of course the district court properly discharged its own statutory responsibility in refusing to approve the plan as approved by the Commission" (S. E. C. Brief, p. 85); and it argues repeatedly that the "basic issue" in this case is one of law (e.g., pp. 84, 108). We agree, as we argued in Part One of our main brief, that in a genuine liquidation such as took place here the "fair and equitable" standard required that the preferred stockholders be limited to $100 per share because of the corporate charter provisions specifically applicable to such liquidation, because of controlling precedents which compel the same result even if the charter liquidation provisions were not deemed applicable to this liquidation, and because of constitutional limitations which preclude a different result.

The Commission's next argument is "that the issue in this case, if not a pure issue of law, must be one of policy which would be for the Commission to decide under any theory of the scope of review" (S. E. C. Brief, p. 89), and it defines that issue of policy as follows: "whether inquiry should be confined to the operation of the particular plan before the Commission or should include a re-appraisal of all past transactions as if the Act had never been passed" (Id. at p. 109); the Commission concludes that upon such matters of policy its judgment should prevail unless "arbitrary or irrational" (Id., p. 110).

This statement of the disagreements between the Commission and the Courts is patently erroneous. The point at which the District Judge and the Court of Appeals on the one hand, and the Commission on the other, differed

was whether, on the assumption that the preferred stockholders were entitled to be compensated for the rights they surrendered "on a going-concern basis", the Commission correctly determined the "equitable equivalents" of the rights surrendered. This issue both the District Judge and the Court of Appeals decided against the Commission on the ground that, as a matter of law, the Commission used an improper and untenable formula for determining the compensation to which the preferred stockholders were entitled. While the Court of Appeals held that the Commission should have another opportunity to determine on a legally correct formula the "equitable equivalents" which the preferred stockholders should receive, the District Court determined that if a correct formula were used, on the record in this case the preferred stockholders could receive no more than $100 per share. Plainly, insofar as the issue between the Commission and the Courts was whether the Commission applied a legally valid formula to measure the equitable equivalents of the right surrendered by the stockholders under the impact of the statute, a question of law was presented, and the decision of the Courts is authoritative. The only question upon which a difference between the Commission and the Courts would require an exercise by the District Court of its admittedly "broader function than the mere determination of questions of law" (S. E. C. Brief, p. 103) is whether, on a legally correct formula, the facts would permit the result reached by the Commission. We submit that it is precisely at that point that the broader scope which Section 11(e) gives to a District Court comes into play, and that, as in this case, a District Court has the power to determine whether on a correct formula the facts would permit any result other than that which it reached.

(4) Finally the Commission argues, "To construe Section 11(e) as conferring on the district court a valuation function co-ordinate with that of the Commission would make the statute unworkable" (S. E. C. Brief, p. 112); either the Commission's conclusion on fairness and equity should bind the District Court, or the conclusion of the District Court should bind the Commission (Id., p. 114); and "in the interest of uniform administration of the statute" it is necessary that the conclusions of the District Court where he disagrees with the conclusions of the Commission should be subject in turn to full review on appeal (Id., p. 115).

Precisely the same problems of possible conflict between the Commission and District Courts as are here conjured up by the Commission could arise under Section 77 of the Bankruptcy Act; but this Court has not found it necessary either to restrict the independence of the District Courts so as to make them mere courts of review over the determinations of the Interstate Commerce Commission or to enlarge the customary review powers of the Court of Appeals or of this Court so as to make the review powers of the Appellate Courts co-extensive with the District Courts' functions. Instead, this Court has affirmed the difference between the functions of the District Court under Section 77 and the functions of Appellate Courts reviewing the action of the District Court.[1]

Both the District Court and the Commission are bound by the requirement that a plan must conform to the "fair and equitable" standard. If differences arise between the District Court and the Commission as to the meaning or

[1] *Group of Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 564, quoted at p. 132 of our Main Brief.

application of that standard in the context of a particular case, the final decision rests, as always, with the Appellate Courts. It is thus evident that petitioners' arguments concerning the threat of "stalemate" stem primarily from their desire to have the Commission's determinations prevail in an area where Congress intended that security holders would "have the protection of findings as to the fairness and equity of plans by both the Commission and a United States District Court" (10th Annual Report of the Commission, p. 65). Cf. *North American Co. v. S. E. C.*, 327 U. S. 686, 709.

Dated, January 5, 1949.

Respectfully submitted,

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Nos. 226, 227, 243, 266.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 226.

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

CENTRAL ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 227.

THOMAS W. STREETER, *et al.*,

Petitioners,

v.

CENTRAL ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 243.

THE HOME INSURANCE COMPANY and TRADESMENS NATIONAL BANK AND TRUST COMPANY,

Petitioners,

v.

CENTRAL ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 266.

CENTRAL ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, HOME INSURANCE COMPANY, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THOMAS W. STREETER, *ET AL.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

Nos. 226, 227, 243.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE COMPANY, *et al.*,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCIS BOEHM,

Respondents.

No. 266.

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE COMPANY, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THOMAS W. STREETER, *ET AL.*

Opinions Below.

The opinion of the Court of Appeals (R. 12) and the opinion denying the prayers of the petitions and cross-petitions for rehearing (R. 138) are reported in 168 F. (2d) 722. The opinion of the District Court (R. 283a) is reported in 71 F. Supp. 797. The findings and opinion (R. 25a) and supplemental findings and opinion of the Securities and Exchange Commis-

sion (R. 128a) have not yet been officially reported but are set forth in the Commission's Holding Company Act Releases Nos. 7041 and 7119, respectively.

Jurisdiction.

The judgment of the Circuit Court of Appeals (R. 41) was entered on March 19, 1948. A petition for rehearing (R. 140) was denied on June 11, 1948. The petition of Thomas W. Streeter, *et al.*, for a writ of certiorari was filed on August 16, 1948 and granted on October 25, 1948. The jurisdiction of this Court is invoked under section 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. §347, now §1254 of the revised Title 28 U. S. C.) and made applicable by section 25 of the Public Utility Holding Company Act of 1935 (15 U. S. C. §79y).

Statute Involved.

The applicable provisions of the Public Utility Holding Company Act of 1935 are set forth in Appendix A, *infra*, pp. 163-8.

Questions Presented.

The holding company which is being liquidated in compliance with section 11 is solvent. Under its charter, the three classes of preferred stock have a call or redemption price higher than their involuntary liquidation preference. Each of the three classes of preferred shares has an investment value at least equal to the call price. The following questions are presented:

1. Where a plan under section 11(e) of the Public Utility Holding Company Act is enforced in a dis-

trict court and there is no dispute as to the sufficiency of the evidence upon which the Commission based its finding of fairness, is the district court authorized to reject such finding on the basis of a discretionary weighing of alleged equities and in disregard of the usual limitations upon the scope of review by the doctrines of substantial evidence and administrative finality?[1]

2. Is the involuntary liquidation preference under the charter a conclusive measure of the participation of the preferred stockholders under the instant plan?

3. Did the Commission properly apply the "fair and equitable" standards of section 11(e) of the Act in approving as part of a plan the payment to the preferred stockholders of cash equal to the current going concern value of their shares but not in excess of the call price where this amount exceeds the involuntary liquidation preference of such shares under the charter?

4. Did the court below err in disregarding an improper change in the plan and approving incorrect procedure used in connection therewith both of which were sanctioned by the District Court?

5. Did the court below properly vacate the decree of the District Court and remand the proceedings to the Commission for appropriate action where the plan was disapproved as not being fair and equitable within the purview of section 11(e) of the Public Utility Holding Company Act?

[1] Question 1 may be rephrased alternatively as follows: Is the scope of review by a district court which has been requested to enforce a plan approved by the Commission pursuant to section 11(e) of the Public Utility Holding Company Act so broad that the district court may substitute its judgment as to the fairness of the plan for that of the Commission?

Statement.

History of Proceedings.

A proceeding was instituted in the United States District Court for the District of Delaware by the Securities and Exchange Commission ("the Commission") pursuant to sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935 ("the Act")[2] to effectuate a section 11(e) plan of liquidation and dissolution filed by the Engineers Public Service Company ("Engineers") with the Commission, which plan, as subsequently amended, was approved by that body on January 8, 1947 (R. 141a).

On May 15, 1947, the District Court filed an opinion (R. 283a) approving the plan except as to that portion of it which proposed to retire the outstanding three series of preferred stocks at amounts equal to the respective call prices fixed by the charter (R. 292a). The District Court found the preferred stockholders entitled to only $100 per share—the amount specified in the charter as payable in the event of involuntary liquidation. On May 29, 1947, the District Court entered its order adopting certain changes in the plan, including the creation of an escrow of the amount in excess of $100 per share and directing the retirement of the preferred stocks at $100 per share and the immediate consummation of the plan as so changed.[3]

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[2] Act of Aug. 26, 1935, c. 687, Title I §33; 49 Stat. 838, 15 U. S. C. §§79-79z-6, §79k in particular.

[3] The applications by the petitioners herein for a stay of this order of consummation, pending appeal, were denied in turn by the district court on May 29, 1947 (R. 335a), by the United States Circuit Court of Appeals for the Third Circuit on June 2, 1947 (R. 11) and a Justice of this Court on June 4, 1947. Since then the plan has been consummated except for the distribution of the fund deposited in escrow pursuant to the district court order (R. 39-40).

On May 29, 1947,[4] the petitioners filed their appeal from the District Court order in the Court of Appeals for the Third Circuit from which order appeals were also subsequently taken on behalf of the Commission and the Home Insurance group of preferred stockholders. On March 19, 1948, the Court of Appeals filed its opinion (R. 12), affirming the decision of the District Court that the plan as submitted by the Commission was unfair and inequitable but vacating the decree of the District Court approving the plan as amended, with directions to enter an order of disapproval and to remand to the Commission for further and appropriate action by it. On June 11, 1948, the Court of Appeals filed its opinion denying the prayers of the petitions and cross-petitions for rehearing (R. 138).

History of the Company.

Engineers was incorporated in Delaware in 1925 primarily to acquire and own public utility properties.[5] The Engineers system was put together by Stone & Webster, Inc., an engineering firm engaged in the business of supervising operating public utilities, the acquisition of properties for its own account and the issuance and distribution of securities. Its first subsidiary was Virginia Electric & Power Com-

[4] One of the petitioners herein is Thomas W. Streeter, a director and preferred stockholder of Engineers, who dissented from the initial plan as unfair in its proposal to retire the preferred stock at $100 per share. At Streeter's insistence the Board of Directors authorized the preferred stockholders to employ independent counsel to insure that the rights of those stockholders would be adequately represented before the Commission and in the courts (R. 473a).

[5] For a complete history of the formation of Engineers see Federal Trade Commission, *Utility Corporations*, No. 66, Senate Doc. 92, Pt. 66, 70th Cong., 1st Sess., pp. 41, 564-572.

pany ("Virginia") which was acquired from Frank Gould who is now one of the largest common stockholders[6] of Engineers. Successively, between incorporation and December 1928, control was acquired of Key West Electric Co., Eastern Texas Electric Co., El Paso Electric Co. (Del.), Savannah Electric & Power Co., Baton Rouge Electric Co., Ponce Electric Co., and Puget Sound Power & Light Co.

The system sprawled over many states and was composed of a great many separate corporate entities. From the beginning, long before the Act, the management inaugurated a policy of system simplification (R. 1648a, 1464a). In accordance with this same policy after enactment of the Act, Eastern Texas Electric Co.[7] was dissolved and Gulf States was transferred directly to Engineers. Thereupon Baton Rouge Electric Co. and Louisiana Steam Generating Co. were merged with Gulf States.

By 1930, Stone & Webster, Inc. had acquired direct ownership of over 90% of the common stock of Engineers (R. 1686a). In December, 1937, after the registration provisions of the Act had been upheld as constitutional, Stone & Webster distributed its holdings to its own stockholders (R. 1501a). However, this distribution of the common stock did not disturb the control which the Stone & Webster interests exercised over Engineers.[8] Although there are over 12,000 common stockholders, 338 or 2.52% of them own 72.54% of the stock and of this amount the greatest number of shares is owned directly or in-

[6] See Engineers' Exhibit 43, R. 1769a.

[7] Eastern Texas Electric Co. was a holding company controlling the present properties of Gulf States Utilities Co. ("Gulf States") and the Western Public Service Co.

[8] R. 726a-729a. See the lists of officers and directors in the annual reports, Engineers' Exhibit 37-A-37-T, R. 1432a-1641a.

directly by members of the Stone and Webster families (R. 567a-570a).

Of the major subsidiaries acquired by Engineers, all but Puget Sound Power & Light Co. ("Puget"), which represented one-third of the system's properties (R. 1673a), were profitable investments and were still part of the system at the time of the Court's order. These subsidiaries were Virginia, Gulf States and El Paso Electric Co. ("El Paso") which had passed directly to Engineers when its parent El Paso Electric Co. (Del.) was dissolved in 1944. Puget, on the other hand, was a disastrous fiasco as far as Engineers was concerned.[9] The other subsidiaries consisted of small companies which never contributed much, if anything, in the way of earnings to the system and which were ultimately disposed of, on the whole, at a profit to Engineers.

The management, from the outset, had pursued a conservative financial policy with respect to paying dividends on the common stock, recognizing the desirability of building up adequate equities in the subsidiaries as well as in the parent company.[10] Even so in 1936, the Company was forced to write down the common stock from $58,059,513 to $1,909,968 in order to create a capital reserve which would be available to absorb the loss which was evident in the Puget venture and thus to permit the resumption of preferred dividends (R. 1481a). In May, 1938, a reserve of $35,000,000 for losses in investments was created and

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[9] R. 1608a. See *Puget Sound Power & Light Company*, 13 S. E. C. 226 (1943).

[10] R. 1554a, R. 1666a, R. 1676a, R. 1687a, R. 1713a, R. 1444a. In 1938, C. W. Kellogg, then chairman of the Board of Engineers, wrote that "common stock money is the one final and necessary foundation that makes the whole structure stand up." Kellogg, *Audit of 1937 Electric Utility Business*, Electrical World, January 15, 1938.

as a result there was no earned surplus available for dividends on the common stock. From that time on, although there were earnings applicable to the common stock, the management felt that it was "clearly desirable to accumulate additional earned surplus to improve the stability of the Company before consideration is given to a dividend on the common stock" (R. 1537a), and, in addition, for many years prior to the filing of the plan, dividends on the common stock were withheld because of a desire on the part of the controlling interests for capital appreciation and to avoid payment of high personal income taxes.

Integration Proceedings.

On February 21, 1938, Engineers registered with the Commission and on February 28, 1940, the Commission instituted integration proceedings under section 11(b)(1) of the Act. In 1941 the Commission ordered the Company to dispose of its interests in two subsidiaries. The Company did not contest this order. On September 16, 1942, and October 6, 1942, the Commission issued other divestment orders which were set aside by the Court of Appeals for the District of Columbia, the cause being remanded to the Commission. *Engineers Public Service Co.* v. *S. E. C.*, 138 F. (2d) 936 (App. D. C., 1943) cert. granted, 323 U. S. 723 (1944). Certiorari was granted by the Supreme Court, but disposition was not had because of the lack of a quorum. In the meantime, Engineers disposed of the properties which were the subject of Commission's orders, in the consummation of the plan, approved and enforced by the District Court's order dated May 29, 1947, after the denial of the stay in turn by the two courts below and a Supreme Court

Justice. On October 20, 1947, this Court dismissed the appeals as moot.[11]

Proceedings before the Commission.

On September 10, 1945, during the pendency of an action before this Court to test the validity of the Commission's divestment orders under section 11(b)(1) of the Act, the Company filed a plan (R. 1307a) under section 11(e) of the Act which was designed to effect compliance with those divestment orders and which also provided for the elimination of Engineers although such action had not been required by the Commission.

This plan was the culmination of efforts of the management stemming from about 1941 during which period several types of plans were considered and discarded.[12] Among some of the possible alternatives were liquidating holding companies, distributions in kind, a one stock reorganization, a "package" distribution, a "preferential common" reorganization, a voluntary take down plan, a partial payment plan, and a voluntary exchange plan.

After consultation with the major common stockholders it was decided that the primary objective to be attained was the ultimate elimination of the preferred stockholders from the enterprise so that the common stockholders would obtain direct ownership of the underlying companies.[13] This aim was to be accomplished with two other objectives in view: first, to obtain the greatest possible tax savings for the common stockholders (R. 756a), and second, to stop

[11] 332 U. S. 783 (1947).

[12] R. 475a, 481a, 482a, 675a, 688a, 689a, 691a, 707a, 709a, 715a, 717a, 718a.

[13] R. 583a, 643a, 687a, 719a, 723a.

the accrual of dividends on the preferred stock (R. 446a-448a, 650a).

Accordingly, a plan was fashioned which was split into parts. Part I, among other things, proposed the issuance of transferable warrants to the common stockholders which would permit the acquisition of Gulf States common stock upon the payment of $11.50 per share and thereafter the immediate retirement of the three series of outstanding preferred stocks,[14] at the involuntary liquidation price of $100 per share plus accrued dividends.[15] This retirement of the preferred stock was to be accomplished by a deposit of $100 in cash by Engineers in favor of the stockholder.[16] Subsequent to the retirement of the preferred stock, Part I of the plan proposed the distribution of the remaining assets to the common stockholders.

Part II of the plan was intended to afford a means for permitting the later determination of the question whether the preferred stockholders were entitled to any amount in excess of $100 per share.

Part III of the plan proposed the elimination of Engineers either by way of dissolution or by merger with Virginia (R. 1320a). During the hearings before the Commission the merger alternative was removed by amendment for the stated reason that such a course would no longer result in substantial tax savings. This amendment was filed after it was ascertained that a merger was not to be deemed a dissolution or liquidation of Engineers within the mean-

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[14] $5 series, $5.50 series and $6 series. Engineers had no debt.

[15] The pertinent charter provisions are set forth in R. 1412a.

[16] The common stockholders who owned preferred were given the option of exchanging the preferred for Gulf States stock (R. 41a). Of course, the exchange of preferred would reduce the cash requirements. The record does not show how many shares were exchanged.

ing of the Charter and, in which event, the statutory appraisal provisions of Delaware or Virginia with respect to the rights of the preferred stockholders might be applicable.[17]

The purpose of splitting the plan into parts was to secure an order from the Commission which would authorize the retirement of the preferred stock and the termination of dividends before the extent of the rights of the preferred stockholders was determined. Director Streeter objected to this splitting device (R. 778a) and the management admitted that if Parts I and II were combined the preferred stockholders would be entitled to dividends until their rights were "finally settled".[18]

Following the termination of extensive hearings before the Commission, counsel for Engineers made a motion (R. 1203a) on January 30, 1946, to separate Parts I and II of the plan and for an order permitting the consummation of Part I.

The preferred stockholders resisted this motion on the ground that the common stockholders had no right to terminate the preferred stockholders' interest in the enterprise pending the determination of the extent of their claims unless the stock were called in accordance with the Charter. The Commission took the motion under advisement.

On December 4, 1946, the Commission issued its findings and opinion (R. 25a, H. C. A. R. No. 7041), in which it found, among other things, that although the plan was necessary to effectuate the provisions of section 11 of the Act, it was unfair to the preferred stockholders in its proposal to retire their stock at $100 per share. The Commission was of the view

[17] R. 495a, 538a, 589a, 590a, 650a, 653a, 712a-714a, 915a.
[18] R. 779a. See also R. 448a, 531a, 649a, 650a, 780a-781a.

that under the principles enunciated in *Otis & Company v. S. E. C.*, 323 U. S. 624 (1945), the preferred stockholders were entitled to the current investment value of their securities and that such value was at least equal to the respective call prices of the three series of outstanding preferreds, namely, $105 for the $5 preferred and $110 for both the $5.50 preferred and $6 preferred. The Commission reached this conclusion after (a) consideration of "all provisions of the charter applicable to the preferred, such as the dividend rate and the call price, as well as the liquidation preferences", (b) analysis of "the financial condition of the company, with particular regard to the asset and earnings coverage of the preferred" (R. 62a), and (c) reference to the undisputed testimony of both the preferred stockholders' and the Company's witnesses that the intrinsic values of the preferred were considerably in excess of the call prices (R. 67a). However, the Commission was of the opinion that the call prices placed a ceiling on the right of the preferred to participate in the distribution of the assets (R. 67a).

The Commission also found that it could not grant the Company's motion to split the plan but stated that it would approve an amendment to provide an arrangement whereby the amount in excess of $100 per share could be deposited in escrow in the event the Company desired to litigate the Commission's findings with respect to the rights of the preferred stockholders (R. 75a). However, in the event of an escrow, the Commission held that the preferred stockholders would be entitled to interest on the escrowed amount as additional compensation for the delay in payment. The Commission stated that if the Company did not amend the plan in accordance with its views, an order disapproving the plan would be entered (R. 73a, 299a).

Within the time specified, Engineers filed a new plan. This plan proposed to retire the preferred at their respective call prices.[19] It contained no splitting device and made no mention of an escrow. Under the terms of the plan the dividend rights of the preferred were to be terminated only upon the receipt of the full call prices.[20]

The Commission thereupon issued its Notice of Filing of Amendment and Order for Argument and Hearing on Plan, as Amended, and Order Reopening Record (R. 417a). This notice was sent to all the stockholders by the Company and in an accompanying letter (R. 1937a.) they were informed that Engineers had decided not to contest the Commission's finding that the preferred stockholders were entitled to the call prices.

At the hearing, two groups of common stockholders who had not previously participated, objected to the treatment proposed to be accorded the preferred. However, no evidence was offered although the record had been reopened for that purpose. Counsel for the Streeter group contended that the plan, as amended, did not accord the preferred stockholders their full rights because it contained no provision for continuing the preferred dividends or even for the additional compensation which the Commission had found should be paid the preferred stockholders in the event of delay (R. 1294a, 1299a).

On January 8, 1947, the Commission issued its supplemental findings and opinion and order among other things (a) approving the plan as amended, (b) direct-

[19] The feature whereby the preferred could be exchanged, at a value equal to the call prices, for Gulf States stock was retained. As before this alternative was available only to common stockholders who also owned preferred and to preferred stockholders who were able to acquire warrants.

[20] R. 105a-106a, 107a-108a.

ing its counsel, in accordance with Engineers' request, to proceed with court enforcement, and (c) finding it fair and equitable to provide an escrow arrangement subject to the enforcement court's jurisdiction in the event of delay due to further litigation (R. 128a, 141a).

Court Proceedings.

In accordance with the Commission's direction, an application (R. 4a) was filed on January 9, 1947, with the United States District Court for the District of Delaware. Prior to the hearing before the District Court, in accordance with a prescribed notice (R. 175a) to all stockholders, written objections were filed to the Commission's application and its findings. Counsel for the Streeter group, alleging the fairness of the plan as presented for enforcement, objected to any change to permit the termination of the rights of the preferred stockholders in the manner suggested by the Commission. The only other objectants were two common stock groups (four stockholders out of over 12,000) which hold 7,000 shares or .3% of the 1,909,968 shares of common stock outstanding. These shares were acquired by these two groups between 1943-1946 (R. 1287a), immediately prior to and during the pendency of these proceedings and subsequent to the Commission's decision in *The Western Public Service Company*, 12 S. E. C. 804, 814 (1943), case where it was publicly announced that it was Engineers' contention that, in the event of the liquidation of Engineers under Section 11 of the Act, the charter liquidation provisions would not govern the rights of the preferred stockholders who would be entitled to the fair value of their expectations absent such proceeding.

On February 7, 1947, the President of Engineers,

apparently without prior authority from the Board of Directors, wrote a letter (R. 271a, 394a) to the Commission requesting that the Commission amend its order of January 8, 1947, so as to permit the consummation of the plan by an "alternative" method and to make the recitals required by Supplement R of the Internal Revenue Code so as to entitle Engineers to certain tax relief.

Pursuant to this request and without notice to the preferred stockholders or an opportunity to be heard thereon, the Commission entered a so-called Order of Amendment (R. 165a) on February 11, 1947, which among other things purported to approve, in advance, the changing of the plan so that it could be split and consummated in a manner similar to that proposed in the original plan[21] by an alternative method through the use of an escrow.[22]

At the hearing before the District Court on February 17, 1947, counsel for the Commission made a motion (R. 162a) to amend its application by incorporating the Order of Amendment. The motion was granted (R. 163a) over the objections (R. 181a) of counsel for the Streeter group whereupon a Supplemental Statement of Objections, directed to the Commission's application, as amended, was filed (R. 177a).

At the hearing, counsel for Engineers stated that it appeared likely that the *common stockholders* would appeal and that Engineers desired to follow the alternative method of effectuating the plan (R. 278a). He submitted to the Court a form of Escrow Agreement (R. 408a) which he stated had been worked out by the Company and the Commission's staff.[23] Counsel

[21] R. 170a-171a.

[22] It is the Commission's view that the Order of Amendment did not constitute an amendment to the plan, R. 169a, 389a.

[23] R. 277a. While the matter was under advisement, counsel for Engineers sent a revised form of Escrow Agreement to the District Court.

for the Streeter group contended that this alternative method constituted a material change in the plan and that the Act required the Commission to afford the preferred stockholders an opportunity for hearing as to the fairness of the changes and the adequacy of the Escrow Agreement (R. 177a-179a).

On May 15, 1947, the District Court filed an opinion in which it concluded "that because of the provision for payment of premium, the plan does not meet the requirements of fairness and equity. With the exception of the payment of redemption premiums, the plan is approved including the Escrow Agreement" (R. 292a). It was the District Court's view that a "§11(e) court has the affirmative and independent duty to consider and find whether a proposed plan, which has been approved by the Securities and Exchange Commission, is fair and equitable" (R. 286a). Stating that the quantum of participation to be allowed the preferred stockholders under §11 was to be measured by standards of "colloquial equity", the District Court found that the investment value of the preferred stock was not controlling but was just one of the elements to be considered and that "after consideration of all factors involved" (including issue price, market history, losses due to divestments, "past sacrifices", etc.); it concluded "that $100 would be fair and equitable, but that the payment of premiums would not be fair and equitable" (R. 288a).

Subsequently, on May 26, 1947, counsel for the Commission submitted a proposed form of order (R. 416a) embodying the alternative method of consummation which had been previously approved by the Commission and elected by the Company for the purpose of being adopted in the event of the likelihood of an appeal by the *common stockholders*. This proposed order treated the plan as "supplemented" to include an escrow agreement and certain incidental

changes and incorporated a revised Escrow Agreement which had been submitted to the District Court *after* the hearing on February 17, 1947.[24]

Counsel for the Streeter group opposed the entry of the proposed order (R. 361a-365a) for the reasons *inter alia* that: (1) the District Court had no power under the Act to enforce a plan which it had failed to approve *in toto;* (2) the District Court had no power to rewrite the plan in the first instance; (3) if the District Court had the power to adopt changes it was required by the Act to give notice and afford an opportunity for hearing; (4) the Escrow Agreement was inadequate to protect the interests of the preferred stockholders; and (5) the plan would be unfair to the preferred stockholders if it terminated their dividends in violation of their rights under the charter.

On May 29, 1947, the District Court entered its findings of fact and conclusions of law (R. 293a) and an order (R. 318a), among other things, (a) adopting the alternative method of consummation via an escrow arrangement, (b) directing the retirement of the preferred stock at $100 per share [despite the Commission's finding that such treatment was unfair] and (c) the immediate consummation of the plan, except for the proposed allowance of the so-called premium. In accordance with this order, the plan has been carried into effect, except for the distribution of the fund deposited in escrow (R. 39-40).

[24] See footnote 23. The record demonstrates that if was never contemplated to follow the alternative method in the event the Court *failed* to approve the plan. Counsel for Engineers stated before the District Court (R. 269a, 280a) that the failure of the District Court to approve the payment of the call prices would prevent the carrying out of the plan. Moreover, the Escrow Agreement attached to the proposed order (R. 424a) was different in this respect from the agreement which had been submitted to the Commission on Feb. 7, 1947 (R. 402a), and to the District Court on Feb. 17, 1947 (R. 408a).

On the appeals filed by the Commission and the Home Insurance and Streeter groups of preferred stockholders, the Circuit Court affirmed the decision of the District Court that the plan, as approved and submitted by the Commission was unfair and inequitable, and vacated the District Court's decree for its error in amending the plan to substitute its own estimates of values and approving and enforcing the plan as so amended. It directed the return of the record for further and appropriate action by the Commission, the remaining problem being one of valuation. The Circuit Court also noted that in view of its denial of the Streeter motion for a stay made shortly after the entry of the District Court's order of approval and enforcement, the plan had been carried into effect except for the payment of the fund deposited in escrow (R. 39-40).

The rationale of the Circuit Court's decision hinges primarily upon two concepts—(1) the function of a section 11(e) court, and (2) the standards of valuation for determining equitable equivalents. With respect to the first concept the Circuit Court concluded that a "Section 11(e) court must exercise its full and independent judgment as to the fairness and equity of the plan" (R. 33) and expressly refused to apply the substantial evidence rule to a section 11(e) proceeding (R. 33), and also refused to follow the principles that "unless the conclusions of the Commission lack rational or statutory foundation they may not be disturbed by the section 11(e) court or that a reversal of the Commission's judgment by the court may not be effected save where the Commission has plainly abused its discretion" (R. 34).

In reference to the standards of valuation, the court below held that "All pertinent factors and all substantial equities must be considered by the Commis-

sion whether equitable equivalents are to be reached by the approach *ex* the Act or the approach *intra* the Act" (R. 38). It stated that the Commission has "misunderstood the principle of 'equitable equivalents' enunciated by the Supreme Court in the *Otis & Co.* case"; that "the new doctrine of investment value * * * may not be substituted for the doctrine of equitable equivalents"; and that "investment value is and can be only one of a series of factors to be used in arriving at equitable equivalents" (R. 38, 39). The court below also criticized the Commission for its alleged errors in (a) failing to give adequate consideration to such "equities" and "factors" as losses occurring to Engineers by virtue of the divestitures compelled by the Act, future earning power, etc.; (b) adopting inconsistent techniques in valuing the preferred "*ex* the Act" and the common "*intra* the Act"; (c) making "no finding as to the 'value' of the common stock"; and (d) disregarding the fact that "the holding company enterprise is at an end; both for the preferred and common", which fact (according to the court below) differentiates the instant case from The United Light & Power Company reorganizations (R. 35, 36).

Petitions for rehearing were filed on behalf of the Commission and the Home Insurance and Streeter groups of preferred stockholders for the reason, among others, to obtain clarification of various aspects of the opinion below relating to the functions of a section 11(e) court vis-a-vis the Commission and the standard of valuation in simplification proceedings. Answers and cross-petitions were filed on behalf of two groups of common stockholders. The court below denied the prayers of the petitions and cross-petitions, stating that "neither the Commission, nor the district court, nor this Court possesses the power to waive the provision of section 11(e) providing for approval of a

plan of reorganization as fair and equitable" (R. 139). It refused to treat the Commission's amendatory order of February 11, 1947 or its approval of the escrow agreement as a rejection of Commission's statutory role—the order (according to the court below) being merely a device to expedite execution of the plan of reorganization after the requisite statutory approval. In view of its affirmance of the District Court's disapproval of the plan as unfair and inequitable, the court below directed the Commission to reconsider the problem presented in the light of its opinion or "procure the review" thereof by this Court (R. 140).

Summary of Argument.

I.

The district court and the Commission exercise cooperative and complementary roles under section 11(e) of the Act. Such view is consistent with the legislative history of the Act and receives support from the language of the Act and analogous reorganization statutes and precedents. That statutory scheme should not be distorted by a judicial urge for power in disregard of the legislative division of function between the Commission and the district court. The section 11(e) court is not, as the court below states, a traditional court of equity; nor for that matter do we contend that it is *only* a court of review. Rather do we urge that the powers of the 11(e) court consist of both equity and review functions.

The Commission and the court, we submit, work cooperatively in the process of simplification. That cooperation envisages the recognition by the district court of the sifting procedure of an expert administrative body and the performance of judicial duty in that light with adequate regard for the findings and

judgment of the Commission. On such approach the district court should sustain and not reject the administrative findings and determination of fairness, as well as value and equivalence, if supported by substantial evidence and having warrant in the record and the law. The district court may not substitute its judgment (except for a plain abuse of discretion) for that of the Commission by its own discretionary weighing of alleged "colloquial" or "special" equities. Therefore, the rejection by the court below of the doctrines of substantial evidence and administrative finality as limitations upon the scope of the district court's power under section 11(e), we contend, is erroneous.

The limitation upon the district court's review function in passing upon a plan under section 11(e) accords with the prevailing authorities under the Act and with the decisional and statutory trends in the general field of administrative law and squares with the corresponding responsibility of the court of appeals under section 24(a) in the direct review of administrative action affecting section 11(e) plans. The recognition of the coordinate roles of the district court and the court of appeals under sections 11(e) and 24(a) respectively, in the light of the Commission's primary responsibility for the approval of all plans regardless of enforcement will greatly facilitate the uniform and expeditious administration of the Act.

II.

The Commission and the courts below properly applied the principle of the *Otis* case that the charter liquidation preferences are not conclusive as to the *quantum* of the participation to be accorded security holders in simplifications or reorganizations under the

Act. The Engineers' charter of 1925 could no more contemplate the action required than the 1929 charter involved in the *Otis* case. Furthermore, *Congress* did not intend the exercise of its power to simplify, to mature the liquidation preferences. That view is equally applicable, regardless of the method of simplification (merger, dissolution, liquidation) or the procedural sequence thereof. The *Otis* case makes clear that the security holders' participations are to be measured on a going concern basis and "not as though a liquidation were taking place". If however, this court should conclude that the charter liquidation provisions are operative, it is then urged that the voluntary liquidation preferences (and not the involuntary) should be determinative under the circumstances of the instant case. In any event, even if the voluntary liquiidation provisions are not determinative, the involuntary liquidation preference, if applicable, must not stand in the way of Congressional objectives and cannot control in the determination of a fair and equitable plan under the statute and the constitution.

III.

The Commission properly applied the principle of full priority and the correct technique under the fair and equitable standard in the valuation of the respective interests of the preferred and common stockholders. Under the plan the Commission approved a cash payment to the preferred stockholders for the surrender of their interests in the Company and the receipt by the common of the residual assets in exchange for their intgrests. In reaching this conclusion, the Commission deemed the charter provisions not conclusive as to the measure of the respective

participations but proceeded with a detailed valuation of the preferred stock on a going concern basis, considering all the provisions of the charter applicable to the preferred, such as dividend rate, call price and liquidation preference, and making a careful financial analysis of the Company with particular regard to the asset and earnings coverage of the preferred. Such approach accords with the principles enunciated in the *Otis* case. Under the *Otis* case, the principle of full priority requires that each security holder receive the equitable equivalent of the rights surrendered on a going concern basis. This bundle of rights must be valued as though in a continuing enterprise or a going concern apart from the reorganization. In the evaluation thereof the liquidation preferences are not matured by the impact of the Act. In both the *Otis* and the instant case, the two classes of stockholders were given the equitable equivalents of their participations on a going concern basis and in neither was the Act permitted to mature the liquidation claim which might be greater or less than the existing values. Contrary to this approach, the court below presumably recognizes the full priority rule but erroneously requires the Commission to measure the respective participations on the basis of a nebulous standard of so-called "colloquial" or "substantial" equities. This ambiguous standard substitutes for the well-defined rights of the security holders such indefinite alleged "colloquial" equities as issue price and market history, retention of earnings and conjectural losses from past divestments under the Act. The views of the courts below stress supposed equities which are both factually unsound and legally unimportant and involve a veering away from elements such as current rights to earnings and assets which

are entitled to primary weight. These substitute criteria for the determination of the respective participations by irrelevant factors extrinsic to the contract rights of the security holders, afford no rational basis for the uniform administration of the Act. In requiring the valuation "as if the Act had never been passed" (R. 35), the court below has not applied the principle of valuation on a going concern basis as enunciated in the *Otis* case. In addition, the valuation directed by the court below makes necessary a retroactive readjustment of profits and losses since the passage of the Act and thus imposes an insuperable burden upon the Commission.

The court below also erroneously required a dollar valuation of the common stock interest where the preferred stockholders receive cash and the common stockholders, by choice, receive residual assets. In the instant case, the Commission valued the preferred on a going concern basis, leaving the residual interest for the common. The preferred stockholders were found entitled, according to the Commission, to amounts at least equal to their redemption prices as the equitable equivalent of the rights surrendered and the common were entitled to the remaining assets in exchange for their rights, there being no need to place a dollar value on the residual interest. In thus valuing the preferred stocks, the Commission has followed the usual technique in valuing senior securities upon retirement unaccompanied by a liquidation of the company, in which event the junior securities receive the residual assets as in the instant case. Dollar valuation would serve no useful purpose in the instant case where the Commission has expressly found that "the plan is fair to the common stockholders" and that the "retirement of the preferred stockholders will be of immediate benefit to the common stockholders".

The Commission has applied the correct technique in the valuation of the preferred in the instant case, where at the choice of the common stock management, the preferred are eliminated by a cash payment. This method of compliance with the Act by the elimination of the preferred by a cash payment, is far different from the situation where an indefinite projection of earning capacity is made and apportioned since they involve the formation of a new company and the allocation of the interests therein. In any event, the Commission took into account such criteria as earning records, asset coverage, earning capacity, etc., all of which provide a proper basis for valuation. The facts of this case amply warrant the conclusion reached by the Commission.

Other criticisms directed by the court below at the Commission are also based upon a misconception of the correct principles and techniques of valuation and consequently are erroneous.

IV.

The court below also committed two other errors. First, it disregarded a change in the plan by the District Court. Over objection, the District Court by its order altered the plan through the creation of an escrow so that the dividend rights of the preferred stockholders were terminated prior to the receipt of the full amount of the current value of their stock as limited by the call prices. Such premature termination is unwarranted. In the second place, the procedure whereby the plan was modified or amended to provide such escrow was irregular in that it was accomplished without notice and an opportunity to be heard. This arbitrary procedure is contrary to the statute and the constitution.

V.

Assuming *arguendo* that this Court concludes that the Commission has erred in its valuation, then the question of remand comes to the fore. On the assumption of a proper disapproval of the plan, the court below correctly directed a remand to the Commission for appropriate action. The District Court has no power to amend the plan and reduce the participation of the preferred stockholders, and then to approve and enforce the plan as so amended. As the issue under such circumstances is one of valuation, remand to the Commission for its determination is necessary.

ARGUMENT.

I. The Court Below Erred in Holding That the District Court Has the Power to Reject the Commission's Findings and Determinations of Value, Amply Supported by the Record, on the Basis of a Discretionary Weighing of Alleged "Colloquial" Equities and in Disregard of the Doctrines of Substantial Evidence and Administrative Finality.

A short recital of the views of the Commission and the two courts below will serve to focus attention upon the issue. After consideration of all charter provisions, financial analysis (R. 62a) and reference to undisputed expert testimony as to the intrinsic values of the preferred, the Commission found that the preferred stocks had current investment values at least equal to their respective call prices[25] and

[25] The undisputed testimony of the expert witnesses indicated that the fair investment values of the preferred were considerably in excess of the call prices but the Commission was of the opinion that the call prices placed a ceiling on the right of the preferred to participate in the distribution of the assets. The effect of the charter provision is discussed in point II below and the valuation process in III below.

that fairness and equity required the payment to the preferred of such amounts on retirement (or $105 for the $5. preferred and $110 for both the $5.50 and $6. preferred) (R. 67a-68a) instead of $100 per share for each series.

On the other hand, the District Court, as examination of its opinion and findings[26] discloses, ignored the Commission's findings with respect to the fairness of the plan and more particularly with respect to its determination of value and equivalence and weighed various alleged "colloquial" equities in its own scales, and, arrived at the conclusion that "because of the provisions for the payment of premium,[27] the plan does not meet the requirements of fairness and equity" (R. 292a). In other words, the District Court shifted emphasis from the group of elements which the Commission considered important to another group of circumstances—alleged "colloquial" equities[28] which the Commission undoubtedly considered but did not deem particularly significant.

On the appeal, the court below held "that a Section 11(e) court must exercise its full and independent judgment as to the fairness and equity of the plan" (R. 33) and sustained the District Court's rejection

[26] It is clear that the District Court rejected "such findings and conclusions of the Commission [that] relate to or bear upon the payments of the premiums or are inconsistent with the Opinion dated May 15, 1947 or with the findings and conclusions of law filed with said Order" (R. 293a-294a). Likewise, it can hardly be fairly claimed that the District Court's findings, Nos. 36-38 (R. 307a-308a) are consistent with the Commission's findings (R. 69a-72a).

[27] This characterization as "premium" merely begs the question, since the charter provisions were deemed not controlling.

[28] The District Court took the position that certain "colloquial" equities such as the issue price of the preferred stocks (its market history), alleged losses due to divestments, the past "sacrifices" of the common stock because of retained earnings, etc., "look toward the non-payment of the premium" (R. 288a *et seq.*).

of the Commission's findings on the basis of its own discretionary weighing of alleged equities in the exercise of its independent judgment (R. 34). Furthermore, it denied the applicability of the substantial evidence doctrine to the Commission's findings and refused to hold that the Commission's conclusions may not be disturbed by a section 11(e) court unless they lack "rational or statutory foundation" or that the Commission's judgment may not be reversed by such court except for a clear abuse of discretion (R. 33, 34).

The issue thus presented may be stated in a variety of ways. One statement of the question is whether a section 11(e) court is free to reject the findings or determination of the Commission, respecting the fairness of a plan (or its valuation of a security interest or the equivalence thereof) when based upon substantial evidence and possessing a rational basis and proper statutory foundation. Stated in another way, it is the extent to which a district court which has been requested to enforce a plan approved by the Commission pursuant to section 11(e) of the Act, may substitute its judgment as to the fairness of a plan for that of the Commission. Stated more narrowly, the question posed is whether a district court in an 11(e) enforcement proceeding is authorized to reject a finding of fairness of the Commission (which is based upon evidence, the sufficiency of which is not in dispute) on the basis of a discretionary weighing of alleged "colloquial" equities, without regard to the limitations upon the scope of review which this Court has held to apply to a court of appeals in direct review under section 24(a) of the Act. Simply put, the dispute in this aspect of the case, affects the treatment to be accorded the Com-

mission's findings or determination of fairness by a section 11(e) court.

Basic to this issue is the relative function of the section 11(e) court[29] vis-a-vis the Commission in passing upon the fairness of a plan. The legislative history, when impartially examined, will, we contend, disclose a Congressional intention to make an extensive grant of power to the Commission and to establish the district court and the Commission in complementary and cooperative roles. This view of the complementary functions of the court and Commission under section 11(e) of the Act is borne out by the provisions of the Act and is consistent with analogous precedents in the law of reorganization. Full force and effect to such cooperative role requires the court to give considerable weight to the action of the Commission, and to sustain the Commission's findings if supported by substantial evidence and having warrant in the record and the law and not to reverse the Commission's judgment except for a plain abuse of discretion. Consequently, we urge that the court below erroneously defined the relative functions of the section 11(e) court and Commission in the light of a strong predilection for the judicial power and erred by rejecting the doctrines of substantial evidence and administrative finality in its delineation of the scope of review by a section 11(e) court.

A. The Court Below Examined the Legislative History, the Provision of the Act and the Law of Reorganization With a too Jealous Regard for the Judicial Role.

The provisions of section 11 as well as its legislative history and the law of reorganizations must *not* be

[29] The court below indicated that a "question of law which * * * goes to the heart of the instant controversy" concerns the "extent of the "power conferred on the district courts of the United States by the Act" (R. 20).

"read * * * through the distorting lenses of inapplicable judicial doctrine".[30] In its approach to the problem of the status of the district court under section 11(e), the court below postulated a premise, to which it strongly adhered, that a "section 11(e) court must function as an equity reorganization tribunal with the powers and functions of such a court, and not a review court" (R. 30), and must exercise the "general equity jurisdiction of the reorganization tribunal" (R. 29). Rigorous adherence to that concept of a traditional equity reorganization court, in the "classical" pattern permeated the views of the court below and caused it to stray outside its province. It examined in this distorted light the legislative history, the provisions of the Act, and the law of reorganization. As will hereafter appear, a proper analysis and review in the foregoing respects, will demonstrate the error of the conclusions by the court below. There evolves the concept of the cooperative role of the Commission and the court under section 11(e), which envisages judicial action aided by the sifting procedure of the Commission and predicated upon the Commission's initial determination.

1. Congress intended the court and the Commission to perform complementary roles and did not intend the section 11(e) court to act as a "classic" court of equity.

Congress has provided the basic outline or machinery in section 11 of the Act for the course the integration and simplification of holding company systems is to take. It established standards of administration and placed in the hands of the Commission the primary responsibility for the development of a fair and equitable plan. Upon examination to

[30] *F. C. C. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 144 (1940).

learn the purpose of its enactment, section 11 reveals the intention of Congress to place simplification under the aegis of the Commission, subject to a degree of participation by the Court. Cf. *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 468 (1943).

Proper perspective of the Congressional division of function between the district court and Commission can more readily be discerned from a survey of the entire legislative history of section 11 of the Act rather than from reference to isolated segments of that history. The original bill (S. 1725)[31] which was introduced on February 6, 1935, was drafted so as to lodge with the Commission the direction of the process of reorganization, with limited participation by the court. The primary role of the Commission and the subordinate status of the court is evident from the provisions of the original bill.[32] That view finds

[31] Title I of the Public Utility Holding Company Bill S. 1725 is identical, except for section numbers, with Title I of the House bill (H. R. 5423), which was also introduced on February 6, 1935, in the House of Representatives by Congressman Rayburn [Hearings Before the Senate Committee on Interstate Commerce (74th Cong., 1st Sess.), p. 49]. It should be noted that Title II dealt with amendments to the Federal Water Power Act.

Subsections (c) and (d) of S. 1725 have been excerpted and included in Appendix "B" below.

[32] In general, section 11 of the original bill provided as follows: subsection (a) required the essential preliminary studies by the Commission of existing holding company systems. Subsection (b) dealt with integration and simplification orders by the Commission after hearings. Subsection (c) authorized the Commission to apply to a federal court for enforcement of its 11(b) orders, permitted the court to take exclusive jurisdiction of the company assets and made it the duty of the court to appoint the Commission as sole trustee and empowered the Commission, with the approval of the court and subject to terms and conditions prescribed by the court, to dispose thereof in accordance with a reorganization plan approved by the Commission after hearing (prepared in the first instance by the Commission or subject to its rules by any *bona fide* interested person). Subsection (d) authorized the Commission to *institute* proceedings for reorganiza-

[Footnote continued on following page.]

support in the analysis of this section of the original bill.[33] After hearings before both the House and Senate committees, the bill was rewritten and a substitute bill introduced (S. 2796). Title I[34] of the Senate version of the substitute bill,[35] which eventually became known as the Public Utility Holding Company Act, added to section 11 the provision for voluntary readjustment, which was apparently patterned after section 77 of the Bankruptcy Act.[36]

The renumbered subsections (d)[37] and (f) of section 11 of the substitute bill, formerly subsections (c) and (d), remained substantially unchanged. The new subsection (e) contained provision for the mandatory appointment of the Commission as trustee, similar to that in subsections (d) and (f) and for like authority in the court and Commission as under subsec-

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[Footnote continued from preceding page.]

tion under section 77B for any insolvent registered company and required the appointment of the Commission as sole trustee in any such proceeding or otherwise and made the reorganization plan effective only upon the approval by the Commission after hearing and prior to submission to the court (such plan to be prepared in the first instance by the Commission or subject to its rules by any *bona fide* interested party) and subjected the payment of all fees to Commission approval.

Subsections (c) and (d) of S. 1725, which are set forth in Appendix "B", later became subsections (d) and (f) respectively, of the substitute bill, S. 2796 (74th Cong., 1st Sess.) and eventually of the Act.

[33] The analysis of subsections (c) and (d) have been excerpted from the report as contained in the Hearings before the Senate Committee on Interstate Commerce (74th Cong., 1st Sess.), p. 49 and included in Appendix "B" below.

[34] Title II of S. 2796, as did S. 1725, dealt with amendments to the Federal Water Power Act.

[35] The provisions of section 11(d), (e) and (f) of S. 2796 are printed in Appendix "C", *infra*, p. 173 ff.

[36] 79 Cong. Rec. 8845 (74th Cong., 1st Sess.) (Excerpts from the Congressional Debates are included in Appendix "D", *infra*, pp. 180-1).

[37] The phrase "fair and equitable" in reference to a reorganization plan was added to subsection (d).

tion (d), to approve and execute any plan,[38] but otherwise was substantially the same as the finally enacted subsection. This new provision was intended, according to the Senate Report, to provide the machinery for voluntary readjustments, which were "to be carried out under the Commission supervision".[39]

The Senate Report bears out the conclusion that the Commission under the substitute bill, as under the original bill, was to have the dominant role in the reorganization or simplification process and that in this connection subsections (d) and (e) provided alternative methods for readjusting *solvent* registered companies while subsection (f) contemplated the reorganization of *insolvent* ones.[40] It appears from the general introductory portion of the Senate Report on the substitute bill as originally introduced the remedy of divestment[41] was patterned after the "technique" established under the Sherman and Hepburn Acts, that the power of federal courts was to be used to "effect" both voluntary and involuntary readjustments and that "during all court processes" the Commission is "to act as an impartial expert economic adviser

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[38] The final sentence of subsection (e) of the substitute bill which was omitted from section 11(e) of the Act originally read as follows:

> "* * * It shall be within the authority of the court and the Commission to approve and carry out any plan under this subsection which it would be within their respective authority to approve and carry out under subsection (d) of this section." (Appendix "C", *infra*, p. 175.)

[39] See S. Rep. No. 621 (74th Cong., 1st Sess.), p. 8 (Appendix "C", *infra*, p. 177).

[40] S. Rep. No. 621 (74th Cong., 1st Sess.), p. 33 (Excerpt in Appendix "C", *infra*, pp. 178-9). The Senate Report on the substitute bill follows closely the analysis made as to these provisions in the Report on the original bill.

[41] *North American Company* v. *S. E. C.*, 327 U. S. 686, 707 (1946).

and administrative assistant."[42] These broad preliminary comments must be viewed in their proper perspective within the Senate Report and in the light of the *original provisions of the substitute bill*, and consequently must be read consistently and in a reasonable fashion with the Senate Committee's subsequent detailed statements in its sectional analysis.[43] The sectional analysis, which should by its very nature be certainly controlling, is more explicit as to the relationship of the court and Commission. From that analysis it appears that the Commission possesses the dominant role during the reorganization process both in the formulation and approval of the plan and its participation in the execution as trustee, while the introductory remarks, of general nature, merely refer broadly to the technique used and the court's power to carry out readjustments and the function of the Commission *during* the court process. In this latter connection, it is significant that the statement as to the status of the Commission follows the discussion of compulsory readjustments, covered in 11(d) so that at the very least its implications should be determined by a consideration of the provisions of subsection (d) as well as (e). Furthermore, the reference to the status of the Commission "during all court processes" appears to relate to the secondary function as mandatory trustee, assigned to the Commission under the original provisions of the substitute bill. As both subsections (d) and (e) at the time of the Senate Report provided for the mandatory appointment of the Commission as trustee in connection with the execution of the plan, it would seem that the Commission was intended to be an active participant

[42] S. Rep. No. 621 (74th Cong., 1st Sess.), pp. 13-4 (Excerpt printed in Appendix "C", *infra*, pp. 177-8).

[43] S. Rep. No. 621 (74th Cong., 1st Sess.), p. 33 (Excerpt printed in Appendix "C", *infra*, pp. 178-9).

as administrator or trustee of the company's assets in the course of simplification during the court processes. Consequently, a reasonable and consistent explanation of both passages in the Senate Committee's Report negates any legislative intention that the district court function "as in an original equity proceeding, exercising all the powers and duties inherent in a court of equity" (R. 22) like a district court under the Sherman Act. On the contrary these passages affirmatively reveal the intention that the Commission take a dominant role in the reorganization process, and in any event to act in certain respects in cooperation with the courts.

The Congressional debates and administrative interpretation do not afford such unequivocal support for the view of the court below as to the nature of the section 11(e) court, as the court below indicates. Congressional debate, particularly in the Senate, centered upon the provisions of subsection (f) empowering the Commission to institute proceedings for reorganization of insolvent companies under section 77B of the Bankruptcy Act and making mandatory the Commission's appointment as trustee (both of which were changed by amendment).[44] It was urged that the mandatory duty to appoint the Commission as trustee be changed to give the court discretion in the matter as the court had customarily exercised such administrative function. In the course of debate, Senator Wheeler tried, although apparently unsuccessfully, to convince the Senate that the restriction of the court's power of appointment did not oust the court of jurisdiction "because the court has to approve the plan, even though the Commission approves it," pointing out in addition: "In other words, there is really a double check upon the plan, the final de-

[44] 79 Cong. Rec. 8443-4, 8844-5, 8936-41, 8943 (74th Cong., 1st Sess.)

termination rests as in the past in the courts."[44a] This language, by virtue of the analytical dissection by the court below of the words and phrases therein and the attribution thereto of hidden meanings, is found to evidence the Congressional intention to grant to the district court the "traditional function of a court of equity" (R. 23). The broad sweep of the language is lost by the surgical operation which overlooks the extemporaneous nature of Senator Wheeler's remarks made on the floor of the Senate in the course of debate and consequently subjects them inappropriately to an elaborate analysis requiring the same degree of exactitude that may be justifiably applicable to the provisions of a carefully drafted statute.[45] Obviously the significance of the quoted statement can be completely altered by a shift in the stress upon the words in the sentence. Moreover, it should be noted that even where a court in passing upon administrative action performs its duty on the basis of the doctrine of substantial evidence and administrative finality, the "final determination"[46] rests in the courts, and that the phrase "as in the past" could

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[44a] 79 Cong. Rec. 8845, 74th Cong., 1st Sess. (Excerpt printed in Appendix "D", *infra*, pp. 180-1.)

[45] Apparently the difficulties of construction are doubled because of the need to interpret not only the provisions of Section 11(e), but also the language in the Congressional debates and reports. Hence doubly appropriate are the remarks of Mr. Justice Frankfurter in *Palmer* v. *Massachusetts*, 308 U. S. 79, 83 (1939), when he cautioned:

> "* * * And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. * * *"

[46] See discussion of "substantial evidence" rule as incorporated in Administrative Procedure Act, *infra*, p. 92, n. 120.

certainly as easily refer to "past" status of the court under "past" administrative law without harking back to historic origins of the court of equity. In plain language without emphasis upon words and phrases and hidden meanings, Senator Wheeler was at the time attempting to assure the Senate that the limitation upon the court's power of appointment was not too significant as in any event the court had to approve the plan before it became effective and hence still operated, as formerly, as a final check upon the Commission. Besides, this meager discussion of the relation of the Commission to the court, which was only incidental to the debates on the mandatory appointment of the trustee under subsection (f), clearly discloses the limited extent of the Congressional consideration of subsections (d) and (e) and is certainly a slender basis upon which to find a Congressional intent to bestow the full traditional equity powers upon the district court under section 11(e). The amendment to provide for judicial discretion in the appointment of a trustee of course affected the secondary function of the Commission with respect to the execution of the plan during the court process, but left untouched its primary function in connection with the approval of the plan. The removal of this restriction upon the power of the 11(e) court did not of itself convert that court into a traditional court of equity.

The administrative interpretation upon which the court below placed its reliance is an inadequate ground for its conclusion. Here again the ambiguous remarks made by former officials of the Commission at recent hearings and equivocal statements appearing in the Commission's Tenth Annual Report to Congress (R. 23-4), provide at best a tenuous support for the conception by the court below of the section

11(e) court as the traditional court of equity with all its powers. In contrast equally ambiguous statements appearing in the records of these same hearings[47] and in the same Annual Report [48] of the Commission characterize the district court as a review court. Accordingly, neither view can justifiably be deemed conclusive one way or the other.

A fair analysis of the entire legislative history, as presented above, which is apparently unaffected by administrative interpretation, discloses that subsections (d), (e) and (f) are interrelated and that the court thereunder is not solely a court of equity nor only a court of review.[49] It is not all white nor all black. It exercises both review and equity functions,

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[47] Mr. Milton H. Cohen, a former director of the Public Utilities Division of the S. E. C., on whose testimony the court below relied, stated at the same hearing: "The Commission's judgments, of course, are not final; as I pointed out, any plan is subject to *review by the United States district court* which must approve the plan as fair and equitable, and thereafter there is the right of appeal to the United States circuit court of appeals, and in appropriate cases review may be sought in the United States Supreme Court." (Italics ours.) Hearings Before the Securities Subcommittee of the House Committee on Interstate and Foreign Commerce, 79th Cong., 2nd Sess., Part 3, p. 963.

[48] Tenth Annual Report to Congress of the Securities and Exchange Commission, p. 87: "Once proceedings under Section 11 are instituted by the Commission (*or are initiated by the filing of a voluntary plan*), *full hearings* are held in which all interested parties are given the opportunity to present evidence and voice their views before the Commission. *On the basis of the record* before it and the contentions made as to the applicability of the law to the facts, the Commission issues its findings and opinion and order. All such orders are subject to full *judicial review* in the Federal courts." (Italics ours.)

[49] As Mr. Justice Douglas in *Estin* v. *Estin*, 334 U. S. 541, 545 (1948), so aptly said in another connection:

> "* * * But there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree."

under section 11(d), (e) and (f), and must work cooperatively with the Commission in the simplification or reorganization process. The function of the Commission and the court complement each other, and do not operate independently of each other.

2. Internal evidence in the Act.

The language of section 11(e) was also read by the court below through "the distorting lenses of inapplicable judicial doctrine". Various inconsistencies and absurdities and the distortion of the statutory scheme result from the conclusion, based on the phraseology of section 11(e), that Congress intended to require "the district courts in Section 11(e) proceedings to exercise in connection with the approval or disapproval of a plan the traditional powers of a court of equity in deciding that justiciable issue" (R. 25). The major items of internal evidence in the Act upon which the court below relied will be considered *seriatim* below and demonstrated to be an erroneous, insufficient or unmeritorious basis for the conclusion of the court below respecting the function of a section 11(e) court.

(a) Subsection (e) which the court below apparently analyzed in isolation[50] from the related subsections (d) and (f) of section 11 provides in part as follows:

> "* * * If * * * the Commission shall *find* such plan * * * [necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan], the Commission shall make an order approving such plan * * *. If * * * the court [* * *] shall *approve* such plan

[50] Cf. *American Power and Light Co. v. S. E. C.*, 329 U. S. 90, 104 (1946).

as fair and equitable and as appropriate to effectuate the provisions of section 11], the court as a court of equity may * * * take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; * * *." (Italics ours.) (Brackets added).

The similarity in the bracketed portion of the quoted language respecting the duties of the court and Commission is deemed by the court below to disclose a Congressional intent to impose the same duty upon both the court and Commission in determining *de novo* the fairness of a plan. However, it should be noted that even from a technical or grammatical approach, the same words are not used to describe the respective functions (as claimed by the court below) since the Commission is required to "find" while the court is to "approve". The word "find" arguably may imply the *de novo* determination of the facts, while the word "approve" seems to mean confirm or ratify—something in the nature of a review function as distinguished from a *de novo* determination. Furthermore, the sequence of events whereby approval is followed by enforcement seems to suggest the operation of the equity power *after* approval. On the other hand, it may be fairly inferred that the language imposed the duty on the court to determine compliance with the statutory standards (appropriateness and fairness), and incidental therewith to examine the Commission's findings for support by substantial evidence. Such construction of the language would establish comprehensive dichotomy (consistent with the legislative history and the trend of the law) whereby the Commission makes findings of facts as to the fairness of the plan and the district court examines the record, to ascertain the existence of substantial foundation therein for such findings and to determine

compliance of the administrative action with the statutory standards. Thus similar language in section 77 of the Bankruptcy Act, after which section 11(e) was patterned, has been construed to authorize a review function in an analogous situation.[51] Moreover, in view of the intertwining[52] of the terms "fair and equitable" with the phrase "appropriate to effecuate the provisions of Section 11" in defining the duty of the court under subsection (e) it is likely that Congress intended the same type of examination by the district court with respect to the Commission's determinations both as to fairness and equity and appropriateness to effectuate provisions of section 11(b).[53] Accordingly, since the Commission's findings relating to "appropriateness" are entitled to the greatest weight[54] and are tested primarily for warrant in law and justification in fact[55] and not on a *de novo* basis by a section 11(e) court, the same test or standard must be applied by that court to the Commission's decision as to fairness and equity.

Nor are "dissonant meanings" ascribed to the basic statutory standards of "fairness" and "appropriateness" as implied by the court below, since the section 11(e) plan must always measure up to these standards when examined by both the Commission and the district court. In this way the statutory standards re-

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[51] See *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943) (discussed *infra*, p. 83 *et seq.*).

[52] The same nexus between these two statutory standards is implicit under subsection (d), which provides for district court enforcement of an 11(b) order and the disposition of assets in accordance with a fair and equitable reorganization plan.

[53] Subsection (b) expressly provides for review of its orders under section 24, under which the Commission's 11(b) findings are conclusive if supported by substantial evidence.

[54] *In re Standard Gas & Electric Co.*, 151 F. (2d) 326, 331 (C. C. A. 3, 1945).

[55] *American Power and Light Co.* v. *S. E. C.*, 329 U. S. 90, 112-113 (1946).

ceive the same treatment throughout the subsection, while the function of the district court and the Commission differ primarily in respect to the extent of judicial re-examination of the Commission's determination. Moreover, it is not contended, as the court below implies, that the "district courts of the United States should exercise *only* the function of review" (R. 24-5). (Italics ours.) Rather was it intended that the section 11(e) court exercise the powers of both a court of review and a court of equity, depending upon the issue at stake at the time.[36] The comment of the court below that "more appropriate language could be employed" if a review function had been intended cuts both ways. It can equally be argued that "more appropriate language could be employed" if a *de novo* determination before the district court had been intended.[37]

In this connection the court below also rhetorically questions "why then, must it not be concluded that it was the Congressional intention that the district courts", like the Commission should "exercise an independent and plenary judgment in passing on the fairness and equity of the plan" (R. 25). The answer is that such conclusion is not supported by legislative history and the language of the Act and runs directly counter to Congressional intention, as evidenced in its enactments for the past quarter of

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[36] The court's powers, like its decrees, may be divisible in nature and partake of functions in different categories, such as review or *de novo*. Cf. *Estin* v. *Estin*, 334 U. S. 541, 545 (1948) (Concept of divisible divorce). Recognition thereof necessarily flows from the superimposition of the administrative agency upon the judicial hierarchy, requiring an accommodation of the latter to the former, somewhat analogous to the accommodation of the independent sovereign states to the full faith and credit clause of the Constitution.

[37] The Commission's determination could have easily been made "advisory" as under section 172 of the Bankruptcy Act (11 U. S. C., sec. 572).

a century, in establishing administrative agencies whose findings are treated as conclusive if supported by substantial evidence and are not subject to *de novo* determination by the courts.[38]

(b) The court below also discovers a "Congressional intention" to require independent, *de novo* reexamination of the fairness of a plan from the following language contained in subsection (e):

> "* * * If * * * the court * * * shall approve such plan * * *, the court as a *court of equity* may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; * * *" (Italics ours.)

The reference to the phrase "court of equity" it should be noted, is made in connection with the grant of "exclusive jurisdiction of the company and its assets wherever located" and would seem to reveal a Congressional intent to vest sole or exclusive control of the company or its assets in a particular court (so as to avoid any jurisdictional dispute) and at the same time to establish the geographical limits of that control. This analysis is not only borne out but is even further clarified by the use of almost identical phraseology in the interrelated subsection (d),[39] in a context completely divorced from any question of court approval or disapproval. From a consideration of both subsections (d) and (e), it would seem that the

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[38] *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142 ff. (1940); see Cushman, *The Independent Regulatory Commissions* (1941) pp. 474-5.

[39] Subsection (d) provides in part as follows: "* * * In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; * * *"

court was to exercise its equity powers in reference to situations outside the zone in which both the Commission and the court are to cooperate by virtue of statutory provision. Thus the section 11(e) court may exercise its equity power to protect its present, future and reserved jurisdiction by injunction.[60] While the powers of the section 11(e) court (except for a possible conflict of jurisdiction[61]) are broad in its relation with other courts, its powers are affirmatively limited in its relation with the Commission, as evidenced by the provisions for the Commission's prior approval of a plan, approval of fees, etc.[62] It is obvious that unlimited power has not been granted to the section 11(e) court.

(c) The court below also refers to the inclusion in section 11(b) of the language that "any order made under this subsection shall be subject to judicial review as provided in section 24". Admittedly these words are "apt for creating a review function", but it is also highly significant that no other subsection or section of the entire Act contains a similar reference, and yet the review of Commission action under many different sections is made nevertheless pursuant to section 24(a), including various phases of the simplification program. Consequently its absence from section 11(e) is no more significant than its omission everywhere else in the Act. It is interesting to note that the provisions of section 11(b) of

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[60] *Okin* v. *S. E. C.*, 161 F. (2d) 978 (C. C. A. 2, 1947); *In re Standard Power & Light Corp.*, 48 F. Supp. 716 (D. Del., 1943); *Illinois Iowa Power Co.* v. *North American Light & Pow. Cos.* 49 F. Supp. 276 (D. Del., 1943); *In re American Gas & Power Co.*, 55 F. Supp. 756, 761 (D. Del., 1944).

[61] For discussion of overlapping area of jurisdiction between district court under section 11(e) and court of appeals under section 24(a) see *infra*, p. 70.

[62] The powers of the Commission are further considered *infra*, pp. 61-3.

the original and substitute bills, as introduced, do not refer to review under section 24(a), nor do the Senate and House Committee Reports make any comment thereon. On the other hand, the Congressional debates disclose discussion of the vulnerability of section 11(b) orders on the theory of the *Schechter* case, in the absence of any judicial review and mention the reviewability of all orders under section 24(a).[63] Conceivably this explicit reference in section 11(b) to section 24(a) was included in the course of Congressional consideration to eliminate any doubt as to the reviewability of the Commission's 11(b) orders especially since the provisions of section 11(b) (commonly known as the "death sentence" clause) caused a great deal of public furor. The danger of such singling out for special treatment is clearly made apparent in the instant case since the general coverage of the broad language of section 24(a) is thereby rendered ambiguous and may be limited, in an unintended fashion, by a mechanical application of the doctrine of *inclusio unius exclusio alterius*.[64] This principle of statutory construction which is of course to be applied only in the absence of legislative intention should never be used to defeat any clear expression of such intention and accordingly yields in the instant case, in the face of

[63] 79 Cong. Rec. 8946-7 (74th Cong., 1st Sess.).

[64] A similar situation recently arose in connection with the hearings of 1946 on proposed amendments to the Act, one of which was to amend section 11(e) so as to add an express provision for a stay. It was quickly pointed out at the hearing in this connection that section 24(b) contained a general provision for a stay and that the inclusion, by amendment of an express provision for a stay in section 11(e) might be construed to imply its exclusion from all other portions of the statute and so operate to limit the coverage under section 24(b). Hearings Before Securities Subcommittee of House Committee on Interstate and Foreign Commerce (79th Cong., 2nd Sess., pp. 1089-94). Apparently the proposed amendment was never adopted.

the evidence of intention in the Congressional debates[65] to make all final orders of the Commission, and not merely 11(b) orders, reviewable under section 24(a). Hence the observation of the court below as to the reference in section 11(k) to section 24(a), although "interesting", affords no proper basis for determining the scope of section 24(a) nor for its conclusion as to the function of the section 11(e) court.

The absence, moreover, from section 11(e) of the sentence or its equivalent which makes the findings of the Commission as to facts conclusive, if supported by substantial evidence, is not as notable as the court below states. The omission of this sentence does not preclude a section 11(e) court from sustaining the Commission's findings of appropriateness with substantial foundation in the record, as indicated above. Besides, there are many analogous situations in which the doctrine of substantial evidence has been applied without the magical sentence[66] (as will be shown below). This principle has been evolved by recognition of the realities of the situation—the creation of an expert administrative body acting as a trier of the facts and fastens itself upon the relationship between

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[65] The following colloquy occurred between Senators Wheeler and Borah when the latter inquired as to the appealability of 11(b) orders. [79 Cong. Rec. 8946 (74th Cong., 1st Sess.)]:

"Mr. Wheeler: Yes. Every order which is made by the Commission is appealable to the courts.

"Mr. Borah: That is covered by what section?

"Mr. Wheeler: Section 24(a), line 16, page 83, which reads as follows: * * *

"Mr. Borah: In other words all these orders which would be made with reference to reorganization and so forth would be appealable to the courts?

"Mr. Wheeler: Absolutely."

[66] See cases cited, *infra*, p. 91, n. 117.

the court and the agency as a means for allocating their respective responsibilities.

(d) The use of the phrase "after notice and opportunity for hearing" in section 11(e) is stretched by the court below to signify "the manifest intention of Congress to give all persons who might be affected by the plan a day in court in an equity proceeding" (R. 26). It is difficult to see just how that particular phrase conjures up a "manifest intention" to provide affected parties with "a day in court in an equity proceeding". Strangely enough, that same special significance is not attributed by the court below to the identical phrase appearing in section 11(e) in connection with the proceedings before the Commission. Nor for that matter does the identical requirement of notice and an opportunity for hearing in section 11(b) give rise to any unusual consequence or interpretation. Likewise the logic of the court's analysis when applied to section 11(d) leads to the absurd conclusion that "a day in court in an equity proceeding" is *not* intended to be available to parties affected in section 11(d) enforcement proceedings in view of the absence therefrom of any express provision for notice and hearing before the district court. Such construction would obviously result in a ridiculous situation whereby the two enforcement courts under sections 11(d) and (e) respectively would function differently and possess a different status on the same issue. Such a consequence would be at variance with the legislative history which evidences the interrelationship between these two enforcement courts. Clearly the provision for notice and opportunity for hearing must be implied in section 11(d) for the sake of consistency with section 11(e) and therefore its presence or absence is not necessarily conclusive as to the nature of

the court hearing. Moreover, any innuendo in the quoted phraseology that only an equity proceeding can properly protect the rights of affected parties is unwarranted. In fact, Congress could have completely ousted the district court of jurisdiction and constitutionally lodged sole responsibility for the supervision of the entire simplification process with the Commission, subject to review by the appellate courts.[67] In any event, the courts do not have the sole burden of carrying out the Act as the Commission has been entrusted with a share of that responsibility. Under such circumstances and particularly since all plans must be approved by the Commission while all need not necessarily be the subject of enforcement by the section 11(e) courts, one may question the accuracy of the court's statement that "Many, if not most, of these persons [affected by the plan] will not have appeared before the Commission" (R. 26). No factual or documentary support is furnished for the gratuitous statement made by the court below. Contrariwise, the reverse is more apt to be true, namely, that most of the persons affected by the plan will have appeared before the Commission.[68]

(e) Time and again, as has been indicated, the court below ascertains Congressional intention respecting the function of a section 11(e) court on the basis of unwarranted inferences drawn from insupportable or erroneous premises. This approach is again exemplified by the tenuous and disputable inferences of

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[67] Such provision for notice and hearing, although present in section 77 of the Bankruptcy Act, has not prevented the district courts from exercising limited review functions on certain issues. See *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943).

[68] Other equally questionable statements of the court below respecting the receipt of evidence *aliunde* the Commission's record will be discussed, *infra*, at p. 73 *et seq.*

Congressional intention not to limit the district court to a review function, which the court below draws from the absence of a statutory provision for a vote upon a proposed plan. In the language of the court below:

> "It seems improbable to us that Congress intended that the district courts of the United States should be limited to the function of mere review under the Public Utility Holding Company Act, the only Federal reorganization statute by the terms of which security holders are not permitted to vote their approval or disapproval of a proposed plan or reorganization, *and to prevent its operation if the holders of the requisite amounts of the securities affected are not in favor of it*" (R. 26-27). (Italics ours.)

It is apparent that the court below postulates as its basic premise, upon which its inference is based, that all federal reorganization statutes except the Public Utility Holding Company Act permit security holders to vote upon a proposed plan and to prevent its operation by their dissent or veto.

The main thrust of this statement by the court below which is italicized in the quotation, *supra*, relates to the supposed power of dissenting security holders to veto any reorganization plan, and so act as an additional check. That major premise, upon which the court below relied, is erroneous; therefore the inference drawn therefrom respecting the Congressional intention not to limit the district court to a review function is also fallacious. Reference to the Bankruptcy Act discloses that express provision has existed since the adoption of an amendment in 1935[69] to sec-

[69] Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C. sec. 205.

tion 77 for overriding the vote of dissenters and for authorizing confirmation of a plan despite their rejection, provided in substance that the dissenters receive fair and equitable treatment and are not reasonably justified in their rejection.[70] These "cram down" provisions[71] which permit confirmation by the courts over objection of security holders were recently held within the bankruptcy powers of Congress. *R. F. C.* v. *Denver & Rio G. W. R. Co.*, 328 U. S. 495, 533 (1946). Thus the voting requirement has been relegated to relative insignificance and a mere token existence, at least in railroad reorganizations under section 77 of the Bankruptcy Act, since fair and equitable treatment of dissenters will usually render their rejection without reasonable justification. As

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[70] Section 77(e) of the Bankruptcy Act [11 U. S. C. §205(e)] provides in pertinent part as follows:

> "Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e):* * * *" (Italics ours.)

[71] Craven and Fuller, *The 1935 Amendments of the Railroad Bankruptcy Law*, 49 Harv. L. Rev. 1254 (1936).

stated by this court in *R. F. C.* v. *Denver & Rio G. W. R. Co.*, *supra*:

> "* * * If there is a rejection, there is a reexamination of the plan to assure that those who dissent have had fair and equitable treatment. Apparently the reexamination for this treatment does not differ from that for the original court approval under the first paragraph of subsection (e). It does, however, center upon the rights of those who rejected the plan.
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> "* * * If a plan gives fair and equitable treatment to dissenters the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection. If only those elements are relied upon, as here, the rejection is not reasonably justified." (328 U. S. 534, 535).

Accordingly, the voting requirement is presently yielding to an expanding concept of the bankruptcy power under the Constitution. In any event, no vote is required where an overriding statutory policy compels the reorganization or readjustment, as under the Sherman and Hepburn Acts. E. g., *Continental Ins. Co.* v. *U. S.*, 259 U. S. 156 (1922). Strangely enough, this precedent is completely disregarded by the court below, although it provided the basic authority for the compulsory and voluntary readjustment provisions of the Act.[72] It may reasonably be concluded in the light of the legislative history and, by analogy to the precedents under the Sherman and Hepburn Acts, that the overriding policy of the Act is the basis of the omission of the voting requirement, particularly

[72] It is of interest to note that the precedents under the Sherman and Hepburn Acts are the bases for the Senate Committee's statement as to the court's power to effect readjustments, upon which the court below relies in an earlier portion of its opinion.

in view of the statutory interpolation in the reorganization process of an expert body, as the Commission, charged with the duty of protecting the rights of investors as well as the public interest. Yet, even if the precedents under the Sherman and Hepburn Acts are not fully decisive, the persuasive analogy of the 1935 amendments to section 77 of the Bankruptcy Act negates the importance of the voting requirement, and renders unwarranted any inference of Congressional intention respecting the function of the district court on the basis of the absence of a veto power of the security holders.

3. Law of reorganizations.

The court below also makes the broad claim that "The history of the law of reorganizations tends to support the view that a Section 11(e) court must function as an equity reorganization tribunal" (R. 27). This claim is not borne out by the precedents in the law of reorganization.

(a) *Precedents under section 77 of the Bankruptcy Act.*

This general conceptualistic approach places primary emphasis upon the historical origins of the reorganization process, and overlooks the recent developments in the law of railroad reorganization under the Bankruptcy Act and the current trends in the field of administrative law. The legislative history discloses that the provisions of section 11 pertaining to the relation of the district court and Commission, in the simplification or reorganization process, were patterned after the provisions of section 77 of the Bankruptcy Act (as distinguished from 77B or Chapter X) affecting the relation of the

Interstate Commerce Commission and the court. This view is reinforced upon examination of the comparable provisions of these two sections.[73] It is recognized that the district courts have definite responsibilities under section 77 of the Bankruptcy Act, and likewise definite limitations upon their action. The status of the district courts under section 77 of the Bankruptcy Act would certainly seem exaggerated, at least by innuendo, in the statement of the court below that "Congress intended the district courts of the United States, within the limitations of the statute, to function as equity reorganization courts." (R. 29). This overstatement of the district courts' position cannot be reconciled with the views of this Court in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 468 (1943), expressed as follows:

> "* * * Congress outlined the course reorganization is to follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. *When examined to learn the purpose of its enactment, § 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court.*
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> "It is clear from the discussions and the statute itself that there was recognition by everyone of the advantages of utilizing the facilities of the Commission for investigation into the many sided problems of transportation service, finance and public interest involved in even minor railroad reorganizations and utilizing the Commission's experience in these fields for the appraisals of values and the development of a plan of re-

[73] The parallel is not unexpected since the railroads and utilities have long been subjected to regulation as industries affected with the "public interest".

organization, fair to the public, creditors and stockholders. *The resulting legislation was an attempted balance between the power of the Commission and that of the court.*" (Footnotes omitted.) (Italics ours.)

Later in the same case, after discussing the limited powers of the district court with respect to issues of valuation and compatibility with public interest, this Court concluded as follows:

> "*Thus limited the district court acts concerning the plans only upon the issues specifically delegated by subsection (e). As to these, its powers are negative. It may veto the plan in its entirety but may improve it only by suggestion.* It becomes a necessary and important factor in railroad reorganization. These reorganizations may be attained only through properly coordinated action between the Commission and the court" (318 U. S. 474-5). (Italics ours.)

Thus this Court analyzes the powers of the section 77 court as negative and not affirmative at least in relation to the Interstate Commerce Commission, contrary to the court below.

Equally questionable is the further statement of the court below with respect to the function of the section 77 court vis-a-vis the Interstate Commerce Commission, on the issue of value, to the following effect:

> "* * * Though the Commission must make the primary determinations respecting the plan, including in particular those relating to valuations of railroad securities, the court must exercise its own independent judgment in approving or disapproving the plan *whether the court's rulings relate to value or to some other pertinent subject.* See *In re Erie R. Co.*, 37 F. Supp. 237, 243-5,

aff'd, 6 Cir. 133 F. 2d 730, cert. den. 320 U. S. 748" (R. 29).

The reliance by the court below upon the *Erie* case, *supra*, is misplaced for the District Court in that case clearly recognizes the limitation upon the scope of its review on a question of value when it states:

> "* * * it is my opinion that the Commission's determination of the value of the properties of the Erie and the Chicago & Erie for reorganization purposes—i. e. the total capitalization—is conclusive unless it clearly appears (1) that the Commission applied improper standards of valuation, or (2) that its finding is wholly unsupported by the evidence (citations omitted) * * *" (37 F. Supp. 244).

In any event the italicized portion of the statement (R. 29, *supra*) by the court below does not square with the views expressed as follows by this Court in the *Ecker* case, *supra*:

> "The power of the court does not extend to participation in all responsibilities of the Commission. Valuation is a function limited to the Commission, without the necessity of approval by the court. * * *
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> "* * * Congress apparently intended to leave the determination of valuation 'of any property for any purpose under this section' to the Commission. The language chosen leaves to the Commission, we think, the determination of value without the necessity of a reexamination by the court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards" (footnotes omitted) (318 U. S. 472-3).

Thus this Court clearly indicates that "judicial review does not contemplate an independent examination into valuation" by the bankruptcy court under section 77, stating that "valuation is essentially a problem for the [Interstate Commerce] Commission". Likewise the intimations of this Court are to the effect that the scope of review may be wider with respect to issues other than valuation (e. g., exclusion of claimants for lack of value), but does not contemplate an independent *de novo* determination by the district court. Certainly the description by this Court of the functions of the section 77 court cannot be reconciled with the concept of that court, as envisaged by the court below. Accordingly, the expressions of this Court in the *Ecker* and other cases[74] make it impossible to accept the conclusion of the court below with respect to the relation of the Interstate Commerce Commission and the district court under section 77 of the Bankruptcy Act that "the limitations imposed by the statute are *largely procedural,* operative in the respective fields specified by Congress to Commission and court, and *do not substantially circumscribe the general equity jurisdiction of the reorganization tribunal*" (R. 29). (Italics ours.) Therefore, as the premise of the court below respecting the function of a section 77 court, is erroneous, its inference based thereon pertaining to the function of the section 11(e) court must necessarily be fallacious.

(b) *Section 77B and Chapter X are not analogous.*

The reliance by the court below upon the analogy to and the precedents under, section 77B and Chapter X of the Bankruptcy Act for cloaking the section

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[74] *E. g., Palmer* v. *Massachusetts*, 308 U. S. 79 (1939); *Warren* v. *Palmer*, 310 U. S. 132 (1940). Also see concurring opinion in *Ecker* case, *supra*, 318 U. S. 512-13, 515.

11(e) court with the classical equity powers, has been misplaced. At the outset it must be pointed out that the provisions of section 77B of the Bankruptcy Act are substantially different from those of section 11(d), (e) or (f) of the Act, since the Commission, apart from section 11(f), exercised no functions, under section 77B and the 77B reorganizations were conducted wholly under the supervision and direction of the bankruptcy courts. Therefore, the situation under section 77B is not analogous and so provides no real guidance on the question of the function of the court vis-a-vis the Commission under section 11(e) of the Act.

Similarly, Chapter X (which is the successor to section 77B by virtue of the 1938 amendments to the Bankruptcy Act, known as the Chandler Act) affords no aid to the views espoused by the court below. Far different is the function of the Commission under Chapter X of the Bankruptcy Act than under section 11 of the Act. Its duties and powers under Chapter X are certainly more limited than under section 11. The Commission has itself described its restricted position under Chapter X in the following language:

> "In participating in proceedings under Chapter X of the Bankruptcy Act, the role of the Commission differs markedly from that under the other Acts which it administers. The Commission does not administer Chapter X. It does not initiate the proceedings, hold its own hearings, or adopt Rules and Regulations, but acts, as the representative of investors and as an aid to the Court, in a purely advisory capacity. It has no authority either to veto or to require the adoption of a plan of reorganization or to render a decision on any other issue in the proceeding. The facilities of its technical staff and its impartial recom-

mendations are placed at the services of the judge and the security holders, affording them the views of experts in a highly complex area of corporate law and finance."[75]

Thus, under Chapter X, the Commission upon the referral of a plan has the discretion to prepare a report which in any event is only "advisory". Regardless of the action or inaction of the Commission, the district court is required to determine the fairness of a plan. As there is no division of responsibility between the court and the Commission under Chapter X, the ultimate approval or disapproval of plans is left solely with the district court.

Accordingly, although the court under Chapter X may possess "the full and independent equity powers in the classical pattern of reorganization courts", it is here contended, that the significant dissimilarity between the reorganization provisions of Chapter X and those of section 11, renders inapplicable the analogy of a Chapter X court to the section 11(e) court.

This view as to the inapplicability of the Chapter X concept to determine the relation of court and Commission under section 11, is fortified by the implications of section 172 of Chapter X (11 U. S. C. sec. 572) which makes the Commission's report upon the referral of a plan, only advisory. This proviso relating to the status of the Commission's report under Chapter X, as the court below admits, may support the inference of Congressional intention that the Commission's report under section 11(d), (e) and (f) should be more than "advisory" to the district court

[75] Twelfth Annual Report of the Securities and Exchange Commission, June 30, 1946, pp. 81-2. Such administrative interpretation is entitled to weight by the courts.

in passing upon the fairness and equity of a plan.[76] That inference is strengthened by the express requirement under section 11, for the approval of a plan by the Commission, before its enforcement, which is not required by section 172 of the Bankruptcy Act.

At this point the impact of section 11(f) of the Act upon sections 172 and 174 of Chapter X (11 U. S. C. secs. 572, 574) sheds light upon the status of the court under section 11(e). Thus, it would seem from an examination of provisions of the two statutes that the mandatory requirements of submission to, hearing before, and approval for fairness by, the Commission before submission to the court, stem primarily from the provisions of section 11(f) rather than sections 172 and 174, as the court below seems to imply (R. 28). Such construction would accord with the legislative history of the Holding Company Act and the express provisions of section 11(f), which discloses a Congressional intention to achieve the overriding policy of the Act with respect to both solvent and insolvent registered companies. In effect, section 11(f) would seem to project the Commission into the reorganization of insolvent registered holding companies, whether under Section 77B or its successor, Chapter X, in substantially the same position that the Commission occupies with respect to the readjustment or simplification of solvent registered companies under sections 11(d) and (e). In other words, the status of the S. E. C. under section 11(f) when projected into Chapter X closely parallels that of the I. C. C. under section 77 of the Bankruptcy Act; as section 11(f) is in substance a miniature reor-

[76] R. 28. The Chandler Act, enacted three years after the Holding Company Act, does not evidence a Congressional intention to modify or repeal the provisions of section 11(f). Moreover, it is well settled that repeals by implication are not favored.

ganization statute. Such specific statute as the Holding Company Act, which clearly contemplated the exercise by the Commission of functions in connection with bankruptcy reorganizations of insolvent registered companies, should not be unduly restricted by the general and broad provisions of the Bankruptcy Act, which affect all types of insolvent business corporations. Possibly a consistent construction of the provisions of both acts may be achieved by carefully marking out the different areas of operation by the Commission in terms of the issue at stake—divestment or insolvency. In any event, the accommodation of section 11(f) to the provisions of the Bankruptcy Act must not be made at the expense of the Holding Company Act, and certainly not at the expense of any part of section 11(e). Therefore the views expressed in *In re Midland United Co.*, 58 F. Supp. 667 (D. Del. 1944), which reflect an unwarranted expansion of the Bankruptcy Act rather than the accommodation of, the two acts to each other, must be rejected to that extent. In that case, Judge Biggs, who wrote the opinion for the court below in the instant case, was then sitting as District Judge and was called upon to determine the functions of a district court under section 174 of the Bankruptcy Act in relation to the Commission's function under section 11(f) of the Holding Company Act. He noted the review restrictions contained in section 24(a) of the Holding Company Act, but refused to read them into section 174 of the Bankruptcy Act because the two acts were not in *pari materia*,[77] and expressed the view that the district court under section 174 must exercise its independent judgment in approving a plan. At least the converse should be equally true,

[77] 58 F. Supp. 683, n. 15.

namely that the interpretation placed upon section 174 of the Bankruptcy Act should not be read into section 11(f), and certainly not into section 11(e), of the Holding Company Act. Consequently the *Midland* case in effect represents an unwarranted intrusion of Chapter X of the Bankruptcy Act upon the Commission's function under section 11(f), which the court below now seeks to extend to the Commission's function under section 11(e). Such extension would result in a distortion of the statutory scheme.

In this manner the court below has attempted to pull itself up by its own boot-straps, compound its own erroneous interpretation, and extend unduly the effect thereof. This is but another instance in which the court below has applied unreasonably and mechanically its views as to the classical court of equity to the overlapping provisions of the Holding Company and Bankruptcy Acts.

The status of the Commission under section 11 of the Holding Company Act, as indicated above, provides a striking contrast with its position under Chapter X, and is even more dignified, in certain respects, than that of the ICC under section 77. Thus, while under both section 77 and Chapter X of the Bankruptcy Act the proceeding originates in the district court, the proceedings under the Act, except for insolvency situations within the coverage of section 11(f) which should be accommodated to the provisions of the Bankruptcy Act, are instituted by the Commission and heard, if at all, by the district court upon the administrative record. The Act expressly provides for public hearings before the Commission and the maintenance of appropriate records thereof.[78] On the substantive aspect no plan under

[78] Section 19 of the Act, 15 U. S. C., §79(s) (Appendix "A" *infra*, pp. 166-7).

the provisions of section 11(d), (e) and (f) can become effective without the approval of the Commission after an opportunity for hearing and prior to submission to the court. Under subsection (e) a registered holding company may, subject to the rules and regulations of the Commission, propose the plan, while under subsections (d) and (f) a reorganization plan may be proposed in the first instance by the Commission or subject to its rules and regulations, by a *bona fide* interested party. In connection with the appointment of a trusteee or a receiver under section 11(d), (e) and (f) it appears that the Commission is to be notified and given an opportunity to be heard before the appointment of such trustee or receiver, and cannot be so appointed without its "express consent". Lastly, the Commission may, in accordance with its rules and regulations, require all fees paid in connection with "any reorganization, dissolution, liquidation, bankruptcy or receivership, in such proceeding" to be "subject to approval by the Commission".

The foregoing provisions of the Act establish at one and the same time the restrictions upon the usual powers of a court of equity and the division of function between the court and the Commission under section 11 of the Act. Thus Congress has assigned definite responsibilities to the district court and likewise made a very broad grant of power to the Commission.[79] The whole scheme of Section 11 leaves no doubt that Congress did not mean to grant to the district court the same scope that it may have historically had as a court of equity. In view of the legislative history of section 11 and the extent to which section 11 made judicial action dependent upon

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[79] *In re Standard Gas & Electric Co.*, 151 F. (2d) 326, 331 (C. C. A. 3, 1945).

approval by the Commission, it would violate the traditional respect of Congress for the administrative processes to imply the power, in a district court, to ignore determinations of value and fairness, by the administrative agency that has received a broad grant of power in the premises. Congress appears to have intended that the judicial functions of the section 11(e) court and the administrative functions of the Commission work cooperatively in simplifications.[80] Accordingly, the district court must not be permitted to exercise its powers independently of the Commission's action and thereby to impinge upon the function of the Commission.

The foregoing analysis discloses that the court below has been viewing the section 11(e) court through the distorting lenses of the inapplicable concept of the traditional court of equity. The legislative history, the provisions of the Act and the law of reorganizations do not support the determination of the court below, except if reviewed in the light of the predilection of the court below for the inapplicable judicial doctrine of the traditional court of equity and apparently an overwhelming desire to protect the judicial power. Such wholesale transplantation of that concept by the court below, which plays havoc with the statutory scheme of section 11, may be attributed to its failure to observe the admonition of this Court in *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-144 (1940), when, in commenting upon the relation between court and agency under another federal statute, it stated as follows:

> "Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less nar-

[80] Cf. *Warren* v. *Palmer*, 310 U. S. 132, 138 (1940).

rowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those. *To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process.* That this movement was natural and its extension inevitable, was a quarter century ago the opinion of eminent spokesmen of the law. *Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims*—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. *These differences in origin and function preclude wholesale transplantation of the rules* of procedure, trial and *review* which have evolved from the history and experience of courts. * * *" (Italics ours.)

Due regard for the proper distribution made by Congress of legal authority as between two law-enforcing agencies of government, the administrative

and judicial, is required.[81] Each has been entrusted with its share of the responsibility for carrying out the Act. The section 11(e) court and the Commission are not totally independent and unrelated instrumentalities, but exercise roles complementary to each other and can achieve the objectives of the Act only through cooperative action.[82] That analysis, despite the contrary views of the court below, stems from the language of section 11 of the Act, and is fortified by its legislative history and analogous precedents in the law of reorganizations. Moreover, if the respective roles of the Commission and the section 11(e) court have not been sharply defined in every detail by Congress and must be spelled out by the judicial process, extreme care must be exercised lest in the course of the delineation the respective functions of the Commission and court become confused and distorted. The court below interpolated its notions of policy in the interstices of the legislative provisions and upset the statutory scheme because of a jealous predilection for the judicial role, in complete disregard of the legislative division of functions between the Commission and the section 11(e) court.

The cooperative action envisaged entails a recognition of the proper relation of the court to the Commission and requires the judicial function to be performed in the light of, and with due regard for, the administrative action. By no means does such view contemplate a *de novo* judicial determination and a disregard of the Commission's action. Rather, the scope of the district court's function is to re-examine, on the basis of the administrative record the Commis-

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[81] *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407, 441 (1942).

[82] *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142 (1940).

sion's determination of value and fairness to see that it has warrant in the record and in the law. That conclusion, as will be demonstrated below, accords with the correct analysis of interrelated sections of the statute and is supported by a preponderance of the decisions on this question.

B. The District Court's *De Novo* Approval of an 11(e) Plan Is Not a Prerequisite to Its Consummation.

It has been pointed out above that the functions of the 11(e) court are limited by the terms of the statute. Especially significant in this connection is the fact that there is no requirement under the Act for the approval in all instances of the district court prior to the consummation of the plan, while express provision makes mandatory the approval of the *Commission* in every case before a plan can become effective [subsections (d); (e) and (f)]. Such prior approval of the Commission is necessary whether the proceeding originates with the Commission [under 11(d) or (e)] or with the bankruptcy court as contemplated under 11(f) (closely analogous to a railroad reorganization under section 77 of the Bankruptcy Act). Therefore recourse to the district court is had under section 11(e) *only* if the company *in its discretion* requests such action. In fact, *there may never be any approval, but the Commission's. Commonwealth and Southern Corp.* v. *S. E. C.*, 134 F. (2d) 747, 751 (C. C. A. 3, 1943); *Phillips* v. *S. E. C.*, 153 F. (2d) 27, 29-30 (C. C. A. 2, 1946), cert. den. 328 U. S. 860 (1946). Thus, in the *Commonwealth* case, *supra*, the statement was made:

> "* * * If the plan is one which can be carried out by the sole action of the parties thereto no further proceedings are needed."

Similarly, in the *Phillips* case, *supra*, the Second Circuit pointed out:

> "* * * And in the face of the very clearly permissive wording of the statute, we are not disposed to strain for an interpretation of the statute which will force unneeded enforcement proceedings."

In addition, the proceeding before the Commission for the approval of a plan is comparable to a "trial", surrounded, in compliance with the due process requirements of the Constitution, with the usual safeguards of notice and an opportunity to be heard, public hearings and the maintenance of appropriate records.

In view of this limited participation of the district court in the approval of a plan under section 11(e) [and (d)] as contrasted with the affirmative requirement of Commission approval in all instances and the "trial" nature of the proceeding before the Commission, it is submitted that the district court's independent duty in the event of resort to it does not extend to making a *de novo* determination as to the fairness of a plan presented for enforcement.

If a district court in a section 11(e) proceeding is authorized to consider the matter *de novo* and in addition is permitted to substitute its conclusions for the determination of the Commission, and if the court's "independent" judgment in such case is to prevail, there would be little use in retaining the Commission. This process, if permitted, would only duplicate the uncertainty of any particular case and would bring it out at the end of the administrative stage of the proceedings with nothing settled which might not be overruled because a district judge might take a different view of the evidence. After the Commission has spoken, the whole case would still be as open, and

the nature of the ultimate decision as uncertain, as if no proceedings had yet been had. Such a hazard is not one which the security holders ought fairly to be called upon to bear.[83] Congress never contemplated any such result.

C. Section 11(e) Offers a Method of Review Alternative to That Under Section 24(a).

The view as to the limited nature of the functions of a section 11(e) court is fortified by the express provision for direct review by a court of appeals under section 24(a). This division or allocation of the judicial function (for which no analogy exists under section 77 and 77B or its successor, Chapter X, of the Bankruptcy Act) establishes exclusive as well as overlapping areas for the jurisdiction of each court but it is by no means contended that the section 11(e) and section 24(a) courts possess or exercise identical functions.[84] On the other hand, it is seriously urged that these two courts in the overlapping area of their activities exercise a similar review function. Thus in this penumbral zone under sections 11(e) and 24(a), the two courts' functions are coordinate and the proceedings under these sections are alternate avenues for the re-examination of administrative action under section 11 of the Act. Strong support for this conclusion is afforded by virtue of the reliance in both of these proceedings upon the administrative record and

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[83] See Dickinson, *Administrative Justice and The Supremacy of Law* (1927), p. 202.

[84] Thus while the section 24(a) court reviews a broad variety of rules, regulations and final orders of the Commission (many of which never reached a district court), the section 11(e) court exercises both review and equity powers. In fact the differences in phraseology in sections 11(e) and 24(a) may well be ascribed to the absence of complete identity in the functions to be performed by the two courts. Sections 11(e) and 24(a) are printed in Appendix "A", *infra*, pp. 163-5 and 167-8, respectively.

by a comparison of the relative powers of the respective courts therein.

1. Fortuitous selection of review procedure.

Verbal differences in sections 11(c) and 24(a)[85] may be attributed to the duality or admixture of the functions to be performed thereunder by the respective courts and in any event should be interpreted so as to give recognition to the manifest desire of Congress in establishing an expert body to deal with the varied and complex situations under the Act, to secure a uniform administration of the statute.[86] The ultimate purpose of Congress is to be achieved, if possible, and not be frustrated by blind adherence to mere words. Thus in *U. S.* v. *American Trucking Association*, 310 U. S. 534, 543 (1940), this Court, speaking through Mr. Justice Reed, said:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even

[85] Section 24(a), applicable to the court of appeals: "Upon the filing of such transcript such court shall have exclusive jurisdiction to *affirm, modify, or set aside* such order, in whole or in part * * *. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." (Italics ours.)

Section 11(c), applicable to the district court: "If, upon any such application, the court, after notice and an opportunity for hearing, shall *approve* such plan as fair and equitable * * *." (Italics ours.)

[86] Cf. *Dobson* v. *Commissioner*, 320 U. S. 489 (1943).

when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose rather than the literal words."

Whether an 11(e) plan is tested first by a district court is entirely fortuitous. Of course when an 11(e) enforcement proceeding is pending, a court of appeals will not because of judicial comity, pass upon a petition for review.[87] That situation of potential conflict in jurisdiction[88] implicitly identifies the overlapping area in which the 11(e) and 24(a) courts are coordinate and perform the same function. Furthermore, it is possible that an 11(e) plan may be passed upon by the court of appeals before the district court is requested to enforce the plan.[89] In that

[87] *Phillips* v. *S. E. C.*, 153 F. (2d) 27 (C. C. A. 2, 1946), cert. den. 328 U. S. 860; *Okin* v. *S. E. C.*, 145 F. (2d) 206 (C. C. A. 2, 1944); *Gilbert* v. *S. E. C.*, 146 F. (2d) 513 (C. C. A. 7, 1944); *Lownsbury* v. *S. E. C.*, 151 F. (2d) 217 (C. C. A. 3, 1945).

[88] An analogous instance of potential conflict may occur when petitions for review of the same order have been filed in two different courts of appeal. E. g., *L. J. Marquis & Co.* v. *S. E. C.*, 134 F. (2d) 335 (C. C. A. 2, 1943); *Columbia Oil & Gasoline Corp.* v. *S. E. C.*, 134 F. (2d) 265 (C. C. A. 3, 1943); *Marquis & Co.* v. *S. E. C.*, 134 F. (2d) 822 (C. C. A. 3, 1943). Cf. *Lewis* v. *S. E. C.*, not officially reported, C. C. H. Fed. Sec. Serv., Par. 90,428 (U. S. C. A. 8, 1948).

[89] See *Columbia Gas & Electric Corp.*, H. C. A. R. No. 3885 (1942), aff'd *Marquis & Co.* v. *S. E. C.*, 134 F. (2d) 822 (C. C. A. 3, 1943), plan enforced, *Application of S. E. C.*, 50 F. Supp. 965 (D. Del., 1943); *Illinois Iowa Power Co.* v. *North American Light & Power Co.*, 49 F. Supp. 277, 280 (D. Del., 1943). See also *New York Trust Co.* v. *S. E. C.*, 131 F. (2d) 274 (C. C. A. 2, 1942).

It is understandable that an 11(e) proceeding may follow a 24(a) proceeding as the equity powers of the 11(e) court may still be needed to carry out a plan, whereas the converse is not usual. Possibly to avoid conflicts in jurisdiction, the Commission sometimes conditions its orders of approval upon securing the approval of a district court. See R. 144a and *Lownsbury* v. *S. E. C.*, *supra*.

situation it would be anomalous, if the scope of review were to differ when the procedures thus afforded are alternatives.[90] A security holder's rights should be equal whether he is restricted to a 24(a) review because of the absence of 11(e) enforcement proceedings as in the *Phillips* case or he is relegated to the district court as the result of the Commission's condition attached to its order as here and as in the *Lownsbury* case. Obviously, if the district court's reviewing powers are greater than that of a court of appeals under section 24(a) it would not be true, as has been stated, that the procedural device adopted "can do no harm to the rights of a security holder".[91]

The second *Chenery*[92] case, recently decided by this Court, is an illustration of the different route that an 11(e) plan may take other than by way of the district court. In that case, after a prior remand by this Court,[93] the company filed an application for approval of an amended plan which would have allocated securities in a certain manner. The Commission denied such application by order and a petition for review of such order was entertained under section 24(a). There was no plan to enforce in the district court since the Commission had not approved it. Instead, the fairness of the proposed plan was tested

[90] *United Light & Power Co.*, 51 F. Supp. 217, 220 (D. Del., 1943): "I think it may fairly be argued that the appeal provided by Sec. 24(a) and an opportunity to be heard before the District Court under Sec. 11(e) with the concomitant right to appeal under Sec. 25 to, as here, the Third Circuit Court of Appeals, from the District Court's finding are alternative rights of appeal." See also *In re North Continent Utilities Corp.*, 61 F. Supp. 419, 421 (D. Del., 1945).

[91] 151 F. (2d) 217, 221 (C. C. A. 3, 1945).

[92] *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, rehearing den. 332 U. S. 783 (1947). See also *New York Trust Co.* v. *S. E. C.*, *supra*, n. 89.

[93] 318 U. S. 80 (1943).

by review in the Court of Appeals for the District of Columbia.

In the present case, if Engineers had persisted in its application for approval of its original plan which proposed to retire the preferred at $100 per share, the Commission would have entered an order denying the application. Then, as in the second *Chenery* case, the Company or a common stockholder could have petitioned directly to the court of appeals for review under 24(a) and the district court would not have been involved. The original plan actually contemplated this procedure (R. 1320a). The mere fact that Engineers elected to abandon its original plan should not put the Commission's order to a different test as to its validity.

Another anomalous situation is possible if there are different standards of review depending upon how the Commission's order is tested. When Engineers dissolved its subsidiary, *El Paso Electric Co. (Del.)*, H. C. A. R. No. 5499 (1944), it filed an application-declaration pursuant to sections 10 and 12 of the Act. Although the Commission applied the standards of section 11, the only way the Commission's order could have been tested would have been by way of section 24(a). Had the Company proceeded in this case as it did with *El Paso (Del.)*, again there would have been no occasion for the District Court to pass on the fairness of the Company's proposals.[94]

As a matter of fact, the plan did not contain a request for court enforcement and without such a request the District Court could not have obtained

[94] This possible mode of procedure was considered by Engineers' counsel, R. 1735a.

jurisdiction.[95] It was only after the matter was taken under advisement by the Commission and after this Court sustained the constitutionality of section 11(b)(1)[96] that the Company requested the Commission to apply for enforcement in the event the plan was approved. It is urged that the purely fortuitous entry of the district court into this proceeding should not be permitted to affect the rights of the preferred stockholders.

2. Comparable status of administrative record and relative judicial power in 11(e) and 24(a) proceedings.

The view that 11(e) and 24(a) proceedings are alternative avenues for the review of a plan is reinforced by reason of their reliance upon the same administrative record and by a comparison of the relative power of the respective courts thereunder. Thus both the proceedings are conducted on the basis of the administrative record, whether by virtue of express statutory provision therefor under section 24(a) or in accordance with the preponderance of decisional authorities under section 11(e).[97] Contrary to the weight of authority are the *obiter dicta*[98] in the opinion below authorizing the receipt of additional evidence by the section 11(e) court. In that connection the court below stated that a section 11(e) court may "receive evidence *aliunde* the Commission's

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[95] It was not the intention to consummate the plan until the case pending in this Court was decided. R. 1314a. See R. 11a.

[96] *The North American Co. v. S. E. C.*, 327 U. S. 686 (1946).

[97] *In re Electric Bond & Share Co.*, 73 F. Supp. 426, 443 (S. D. N. Y., 1946); *In re Laclede Gas Light Co.*, 57 F. Supp. 997, 1002 (E. D. Mo., 1944), aff'd *sub nom. Massachusetts Mutual Life Ins. Co. v. S. E. C.*, 151 F. (2d) 424 (C. C. A. 8, 1945), cert. den. 327 U. S. 795; *In re Jacksonville Gas Co.*, 46 F. Supp. 852 (D. Fla., 1942); *In re Eastern Minnesota Power Corp.*, C. C. H. Fed. Sec. Service, Par. 90,339-1 (D. Minn., 1947).

[98] No additional evidence was introduced in the hearing before the District Court.

record respecting the fairness and equity of a plan" and "may decide upon the new evidence and upon that contained in the Commission's record that the plan is unfair and inequitable and remand the proceeding to the Commission for further consideration" (R. 26). Such unlimited reopening of the administrative record is fraught with danger, as it permits in effect a trial *de novo* by the district court and affords an opportunity to obstructionists to make a Roman holiday of these complex simplification proceedings. The delay incident thereto may, in a swiftly moving world and a dynamic economic society, result in a procession of stale records and thus in a complete frustration of Congressional intent. Besides, the ruling of unfairness by the district court on the basis of the additional evidence not heard by the Commission may conceivably be construed as binding upon the Commission, even though such limitation upon it is not intended. Therefore, these dicta permitting the reopening of the administrative record must be rejected as a mistaken reliance by the court below upon the inapplicable concept of the traditional equity reorganization tribunal and repudiated as contrary to the rule uniformly and generally applied by the federal, appellate and lower courts in other circuits, to 11(e) proceedings under the Act (*supra*, n. 97) and implicitly recognized in cases applying the substantial evidence ruling (*infra*, n. 100), and also followed in analogous cases.[99]

Under the majority view, as indicated above, the same rule on hearing additional testimony characterizes both the 11(e) and 24(a) proceedings. Explicit recognition of this identical characteristic of the hearing is found in *In re Electric Bond & Share Co.*,

[99] *E. g. St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, 54 (1936).

supra, when the District Court, in quoting from the case of *Laclede Gas Light Co., supra*, said:

> "* * * we can see no more reason for permitting evidence to be offered other than the record made before the Commission in a hearing under Section 11(e) than in a hearing under Section 24(a) of the Act, and especially do we believe this should be the rule when the Court of Appeals may "modify" or "set aside" order of the Commission "in whole or in part" and yet is restricted in the receipt of evidence, solely to send the case back to the Commission to hear such additional evidence. *A reasonable interpretation of the Act does not permit a more liberal rule on hearing additional testimony in case before the Court under Section 11(e) than under Section 24(a) of the Act.*"
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> "*The province of the District Court in a §11 (e) enforcement proceeding is that of a reviewing authority. Okin v. S. E. C.*, 2 Cir., 1944, 143 F. 2d 206. * * *" (73 F. Supp. 443) (Italics ours.)

The *Laclede* and *Electric Bond* cases, *supra*, also shed light upon the respective powers of the court of appeals under section 24(a) and of the district court under section 11(e) in passing upon the action of the Commission. It is significant that the 24(a) court may "affirm, modify or set aside * * * in whole or in part" any order issued by the Commission, while the 11(e) court can only "approve" or "disapprove" a plan. Thus the 24(a) court has received a broader grant of power for the review of administrative action than the 11(e) court. Consequently, it would seem unwarranted to imply greater power in the 11(e) court than that in a 24(a) court to hear additional evidence and to pass upon a plan. The facts that the 24(a) and 11(e) proceedings are conducted in similar

fashion on the basis of the administrative record and that the 11(e) court has no greater power than the 24(a) court, lend support to the view that these proceedings afford alternative methods of review of the same scope in those areas where their functions overlap. To that extent, the 11(e) and 24(a) courts possess coordinate status and perform a comparable review function.

D. The Section 11(e) Court Is Required to Accept the Findings of the Commission Respecting the Fairness of a Plan, If Based Upon Substantial Evidence and Possessing a Rational Basis in Fact and Law, and May Not Substitute Its Own Judgment for That of the Commission.

The scope of review by the district court under section 11(e) corresponds to that of the court of appeals in direct review under section 24(a). The court of appeals under section 24(a) must accept as conclusive the findings of the Commission if supported by substantial evidence. That same standard of review, we maintain, must be applied by the district court under section 11(e) in passing upon the fairness of a plan.

Uniformly and generally,[100] both before and after

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[100] *In re New England Power Ass'n*, 66 F. Supp. 378 (D. Mass., 1946), aff'd *sub nom. Lahti* v. *New England Power Ass'n*, 160 F. (2d) 845 (C. C. A. 1, 1947);
Ladd v. *Brickley*, 158 F. (2d) 212 (C. C. A. 1, 1946), cert. den. 330 U. S. 816 (1947);
In re Kings County Lighting Co., 72 F. Supp. 767 (S. D. N. Y., 1947), aff'd *sub. nom. Public Service Commission of N. Y.* v. *S. E. C.*, 166 F. (2d) 784 (C. C. A. 2, 1948);
In re Laclede Gas Light Co., 57 F. Supp. 997 (E. D. Mo., 1944), aff'd *sub nom. Massachusetts Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424 (C. C. A. 8, 1945), cert. den. 327 U. S. 795;

[Footnote continued on following page.]

the decisions below,[101] the other federal appellate and lower courts have applied the principle that the Commission's findings are to be sustained if supported by substantial evidence or unless "shown to be without a rational basis in fact or to be predicated upon a clear cut error of law".[102] Thus, according to the preponderance of judicial authorities, the scope of review by a section 11(e) court is delineated in terms of the doctrines of substantial evidence and administrative finality.

The District Court should not have ignored as it did, the findings of the Commission respecting the fairness of the plan. Such treatment was certainly unwarranted in view of this Court's admonition in

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[Footnote continued from preceding page.]

In re Northern States Power Company, 80 F. Supp. 193 (D. Minn. 1948);
In re American and Foreign Power Company, 80 F. Supp. 514 (D. Me. 1948);
In re Eastern Minnesota Power Corp., C. C. H. Fed. Sec. Serv., Par. 90,399-1 (D. Minn., 1947);
In re New England Public Service Company, 73 F. Supp. 452 (D. Me., 1947);
In re Electric Bond & Share Co., 73 F. Supp. 426 (S. D. N. Y., 1946);
In re Jacksonville Gas Co., 46 F. Supp. 852 (D. Fla., 1942).

101 The District Judge's view in the instant case as to his "affirmative and independent duty" to consider the fairness and equity of the plan, which the Circuit Court has in substance adopted, is of relatively recent vintage, and does not square with his own earlier expressions and other decisions within the Third Circuit which are in accord with the majority doctrine of substantial evidence. *E. g.*: *In re Central & South West Utilities Co.*, 66 F. Supp. 690, 693 (D. Del. 1946); *In re Standard Gas and Electric Co.*, 59 F. Supp. 274, 283 (D. Del. 1945), reversed on other grounds, 151 F. (2d) 326 (C. C. A. 3, 1945); *In re United Light & Power Co.*, 51 F. Supp. 217 (D. Del. 1943).

102 *Lahti* v. *New England Power Ass'n*, *supra*.

U. S. v. Morgan, 307 U. S. 183, 191 (1939), to the effect that:

> "* * * court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice. * * * Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body * * * can rightly be regarded by the other as an alien intruder * * *"

Yet it is not our contention that the enforcing court is a mere "rubber stamp" or "should blandly accept the Commission's findings", but it is urged that the Commission's action is not to be taken as lightly as was done by the two courts below. *Ladd* v. *Brickley*, 158 F. (2d) 212, 216 (C. C. A. 1, 1946), cert. den. 329 U. S. 819 (1947); *In re Northern States Power Company*, 80 F. Supp. 193, 201 (D. Minn. 1948). Thus in the *Ladd* case, *supra*, where this view was recently announced, the Court of Appeals said:

> "* * * No court worth its salt will willingly make itself a rubber stamp for approving administrative Commission action. But the studied conclusion of an expert body which has made a prolonged investigation of a subject from the standpoint of the public interest is to be taken seriously."

Similarly, in the *Northern States Power Company* case, *supra*, the court, refusing to accept "blandly" the Commission's findings, recognizes the consistency

of its exercise of its independent judgment with the substantial evidence doctrine in the following language:

> "I conclude, therefore, that the *exercise of my independent judgment* in passing upon the fairness of the plan to the parties involved must be made in recognition of the experience, skill and facilities of the Commission in considering and appraising the facts before it in the lengthy hearings and voluminous testimony during the past five years. *Due weight should be accorded its findings and conclusions in factual matters where there is substantial evidence in support thereof*" (80 F. Supp. 201). (Italics ours.)

Certainly, the district court's duty is no greater than that which exists where a constitutional question is involved, and yet this court has warned that even in confiscation cases,

> "* * * this judicial duty *to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence.* On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency." *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 53 (1936). (Italics ours.)

It is thus clear that the concept of an independent duty is consistent with the application of the doctrines of substantial evidence and administrative finality, despite the view of the two courts below. Furthermore, it becomes obvious that the use of such phrases

as "affirmative and independent duty" or "independent judgment" or "independent check" are not determinative as to the scope of the judicial duty, but merely pose the issue as to the extent to which a court is free to reject or is required to accept the findings of an administrative agency based upon substantial evidence or possessing rational and statutory foundation. In any event, the significance attributed to that concept by the court below so as to permit rejection of administrative findings in disregard of the doctrines of substantial evidence and administrative finality, is contrary to the weight of authority both in connection with the Act and in the general field of administrative law.

These findings of fairness do not come to the court as the result of agreement between the parties or the action of a special master approving a plan in the common form of reorganization proceeding, but they come following a thorough consideration by the Commission which has a very broad grant of power from Congress in the premises.[103] The expertness of the Commission and the limited authority of the section 11(e) court lend weight to the soundness of the view as to the duty of such court to sustain the Commission's findings having a rational basis in fact.[104] Furthermore the Commission's findings in respect to the value of the preferred claim (with which the District Court disagreed) are "in the realm not of mathematical demonstration, but of forecast, based upon expert analysis and weighting of a complex

[103] Cf. *In re Standard Gas & Electric*, 151 F. (2d) 326, 331 (C. C. A. 3, 1945).

[104] *In re New England Power Ass'n, supra; In re Northern States Power Company, supra; In re Laclede Gas Light Co., supra; In re Eastern Minnesota Power Corp., supra; In re Electric Bond & Share Co., supra* (n. 100).

array of figures, in which the informed judgment of the Commission counts heavily".[105] In this connection in the *New England Power Ass'n* case, *supra*, it was stated:

> "In truth, any court charged with a review of the findings of the Securities and Exchange Commission, in a matter so complex in its nature as is the present proceeding, should accept the findings of the expert body unless it concludes that an error of law has been committed or the findings are of an arbitrary or capricious nature" (66 F. Supp. 382).

Thus in the *Northern States Power Company* case, *supra*, the District Judge noted the opinion below in the instant case, but followed the view of the Eighth Circuit in *Mass. Mut. Life Ins. Co.* v. *S. E. C.*, giving "considerable weight" to the Commission's findings with a rational basis. In recognizing the "soundness of the views of the Eighth Circuit as to the duty of the Section 11(e) court," he said:

> "* * * It is my duty to exercise my own independent and informed judgment in determining whether I should approve the plan as fair and equitable. On the other hand, unless I am reasonably clear that the Commission has erred in its factual findings, I should be hesitant to send the plan back to it for further consideration. *It has had this reorganization before it for some five years.* The questions involved are most difficult and complex because they deal primarily with forecasts for the future, and the appraisal of the immumerable uncertainties and contingent events in the years to come are bound to give rise to difference of opinion. *The Commission is the only tribunal which can finally approve a plan of reorganization under the Act.* The Court is not

[105] *Lahti* v. *New England Power Ass'n*, *supra*, p. 76, n. 100.

vested with any authority to propose a plan, or even make suggestions as to any allocation herein as between the preferred and common stockholders which will be binding upon the Commission. The *limited authority vested in the Court*, which has either to approve or disapprove the plan, would seem to lend weight to the soundness of the views of the Eighth Circuit as to the duty of a Section 11 (e) court *where there is a 'rational basis' for the Commission's findings.* This Court does not have access to the many facilities which the Commission is afforded through its public utility analysts, accountants, engineers, attorneys, etc., whose experience and training in this particular field should signally equip them to aid the Commission in analyzing and appraising the factual considerations which are controlling herein"[106] (80 F. Supp. 201). (Italics ours.)

These same doctrines of substantial evidence and administrative finality, as enunciated above, have been applied to test the Commission's findings of equivalence which are in issue here. Thus, in *Mass. Mutual Life Ins. Co.* v. *S. E. C., supra,* the Court of Appeals for the Eighth Circuit said:

> "Obviously, whether, upon retirement of outstanding bonds in the reorganization * * * payment of principal, accrued interest, *and* redemption premiums is the equitable equivalent of the bondholders' rights depends upon the facts of each particular case. *The proper measure of such equivalence is for the determination of the Commission in the first instance, and its expert skill in appraising the facts to be considered must be accorded due weight by the Court.*

[106] This passage which was quoted in *In re American and Foreign Power Co.*, 80 F. Supp. 514, 522 (D. Me., 1948), was stated by the District Judge "to represent in clearcut fashion the attitude of this court."

> "*Since there is a 'rational basis' in fact for the finding of the Commission and no 'clear-cut' error of law by either Commission or court, we are not inclined to disturb the conclusion* that retirement of the bonds at principal and accrued interest amounts to the 'equitable equivalent of the rights surrendered'" [151 F. (2d) 430]. (Italics ours.)

Similarly in *Lahti v. New England Power Ass'n., supra*, the First Circuit Court sustained the Commission's finding of equivalence saying:

> "Appellants' real challenge is to the correctness of the finding by the Commission and the district court that the plan is fair and equitable to the persons affected by it. *This finding cannot be upset by us unless it is shown to be without rational basis in fact or to be predicated on a clear-cut error of law*" [160 F. (2d) 850-1]. (Italics ours.)

Analogy persuasive in the instant situation is afforded by precedents under section 77 of the Bankruptcy Act (11 U. S. C. § 205). In *Ecker v. Western Pacific R. Corp.*, 318 U. S. 448 (1942), this Court had the occasion to give extensive consideration to the function of the district court vis-a-vis the Interstate Commerce Commission under section 77. The majority and concurring opinions are in agreement that the Interstate Commerce Commission's determination of value and also of compatibility of the plan with the public interest is left to the Commission "without necessity of a reexamination by the court when that determination is reached with material evidence to support the conclusion and in accordance with legal standards" and is to be questioned only as to "whether the Commission acted wholly without evidence arbitrarily or in disregard of recognized criteria"

(318 U. S. 473, 512). Likewise, in *New York, New Haven & H. R. Co.* (D. Conn. 1943), 54 F. Supp. 595, 604, aff'd in part and rev'd in part on other grounds (C. C. A. 2, 1945), 147 F. (2d) 40, cert. den. 325 U. S. 884, 65 St. Ct. 1577 (1945), the court said:

> "As I construe the recent Supreme Court cases referred to above [*Ecker* v. *Western P. R. Co.*, 318 U. S. 448 and *Institutional Investors* v. *C. M. & St. P. & P. R. Co.*, 318 U. S. 523], this finding [value of securities being exchanged] is binding on the Court. The underlying facts were such as to furnish support either for the conclusion reached or for the conclusion contended for. The conclusion adopted was the product of the experienced judgment of the Commission. Certainly the subject matter was one of valuation: the direct issue was the equivalence between the new securities and the old.
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> * * * *
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> "'* * * The language chosen leaves to the Commission, we think, the determination of value without the necessity of re-examination by the Court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards.'"

Similar treatment should be afforded the Commission's determination of value in view of the broader grant of power to the Commission than to the Interstate Commerce Commission or by virtue of the force of statutory analogy and the doctrine of *pari materia*.[107]

Another aspect of the *Ecker* case is relevant to our discussion. Under section 77(e) of the Bankruptcy

[107] See Sutherland, *Statutory Construction* (Horack, 3d Ed.), §5202. Cf. *Merrill* v. *Fahs*, 324 U. S. 308 (1945).

Act, the Interstate Commerce Commission is authorized to eliminate from the reorganization certain claimants if the worthlessness of their claims is found by the Commission, "and the judge shall have affirmed the finding". Although the statute requires re-examination by the district judge of the Interstate Commerce Commission action in this regard, this Court stated:

> "* * * The specificity of the direction for re-examination of the Commission's action points to a wider scope of review than an inquiry as to whether statutory standards for valuation have been followed. * * * But we think the *requirement of affirmation of the exclusion of claimants does not require an independent appraisal* of the valuation which ordained their elimination. The court properly affirms the Commission, when it finds no legal objection to the Commission's use of its own valuation to determine whether particular claimants are entitled to participate in the reorganization" (318 U. S. 478-9). (Italics ours.)

The function of the Commission in the instant case is substantially similar to the Interstate Commerce Commission's duty in the respect just noted in the *Ecker* case. Here, too, it is necessary to determine the participation of the preferred stocks. While in the *Ecker* case the determination was a negative or zero participation, in the instant case the determination was a positive or dollar valuation. Consequently, the determination as to the *quantum* of the participations in both cases should be subject to the same scope of review.

The *Ecker* case is significant to our present inquiry in one further respect in view of its discussion of the extent of re-examination of an issue of fairness. In

this connection the concurring opinion indicates that the court in passing upon the issue of fairness should accord finality to the Commission's action if based upon a "substantial foundation in the facts". The language of the concurring opinion is as follows:

> "* * * * In other cases, where the issue of fairness and equity depends upon the facts disclosed, I think it is the duty of the court to go farther and examine the plan sufficiently to satisfy itself that the rule of absolute priority announced in the *Boyd* Case and in the *Los Angeles Lumber Co.* and *Consolidated Rock Products Co.* Cases has not been violated. In performing this duty the court should accord great weight to the Commission's action. It should require the objector to show that the Commission has failed to respect the doctrine. But it should not accord finality to the Commission's action if there be any evidence to support it. I believe the court is charged by subsection (e) with the duty of determining that, in the allocation of securities in the reorganized company, the Commission has a *substantial foundation in the facts for the* allocation of securities required by the plan it approves"[108] (318 U. S. 515). (Italics ours.)

The acceptance, in the concurring opinion in the *Ecker* case, of the doctrine of substantial evidence for testing the Interstate Commerce Commission's determination of fairness affords a persuasive guide for its application to the present case.

As sections 11(e) and 24(a) are, to the extent indicated above, alternate avenues for the review of 11(e) plans, the scope of review thereunder, it is submitted,

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[108] The phrase "substantial foundation in the facts" apparently accords with the concept of substantial evidence as contained in section 10(e)(B)(5) of the Administrative Procedure Act. See discussion *infra* at p. 92, n. 120.

should be the same. The standard of review of administrative action applicable under section 24(a) of the Act has recently been restated by this Court in *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, 207-8, rehearing den., 332 U. S. 783 (1947), in the following terms:

> "The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern. * * * *Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress.* See *National Broadcasting Company* v. *United States*, 319 U. S. 190, 224.
>
> "We are unable to say in this case that the Commission erred in reaching the result it did. The facts being undisputed, *we are free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation.* In that connection, the Commission has made a thorough examination of the problem, utilizing statutory standards and its own accumulated experience with reorganization matters. * * *
>
> "* * * The 'fair and equitable' rule of §11(e) * * * [was] inserted by the framers of the Act in order that the Commission might have broad powers to protect the various interests at stake. * * * *The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters.*" (Italics ours.)

The second *Chenery* case, *supra*, expounds a doctrine of judicial review of administrative action, which, although deemed not controlling in the case at bar by

the court below, we submit, is applicable here and at variance with the lower court's position and affords the correct test of administrative action, whether judicial review occurs *via* section 11(e) as in the instant case, or *via* section 24(a)[109] of the Act as in the second *Chenery* case. Furthermore, that scope of review is the same, according to this Court, even where, assuming *arguendo*, as the court below suggests,[110] the Commission has announced and applied a "new doctrine of investment value" (R. 38) in the evaluation of the rights surrendered in the simplification of a holding company system.

The "weighting of a complex array of factors",[111] based upon expert analysis calls for an economic[112] judgment by the Commission. Such economic determination is entitled to the "greatest amount of weight", as it lies primarily in the informed discretion of the Commission and is a judgment, of the type which the Commission is especially equipped to make, being based upon statutory standards and its own accumulated reorganization experience. The unique role of the Commission under the Act was recognized

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109 Section 24(a) of the Act [15 U. S. C. §79x(a)] provides in pertinent part as follows: "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

110 It is of interest to note that the court below now considers the second *Chenery* case as not controlling (R. 33) but previously referred to the first *Chenery* case [318 U. S. 80 (1943)] as not precisely apposite, but as showing "the general approach of the Supreme Court to the problems presented by the Act". *In re Securities & Exchange Commission*, 142 F. (2d) 411, 420, n. 22 (C. C. A. 3, 1944).

111 *Lahti* v. *New England Power Ass'n*, *supra*, p. 76, n. 100.

112 It is the function of the Commission to give each class of security holders the "full economic equivalent" of its present holdings in satisfaction of the full priority rule. See *Schwabacher* v. *United States*, 334 U. S. 182 (1948).

by this Court when it stated on a related question in *American Power and Light Company* v. *S. E. C.*, 329 U. S. 90, 112-13 (1946):

> "* * * In dealing with the complex problem of adjusting holding company systems in accordance with the legislative standards, the Commission here has accumulated experience and knowledge which no court can hope to attain. *Its judgment is entitled to the greatest weight.* While recognizing that the Commission's discretion must square with its responsibility, only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter." (Italics ours.)

Under such circumstances, it would seem that Congress intended that the economic judgment of the Commission on which the fairness of the 11(e) plan in the instant case rests should not be disturbed by a district court, by its own discretionary weighing of the factors and in its roving through the evidence to seek support for its own conflicting inferences and conclusions.[113] Highly appropriate is the statement of this Court in *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 522, 523 (1944), when in passing upon the relative powers and responsibilities of two federal agencies as well as the courts under wartime stabilization legislation, it said:

> "That the weight to be given to stabilization considerations in relation to other factors calls

[113] *Commissioner* v. *Scottish American Investment Co.*, 323 U. S. 119, 124 (1944). As this Court noted with respect to a similar function of a court in reviewing a decision of the Tax Court:

> "* * * The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or litigants may consider more reasonable or desirable."

for an exercise of judgment in any given case is not denied by the Administrator. * * * The opinion of the Administrator is not, as we have pointed out, mandatory on the Commission. *Nor is such an economic judgment the function of the courts unless all that has been established in administrative law concerning the limitation on judicial review is to be thrown overboard. The decision of such a matter by the Commission is clearly not reviewable by a court because it thinks differently of the weight that should be accorded to some factors in relation to others.*

* * * *

"* * * it is not for the Court to set aside, without legislative command, its slow-wrought general principles which protect the *finality* and *integrity of decisions by administrative tribunals.*" (Italics ours.)

Accordingly, the balancing and weighing of the factors is for the Commission to determine and the substitution by the court of its own appraisal thereof would usurp the administrative function.[114]

The view, as enunciated by the majority of courts, that the Commission's findings and determination of fairness[115] under section 11(e), when supported

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114 Cf. *New York* v. *United States*, 331 U. S. 284, 349 (1947).

115 Since in determining the fairness and equity of a plan the Commission must consider both law and facts, even a conclusion of the Commission on a question of law must be accorded at least great weight if not finality. Mr. Justice Jackson's language in the *Dobson* case regarding the status of the Tax Court's determinations is apropos here:

"* * * In view of the divisions of functions between the Tax Court and reviewing courts it is of course the duty of the Tax Court to distinguish with clarity between what it finds as fact and what conclusion it reaches on the law. In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. The Tax

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by substantial evidence or possessing a rational and statutory foundation, are not to be disturbed by the district court, is in accord with the prevailing decisional and statutory trends and authorities in the general field of administrative law.[116] Under the present state of the law, the administrative determinations of a wide variety of governmental agencies and regulatory commissions are uniformly and generally reviewed on the basis of the doctrines of substantial evidence and administrative finality, where the scope of review is not specifically prescribed by statute.[117] These same standards of

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Court is informed by experience and kept current with tax evolution and needs by the volume and variety of its work. While its decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible." *Dobson* v. *Commissioner*, 320 U. S. 489, 502 (1943).

A similar view is expressed by this court in *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 672 (1947), when it said with respect to certain conclusions of law of the Interstate Commerce Commission:

"As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for the administration and enforcement of this law, these conclusions are entitled to special consideration. * * *"

[116] See Cushman, *The Independent Regulatory Commissions* (1941), p. 475.

[117] *E. g.*, *National Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 224 (1943); *Gray* v. *Powell*, 314 U. S. 402, 411-13; *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 139, 140, 145, 146 (1939); *U. S.* v. *Morgan*, 307 U. S. 183, 199 (1939); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 473 (1943); *RFC* v. *Denver & Rio G. W. R. Co.*, 328 U. S. 495, 508-9 (1946); *Dobson* v. *Commissioner*, 320 U. S. 489 (1943); *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 477-8 (1947). See Stern, *Review of*

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review of administrative action have been codified in the Administrative Procedure Act [118] which has been held declaratory[119] of the existing law of judicial review. It is significant in this connection that the legislative history of the Administrative Procedure Act clearly reveals that the courts' "exercise of their independent judgment" is consistent with their application of the substantial evidence doctrine in the review of administrative action.[120] These codified

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Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 Harv. L. Rev. 70, 75, 99 ff. (1944); Stason, *"Substantial Evidence" in Administrative Law*, 89 U. of Pa. L. Rev. 1026 (1940); Brown, *Fact and Law in Judicial Review*, 56 Harv. L. Rev. 899, 921 ff.

[118] Section 10(e)(B)(1) and (5) of the Administrative Procedure Act [60 Stat. 243; 5 U. S. C. §1009(e)(B)(1) and (5)]. Section 10(e)(B)(1) and (5) require the reviewing court to "(B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "(5) unsupported by substantial evidence in any case, * * * reviewed on the record of an agency hearing provided by statute". The Senate Judiciary Committee has indicated that "The fifth category necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which the administrative record may be made" (Sen. Doc. No. 248, 79th Cong., 2nd Sess., p. 39 (1946).

[119] *Olin Industries* v. *N. L. R. B.*, 72 F. Supp. 228 (D. Mass., 1947).

[120] Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 279. The House Judiciary Committee states in its report:

> "'*Substantial evidence*' means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7 (c), and material to the issues. It is exceedingly important. Difficulty has come about by the practice of agencies and courts to rely upon something less—suspicion, surmise, implications, or plainly incredible evidence. *Although the agency must do so in the first instance, under this bill it will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment*

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rules as to the scope of review represent the crystallization, by legislation, of the developments in the field of administrative law and consequently afford persuasive support for their application to the instant case.

The force of reason as well as the historical evolution of administrative law impels the conclusion that the determination of the Commission receive the same dignity afforded the rulings of other administrative agencies where the statute is not explicit as to the scope of review. The Commission's action, when tested by every theoretical and practical reason for administrative finality,[121] is entitled to the highest credit in the courts. The Commission is an independent expert body dealing with a subject highly specialized and complex. Its procedures assure fair hearings and its deliberations are evidenced by careful opinions which habitually utilize all guides to judgment available to judges. It is relatively better staffed for its task than the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subject. The volume of matters flowing through the Commission keeps its members informed as to the background of the controversies and the effect of the impact of their decisions upon

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whether on the whole of the proofs brought to *their attention the evidence in a given instance is sufficiently substantial to support a finding*, conclusion, or other agency action or inaction. In reviewing a case under this fifth category the *court must base its judgment upon its own review of the entire record* or so much thereof as may be cited by any party." (Italics ours.)

121 Cf. *Dobson* v. *Commissioner*, 320 U. S. 489 (1943) (Paraphrase). By statute the principle of the *Dobson* case has been rendered inapplicable to decisions of the U. S. Tax Court. (See section 36 of Public Law 773, 80th Cong., 2nd Sess., C. 646, amending section 1141-(a) of the Internal Revenue Code.)

the industry and the administration of the Act. Individual cases are disposed of wholly on records publicly made, in adversary proceedings.

Furthermore, the consideration of a uniform and expeditious administration of the Act demands that the Commission be given all the credit to which it is entitled under the law and that its decisions receive identical treatment. The dispersal of section 11(e) enforcement proceedings to district courts all over the country tends inevitably to produce conflicting decisions and the concomitant lack of uniformity, particularly if every district court is given the power to substitute its judgment for that of the Commission.

Uniform application of the Act can only be accomplished by the coordination of the standards of review under section 11(e) and section 24(a) on the basis of the doctrines of substantial evidence and administrative finality as enunciated by this Court. Such application of these principles of limited review would constitute a reasonable interpretation of the Act, consistent with the legislative history and the Congressional intention; accord with the preponderant judicial authorities passing upon the question under the Act; follow analogous precedents under the law of reorganization; apply the prevailing decisional and statutory authorities in the general field of administrative law; and finally give proper recognition to an expert body possessing a broad grant of power.

II. Involuntary Liquidation Preferences Are Not Controlling.

The Engineers' charter provided in part that "In the event of liquidation, dissolution or winding up * * * or any reduction of its capital stock, resulting in any distribution of its assets", the preferred stockholders in the three series are to receive an amount equal to $100.00 per share, "together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premiums for such series", before any distribution of its assets to the common stockholders (R. 1412a). In considering this charter provision, three members of the Commission were of the opinion that the dissolution as proposed was neither voluntary nor involuntary within the meaning of the charter (R. 138a), while one commissioner held that it was clearly a voluntary act contemplated by the parties (R. 141a). On the other hand, the District Court preferred "not to definitely decide" the applicability of the charter provision to a "true liquidation" as distinguished from the "fictitious liquidation" involved in the *Otis* case, but "to consider the charter provisions as but one of several factors in determining the relative rights of the various security holders" (R. 287a-288a, 317a). The court below, however, deemed charter provisions as not "dispositive", under a "proper application of one of the principles enunciated" by the Supreme Court in *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 637 (1945) (R. 34).

The issue is thus raised as to whether the charter liquidation provisions are the conclusive measure of the respective participations of the common and preferred stockholders. We shall contend below (A) that the charter liquidation provisions, voluntary and

involuntary, are not conclusive; (B) that if operative, then the voluntary liquidation provisions are determinative; and (C) that the involuntary liquidation provisions, even if applicable, are not controlling in a determination of a fair and equitable plan, under the statute and Constitution.

A. Charter Liquidation Provisions Are Not Conclusive.

The *Otis* case, as the court below indicated, is the answer to any contention as to the applicability of the charter provisions. In the *Otis* case, this Court held that a charter written in 1929 did not as a matter of federal law, contemplate action required by the Act.[122] Surely Engineers' charter prepared in 1925 (R. 1403a) could not have contemplated such action any more than did the charter of the United Light & Power Company. The inapplicability of the Engineers' charter provisions is an *a fortiori* application of the *Otis* principle.

If there were any doubt that the proposed dissolution was not contemplated when the Charter was drafted, that doubt is removed by the contentions of counsel for Engineers in the *Western Public Service Co.* case, 12 S. E. C. 804 (1943), where he urged:

> "When you act under the bankruptcy laws of Chapter X on account of a financial failure, the stockholders must be deemed to have had the financial failure of this organization in mind when they acquired their investment. Section 11

[122] As stated in the *Otis* case:

> "* * * The provision having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a 'simplification' under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated 'liquidation' within the meaning of Power's charter provision" (323 U. S. 637).

is not a situation where the company is in financial difficulty in the ordinary sense, and it certainly would be so in our case, because we have no bonds, we have no bank debt, we just have preferred stock. It is an arbitrarily and forced statutory termination of the enterprise, and *it has no relation whatsoever to any factors which the parties could have had in mind when they entered the enterprise*" (R. 256a).[123] (Italics ours.)

The absence of the word "involuntary" from Engineers' charter is of no consequence. The draftsman (R. 256a) of Engineers' charter, its counsel, consistently referred to the provisions regarding the payment of $100 in liquidation as applicable in the event of "involuntary" dissolution.[124] So, too, did the Company in its annual reports before there was any thought of dissolving (R. 1517a). In any event, the dissimilarity in language in these charters is not significant as the dissolution under the Act is distinct from the type of action envisaged under the charter, whether voluntary or involuntary. As stated in the *Otis* case:

"* * * The exercise of legislative power by Congress through Section 11(b)(2) to accomplish simplification as a matter of public policy and the Commission's administration of the Act by dissolution of this particular company results *in a type of liquidation which is entirely distinct from the 'liquidation' of the corporation, whether voluntary or involuntary, envisaged by the charter provisions of Power for preferences to the senior stock*" (323 U. S. 631). (Italics ours.)

It is also clear that any "type" of dissolution, liquidation, etc. "adopted as a matter of administra-

[123] See R. 635a, 1240a.
[124] See for example R. 1211a, 1731a.

tive routine", pursuant to the Act, would not come within the coverage of the charter. In short, the sequence and methods of simplification, such as dissolution, liquidation, merger, consolidation, etc. are procedural details, which do not make the charter provisions applicable. This view finds support in the statement in the *Otis* case, where in distinguishing *Continental Ins. Co.* v. *U. S.*, 259 U. S. 156 (1922), this Court said:

> "* * * We do not feel constrained by its dealing with charter rights as in a normal liquidation to hold that where liquidation is adopted as a matter of administrative routine, the preferences are thereby matured" (323 U. S. 639).

Consequently, any lateral attack upon the *Otis* rule of inoperativeness which seeks to base a distinction upon the supposed continuance or termination of the "enterprise" or "system" is unsound.[125]

An additional reason in support of this conclusion is the fact that Congress, as well as the parties, did not intend the Act (*i. e.*, its exercise of the power to simplify) to render the charter provisions "operative" and mature the charter rights, created without regard to the simplification of system structure. So stated this Court in the *Otis* case:

> "* * * Where pre-existing contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate * * *" (323 U. S. 638).

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[125] The court below recognizes that the charter provisions are not "dispositive", but seeks to distinguish the instant simplification from the *United Light & Power* reorganization on the basis of the termination of the enterprise in the former and its continuance in the latter. Such distinction is without merit, as shown below at p. 138 *et seq.*

Such construction, of the charter provisions, based in part upon the contemplation of the parties and in part on the legislative policy "to exercise its power with the least possible harm to citizens" precludes the application of the general rules used to interpret ordinary business contracts such as insurance policies. Consequently, any contention urging the analogy to insurance contracts and the like reflects reliance upon the dissenting opinion in the *Otis* case and must be rejected as but an effort to reargue the majority decision in that case. Similarly resort to factual data to demonstrate the prescience or anticipation of the Act by the draftsmen of the charter is doomed to failure. Reaffirmation of this *Otis* principle of "inoperativeness" in this case is further justified in view of its consistent and continuous application by Commission and court alike over a period, to simplification proceedings under the Act, and is required in order to secure a uniform administration of the Act.

B. Voluntary Liquidation Preferences Are Determinative, If the Charter Liquidation Provisions Are Operative.

We have contended above that the charter liquidation provisions are inoperative under the *Otis* rule, but if this Court should conclude otherwise, then it is our contention that the dissolution or liquidation was the voluntary act of the Company and that consequently the voluntary liquidation preferences are determinative.[126]

[126] We had urged below, *inter alia*, that the liquidation was voluntary within the meaning of the charters and that therefore the voluntary liquidation preferences were controlling. In view of the fact that the amounts proposed to be paid under the Com-

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We now turn to the question of whether the Company's action is voluntary or involuntary within the contemplation of the charter liquidation provisions. While a voluntary filing of a plan for dissolution of the Company under section 11(e) may not mean that such dissolution is voluntary within the meaning of the charter, the corollary is equally true that because action is taken under section 11(e), it does not follow that such liquidation is involuntary within the meaning of the charter. For example, the *El Paso*[127] case was one where a majority of the Commission felt that in the business context in which that company found itself it would and could be dissolved under State law, absent the Act. Consequently, the liquidation (no distinction between voluntary and involuntary) provisions of the charter were held to be controlling. But neither that case, nor any other, held that a company was not bound by its charter provisions if the liquidation proposed was not necessitated by the Act and was within the contemplation of the contracting parties.

The management and its counsel have consistently urged that the Act did not require the termination of the Company's existence. For example, in 1941 when

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mission's opinion as the "present investment worth" equal both the voluntary redemption prices and the voluntary liquidation preferences, we concurred in the Commission's presentation for the purpose of the appeal to the court below, but expressly reserved our contention that under the circumstances of this case the liquidation was voluntary within the meaning of the charter. In our petition for writ of certiorari, we also indicated our intention to argue this issue as an alternative question.

[127] H. C. A. R. No. 5499. See also Commissioner Caffrey's dissent in *United Light and Power Company*, H. C. A. R. No. 6603 (1946).

Engineers sought permission to acquire 5,000 shares of its preferred stock by tenders, the Commission had occasion to note that "Engineers * * * takes the position that it is not certain that there will be necessarily a liquidation of Engineers Public Service Company".[128] Similarly, Barnes (President of Engineers) testified, in the *Western*[129] case, that the pending Section 11 proceeding was not likely to result in the "liquidation" of Engineers. In the brief which Company counsel filed in the *Western* case, one of the points he urged was that "the pending (11b) proceeding is not likely to result in the liquidation of Engineers". (R. 1241a).

Furthermore, there is no order under 11(b)(2) requiring the liquidation of Engineers and it was certainly not clear that such an order would have been entered as a matter of course if Engineers had not presented the plan now before the Court. Besides, the 11(b)(1) orders pursuant to which Engineers has been allegedly liquidating had been set aside by the Court of Appeals for the District of Columbia. *Engineers Public Service Co. v. S. E. C.*, 138 F. (2d) 936 (App. D. C., 1943), cert. granted, 322 U. S. 723 (1944). Certiorari was granted by the Supreme Court, but disposition was not had because of the lack of a quorum. On October 20, 1947, this Court dismissed the appeals as moot [332 U. S. 783 (1947)], since in the meantime, Engineers had disposed of the properties which were the subject of Commission's orders, in the consummation of the plan, approved and enforced by the District Court's order dated May 29, 1947. In that connection dissolution of Engineers has in fact taken place and the direc-

[128] H. C. A. R. No. 2629, p. 7.
[129] 12 S. E. C. 801, 811 (1943).

tors are constituted trustees pursuant to the provision of section 43 of the Delaware Corporation Law [Del. Rev. Code (1935) §2075] (R. 15 n.4).

The management was also free to select other alternatives of complying with the Commission's requirements. There are many ways Engineers could have chosen to comply with the Commission's divestment orders. The merger method which was an alternative originally under the plan, was scrapped because of the appraisal requirements of state law. Other plans were considered, and discarded because the common stockholders would not get exclusive control over the subsidiaries (R. 583a, 643a, 687a). It would have been simple enough to call the preferred stocks[130] and pay them off but when it appeared that there no longer was any tax advantage by keeping Engineers alive, or by merging it with Virginia & Electric Power Company (R. 1320a) but the common stock management decided to adopt the Delaware voluntary dissolution technique although the procedural requirements are not being observed because the dissolution is to occur under Federal law (Cf. R. 15 n. 4).

We contend that the dissolution of Engineers is entirely a voluntary act of the management both legally and factually and submit that the fact that dissolution is occurring in connection with a plan under section 11(e) is therefore immaterial in this case. Accordingly, the voluntary liquidation provisions of the charter should control and determine the rights of the preferred stockholders.

This view was sustained by Commissioner Hanrahan

[130] It is significant that the Commission noted: "Ordinarily a company in this position would exercise its call privilege and redeem the preferred at its call price" (R. 60a).

(now Chairman) when in his concurring opinion he said:

> "* * * The charter provides for payment of the premiums in the event of a voluntary call or voluntary liquidation and it seems clear to me that, within the meaning of such charter provision, the action proposed by Engineers is 'voluntary.' Consequently it follows that fairness and equity require payment to the preferred stockholders of the prices specified in the charter in the event of voluntary liquidation" (R. 140a-141a).

C. The Involuntary Liquidation Preferences, Even If Applicable, Are Not Controlling in the Determination of a Fair and Equitable Plan.

We have urged above that the charter liquidation provisions are not operative in the instant case, but that if operative, that the voluntary liquidation preferences are controlling. Assuming *arguendo* that this Court rejects both contentions, we then urge that the involuntary liquidation provisions of the charter, even if applicable, are not controlling in the determination of a fair plan under both the statute and the Constitution.

The standard of fairness and equity incorporated in Section 11 (e) of the Act imposes the outer limits upon plans thereunder. By adoption of that standard, Congress has in substance decreed that in achieving the objectives of the Act a plan must not produce unfair results. If adherence to charter provisions, such as an involuntary liquidation clause, has that effect, such provisions may not stand in the way of

the Congressional objectives.[131] However, the threat of the due process barrier of the Fifth Amendment to the Constitution is in the instant case unwarranted. The constitutional question is no more "reached" here than in *Otis & Co. v. S. E. C.*, 323 U. S. 624 (1945). Even if it were, the answer to such argument is found in *American Power & Light Company* v. *S. E. C.*, 329 U. S. 90 (1946) and the *North American Company* v. *S. E. C.*, 327 U. S. 686 (1946).[132] The implication from these cases is clear that where under a plan security holders receive "just compensation"

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[131] *North American Company* v. *S. E. C.*, 327 U. S. 686, 705 (1946); *Continental Insurance Co.* v. *U. S.*, 259 U. S. 156, 471 (1922). In the *North American* case, *supra*, this Court said:

> "This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co.* v. *United States*, 196 U. S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act."

Although the two courts below did not pass upon the constitutional issue in view of their respective decisions, the District Court did indicate that "there is respectable opinion that a contractual obligation may be overridden in any case where necessary to achieve an otherwise constitutional purpose" (R. 288a), and the Circuit Court recognized the need to give "just recompense" as an equitable equivalent (R. 38).

[132] In *American Power & Light Company* v. *S. E. C.*, *supra*, this Court rejected largely on the basis of the *North American* case, *supra*, the argument that section 11(b)(2) may affect the rights of investors and holding companies in violation of the Fifth Amendment, and stated:

> "* * * Nor can we say that §11(b)(2) on its face authorizes or necessarily involves any destruction of any valuable interests without just compensation. The legislative policy and the statutory safeguards pointed out in the *North American* case negative that argument" (329 U. S. 106).

for their interest, the due process requirements are satisfied. The substitution of the equitable equivalent for contract rights surrendered involves no destruction of values but merely a change in the form of investment to another of equal value. Accordingly, neither the Act nor the Constitution forbids payment to the preferred of an amount equal to its redemption price established as the equitable equivalent of the rights surrendered under a fair and equitable plan.

III. The Commission Properly Applied the "Fair and Equitable" Standards of Section 11(e) of the Act in Approving as Part of a Plan the Payment to the Preferred Stockholders of Cash Equal to the Current Going Concern Value of Their Shares But Not in Excess of the Call Price Where This Amount Exceeds the Involuntary Liquidation Preference of Such Shares Under the Charter.

Once having concluded on the basis of *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, that the charter liquidation provisions were not dispositive in the instant liquidation (R. 61a) the Commission determined, in accordance with the principle of full priority, whether the plan accorded each security holder "from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered" (R. 62a). The Commission was of the view that the preferred stockholders were entitled to the current investment value of their securities and found that such value was at least equal to the respective call prices of the three series of the outstanding preferreds, treating the call prices as placing a ceiling upon the preferreds' participation (R. 67a). This conclusion was reached after (a) consideration of "all provisions

of the charter applicable to the preferred such as the dividend rate and the call price, as well as the liquidation preferences", (b) analysis of the "financial condition of the company with particular regard to the asset and earnings coverage of the preferred" (R. 62a), and (c) reference to the undisputed testimony of both the preferred stockholders' and company's expert witnesses, that the intrinsic values of the preferred were considerably in excess of the call prices (R. 67a).

On the other hand, measuring the quantum of participation to be allowed the preferred stockholders under section 11 by standards of "colloquial equity", the district court found that the investment value of the preferred stock was not controlling but merely one of the elements to be considered. It stressed as "colloquial" equities which "looked towards non-payment of the premium" (a) issue prices and market history, (b) retention of earnings, and (c) the alleged losses from past divestments under the Act, after "consideration of all factors involved" and "concluded that $100 would be fair and equitable, but that the payment of premiums would not be fair and equitable" (R. 288a-291a).

On appeal, the court below sustained the District Court, concluding that "All pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached by approach *ex* the Act or *intra* the Act" (R. 38). The court below expressed the view that the Commission had "misunderstood the principle of 'equitable equivalents' enunciated by the Supreme Court in the *Otis & Co.* case", and criticized the Commission (a) for substituting "the new doctrine of investment value" for the doctrine of equitable

equivalents; (b) for allegedly failing to give adequate consideration to earning power and supposed "equities" and "factors" (articulated by the District Court as "colloquial" equities); and (c) for allegedly disregarding the fact that "the holding company enterprise is at an end both for the preferred and common", which fact, according to the court below, differentiates the instant case from the *United Light & Power Co.* reorganization.

The issue is thus posed as to whether the Commission has properly applied the fair and equitable standard of section 11(e) in determining the respective participation for each class of stockholders—preferred and common—or whether the two courts below enunciated the correct criteria in terms of "colloquial equity" or its equivalent, for measuring the extent of the participation of the respective classes of stockholders.

A. The Commission Properly Applied the Principle of Full Priority and the Correct Techniques Under the Fair and Equitable Standard in the Valuation of the Respective Interests of the Common and Preferred Stockholders.

Under the doctrine of the *Otis* case, the words "fair and equitable" have received a technical definition as words of art which import the principles of full priority from the equity receivership and bankruptcy reorganization precedents. The principle of full priority requires such treatment be accorded various classes of security interests so that each security holder, in the order of his priority receives from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered. The entire bundle of rights must be determined as though in a continuing enterprise—a going concern

apart from the pending reorganization. Stated in other words, full compensation must be given to senior security holders for the contract rights surrendered on a "going concern" basis and not on liquidation basis, prior to the payment of junior security holders. These principles have been enunciated in the *Otis* case by this court as follows :

> "Like the bankruptcy and reorganization statutes, the Public Utility Holding Company Act, in providing that plans for simplification be 'fair and equitable', incorporates the principle of full priority in the treatment to be accorded various classes of security interests. This right to priority in assets which exists between creditors and stockholders, exists also between various classes of stockholders. When by contract as evidenced by charter provisions one class of stockholders is superior to another in its claim against earnings or assets that superior position must be recognized by courts or agencies which deal with the earnings or assets of such a company. Fairness and equity require this conclusion. * * * This is the rule applied by the Commission in the simplification of corporate structure. The Commission recognizes and applies the doctrine of full priority by giving value to the rights of the preferred in a going concern rather than as if by sale and distribution * * *" (323 U. S. 634-5).

In evaluating the rights surrendered, the liquidation preferences are not matured by the impact of section 11 of the Act, for as stated in the *Otis* case: "Congress did not intend that its exercise of the power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of

creditors" (323 U. S. 638). Consequently the liquidation preferences are only one factor in valuation rather than determinative of amounts payable, as indicated in *Schwabacher* v. *U. S.*, 334 U. S. 182, 199 (1948), where this Court reaffirmed its views in the *Otis* case and applied them to an analogous situation under the Interstate Commerce Act.

Applying these principles to the instant case, which as in the *Otis* case involved a solvent company, the Commission expressed the view that the liquidation preferences were not "conclusive"; considered all provisions of the charter applicable to the preferred such as the dividend rate, the call price and liquidation preferences; carefully analyzed the financial condition of the Company with particular regard to the asset and earnings coverage of the preferred comparing them in the light of these factors with many other utility operating and holding company preferred stocks (R. 61a-68a). The Commission found upon undisputed expert testimony that the preferred stocks had "an investment value at least equal to the respective call prices" of $105, $110 and $110, which "set a ceiling" thereon (R. 65a-68a) and upon a "full consideration of the record" concluded "that the fair and equitable standard would require the payment of an amount equal to the call prices of the securities plus accrued dividends" (R. 68a).

The conclusion that the Commission reached complies with and is required by the views of this Court as enunciated in the *Otis* case and reaffirmed in the *Schwabacher* case. In both the *Otis* and the instant cases, the two classes of stockholders were given the equitable equivalent of their participation as though in a continuing enterprise. The respective classes receive the existing value of their contract rights *inter*

sese, without regard to simplification process. That approach accords with the conclusion of this Court in the *Otis* case:

> "We reach the conclusion that the Securities and Exchange Commission applied the correct rule of law as to the rights of the stockholders *inter sese*. That is to say, when the Commission proceeds in the simplification of a holding company system, the rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place." (323 U. S. 633).

In neither the *Otis* nor the instant case was the Act permitted to mature the liquidation claims and thereby transform the existing values into matured claims which might be greater or less than such existing values. In the *Otis* case, the claim of the preferred stockholders, which, if measured on a liquidation basis would have exceeded its investment value or existing value on a going concern basis, was not allowed to mature. In the instant case, the preferreds' claim, which, if measured on a liquidation basis,[133] would have been less than its investment value (as limited by the call price), as an interest in a continuing enterprise, was not permitted to mature. In both cases, a windfall or a shift[134] in values from one class

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[133] As the preferreds in the instant case would receive amounts at least equal to their respective call prices, both on the basis of their investment values and by the operation of the voluntary liquidation preference under the charter, the maturity of involuntary liquidation preference would result in the payment of less than such amounts and consequently in a "windfall" for the common.

[134] *American Power and Light Co.*, H. C. A. R. No. 6176, p. 8 (1945).

to the other had to be avoided—in the *Otis*, to the preferred; in the instant case, to the common. Such is the force of the mandate in the *Otis* case where this Court said: "Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders" (323 U. S. 637). Consequently, the same rule of valuation on a going concern basis must be applied equally in both instances to avoid a windfall, whether the existing value of the interest turns out to be less or greater than the matured liquidation claim. Otherwise, the rule becomes a one way street by which, in section 11 proceedings, the common stockholders could not lose, and the preferred stockholders could not receive their equitable equivalents. Such unilateral operation of the *Otis* rule was certainly not intended. The effectuation of Congressional policy to avoid "windfall" to a particular group as well as the principles of sound administration and equal justice compels the bilateral application of the rule so both classes—common and preferred—may receive the equivalent of their participation "as though in a continuing enterprise instead of in liquidation". Therefore, since in the instant case, the claim of the preferred stockholders, measured as it were, on a going concern basis or at the call price, at which the common stockholders could have terminated their interest in the enterprise by redemption, exceeds their value on a liquidation basis, the rule of full priority requires the payment of amounts at least equal to their respective call prices in order to satisfy their prior claim to the assets and earnings of the Company. Such analysis would squarely accord with the recent restatement of the *Otis* principle in the *Schwalbacher* case in the following terms:

"In construing the words 'fair and equitable'

in a federal statute of *very similar purposes*, we have held that although the full priority rule applies in liquidation of a solvent holding company pursuant to a federal statute, the priority is satisfied by giving each class the full *economic* equivalent of what they presently hold, and that, as a matter of federal law, liquidation preferences provided by the charter do not apply. We said that, *although the company was in fact being liquidated in compliance with an administrative order, the rights of the stockholders could be valued 'on the basis of a going business and not as though a liquidation was taking place.'* * * * *Otis & Co.* v. *Securities & Exchange Commission*, 323 U. S. 624" (334 U. S. 199). (Italics ours.)

B. The Court Below Misapprehended the Principles and Techniques as Enunciated in the *Otis* Case and Unwarrantedly Criticized the Commission.

Misapprehending the significance of the *Otis* case, as discussed above, the court below claimed that the Commission "misunderstood the principle of 'equitable equivalents'" as enunciated by this Court (R. 38) and criticized the Commission in several respects for its alleged failure to apply the proper techniques and principles in valuation. Thus while the court below agreed with the Commission that the charter provisions are not dispositive of the issues presented and that the doctrine of equitable equivalents "includes within its ambit cash for securities as well as securities for securities" (R. 38), it rejected the principles and methods used by the Commission to arrive at the equitable equivalents of the two classes of securities.

1. The court below erroneously applied a standard of "colloquial equity."

Paying merely lip service to the *Otis* principles, the court below has in reality strayed far afield from the rules established by this Court and has announced that "All pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached by the approach ex the Act or the approach intra the Act" (R. 38). This criterion, apart from its nebulous character, represents only a mirage of consistency with this Court's views and in reality, rejects the conception that the phrase "fair and equitable", as used in section 11(*e*) of the Act, imports the principle of full priority as developed in the receivership and bankruptcy reorganization cases. In place of the principle of full priority as discussed above, the court below proposes a variable and uncertain theory of "All pertinent factors and all substantial equities"—apparently similar to the principle of "colloquial equity"[135] by which the District Court in the instant case sought to measure the participation of the security holders. Such nontechnical significance of the phrase "fair

[135] This standard of "colloquial equity" has been articulated on several other occasions in addition to the instant case by the same District Court, *e. g., In re Community Gas & Power Co.*, 71 F. Supp. 171 (D. Del. 1947); *In re Citizs Service Co.*, 71 F. Supp. 1003 (D. Del. 1947). In *In re United Light and Power Co.*, 51 F. Supp. 217 (D. Del. 1943), which eventually became the *Otis* case, the same District Court announced a similar view, suggesting that the "expression 'fair and equitable' should be given its ordinary non-technical meaning". Despite the District Court's statement as to the application of the standard of colloquial equity in the *Otis* case neither this Court nor the Circuit Court adopted any such nebulous theory.

and equitable", resulting as it does in a substitution of indefinite considerations for the well-defined rights of the security holders, is entirely at variance with the technical definition of that expression, as words of art, as defined in the *Otis* and *Schwabacher* cases. That ambiguous standard, enunciated by the two courts, connotes the application of "nonvaluation" or "non-economic" factors in disregard of the implications from the statement in the *Schwabacher* case that "the priority is satisfied by giving each class the full *economic* equivalent of what they presently hold" (334 U. S. 199).

Reference to various "factors" and "equities" which, in the opinion of the court below, merit special consideration, reveals more clearly their lack of merit and their unsoundness. The two courts below gave primary recognition to the following "factors" or alleged "equities": (a) issue price and market history of the preferreds (R. 289a); (b) retention of earnings; and (c) the alleged losses from divestments under the Act. We shall consider in turn the merits of each of these alleged "equities".

(a) *Issue price and market history.*

The two courts below considered significant the issue price and market history of the preferreds (R. 289a, 301a-302a, 305a). The standards of fairness and equity certainly do not require that such weight be attributed to these factors. Rather is it clear that in the absence of fraud, purchase prices do not affect the measure of the security holders' participation under a section 11(e), plan, by analogy to the bank-

ruptcy reorganization precedents.[136] Certainly the issuance of the preferreds at slightly under par or book value does not make it inequitable to give them slightly more for their interest in the enterprise over twenty years later. Such remote factor may have historical interest but little significance. Moreover, if the preferreds' participation is measured quantitatively in terms of the *number* of dollars invested then, it should be equally appropriate to make a qualitative measurement of the dollars invested in terms of their respective *purchasing power* at the time of the Commission's determination. It is unquestioned that the purchasing power of $100 in 1929 at the time of the issuance of the preferred stocks was far greater than its purchasing power on the date of the approval of the plan by the Commission or on the date of its enforcement by the District Court. In any event, the test, as so aptly stated by Mr. Justice Jackson in the *Schwabacher* case in an analogous situation, "*is not what he once put into a constituent company* but what value he is contributing to the merger that is *to be* made good" (334 U. S. 199). That statement puts the factor of issue price in its proper place, without the special significance, which the District Court attributed erroneously to it.

Market history is likewise of little use in determining present values. The historical fluctuation in market prices reflecting changing economic condi-

[136] *In re Pittsburg Railways Co.*, 159 F. (2d) 630 (C. C. A. 3, 1946) cert. den. 329 U. S. 731; *In re Lorraine Castle Apartments Building Corp.*, 149 F. (2d) 55 (C. C. A. 7, 19) cert. den., sub nom., *Lorraine Castle Apartments Building Corporation Inc. v. Mackintosh*, 326 U. S. 728 (1945). In *American Power and Light Company*, H. C. A. R. No. 6176, p. 4 (1945), where the Commission held that it would be unfair to retire the company's debentures at less than the redemption price, it appeared that the debentures were issued to the public for as low as $89.

tions as affected by a variety of political and social events are at best remotely relevant to the determination of present values. It was admitted by Mr. Benjamin that "the present condition of a company is more important than what has happened in the past" in determining the value of its securities (R. 590a). Moreover, past market prices are not only unreliable as a test of current investment value but actually can give a false picture. For example, in 1941 when Engineers' preferred ranged between $70-$85, the breakup value of the underlying securities, even during a depressed market, was estimated at $169 per share. *Engineers Public Service Co.*, 9 S. E. C. 84, 88 (1941). It is a known fact that holding company securities generally sell below the value of the common stocks which underlie them and it should be remembered that the market prices were seriously affected by the depression, the adverse publicity surrounding enactment of the Act, and the Engineers' management's procrastination. In spite of these adverse factors, during much of the time the Company was proposing to retire the preferred at only $100 per share, the stock was selling at close to the call price.[137]

If past market prices are to be given any weight, it should be pointed out that under the management's program of retiring the preferred at a discount there was the incentive and the ability to shape the conduct of the corporation's affairs so as to encourage public sales at low prices. The Commission recognized this

[137] The District Court attributed these high prices to "substantial" purchases by Engineers of its own preferred stock. Finding No. 29, R. 304a. Actually the Company purchased 37,500 shares over a period of 5 years and the total purchases amounted to less than 1% of the preferred stock outstanding. R. 303a, 304a.

possibility in the *Western* case,[138] when it pointed out that the Company had created complete uncertainty as to the management's policies with respect to compliance with Section 11. The Commission's opinion noted that:

> "* * * The continued existence of these uncertainties may well have had and continue to have an effect upon the market for the company's preferred stocks."

Assuming *arguendo* that issue and market prices are independently significant, comparative analysis in these respects of both the common and the preferreds would be highly appropriate and enlightening. On the basis of an average issuance price of $30.40 per share for the common (R. 1820a) and testimony as to the undisputed combined worth of Virginia, Gulf States and El Paso of at least $109,000,000 (R. 981a, 982a) by Barnes, President of Engineers, and after contribution of an additional $11.50 per share by the common to obtain all the underlying assets in these companies, the common will have obtained an interest in the enterprise worth $57 for each $41.90 contributed. Thus even on the District Court's premise, there is inadequate basis for its conclusion. Moreover, the market history of both the common and the preferreds are comparable. Although we dislike to dignify the importance of past market prices, we note that the common stock has had a much more volatile history

[138] 12 S. E. C. 804, 812 (1943). In *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, 204-5, rehearing denied 332 U. S. 783 (1947), Mr. Justice Murphy pointed out management's ability to affect market prices:

> "* * * The broad range of business judgments vested in Federal's management multiplied opportunities for affecting the market price of Federal's outstanding securities * * *."

than the preferreds. While the preferred reached a high of $123 per share in 1929 and a low of $10 1/8 in 1935 (R. 302a), the common reached a high of $79 5/8 in 1929 and a low of $1 1/8 in 1935 (R. 305a). It appears that since 1932 there have been relatively few periods when Engineers common stock has shown a market value in excess of $10 per share (R. 543a). In 1942 the stock sold as low as $1.25 (R. 452a) and between 1942 and 1945 the stock has had a turn-over of almost 300% (R. 903a). Small wonder it is that the Commission did not attribute much weight to market history.

(b) *Retention of earnings.*

The investment value of the preferred stocks has been attributed erroneously to the retention of earnings over a period of years which might otherwise have been paid out as dividends to the common stockholders (R. 291a, 308a-309a). In the first place it cannot be claimed that the dividends were withheld through any misconduct of the preferreds, particularly in view of the common stock voting control. Besides, without conceding the soundness of the District Court's finding in this respect, there would seem to be no basis for assuming that the retention of earnings resulted in an *increased* value of the preferred stocks and a *decreased* value for the common stocks; rather would the probable result be an increased value for both classes of securities. In all probability if the common had taken out all the earnings which

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139 The District Judge considered the "retained earnings" as "past sacrifices" of the common (R. 291a). That view lacks factual basis.

were available to it since 1932, they would have been eliminated from the enterprise now rather than the preferred stockholders. Moreover, this argument overlooks the fact that the rights of the stockholders are to be "measured not in terms of the situation created by the statute but rather in terms of the situation terminated by it"[140] and that "the treatment to be accorded the preferred stocks under a comprehensive plan depends upon the conditions existing at the time such plan is approved.[141]

Even assuming the earnings were available for dividend purposes, the record clearly shows that every reason for non-payment of dividends was attributable to a business need on the one hand, or to a result desired by the controlling stockholders, on the other. Moreover, the retention of earnings was not a "sacrifice" by the common despite the statement of the District Court. In the first place, necessity for establishing a reserve for losses in "investments" made by the common controlled management,[142] required the elimination of earned surplus in 1938 and reduced the capital represented by common from over $58,000,000 to $1,999,968. Under such circumstances it was prudent, if not essential, to build up some equity behind the preferred. Secondly, the management, in the interest of the common as a class, embarked upon a program of accumulating cash in order to retire the preferred piecemeal and at substantial discounts[143]

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[140] *United Light & Power Company*, 13 S. E. C. 1, 13, H. C. A. R. No. 4215, p. 13 (1943).

[141] *Western Public Service Company*, 12 S. E. C. 804, 814 (1943).

[142] The preferred stock had no voting rights unless two years' dividends were in arrears. R. 1415a.

[143] The Company over a period of years acquired 37,500 shares at substantial discounts. These purchases ceased only when the market price of the preferred exceeded $100. See R. 733a, 1519a, 1576a, H. C. A. R. No. 5484.

when it became apparent that Engineers would be required to reduce its capitalization.[144] In fact a deliberate policy of accumulating cash had been pursued so that the preferred stockholders could be ousted from the Company (R. 643a, 687a, 719a). A third and compelling motive for non-payment of dividends was the desire on the part of the handful of controlling stockholders to obtain capital appreciation of their investment rather than dividends which would have been subject to high federal income tax rates (R. 756a). By retiring the preferred out of earnings, which was the objective, substantial savings in taxes resulted. A strange kind of "sacrifice", to say the least.

(c) *Alleged losses from past divestments under the Act.*

The court below directed the Commission to consider and weigh into the calculation supposedly[145] "substantial losses which occurred to Engineers by

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144 See *Western Public Service Co.*, 42 S. E. C. 804, 812 (1943).

145 After disposing of Engineers' insubstantial contention to restrict the preferred to $100 because of the alleged *Puget Sound* "loss", supposedly caused by the Act, the Commission commented:

> "In passing, we should point out that we do not accept counsel's hypothesis that the *Act* has caused the asserted losses. In all of its divestments, Engineers has been free in its choice of methods, and, within limits, to choose the time for divestment. All sales have been negotiated by Engineers at arm's-length. If, as in the case of Puget Sound, the sale brought less than the carrying value on the books of Engineers, the indication is that the carrying value was excessive and not that the sales price was low. It is significant that the market price of Engineers' common when the plan was filed was the highest since 1932 and that the price has been rising steadily since 1942 when the program of simplification got under way. As shown in Footnote 45, *supra*, Engineers' common reached a low of 1⅛ in 1935. By 1945, when the plan was filed, it had reached a high of 37." (R. 72a, n. 55).

virtue of divestitures compelled by the Act" (R. 37). Even assuming *arguendo* that these losses can be traced and attributed to the operation of the Act, this requirement is in conflict with the *Otis* principle of "full priority" which, as indicated above, places primary stress on contract rights to earnings and assets. Furthermore, such re-examination is contrary to the policy underlying the doctrine of *res judicata* and creates an insuperable administrative burden, as will be demonstrated in more detail below at page 127 ff. The sales method of divestments was entirely a choice of the common stock management. In any event, there has been no complaint that these divested securities were dumped upon the market or that inadequate consideration was received at the date of their disposition. *North American Co.* v. *S. E. C.*, 327 U. S. 686, 709 (1946). It is also highly significant that if these same divestments had resulted in substantial profits instead of alleged "substantial" losses, the preferreds would not have been permitted to share in those profits on the premise undoubtedly that the preferreds' participation has been limited by the call provisions, even though the fair investment value of the preferreds would have been even higher than that found by the Commission, absent the call feature. Such a one way street for the benefit solely of the common stockholders could hardly be called fair. Besides the common stock management being in complete control could have easily compelled the preferred stockholders to "share" the alleged losses by proposing a plan which would have permitted the preferreds to continue their participation in the enterprise. This would then have been clearly within the ambit of this Court's decision in the *Otis* case and the preferreds would have received, instead of cash the

equitable equivalent of the rights surrendered, in the form of securities in the underlying companies. The preferreds were unable to secure this participation due to the fixed attitude of the common which sought at the same time to eliminate the preferreds at a bargain price and keep for the common stockholders all the benefits of the flourishing underlying operating companies, using the Act as a cloak to accomplish their true objective. They consistently and persistently contrived to eliminate the preferred from participation and to reserve to the common all of the advantages.[146] Can the common now be heard to complain that they suffered great losses when in fact the preferreds were prohibited from participating in these so-called losses.[147] Such assumed "losses" would have all been previously absorbed and in any event would have been reflected in the present values of the two classes of both preferred and common stock. It is also interesting in this connection that after these divestments, the company's assets as of January 30, 1945 aggregated $65,756,904 (R. 86a) as compared with assets in 1938 of only $60,909,703 (R. 1525a). Likewise it cannot be fairly urged that the alleged Puget Sound book losses on which the two courts below place special emphasis can be attributed to the operation of the Act. Puget had been a cancer in the system from the time of its acquisition in 1928 (R. 1663a). It consistently failed to earn its own preferred dividend requirements and Engineers, in 1938, voluntarily created a reserve of $35,000,000 to reflect the "depreciation" in this "investment". In

[146] R. 583a, 643a, 687a, 719a, 723a.

[147] The Commission found that the elimination of the preferreds was "highly beneficial" to the common stockholders (R. 69a).

1943, Puget was recapitalized[148] and by virtue of the application of the investment value theory, Engineers received 3% of the new common stock in the reorganized company. These securities were sold in 1944 resulting in a book loss to Engineers of $33,320,519 (R. 1608a). It is clear that the book figure itself had no relationship to actual value. *To weigh in this book loss would in effect restore values which had already been lost through the operation of economic forces contrary to the mandate of this Court in the Schwabacher case.* Moreover, various other extraneous considerations entirely divorced from the requirements of the Act motivated the management in its disposition of Puget at the time, such as tax consequences (R. 1833a).

The effect, moreover, of weighing the conjectural losses from divestments for the benefit of the common, as the court below directs, results in substance, in the subordination of the claim of the preferred to that of the common on the basis of such losses, even though the history of Engineers reveals no "spoliation, mismanagement and faithless stewardship" by the preferred.[149] The voting common, not the preferred, have occupied a position of complete control and the Company "has been free in its choice of methods, and, within limits, to choose the time for divestment" (R. 72a, n. 55). Accordingly, the subordination of the wholly innocent preferred stockholders would constitute a misapplication of the "Deep Rock Doctrine".[150] Nor do the public preferred stockholders in the instant case fall within the ban of the principle established by the Commission and sustained by

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[148] *Puget Sound Power & Light Co.*, 13 S. E. C. 226 (1943).

[149] *Pepper v. Litton*, 308 U. S. 295, 308 (1939).

[150] *Comstock v. Institutional Investors*, 335 U. S. 211 (1948), citing *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307 (1939) and *Pepper v. Litton*, *supra*.

this Court in *S. E. C. v. Chenery Corp.*, 332 U. S. 194 (1947), under which management insiders are limited to cost on their purchases of securities during a reorganization.

These views of the two courts below, apart from their intrinsic unsoundness, involve a shift in emphasis to factors entitled under the decisions to but little weight[151] and a veering away from elements such as current rights to earnings and assets which are entitled to primary weight.[152] It in effect seeks to restore "values * * * already lost under the operation of economic forces" in violation of the principle enunciated as follows in the *Schwabacher* case:

> ** * * Public regulation is not obliged and we cannot lightly assume it is intended to restore values, even if promised by charter terms, if they have already been lost through the operation of economic forces.* Cf. *Market Street R. R. Co.*

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[151] Most of the arguments of the District Judge (Leahy, *J.*) are merely those advanced by Commissioner Healy in his dissenting opinion in *American Power & Light Co.*, H. C. A. R. No. 6176, plan enforced (S. N. N. Y. 1945), and those presented to the Commission by counsel for Engineers in support of its original plan. All four Commissioners (Commissioner Healy had died) found no substance in the arguments because they are based on fallacious assumptions: (1) there was no showing that the Act caused any losses; (2) the common stock was not getting "what was left" but was getting full compensatory treatment in order of its priority; (3) the common stock was not being "burdened" but was getting rid of the preferred and its prior claim on earnings; (4) the common stock had not "sacrificed" but had merely built up the value of its equity. Moreover, Judge Leahy ignored the fact that the preferred was actually the loser because the favorable dividend rates which the court termed "excessive yields" are impossible to duplicate.

[152] *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523 (1943); *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 632 (1945); *Lahti* v. *New England Power Ass'n*, 160 F. (2d) 845 (C. C. A. 1, 1947); *Phillips* v. *S. E. C.*, 153 F. (2d) 27 (C. C. A. 2, 1946), cert. den. 328 U. S. 860 (1946).

v. *Commission*, 324 U. S. 548. In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the *current worth* of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good" (334 U. S. 199). (Italics ours.)

Accordingly, the Circuit Court's application of the standard of "All pertinent factors and all substantial equities" constitute a misinterpretation of the fair and equitable standard as enunciated in the *Otis* and *Schwabacher* cases. Moreover, its substitute criteria, under which the extent of participation is measured by irrelevant factors extrinsic to the contract rights of the security holders, afford no rational basis for the administration of the Act upon a uniform national scale and will necessarily create a lack of uniformity in view of its dependence upon determinations of the weight of various intangible factors by different enforcement courts all over the country.

2. The court below erroneously applied a standard of valuation "as if the Act had never been passed".

The court below also states that "No particular, specific approach [to the problem of valuation] is to be nailed to Commission's head" and suggests that an approach either "*intra* the Act" or "*ex* the Act" could "lead to just and appropriate valuations" (R. 37). Such choice of alternative methods of valuation is erroneous and contrary to the opinions of this Court in the *Otis* and *Schwabacher* cases. If an appraisal "*intra* the Act" should require the rights of the security holders to be measured in terms of the situation created by the statute, *i. e.*, as though a liquidation were

taking place and not in terms of the situation terminated by it,[153] that concept would run counter to the *Otis* case under which the preferred and the common were given the equivalent of their participation "as though in a continuing enterprise instead of in liquidation". Under the *Otis* case, neither is permitted to take advantage of a situation created by Congress to secure a benefit at the expense of the other, and both are held to the value of their bargains *inter sese* without reference to the liquidation or reorganization process in accordance with the policy expressed in the *Otis* case. The approach "*intra* the Act" requiring valuation as if the liquidation pursuant to the Act falls within the coverage of the charter liquidation provisions would violate the *Otis* rule of "inoperativeness", discussed *supra* at page , Moreover, the foregoing interpretation of "*intra* the Act" would appear to be contrary to the Circuit Court's statement that the charter provisions are "not dispositive of the issues presented" (R. 34).

Even assuming the proper application of the *Otis* rule of "inoperativeness", in view of the Circuit Court's express statement in this connection, the phrase "*intra* the Act" would seem to imply valua-

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[153] This statement is the converse of a quotation from the opinion of the *Commission in United Light and Power*, H. C. A. R. No. 4215, p. 13 [13 S. E. C. 12] (1943), which appears as follows in the opinion of this Court in the *Otis* case:

> "'Under the circumstances, fair and equitable compensation will be given to all of the claimants if their rights are measured not in terms of the situation created by the statute but rather in terms of the situation terminated by it—*i. e.*, as though no liquidation were to take place. In this way each class of stock will be accorded its proportionate share of the benefits to be gained from the elimination of a useless and expensive corporate entity and from the receipt of a security representing a more direct investment in the underlying assets and earnings of the system.'" (323 U. S. 635, n. 17).

tion "as if the Act had been passed"[154] or the converse of the phrase "*ex* the Act" as defined in at least one place in the opinion of the court below to mean valuation "as if the Act had *never* been passed" (R. 35).

This significance of "*intra*" and "*ex* the Act" appears to require an historical review of the past 10 years' activities in the Engineers' system and the public utility industry, so as to record and appraise the effects of the operation of the Act since its passage and to reconstruct Engineers on that basis. A retroactive adjustment of benefits and detriments (or profits and losses) so as to eliminate or cumulate the effects of numerous orders of the Commission,[155] interspersed among a variety of independent and possibly unrelated causal factors as the economic, political and scientific forces of the times, creates an infinite assignment impossible of fulfillment and imposes an overwhelming burden upon the Commission, in its administration of the Holding Company Act. Besides, in suggesting a re-examination of divestments and other transactions executed pursuant to the Act, it constitutes a collateral attack on the salu-

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[154] It may be that such interpretation of the expression merely harks back to the following quotation from the opinion of the District Court to which the court below refers as "the greatest difference between the respective approaches of the court and the Commission to the problem of valuation":

> "* * * 'I do not consider the argument advanced [by the Commission] as to what these series of preferreds would be worth if there were no Public Utility Holding Company Act. I do not think it profitable to consider an argument based on unreality *for there is a Public Utility Holding Company Act.* Unless one subscribes completely to the doctrine of foreordination things might always be different from what they are' * * *" (R. 20).

[155] For a list of significant orders of Commission which affected the Engineers' system see R. 69-70.

tary policy underlying the doctrine of *res judicata*,[156] upon final decisions, such as the *Puget Sound* divestment, in which the plan proposed by a common stockholder management has already been enforced by the United States District Court for the District of Massachusetts.[157] Hindsight review of the effects of numerous other valid orders would thus be required. Lastly, a valuation "*ex* the Act", predicated upon the aforesaid historical analysis, is not reconcilable with the "current worth" rule of the *Schwabacher* case and the "going concern" doctrine of the *Otis* case. In other words, the phrase "*ex* the Act" must mean "apart from the reorganization compelled by the Act", or "on the basis of a going business and not as though a liquidation were taking place", in the language of the *Otis* case as applied by the Commission. As this Court said in the *Otis* case: "* * * when the Commission proceeds in the simplification of a holding company system, the rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place" (323 U. S. 633).

3. The court below erred in requiring dollar valuation of the common stock interest where the preferred stockholders receive cash and the common stockholders, by choice, received the residual assets.

The court below, having apparently misconceived the meaning of "*ex* the Act" as indicated above, unjustly criticized the Commission for allegedly adopt-

[156] *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948); *Sherrer* v. *Sherrer*, 334 U. S. 343 (1948).

[157] *Puget Sound Power & Light Co.*, 13 S. E. C. 226 (1943), plan approved and enforced, civil action No. 2308 (D. Mass. 1944).

ing inconsistent techniques or methods in valuing the preferreds "*ex* the Act" and the common "*intra* the Act". In reality the Commission valued both the common and preferreds "*ex* the Act" or apart from the reorganization in accordance with the principles enunciated in the *Otis* case. Applying the doctrine of full priority, the Commission first valued the preferreds, and consequently, in valuing the preferreds apart from reorganization or on a going concern basis, necessarily reciprocally valued the common, by the same standard. In other words, since the total enterprise is to be divided between two claimants, the preferreds and the common, once the preferreds have been valued on a going concern basis and that value subtracted from the total, it appears obvious that the residual value is thereby established for the common, on the same basis. The preferreds are entitled, according to the Commission, to amounts at least equal to their redemption prices as the equitable equivalents of the rights surrendered,[158] and the common entitled, in exchange for their rights, to the remaining assets or the securities in the operating companies, there being no need to place a dollar value on the securities thus received in exchange.[159] The record is abundantly

[158] Common stock management selected the type of distribution (*i. e.*, cash for the preferreds and underlying securities for the common). The preferreds were not permitted to participate or retain a stake in the continuing enterprise in any form whatsoever (including the underlying securities) as the common stock management wanted to retire or treat the preferreds otherwise (R. 719a). Likewise, the initiative in suggesting the most appropriate method of complying with the Act from among the available alternatives is left to the Company management. *In the Matter of North American Light and Power Co.*, not officially reported (C. C. A. 3, 1948), printed opinion, p. 13.

[159] Full compensatory treatment may properly be made in either cash or securities by both the I. C. C. and the Commission. *Standard Gas & Electric Co.*, 151 F. (2d) 326 (C. C. A. 3, 1945);

[Footnote continued on following page.]

clear that the common stockholders were determined to secure for themselves all of the underlying securities, to the exclusion of the preferred who were denied the right to participate in the underlying operating companies unless, perchance they owned common stock, or could possibly acquire some Gulf States warrants.

The Commission, in determining fair and equitable treatment for the preferred in the instant case, has applied the usual technique in valuing senior securities, such as bonds, upon retirement unaccompanied by the liquidation or dissolution of the particular holding company.[160] In both situations, namely, the elimination of the preferred in the instant case and the retirement of bonds, a dollar value is placed upon these senior securities, while the junior securities or the common stock receive the residual assets, consisting of securities in the operating companies as in the instant case. The same result is achieved by the common stockholders' acquisition of the complete ownership of the holding company enterprise in the situation where retirement of the senior securities occurs without dissolution. Therefore, the Circuit Court's criticism that the Commission "made no finding as to the 'value' of the common stock" is without

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[Footnote continued from preceding page.]

Georgia Power & Light Co., H. C. A. R. No. 5568, plan enforced (M. D. Ga. 1945); *New York, N. H. & H. R. Co.*, 147 F. (2d) 40, 47 (C. C. A. 2, 1945), aff'g 54 F. Supp. 595, cert. den. 325 U. S. 884 (1945); *Chicago Railways Co.*, 160 F. (2d) 59 (C. C. A. 7, 1947).

[160] The analogy is clear when the Engineers' plan is viewed as embracing two separate phases or transactions, (1) the retirement of the preferred stock, and (2) the subsequent dissolution of Engineers, resulting in the distribution of securities in the underlying operating companies to the common stockholders.

substance.[161] The Commission has stated in detail the very reasoning upon which it based its conclusions.[162] The Commission merely did not place a dollar sign on the rights surrendered by the common[163] but has expressly found that the "plan is fair to the common stockholders" and that the "retirement of the preferred stock will be of immediate benefit to the common stockholders". Hence the Commission has determined that the residual value of Engineers, namely the securities in the operating companies received in exchange, is the equitable equiva-

[161] No such absence of a finding of value for the common was mentioned by the District Judge. Moreover, this same Circuit Court recently gave whole-hearted approval to the Commission's valuation despite the absence of any "'attempt to fix a precise dollar value for each [inter-company] claim'" and "findings and conclusions as to (a) the value and extent" of the assets and debts and senior security claims against such assets, and "the shares and relative rank of common stock entitled to participate in the remaining net assets". *In the Matter of North American Light & Power Co.* (C. C. A. 3, Nov. 5, 1948), unreported, printed opinion, pp. 7, 10. In this latter case, the Third Circuit Court quoted with approval the Commission's statement of its approach in weighing the inter-company claims as "'integral elements of the "bundle of rights" of the respective claimants in order to determine whether the plan achieves a fair and equitable distribution.'" In sustaining the Commission, the Circuit Court concludes:

> "* * * The Commission has determined that the settlement was for the best interests of the parties; that the amount stated in the Amended Plan is both fair and equitable. They are ultimate findings, and represent a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate.' *Ladd* v. *Brickley*, *supra*. In point of fact, the Commission has gone further, and has stated in complete form the very reasoning upon which it based its conclusions. We think that is enough." (Printed Opinion, pp. 17-18.)

[162] See *In the Matter of North American Light and Power Company*, *supra*, printed opinion, p. 18.

[163] As stated in the *Standard Gas* case: "Actually it was not incumbent upon the Commission to reduce the result to dollars and cents in the process of valuation" [151 F. (2d) 333, n. 12].

lent of the rights surrendered by the common. In such a case, a distribution may properly be made without dollar valuation. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523, 565 (1943); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 482 (1943); *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 639-40 (1945). A requirement that dollar values be put upon the rights surrendered and the *quantum* received "would create an illusion of certainty where none exists and would place an impracticable burden on the whole reorganization process." *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co., supra*, at p. 565. Practical adjustments are required rather than a rigid formula. Accordingly, such determination need not be made by the use of any mathematical formula or with mathematical certitude. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co., supra*, at pp. 565-6; *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 529-30 (1941).

4. The court below improperly directed the Commission to give greater consideration to earning power and to apportion it.

A further criticism has been erroneously directed by the court below at the Commission on the basis of the *DuBois*, the *Group of Institutional Investors*, and the *Otis* cases for its alleged failure to "give any substantial consideration to the future earning power of Engineers and its subsidiaries", and its asserted neglect "to ascertain the future earning power of the system" or "apportion earning power between the preferreds and common based upon their respective claims to income" (R. 35).[164] Reference to these cases

[164] Apparently the District Court disagrees with the Circuit Court in this respect as the District Court nowhere in its opinion refers to any inadequate consideration of earning power.

reveals that in each, the reorganization involved the formation of a *new* corporation and the appropriate allocation of the securities therein on the basis of the apportionment of the earning capacity among the claimants. Hence earning capacity was projected far into the future and ascertained in order to insure the ability of the new corporation to meet the interest and dividend requirements of the new securities as a "sine qua non to a determination of the integrity and practicability of the new capital structure", and in order to avoid the "indefensible participation of junior securities in plans of reorganization" in violation of the well established "absolute priority" rule.[165] It would therefore seem that the criticism of the court below reflects a misapplication of the principle of these cases since the instant case, in contrast to the decisions cited by the court below, involves an entirely different type of distribution and method of compliance with the Act. In the instant case, the common stock management decided upon the complete elimination of the preferred class as the method, and cash as the type of distribution, instead of the formation of a new corporation, upon the dissolution of Engineers and the allocation of securities therein. Nor is the "indefensible participation of junior securities" at issue. Accordingly, the criterion of earning capacity, which was originally fashioned as a shield to protect the preferred from "indefensible participation" of the common in a new corporation "in satisfaction of the absolute priority rule" has by the court below been converted improperly into a weapon in the hands of the common against the preferred in disregard of the aforesaid rule. In effect the court below

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[165] *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 525-6, (1941).

has attempted to restrict the preferred by its misapplication of the doctrine of full priority. Moreover, in view of the material differences, particularly with respect to the type of distribution and method of compliance with the Act, between the instant case and the cases cited by the court below in support of its criticism, there is no need for a hypothetical projection into the indefinite future of the earnings capacity nor for an apportionment thereof. Yet it is evident from Badger's analysis, that in his opinion the estimated 1946 earnings indicated a continuation in earnings shown for the 1940-5 period, that future earning trends of Engineers' subsidiaries should not run counter to the strong growth trend of the public utility industry as there were no peculiar economic characteristics in respect to the territories served by these companies, and that Engineers should continue in future years to register progress along with other units in the industry (R. 2103a). Thus, in the instant case, *actual* as well as estimated earnings were considered, although, where, as here, a careful study indicates the amplitude of earnings coverage for the preferred, it does not appear necessary to go further as the common's claims to income would be subordinate, in any event, to those of the preferred stockholders. "The extent and method of inquiry necessary for a valuation based on earning capacity are necessarily dependent on the facts of each case." *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527 (1941).

5. The court below misconceived the significance of fair investment value.

In addition, the court below has unjustifiably found fault with the Commission for attempting to substitute "the new doctrine of investment value * * * for the

doctrine of equitable equivalents enunciated in the *Otis & Co.* decision",[166] and maintains that "investment value is and can be only one of a series of factors to be used in arriving at equitable equivalents". Despite the statement of the court below, novelty cannot be ascribed to the investment value doctrine in view of its recognition by this Court in the *Otis* case. There it was pointed out that once it is concluded, as it has been here, that the dissolution results in a type of liquidation entirely distinct from the liquidation envisaged by the charter provisions, the Commission is permitted "to examine the investment values of the

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[166] Certainly novelty is not revealed in the following rationale in the Commission's decision in the instant case:

> "It is settled that in a Section 11 reorganization a security holder must receive, in the order of his priority, from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered. Since under the circumstances of this case, we do not think it proper to regard the liquidation provisions of the charter as conclusive in determining those rights, we must consider all provisions of the charter applicable to the preferred, such as the dividend rate and the call price as well as the liquidation preferences, and we must analyze the financial condition of the company with particular regard to the asset and earnings coverage of the preferred" (R. 62a).

After reviewing the financial data and expert testimony the Commission concluded:

> "It is apparent that the preferred has an investment value at least equal to the respective call prices. * * *
>
> "Upon a full consideration of the record * * * the fair and equitable standard would require the payment [to the preferred] of an amount equal to the call prices of the securities, plus accrued dividends * * *": (R. 67a-68a).

It is significant that the report of the Senate Committee on Interstate Commerce, in reviewing Section 11 of the Senate bill on the Public Utility Holding Company Act, states: "Precedents under the Sherman Antitrust Act and under the Hepburn Act demonstrate that the necessary corporate adjustments can be made without forced liquidation or the sacrifice of *legitimate investment value*." S. Rep. No. 621, 74th Cong., 1st Sess., p. 33. (Italics ours.)

common and preferred stock". In reality, the doctrine of investment value connotes no novel technique but reflects the *measure* of the stockholders' rights determined in the simplification of a holding company system on the "basis of a going business", as recognized in the *Otis* case.

It has been a settled principle at least since the *United Light & Power Co.* case, 13 S. E. C. 1 (1943)[167] (the original *Otis* case) that has been continuously applied by the Commission[168] and recently reaffirmed in another aspect of that simplication,[169] that the present investment worth of a security, based on the bundle of rights surrendered, must be the measure of its participation in a section 11(e) plan. This concept[170] has recently been approved in an analogous situation in the *Schwabacher* case, *supra*, where this Court stated: "In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the *current*

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167 In the words of the Commission: "It is our conclusion that we must judge the fairness of the plan according to legitimate investment values existing apart from the duty of liquidation imposed by the statute" (13 S. E. C. 11). The Commission then proceeds to a discussion of the "bundle of rights" affecting normal value.

168 *E. g., Washington Railway & Electric Co.*, H. C. A. R. No. 7410 (1947), enforced June 16, 1947 (D. C. Dist. of Col.); *Pennsylvania Edison Co.*, H. C. A. R. No. 8550 (1948).

169 *United Light & Power Co.*, H. C. A. R. No. 6603 (1946).

170 This investment value doctrine has recently received judicial sanction in the First Circuit in *In re American and Foreign Power Company*, 80 F. Supp. 514, 528 (D. Me., 1948), where the District Court said with reference to the values assigned to certain preferred stocks under a section 11(e) plan:

> "• • • But it is clear that the Commission arrived at these figures not from a conception that this was a 'call' but from a *consideration of what was the fair investment value of these stocks*, in accordance with the overriding policy of *Otis & Co.* v. *S. E. C.*, 323 U. S. 624." (Italics ours.)

worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good" (334 U. S. 199). (Italics ours.) The analogy to the instant case is borne out by this Court's own recognition in the *Schwabacher* case of "the very similar purposes" of the Holding Company and the Interstate Commerce Acts and its reaffirmation of the *Otis* "rule of full priority" as embodied in the fair and equitable standard. Moreover, the doctrine of "current worth" is applicable, regardless of the method of system adjustment in view of the admonition in the *Otis* case that such incidents of simplification should not affect rights. It is immaterial that the Interstate Commerce Act expressly limits the types of recapitalization while the Holding Company Act does not, since in both situations, valuation is to be determined on a going concern basis.[171]

In short, present investment value or current worth is not a substitute for equitable equivalent, but its measure. It is not "one of a series of factors" to be used in the valuation, but is the end result, the final product of the valuation process based on the bundle of rights surrendered and reflecting earning power, market history, dividend record, asset priorities, and other relevant factors,[172] all of which the Commission has taken into account in arriving at equitable equivalents. Such criteria provide a proper basis of valuation. *Consolidated Rock Products Co. v. Du Bois*, 312 U. S. 510, 526 (1941).

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171 The similarity in the two statutes in another related aspect of the reorganization process is noted in *In the Matter of North American Light & Power Co.*, not officially reported (C. C. A. 3, 1948), printed opinion, p. 15.

172 Dr. Badger took all these elements into consideration in arriving at his values (R. 2097a).

6. The court below erred in distinguishing the *Otis* case on the basis of the continuance of the enterprise.

In addition, the court below erroneously criticized the Commission for its alleged disregard of what it conceives to be a substantial difference between the instant case and the *United Light and Power* reorganizations, namely, the termination of the holding company enterprise both for the preferreds and the common in the former and the continuance of the holding company enterprise in the latter, there being merely a shift of "the security holder participation in the enterprise * * * from the top holding company * * * to a subsidiary holding company". Thus the court below approves the district court's valuation in the instant case "of the securities '*ex* the Act', considering the holding company enterprise to be at an end as it is in fact" (R. 36). This attempted distinction is not valid and in fact represents a lateral, rather than a frontal attack upon the *Otis* principle that the charter liquidation provisions are controlling regardless of the type of liquidation involved. Granting *arguendo* that the present Engineers' plan is a "real liquidation" (as contrasted with a "nominal liquidation") then the claimed distinction disregards the admonition of this Court in the *Otis* case: "*The reason* [for its decision] *does not lie in the fact that the business of Power continues in another form.* That is true of bankruptcy and equity reorganization". (Italics ours.) In fact, the Commission viewed the dissolution in the *United Light & Power* (*Otis*) case as an actual dissolution and not merely the "peeling" off of a company in a holding company system.[173] In any

[173] In the reorganization of Puget Sound Power & Light Co., a former subsidiary of Engineers', the Commission referred to its views in the *United Light & Power* decision (13 S. E. C. 1, H. C. A. R. No. 4215) (1942) as follows: "These views were expressed in the course of our discussion of a proposal which contemplated an *actual liquidation*" [13 S. E. C. 226, 246 (1943)]. (Italics ours.)

event, a "real liquidation" of the enterprise has not occurred in the instant case, for the business of Engineers' continues in the operating companies which are now owned directly by the common stockholders instead of indirectly, since the elimination of Engineers (R. 1397a). In *American Power & Light Company* v. *S. E. C.*, 329 U. S. 90, 117 (1946), this Court has pointed out that the dissolution of a holding company means little more than the receipt of securities of the operating company in lieu of their present shares in the holding company.[174] Furthermore, the reasoning of the court below leads to the absurd result, that if Engineers, even though allegedly economically useless, had merged with one of its subsidiaries as originally contemplated, the holding company enterprise would have continued. Such a flimsy distinction[175] must be rejected as unsound.

Thus, the view of the court below when carried to its logical conclusion[176] results in improper emphasis

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[174] The Company itself indicated to its stockholders that the results of the plan would be to give them direct ownership of the subsidiaries. See *North American Co.* v. *S. E. C.*, 327 U. S. 686 709 (1946).

Also see *Northern States Power Co.* (Del.), H. C. A. R. No. 5745, p. 21 (1945), where the Commission appropriately said: "While the plan contemplates a formal dissolution of Delaware as a separate corporate entity, the *actual business enterprise* represented by the securities of Delaware, is being continued." (Italics ours.)

[175] Cf. *Community Gas & Power Co.*, 168 F. (2d) 740, 743 (C. C. A. 3, 1948). This same Circuit Court apparently distinguishes between a going business "destined to continue" and "an enterprise which is terminating". The distinction is lacking in merit where the termination of the enterprise is compelled by the operation of the Act. In the instant case, Engineers' counsel argued that the Company would have continued into the future for many years, but for the Act (R. 61a n. 42).

[176] It would seem from the opinion of the court below that the *Otis* rule would be applied to the first of these two holding companies but not to the liquidation of the second, since no holding

[Footnote continued on following page.]

upon the procedural sequence of simplification, even though, as this Court has said in the *Otis* case, values should not "be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the device of merger or consolidation". Procedural decisions, such as the selection of a particular sequence in or method of system adjustment (especially since in the case at bar the choice has been made by the common stock management of Engineers) (R. 718a, 719a), should not affect rights.[177] So said this Court as follows in the *Otis* case:

> "* * * Satisfaction of the great-grandfather clause might have been obtained in this or other holding company systems by an order for merger, consolidation or recapitalization between top holding companies or between associate companies

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[Footnote continued from preceding page.]

company system remains after the liquidation of the second. Such result could hardly be justified as fair and equitable when each holding company has separate groups of stockholders whose interests are accorded different treatment although both companies were dissolved because of the Act. The sequence of liquidation of a particular company in a holding company system should not affect rights.

[177] Under section 11(e) of the Act, the choice of an appropriate method of compliance from available alternatives is left by the Commission to the company or as in the instant case to the common stock management of Engineers. *Commonwealth & Southern Corp.* v. *S. E. C.*, 134 F. (2d) 747, 751 (C. C. A. 3, 1943); *In the Matter of North American Light and Power Co.*, not officially reported, printed opinion, p. 13 (C. C. A. 3, 1948); *The United Corp.*, H. C. A. R. 8396 (1948). The dominant role of management in the presentation of a plan is clearly recognized in the *North American Light and Power* case, *supra*, where the Third Circuit Court said: "* * * Since the *modus operandi* of Section 11(e) provides for a unilateral plan by management, it would be in naive disregard of human instinct to assume that such plans would, in every instance, be free of the influence of dominating interests." (Printed Opinion, p. 13.)

in the lower tiers of the corporate hierarchy. Such procedure would avoid the liquidation of Power. * * * *The selection by the Commission of one method of system adjustment to accomplish simplification rather than another is an incident which ought not to affect rights*" (323 U. S. 631). (Italics ours.)

Likewise any inference from the views of the court below that the applicability of the *Otis* case depends upon the continuation of the underlying holding company system (which was the fact in the *United Light & Power* reorganization) does not stand analysis. The *Otis* rule has in fact been applied in simplification proceedings under section 11, regardless of whether or not there has been a continuing holding company system.[178] Moreover, the emphasis upon the continuation of the holding company system places a premium upon the sequence of simplification and makes stockholders' rights contingent upon the procedure of system adjustment. But such procedural decisions should not affect rights any more than the selection of a particular method of system adjustment, as this Court cautioned in the *Otis* case.

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[178] For example, in *Puget Sound Power & Light Company*, 13 S. E. C. 226 (1943), Puget Sound had no holding company system beneath it when Engineers filed the plan for it. Also in *Southern Colorado Power Co.*, H. C. A. R. No. 4501 (1943), enforced in Civil Action No. 670 (D. Colo., 1944), aff'd *sub nom.*, *Disman* v. *S. E. C.*, 147 F. (2d) 679 (C. C. A. 10, 1945), cert. den. 325 U. S. 863 (1945), the holding company interest was wiped out so that Southern Colorado was no longer in a holding company system.

C. The Commission Applied the Proper Standards and Techniques in the Valuation Process. Its Findings Should Have Been Sustained Since Based Upon Substantial Evidence and Possessing Rational and Statutory Foundation, and in Any Event They Were Not Capricious.

In determining the participation of the preferred, the Commission, as urged above, has applied the correct standards and techniques in the process of valuation. Under the applicable principles, such participation is measured by the present worth of the security, based upon the bundle of rights surrendered, and valued as though in a continuing enterprise, with primary emphasis upon the current rights to earnings and assets. *Otis & Co.* v. *S. E. C.*, 323 U. S. 624 (1945). That process requires "expert analysis and the weighting of a complex array of factors, in which the informed judgment of the Commission counts heavily". *Lahti* v. *New England Power Ass'n.*, 160 F. (2d) 845 (C. C. A. 1, 1947). The appraisal of these factors calls for the exercise of an expert economic judgment as to "current worth" of the contract rights. *Schwabacher* v. *U. S.*, 334 U. S. 182 (1948). The Commission's determination has "substantial roots" in the law and in the facts, *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469, 478 (1947), and is not capricious (as the two courts below apparently believed).

Viewing the charter liquidation provision as not "conclusive" in determining the equitable (economic) equivalent of the rights surrendered, the Commission considered "all provisions of the charter applicable to the preferred, such as dividend rate and call price as well as the liquidation preferences" and carefully analyzed "the financial condition of the company with

particular regard to the asset and earning coverage of the preferred" (R. 62a). It appeared that the preferred stock of Engineers represented 17.5% of corporate capitalization and surplus, is junior to 66.2% and senior to 16.3% (R. 64a). For the period 1940 to 1945, the average coverage of fixed charges and dividends was 1.4 times, and for the same period, preferred dividend requirements on a corporate basis had been earned an average of 1.5 times (R. 64a). Reliance was placed on the testimony of Badger, an expert witness, as well as Barnes, President of Engineers and other Company officers. Badger prepared an extensive report analyzing the values of the three series of preferred stock (R. 2056a *et seq.*). He examined the history of Engineers, the records in respect to the Company's property and its business, the management, the asset position, the earnings and dividend record and other pertinent data relating to the going concern value of Engineers preferred stock. He ascertained that during the years 1940 through 1945 there was a continuous improvement in the Times Charges and Preferred Dividends earned, with the exception of 1945. In 1940, these charges were earned 1.22 times and increased gradually to 1.54 times in 1944. In 1945, charges were earned 1.47 times. If effect is given to the reduction in Federal Income and Excess Profits Taxes in that year, resulting from nonrecurring deductions, the figure becomes 2.12 times (R. 2099a). Preferred dividend requirements for Engineers alone, based on balances of earnings available for Engineers, were covered between 1.81 times and 3.2 times for the period 1940 through 1945. If extraordinary deductions of income taxes for 1945 is given effect the dividends would have been earned 4.75 times (R. 2101a). Based on the Company's own estimate of 1946 earnings (R. 1826a), Badger calculated that

over-all charges in 1946 would be earned 1.67 times and Engineers' preferred dividend requirements alone would be earned 3.39 times (R. 2102a). The estimate of 1946 earnings thus indicates a continuation of the improvement in coverages shown for the 1940-45 period. In that connection Badger also expressed the view that earning trends of Engineers' subsidiaries should not run counter to the strong growth trend of the public utility industry as there were no peculiar economic characteristics in respect to the territories served by these companies, and that Engineers should continue in future years to register progress along with other units in the industry (R. 2103a). After the analysis of earnings of Engineers he compared, on the basis of investment characteristics, Engineers preferreds with preferred stocks of five public utility holding companies which he believed to be similar to Engineers for the period 1940 to 1945 in order to ascertain their relative position and yield (R. 2108a). On the basis of a comparison of yields of the securities studied, he concluded that the $5., $5.50, and $6.00 had a respective average value of $107.49, $118.31 and $129.07 (R. 2112a). Badger also prepared a study of the preferred stock of ten operating and holding companies selected for similarity of their earnings to those of Engineers (R. 2113a). He found an average yield for the ten stocks selected of 4.5 and by an application of this yield to the $5.00, $5.50 and $6.00 preferreds, obtained their corresponding values of $111.11, $122.22 and $133.33 (R. 2114a). He concluded that a proper yield for Engineers preferreds would be 4.6%, resulting in respective fair investment values per share for the three series of $108.70, $119.57 and $130.33, absent the call features. In view of the redemption feature and a premium for a period

until call, it was his opinion that the three series had fair investment values of $106.25, $111.38 and $111.50 respectively (R. 66a-67a, R. 2118a). It also appears from the opinion of the Commission that "No additional expert testimony on value was introduced into the record and no serious challenge was made in the proceedings to Badger's conclusion that the fair investment value of the preferred on a going concern basis is in excess of the call price" (R. 67a). In fact, this view was substantiated by other testimony as that, for instance, by Barnes, President of Engineers (R. 522a). In the opinion of both witnesses the call price of the securities established a ceiling or "stopper" on their value.

The Commission found that the preferred has an investment value at least equal to the respective call prices and concluded, upon "full consideration of the record" before it, that "the fair and equitable standard would require the payment of an amount equal to the call prices of the securities, plus accrued dividends" (R. 68a). The Commission also found that "the retirement of the preferred stock will be of immediate benefit to the common stockholders" (R. 72a) and that "the plan is fair to the common stockholders" (R. 135a). The Commission considered comparatively unimportant such factors as issue prices and market history, alleged losses from divestments, etc. The appraisal by the Commission, which involves a discretionary weighing of a variety of factors, is based upon substantial evidence and has a rational basis in fact and is not predicated upon any clear cut error of law. In any event, its determination is not arbitrary or capricious but reflects the exercise of an informed expert economic judgment based upon the record.

This determination of the Commission should be considered as of the date of its approval, particularly as the District Court accepted Badger's values and "in the absence of a showing of changed circumstances", assumed "that they are applicable at the present time" (R. 2110a), although not considering them "controlling as the plan did not propose to give these amounts" to the preferred stockholders (R. 290a). In any event, the Commission's decision should be reviewed on the basis of the administrative record as of the date when the rights of the parties were fixed by virtue of the *actual* consummation of the plan pursuant to the District Court decree,[179] after the denial of the Streeter petitions for a stay by the two courts below and by a Justice of this Court. In that connection it should be noted that the dividend rights of the preferreds were terminated at that time and that the consummation of the plan led to the mooting of the appeals then pending before this Court with respect to the 11(b) divestment orders (R. 113, n. 1). In any event, no substantial or radical change has occurred which would require a reopening of the administrative record. Under such circumstances, the Commission's action should be tested on the basis of the administrative record which is the same both at the time of the Commission's and the District Court's action. Consequently, it is urged that the Commission's determination should have been sustained since it has a rational and statutory foundation and the Commission has not plainly abused its discretion, even though the District Court believed

[179] Cf. *Public Service Commission of N. Y. v. S. E. C.*, 166 F. (2d) 784, 788 (C. C. A. 2, 1948).

that greater weight should be given to certain elements all of which had been considered by the Commission. The court below therefore should have held that the decision of the District Court was clearly erroneous both in fact and in law.

IV. The Court Below Erred in Disregarding an Improper Change in the Plan and Approving Incorrect Procedure Used Therefor, Both Sanctioned by the District Court.

A. The Dividend Rights of the Preferred Stockholders Should Not Have Been Terminated Under a Fair and Equitable Plan Prior to Receipt of the Full Amount of Current Value of Their Stock as Limited by the Call Prices.

As heretofore related, the plan which was approved by the Commission and submitted to the District Court for enforcement provided for the retirement of the preferred stock at amounts equal to the respective call prices (R. 134a). Although the undisputed investment values of the preferred shares exceeded their respective voluntary redemption prices, the Commission treated the call prices as setting "a ceiling" and restricted the participation of the preferred stockholders to amounts at least equal to their respective call prices. In accordance with the redemption provisions of the charter (R. 1413a), under the provisions of the plan the dividend rights of the preferred stockholders could be terminated only upon payment of the full amounts to which they were entitled (R. 108a). We agreed with the Commission that this plan was fair and equitable and urged its enforcement (R. 158a).

The District Court, however, over our objections (R. 361a) changed the plan by its order so that the

dividend rights of the preferred stockholders were terminated upon the receipt of $100 per share, together with the creation of an escrow to cover the excess between $100 and the respective call prices plus an amount of prospective interest (R. 320a, 321a). Although holding that "the escrow provisions of the plan are proper" (R. 40), without discussion of the objections, the court below directed the District Court to enter an order disapproving the plan as the District Court had found the plan as submitted by the Commission unfair and inequitable. The court below also pointed out that in view of the denial of a stay of consummation, "the escrow agreement accordingly delimits the area in which the plan to be approved by the Commission and district court must fall" (R. 40).

Assuming but not conceding that the District Court had the power to rewrite the plan in the first instance,[180] it is our contention that the plan as changed is unfair to the preferred stockholders, particularly in the light of the Circuit Court's direction for the disapproval of the plan.

Although the *Otis* case held that liquidation preferences in the charter are "inoperative" under section 11 it did not hold that the redemption provisions are likewise inoperative. In fact, the Commission *applied* the redemption provisions when it restricted the preferred's claim to their respective call prices in spite of the undisputed testimony that the investment values were in excess of such prices.

The Commission stated the theory as follows:

"* * * We have indicated in previous opin-

[180] The Commission maintains that its Order of Amendment did not constitute an amendment to the plan (R. 389a).

ions that the call price will ordinarily set a ceiling on the value of a security, for it provides a means, apart from the Act, whereby the security can be retired at a maximum price." (R. 67a).

The District Court also applied the redemption provisions of the charter by permitting the consummation[181] of the plan and the creation of an escrow of the difference between $100 per share and the respective call prices plus an amount of prospective interest.[182] This the court below sustained, in spite of its direction for the disapproval of the plan. The effect of what the Commission and the two courts below did was to place a ceiling on the preferred's claim, which ceiling, absent the redemption provisions, would be nonexistent. *Continental Insurance Co. v. U. S.*, 259 U. S. 156 (1922). At the same time the two courts below permitted the termination of the preferred's dividends upon their receipt of $100 although under the redemption provisions the common stockholders did not have that right except upon the payment of the full call prices. Thus the common received the full benefits for which the charter required them to pay a premium, but without payment of the premium. On the other hand, the preferred suffered all the detriments which a call of the stock would have entailed but did not receive the benefits, *i. e.*, receipt of the premium.

The premature termination of the preferred's dividend rights under the circumstances herein is contrary to congressional intent. S. Rep. No. 621, 74th Cong.,

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[181] The plan has since been consummated except for the payment of the amounts in excess of $100 per share (R. 40).

[182] The escrow also included an allowance for expenses and for interest on the amount withheld from the preferred.

1st Sess., p. 33. In the course of its analysis of sections 11(d), (e) and (f), the Senate Report states: "If a company is *solvent*, the court should continue the payment of interest and in appropriate cases *dividends until a prudent reorganization is effected.*" (Italics ours.) An analogous principle has been applied to consolidations, reorganizations or liquidations under State law.[183]

It is no answer to say that the receipt of $100 plus the escrow was sufficient to protect the preferred. The weighted average dividend rate on all series of preferred was 5.37%. Dr. Badger testified that under present and reasonably foreseeable future conditions a return of only 4.6% could be obtained on a security equivalent in quality to Engineers' preferred. Thus the preferred as a class loses .77% on $39,245,500, the aggregate stated value of their stock, or $302,190 per year.[184]

Furthermore, the Escrow Agreement is unfair because it required the preferred stockholders to turn in their stock certificates, whereas the common stockholders retained theirs. Thus, the preferred stockholders have no indicia of ownership. Moreover, we found no other case where similar action was taken. In cases before and after the present one, the Com-

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[183] *Lonsdale Securities Corp.* v. *International Mercantile Marine Co.*, 101 N. J. Eq. 554; *Colgate* v. *U. S. Leather Co.*, 73 N. J. Eq. 72, rev'd on other grounds, 75 N. J. Eq. 229; *Wilson* v. *Laconia Car Co.*, 275 Mass. 435; *Garritt* v. *Edge Moor Iron Co.*, 22 Del. Ch. 142, aff'd *sub nom. Pennsylvania Co.* v. *Cox*, 23 Del. Ch. 193.

[184] Since the escrow makes provision only for interest on the excess over $100 per share, it is not adequate to protect the rights of the preferred stockholders in the event it is ultimately determined that they are entitled to amounts equal to the call prices.

mission and the courts have approved the issuance of certificates to the preferred stockholders.[185]

At all events, these elements present equities for the preferred which this Court may wish to weigh in the light of the circumstances of this case.

B. The Court Below Erroneously Sanctioned a Departure From the Statute and the Constitution in Permitting an Amendment or Modification of the Plan to Provide an Escrow Without Notice and an Opportunity to Be Heard.

As shown in our Statement the Commission, by *ex parte* action, approved the escrow arrangement (R. 170a) after the hearings before it had been closed. Objection was made (R. 181a) to the Commission's motion to amend its application to include its "Order of Amendment", because we had not been afforded an opportunity to be heard as to the adequacy of the Escrow Agreement[186] which had been submitted to the Commission. At the hearing on February 17, 1947 this version of the agreement was filed with the District Court, but after the hearing was closed a revised agreement[187] was sent to the District Court by counsel for Engineers.

On May 26, 1947, counsel for the Commission presented a proposed form of order embodying this revised Agreement (R. 422a). We objected (R. 372a)

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[185] See *Electric Bond & Share Co.*, 73 F. Supp. 426 (S. D. N. Y., 1946); *Eastern Minnesota Power Corp.*, H. C. A. R. No. 7441 (1947), plan enforced (D. Minn., 1947), C. C. H. Fed. Sec. Serv., Par. 90,399-1; *New England Public Service Co.*, H. C. A. R. No. 7511 (1947), plan enforced, 73 F. Supp. 452 (D. Me., 1947); *Pennsylvania Edison Co.*, H. C. A. R. No. 6723 (1946).

[186] R. 402a. This version was drafted on the theory that it would be utilized in case of an appeal by the common stockholders.

[187] R. 362a. This revised form was drafted to be used in the event of an appeal by either preferred or common stockholders.

again because we had not been afforded an opportunity to be heard as to its adequacy.

On May 29, 1947 the District Court over our objection entered the order from which an appeal was taken (R. 391a) and adopted the Escrow Agreement submitted by counsel for the Commission. An appeal was immediately filed and we moved (R. 333a) for a stay of consummation because of the amendment to provide an escrow and because of its inadequacy, but were denied relief (R. 335a). Likewise petitions for stay which were filed in turn with the court below and a Justice of this Court were denied. Implicit recognition of the merit of our request for a stay is found in the opinion below where the Circuit Court said: "The action which the Commission may take will, of course, be limited by the fact that with its approval, evidenced by its opposition to the appellant Streeter's motion to stay which this court denied, the plan has been carried into effect, with the exception of the payment of the premiums which the district court disapproved" (R. 39-40).

There was no precedent or justification for this irregular procedure. The Act requires an opportunity for hearing both before the Commissions and the Court. *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90 (1946). Such opportunity to be heard is commanded by the procedural due process requirements of the Fifth Amendment to the Constitution: *Railroad Com. of Cal.* v. *Pac. G. & E. Co.*, 302 U. S. 388, 393 (1938); *Philadelphia Co.* v. *S. E. C.*, not officially reported, C. C. H. Fed. Sec. Serv., par. 90,426 (C. A., D. C., 1948). Neither the Commission nor the District Court acted in such arbitrary fashion in other instances. For example, in *American Water Works and Electric Company*, H. C. A. R. No. 7208 (1947),

the Commission approved a plan which included an escrow arrangement that had been proposed as a part of the plan and the Commission specifically reserved jurisdiction over the terms of any escrow agreement. Thus, all parties would be afforded an opportunity to be heard.

Moreover, in *Pennsylvania Edison Co.*, H. C. A. R. No. 6723 (1946), which was cited to the District Court by Commission counsel as a precedent for an escrow it appears that the Commission afforded the preferred stockholders an opportunity to be heard. Similarly, in *Eastern Minnesota Power Co.*, H. C. A. R. No. 7441 (1947), such opportunity was given before submission to the District Court for enforcement. A final illustration is the recent decision in *Federal Light & Traction Co.*, H. C. A. R. No. 7701 (1947), where as in all other instances, except the present case, the preferred stockholders received an opportunity to be heard on the escrow arrangement and were given transferable indicia of ownership pending ultimate disposition of their claims.

Regardless of the outcome, the preferred stockholders had a valuable right to be heard as to the terms of the escrow. Especially is this true, when, as shown above, the plan as modified by the District Court to termina e the preferred's dividend rights is not fair and equitable to the preferred stockholders. As stated in the *Phildalephia Co.* v. *S. E. C.*, *supra*, "Denial of a procedural right guaranteed by the Constitution * * * is never 'harmless error'."

V. Assuming *Arguendo* the Unfairness and Inequity of the Plan, the Court Below Properly Vacated the Decree of the District Court and Directed the Remand of the Proceedings to the Commission.

We have maintained that the Commission correctly determined that the preferreds have a fair investment value at least equal to the call prices and that fairness and equity require the payment to the preferreds of that amount. If, however, this Court concludes that the Commission erred in its valuation, then and only then the question of remand comes to the fore.

Assuming but not conceding the correctness of the District Court's determination "that because of the provision for the payment of premium,[188] the plan does not meet the requirements of fairness and equity" (R. 292a), nevertheless the District Court had no power to rewrite or amend the plan so as to reduce, on the basis of its own estimates and valuation, the *quantum* of participation accorded to the preferred stockholders under the plan submitted by the Commission, and then to approve and enforce the plan as so amended by it. In other words, since the District Court had, in effect, disapproved the plan submitted as unfair and inequitable,[189] it had no choice but to reject the plan, deny enforcement and remand to the Commission for appropriate action. Its failure so to do constituted a reversible error, for which

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188 The reference of the District Judge (Leahy, *J.*) to "premium" is an inaccurate characterization, as the plan does not call for the payment of a "premium" as such, but an amount equivalent to the redemption price. Such reference reflects a "nominal" approach which begs the question.

189 In its opinion on rehearing, the court below indicated that the "district Court found the plan to be unfair and inequitable and rejected it." (R. 140).

the court below correctly vacated the District Court's decree and directed the remand to the Commission for its action (*i. e.*, valuation).[190] Such was the determination of the court below when it said:

> "Though a district court of the United States sitting pursuant to the provisions of Section 11(e) may reject a plan, if cannot value the securities, find equitable equivalents therefor and substitute its own estimates for those of the Commission requiring the plan as amended by it to be carried out. *To put the matter briefly, a district court may reject but not amend the plan. The court below, therefore, erred in one particular. It entered an order approving and enforcing the plan as amended by it. It was without power to do this.* The provisions of Section 11(e) make it clear that the Commission in the first instance must approve the plan and find it to be fair and equitable. If, as here, the district court disagrees with the conclusion of the Commission that the plan is fair and equitable, it must refuse to approve the plan and 'remand' the record to the Commission for further and appropriate action by it" (R. 39). (Italics ours.)

The principle enunciated by the court below that a section 11(e) court may disapprove and reject a plan, but not amend and then approve it has been uniformly applied by the courts.[191] A district court

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[190] In referring to the action to be taken by the Commission, the court below said:

> "* * * The problem is and will remain, until its disposition by the Commission, one of valuation of the securities of Engineers, viz., the preferreds and the common" (R. 40).

[191] *In re Laclede Gas Light Co.*, 57 F. Supp. 997 (E. D. Mo., 1944), aff'd *sub nom. Massachusetts Mutual Life Ins. Co. v. S. E. C.*, 151 F. (2d) 424 (C. C. A. 8, 1945), cert. den. 327 U. S.

[Footnote continued on following page.]

cannot (as the instant District Court attempted) approve a plan in part and disapprove it in part.[192] Furthermore, it cannot rewrite the plan and then approve.[193] Accordingly, the District Court in the case at bar did not have the power to amend the plan so as to reduce the compensation proposed to be paid to the preferred stockholders any more than it could change the method of payment from cash to kind, or modify any other part of the plan.[194] Nor was it free to change any of the provisions as to the

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[Footnote continued from preceding page.]

795; *In re Kings County Lighting Co.*, 72 F. Supp. 767 (S. D. N. Y., 1947), aff'd *sub nom. Public Service Commission of N. Y.* v. *S. E. C.*, 166 F. (2d) 784 (C. C. A. 2, 1948); *In re Electric Bond & Share Co.*, 73 F. Supp. 426 (S. D. N. Y., 1946); *In re Eastern Minn. Power Corp.*, C. C. H. Fed. Sec. Serv., Para. 90, 399-1 (D. Minn., 1947); *Matter of Northern States Power Company*, unreported, decided Aug. 30, 1948 (D. 4th), D. Minn., Civil Action No. 2673.

192 *In re Laclede Gas Light Co., supra.*

193 Thus in *In re Electric Bond & Share Co., supra*, it was held:

> "* * * The Court cannot *amend* or *modify* the plan and then enter an order of approval since §11 (e) provides that the plan must in the first instance be approved by the Commission. The function of the Court is to approve and enforce the plan of reorganization submitted to it, if it finds such plan fair and equitable and appropriate to effectuate the purposes of the Act. * * *" (73 F. Supp. 443).

194 That such amendment is not permitted is evident from the following statement by the District Court in the *Kings County* case, *supra*:

> "* * * I agree thoroughly with the position taken by counsel for the State Commission that, under my narrow statutory jurisdiction I could not *amend* a proposed plan. For example, I could not, in the case at bar approve the plan on condition that Long Island receive, not 7½% of its present common stock holding, but 3¾%, this representing a compromise between the views expressed by the two commissions. Any such disposition would be wholly without jurisdiction" (72 F. Supp. 774).

stockholders' rights under the plan.[195] Unquestionably, any change in the *quantum* of participation to be accorded the stockholders necessarily alters substantial rights.

Likewise, this principle limiting the district court's power to amend a plan has been applied to analogous situations arising under section 77 of the Bankruptcy Act. Thus in section 77 proceedings, where the district court's approval is required in all cases, that court can only pass upon such plans as are certified to it[196] and has no power to amend the plan,[197] but is limited to approval or disapproval, in which latter event it must either dismiss the proceedings or refer the plan to the Interstate Commerce Commission.[198] Furthermore, even the "interest of speed" or expedi-

[195] In the *Public Service Commission* case, *supra*, which affirmed the *Kings County* case, *supra*, the Court of Appeals for the Second Circuit apparently imposed a stricter limitation upon the district judge's power of approval, stating:

> "We will take up the last objection first. We may assume for argument that the judge's power was limited to an approval or a rejection of the plan, as it stood. He held that, nevertheless, the condition that the plan should be submitted to the PSC for its approval was not an 'essential' part of the plan, and that for this reason he was free to disregard it. *In this he was right, not indeed because he would have been free to change any of those provisions for the issue of securities or the alteration of shareholders' rights which made up the plan, which he thought not to be 'essential';* but because, as we shall show, §11(e) did not require the consent of the PSC, and because submission to that commission was not part of the plan at all; but, as it itself declared, only one of the 'steps to be taken to make the amended plan effective' " (166 F. (2d) 786). (Italics ours.)

[196] *In re New York, N. H. & H. R. Co.*, 27 F. Supp. 392 (D. Conn., 1938), aff'd 104 F. (2d) 1018 (C. C. A. 2, 1939).

[197] *In re New York, N. H. & H. R. Co.*, 54 F. Supp. 595 (D. Conn., 1943), aff'd in part and rev'd in part on other grounds 147 F. (2d) 40 (C. C. A. 2, 1945), cert. den. 325 U. S. 884 (1945).

[198] *In re Erie R. Co.*, 37 F. Supp. 237 (D. Ohio, 1940), aff'd 133 F. (2d) 730 (C. C. A. 6, 1943), cert. den. 320 U. S. 748 (1943).

tion does not justify the judicial amendment or modification of a plan submitted by the Commission.[199]

In addition, the Commission's so-called amendatory order of February 11, 1947, and the District Court's adoption of the escrow resulted in the restoration of the splitting features of the original plan,[200] after they had been withdrawn, by separating part of the plan it disapproved and so constituted substantive changes of valuable rights[201] without authority in law so to do, as indicated above at p. 155. In any event the Commission's amendatory order and its consent to the escrow do not satisfy the statutory requirement of approval by both the Commission and the District Court. Nor can this requirement be waived by either the Commission or the District Court. The

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[199] *In re Alton R. Co.*, 159 F. (2d) 200 (C. C. A. 7, 1947); *In re Chicago, R. I. & P. Ry. Co.*, 162 F. (2d) 257 (C. C. A. 7, 1947).

Thus, in the *Alton* case, *supra*, where the District Court in the interest of speed rewrote certain provisions of the plan after its approval by the Interstate Commerce Commission, and the security holders, the Court of Appeals reversed the District Court order, rejecting the argument as to the District Court's authority to rewrite in connection with its supervision of the execution of the plan.

The *Alton* case, we believe, cannot be distinguished from the instant case, in which the plan as approved by the Commission and submitted to the court contained none of the provisions concerning the treatment of the preferred stockholders which were incorporated by Paragraph 6 of the court's order (R. 321a). Nor does the District Court's desire for speed in the instant case justify its attempt to change the plan any more than in the *Alton* case.

[200] Although counsel for Engineers had made a motion to separate Parts I and II of the plan and for an order permitting the consummation of Part I, the Commission found that it could not grant the motion to split the plan, but stated that it would approve an amendment to provide for escrow in the event of further litigation as to the rights of the preferred stockholders (R. 75a).

[201] The Commission does not view the amendatory order as an amendment to the plan (R. 169a, 389a).

court below expressed itself on this point in the following language:

> "* * * we are of the opinion that *neither the Commission, nor the District Court, nor this court possesses the power to waive the provision of Section 11(e), providing for approval of a plan of reorganization* as fair and equitable by the Commission and by the District Court. *Moreover, we cannot treat the Commission's amendatory order of February 11, 1947 or its approval of the escrow agreement as a rejection of the role imposed on the Commission by Congress.* The correctness of our position in this regard is demonstrated by the fact that the amendatory order of the Commission provides that the escrow agent may make payment to the preferred stockholders only when the order of the District Court has become final and not subject to appeal. What the Commission intended to effect by the order was nothing more than the establishment of a means for expediting the execution of the plan of reorganization when the approval required by the statute had been attained" (R. 139). (Italics ours.)

As the District Court disapproved the plan as unfair and inequitable and the requisite concurrent approval is lacking, the District Court was required to remand the cause to the Commission for appropriate action. This procedure which the court below correctly ordered has been uniformly followed. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80 (1943); *Schwabacher* v. *U. S.*, 334 U. S. 182 (1948). Both of these Supreme Court cases involved the treatment to be accorded stockholders under a statutory reorganization plan. Thus in the first *Chenery* case, *supra*, where an order of the Commission approving a reor-

ganization plan under the Act, was reversed as based upon inapplicable judicial precedents, this Court directed the remand to the Commission for appropriate action in accordance with its opinion. As stated in the *Chenery* case, *supra*:

> "* * * But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. *If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.* For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency" (318 U. S. 88). (Italics ours.)

Similarly, in an analogous situation in the *Schwabacher* case, *supra*, this Court again directed a remand to the Interstate Commerce Commission for reconsideration as that Commission may have failed to consider the effect of certain rights of stockholders upon the "intrinsic or market values". In view of the foregoing authorities, the decision of the court below correctly requires the remand to the Commission for valuation in accordance with its opinion, where the plan has been disapproved.[202]

---

[202] As noted above, the question of remand has been argued on the assumption that the disapproval of the plan was correct, but that disapproval is of course challenged by the Streeter group of preferred stockholders.

Conclusion.

By reason of the foregoing, the judgment of the court below should be reversed and, by appropriate direction to the District Court, the plan approved by the Commission should be enforced insofar as it provided for the payment to the preferred stockholders of the amounts equal to the respective redemption prices of their stock (less $100 per share already received) plus adequate recompense for the delay in payment. In the event, and only in the event, that this Court finds that the Commission erred, as a matter of law, in the valuation process, this proceeding should be remanded to the Commission for its further action in conformity with the instructions of this Court.

Respectfully submitted,

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APPENDIX A

Section 11(d), (e) and (f) of the Public Utility Holding Company Act of 1935 [15 U. S. C. 79k(d) (e) and (f)] provides as follows:

"(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this chapter, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b) the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

"(e) In accordance with such rules and regulations or order as the Commission may deem neces-

sary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan thereto-

fore approved by the court and the Commission, the assets so possessed.

"(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of in-

vestors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission."

Section 18(f) of said Act [15 U. S. C. §79r(f)] provides as follows:

"(f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the district court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this chapter."

Section 19 of said Act [15 U. S. C. §79s] provides as follows:

"Hearings may be public and may be held before the Commission, any member or members

thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before the Commission, the Commission, in accordance with such rules and regulations as it may prescribe, shall admit as a party any interested State, State commission, State securities commission, municipality, or other political subdivision of a State, and may admit as a party any representative of interested consumers or security holders, or any other person whose participation in the proceedings may be in the public interest or for the protection of investors or consumers."

Section 24(a) of the said Act [15 U. S. C. §79x(a)] provides as follows:

"Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No

objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended [28 U. S. C. §1254]."

APPENDIX B

Section 11(c) and (d) of the Public Utility Holding Company Bill S. 1725 (Hearings before Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., p. 19 ff.) provides as follows:

"(c) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order under this section. Upon any such application, the court shall take possession and exclusive jurisdiction for the purposes of this act of such assets of the company, wherever located, as may be held in contravention of such order, or, in the case of any order for reorganization or dissolution, possession, and exclusive jurisdiction for the purposes of this Act of the company and all of its assets, wherever located; and the court shall have jurisdiction, and it shall be the duty of the court, to constitute and appoint the Commission as sole trustee to administer the assets so possessed and the proceeds thereof as a trust estate for the benefit of the persons interested therein as their interests may appear. *In any proceedings for the enforcement of an order of the Commission under this section, the Commission with the approval of the Court shall have power to dispose of any or all such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be prepared in the first instance by the Commission,* or, subject to such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide

interest (as defined by the rules and regulations of the Commission) in the reorganization.

"(d) If, in the judgment of the Commission, any registered holding company or any subsidiary company thereof is insolvent or unable to pay its debts as they mature, the Commission shall have power to institute proceedings for the reorganization of such company under Section 77B of the Act of July 1, 1898, entitled 'An act to establish a uniform system of bankruptcy throughout the United States', as amended. In any such proceedings or in any other proceedings in a court of the United States, whether under said Section 77B or otherwise, by whomsoever instituted, for the reorganization or liquidation of any registered holding company or subsidiary company thereof or in which a receiver or trustee of any such company or any assets thereof is appointed, the court, at the request of the Commission, shall have jurisdiction, and it shall be the duty of the court, to constitute and appoint the Commission as sole trustee or receiver, whether or not a trustee or receiver shall theretofore have been appointed. *In any such proceedings a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for a hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be prepared in the first instance by the Commission* or, subject to such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as

defined by the rules and regulations of the Commission) in the reorganization. All fees, expenses, and remuneration paid in connection with any reorganization or liquidation of a registered holding company or subsidiary company thereof, whether under said section 77B or otherwise, shall be subject to the approval of the Commission. The Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceedings as the court may allow." (Italics ours.)

Excerpt from analysis of S. 1725 (Hearings Before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., p. 49):

"Subsections (c) and (d) outline the procedure whereby the reorganization plans must be approved by the Commission and carried out under court supervision. The court is to take jurisdiction of the assets involved and appoint the Commission sole trustee or receiver to administer the assets as a trust estate for the benefit of the persons interested therein as their interest may appear. By these provisions it is intended to give the Commission the complete supervisory power which is essential to the elimination of the present wasteful practices in corporate reorganizations. It also ensures the investors that their properties will not be needlessly sacrificed but will be conserved by the Commission and court until a satisfactory reorganization can be arranged. If a company is solvent, the court could continue the payment of interest and in appropriate cases dividends, until a prudent reorganization is effected. If it is insolvent or unable to

pay its debts, the Commission is empowered by subsection (d) to institute proceedings for the reorganization of the company under Section 77B of the Bankruptcy Act; in such proceedings, also, the Commission could have itself appointed sole trustee. Under either subsection Commission approval of reorganization plans and supervision of the conditions under which such plans are prepared will make it impossible for a group of favored insiders to continue their domination of inarticulate and helpless minorities, or, as is more often the case majorities. All fees and expenses and remuneration paid in connection with any such reorganization, whether under section 77B of the Bankruptcy Act or otherwise, are made subject to the approval of the Commission. The court is to allow the Commission reasonable compensation for its services as trustees."

APPENDIX C

Section 11(d), (e) and (f) of the Public Utility Holding Company Bill S. 2796 (74th Cong., 1st Sess.) provides as follows:

"(d) The Commission may apply to a court in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order under this section. Upon any such application, the court as a court of equity shall take exclusive jurisdiction and possession, for the purposes of this title, of such assets of the company or companies, wherever located, as may be the subject of such order, or, in the case of any order for reorganization or dissolution, exclusive jurisdiction and possession, for the purposes of this title, of the company or companies and all the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court shall have the power, and it shall be the duty of the court, to constitute and appoint the Commission as sole trustee, to administer under the direction of the court the assets so possessed and the proceeds thereof as a trust estate for the benefit of the persons interested therein as their interests may appear. In any proceeding for the enforcement of an order of the Commission under this section, the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance *with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing.* Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such

rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

"(e) *In accordance with such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers,* any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for the reorganization or dissolution, of such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of this title and the rules, regulations and orders thereunder or to make unnecessary the issuance of any order by the Commission in respect of any such company under subsection (b). *If, after notice and opportunity for hearing, the Commission shall approve such plan, as submitted or as modified to meet such terms and conditions as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers, as fair and equitable to the persons affected by such plan and as appropriate to effectuate the provisions of this title and the rules, regulations, and orders thereunder, the Commission shall make an order authorizing and directing such company or any subsidiary company thereof to divest itself of control, securities, or other assets or to be reorganized or dissolved*

in accordance with such plan; and the Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with such order. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this title and the rules, regulations, and orders thereunder, the court shall take exclusive jurisdiction and possession, for the purposes of this title, of such assets of the company or companies wherever located, as may be the subject of such order; or, in the case of any order for reorganization or dissolution, exclusive jurisdiction and possession, for the purposes of this title, of the company or companies and all the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court shall have power, and it shall be the duty of the court, to constitute and appoint the Commission as sole trustee, to administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed and the proceeds thereof as a trust estate for the benefit of the persons interested therein as their interest may appear. It shall be within the authority of the court and the Commission to approve and carry out any plan under this subsection which it would be within their respective authority to approve and carry out under subsection (d) of this section.

"(f) If, in the judgment of the Commission, any registered holding company or any subsidiary company thereof is insolvent or unable to pay its debts as they mature, the Commission shall have

power to institute proceedings for the reorganization of such company under Section 77B of the Act of July 1, 1898, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', as amended. In any proceeding pursuant to this section or in any other proceeding in a court of the United States, whether under said section 77B or otherwise, by whomsoever instituted, for the reorganization, dissolution, liquidation, bankruptcy, or receivership of any registered holding company or subsidiary company thereof or in which a receiver or trustee of any such company or any assets thereof is appointed, the court shall have jurisdiction to appoint a trustee or receiver, and, at the request of the Commission, shall have power, and it shall be the duty of the court to constitute and appoint the Commission as sole trustee or receiver, whether or not a trustee or receiver shall theretofore have been appointed. *In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission* or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public

interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, whether said section 77B or otherwise, shall be subject to approval by the Commission. The Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceeding as the court may allow." (Italics ours.)

Excerpts from S. Rep. No. 621, 74th Cong., 1st Sess.

At page 8:

"The committee has further added a new provision to the so-called 'elimination' section to provide the machinery for voluntary readjustments by the companies. These voluntary readjustments are to be *carried out under Commission supervision* in order to effectuate the policies of title I. This makes it possible for companies to submit their own readjustment plans for the examination and approval of the Commission at any time after the enactment of the title and to have those plans carried out if necessary in the Federal courts of equity." (Italics ours.)

At pages 13-14:

"(a) Voluntary readjustment.—* * *

"Section 11 provides that plans for the voluntary readjustment of the affairs of holding companies to conform with the section may be presented to the Federal courts at any time and that in such cases those courts may exercise in the furtherance of such voluntary plans all the extra-

ordinary powers such courts have been accustomed to exercise when called upon under the Sherman and Hepburn Acts to effect compulsory corporate readjustments required by the public policy expressed in those acts.

* * * * *

"(b) Compulsory readjustment.—In the case of those holding companies which at the end of the 5 years may not have completed for themselves the task of transformation into an investment trust or of rearrangement of their properties into a single integrated system, the Securities Commission is given power to take them into the Federal courts to require compliance with the title in one or the other way. The process of compulsory divestment of control is left to the Federal courts, without time limit, for the application of the technique worked out in the dissolutions under the Sherman Act and the Hepburn Act (commodities clause).

"The title provides that during all court processes the Securities and Exchange Commission shall act as an impartial expert economic adviser and administrative assistant to the courts. That expert assistance will enable the courts to save time and expense in the solution of essentially economic and administrative problems for which in the Sherman Act cases it had no assistance except that of opposing counsel. But the courts can take such time as they deem advisable to dispose of assets without sacrifice"

At page 33:

"Subsections (d), (e), and (f) outline the procedure whereby the reorganization plans must be approved by the Commission and carried out

under the supervision of the Federal courts. The court is to take technical jurisdiction of the assets involved and appoint the Commission sole trustee or receiver to administer the assets as a trust estate for the benefit of the persons interested therein as their interests may appear. By these provisions it is intended to give the Commission the complete supervisory power which is essential to the elimination of the present wasteful practices in corporate reorganizations. * * * Subsection (e) expressly authorizes a holding company subject to the approval of the Commission and the court to work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization by the Commission, and the Commission and the court are authorized to approve any plan so worked out voluntarily by a holding company as the Commission and the court might order under their compulsory powers. * * * If a company is insolvent or unable to pay its debts, the Commission is empowered by subsection (f) to institute proceedings for the reorganization of the company under section 77B of the Bankruptcy Act; in such proceedings also, the Commission could have itself appointed sole trustee. Under these subsections, Commission approval of reorganization plans and supervision of the conditions under which such plans are prepared will make it impossible for a group of favored insiders to continue their domination over inarticulate and helpless minorities, or even as is often the case, majorities. Fees, expenses, and remuneration paid in connection with any such reorganization, whether under section 77B of the Bankruptcy Act or otherwise, are made subject to the approval of the Commission.

APPENDIX D.

Excerpts from Congressional Record, Vol. 79, 74th Cong., 1st Sess., p. 8845:

"MR. BORAH. Mr. President, I desire to ask the Senator from Montana [Wheeler] a question. On page 50, beginning with line 2, the bill provides as follows:

> 'In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court.'

I do not exactly understand that language. Does it mean that the court's jurisdiction with reference to the reorganization, or what shall be permitted by decree of the court, is limited; or is it merely recommendatory to the court?

"MR. WHEELER. We do exactly the same thing at the present time, as I understand, with reference to the Interstate Commerce Commission. A plan for the reorganization of a railroad is supposed to be submitted to the Interstate Commerce Commission for its approval before it is approved by the court. We put this provision in here in exactly the same manner, as I recall, as the existing provision with reference to the Interstate Commerce Commission in the case of railroad reorganizations.

* * * *

"MR. STEIWER. In respect to the language which is now under discussion, at the top of page 50, has there been urged upon the committee, or brought to the attention of the chairman, the con-

tention that that language would oust the court of its jurisdiction, and, therefore, would be objectionable?

* * * * *

"MR. WHEELER. No; I do not think it would oust the jurisdiction of the court. I think there is no question that Congress would have the power to say that the court shall, when it appoints a receiver, appoint the Commission receiver, because, after all, the court is a statutory court, and we have the right to say that before this plan is approved by the court it shall be approved by the Commission. Furthermore, this is a mere matter of Congress providing the administrative machinery surrounding receiverships, and in no way usurping any judicial powers. The judicial functions remain, as always, in the court.

If I am not mistaken about the matter, we employ exactly that procedure in railroad reorganizations at the present time; and the only complaint we have had has been that the Interstate Commerce Commission has been too lenient, and has approved a number of plans which should not have been approved.

"MR. STEIWER. I make no contention about the matter at this time, but it occurs to me that provision might be subject to the objection that it would oust the jurisdiction of the court.

"MR. WHEELER. The Senator from Indiana [Mr. Minton] has called my attention to the fact that the provision does not oust the jurisdiction of the court at all, because the court has to approve the plan even though the Commission approves it. In other words there is really a double check upon the plan, and final determination rests as in the past in the courts."

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SUPREME COURT U S

Nos. 226, 227, 243, 266.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 226.

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 227.

THOMAS W. STREETER, *et al.*,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 243.

THE HOME INSURANCE COMPANY and TRADESMENS NATIONAL BANK AND TRUST COMPANY,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 266.

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, HOME INSURANCE COMPANY, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ANSWERING BRIEF OF THOMAS W. STREETER, *ET AL.* TO BRIEF OF CENTRAL-ILLINOIS SECURITIES CORP., *ET AL.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

Nos. 226, 227, 243.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE COMPANY, *et al.*,
Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM,
Respondents.

No. 266.

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE COMPANY, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ANSWERING BRIEF OF THOMAS W. STREETER, *ET AL.* TO BRIEF OF CENTRAL-ILLINOIS SECURITIES CORP., *ET AL.*

Preliminary.

The Brief previously submitted on behalf of Thomas W. Streeter, *et al.*, contains the following subjects—Opinions Below, Jurisdiction, Statute Involved, Questions Presented and Statement, to which the attention of this Court is respectfully directed and which it is

requested, be deemed incorporated herein. This Brief[1] will be devoted to answering the contentions raised in the Brief of Central-Illinois Securities Corporation and Christian A. Johnson, Respondents-Petitioners.[2]

The Procedure Suggested by Central-Illinois and Its Implications.

At the outset it should be noted that this case involves much more than the cash in the escrow fund. The issues lie far deeper than that. If the technique proposed by Central-Illinois is followed, the following will be the pattern in future cases:

First, if this Court upholds the District Court, it will amount to a judicial approval of by-passing the Commission in matters involving simplification under the Act, and particularly in valuation problems.

Second, it will place a premium on small groups of minority stockholders (a) offering no evidence before the Commission, (b) offering no evidence before the District Court, and (c) using arguments in briefs based on matters not in the record relating to alleged facts happening either prior to or subsequent to the Commission proceedings and even *after* consummation of the plan. It will place a premium on objecting stockholders carefully avoiding any request for a hearing or a reopening, at the same time implying radically changed circumstances. It will open the door to objectants having no connection with the

[1] The Brief, previously submitted on behalf of Thomas W. Streeter, *et al.*, will be called hereinafter the "Streeter Brief".

[2] The Brief for Central-Illinois Securities Corp., *et al.*, will be called hereinafter the "Central-Illinois Brief". For the sake of brevity, we shall also hereinafter refer to the Respondents-Petitioners as "Central-Illinois". In answering the contentions raised, we have followed the sequence of the Central-Illinois Brief.

Company to persuade district courts after "extensive oral argument and briefs" (see Central-Illinois Brief, p. 15) to decide valuation questions on the basis of "colloquial" equities.

Finally, it will approve a procedure eliminating a remand so that experts of the Commission and other litigants who have participated in this proceeding from its inception, would have no opportunity to expose the inapplicability of the mass of irrelevant financial data, of which this Court and the lower courts have been asked to take judicial notice.

This is the program that will stem from an affirmance of the District Court's order as requested by Central-Illinois.

Fair Presentation of the Record.

1. Haphazard Market Prices v. Fair Investment Value.

The brief of Central-Illinois exhibits a penchant for the selection of a single element, out of many considered by the Commission coupled with the incorrect assertion that such single element was the *only* element which the Commission considered. Having adopted this baseless premise, the brief proceeds to build legal arguments on such an unsubstantial base. Thus, the statement is made and frequently reiterated, that the Commission determined the investment values of the preferred and the equitable equivalents of the rights which the preferreds were forced to surrender "solely on the basis of market prices of allegedly comparable preferred stocks, as of a specific haphazard moment".[3] This demonstrably

[3] Central-Illinois Brief, pp. 26, 72 ff.

false statement is repeated in many ways and forms and many arguments are predicated on this incorrect representation of the record. In answer, we prefer to let the following portion of the record speak for itself (R. 1173a-1176a):

> "Q. Dr. Badger, page 4 of your report, second full paragraph, your definition of fair investment value, reading:
>
> 'Fair investment value may be defined as the price or value at which the shares of the several classes of stock would exchange hands between willing buyers and willing sellers, neither under compulsion to buy or to sell, and both thoroughly informed of all of the various elements of value.'
>
> Could you tell me what you had in mind when you used as part of your definition 'all of the various elements of values'?
>
> A. Well, the elements of value would include a question of the history of the enterprise, the question of its management, the nature of the business in which it was engaged, the question of competition, the question of past, present and future earnings, the dividend-paying capacity of the Company, the asset values behind the security—that, I think, would cover the more important elements.[4]

[4] The following statement from *Matter of Fulton*, 257 N. Y. 487, 495 (1931) supports Dr. Badger's concept of value:

> "It will be readily appreciated that the appraisers should have considered the investment value of the stock which is largely determined by the rate of return, the security afforded that the dividends will be regularly paid, the possibility that dividends will be increased or diminished, the selling price of stocks of like character, the amount of preferred stock in comparison with the common stock, the size of the accumulated surplus applicable to the payment of dividends, the record of the corporation and its prospects for the future."

Q. And in your determination of the fair investment value of the preferred stocks of Engineers did you take into consideration every one of those elements of value?

A. Yes sir. I did not cover them all in this report, but I gave consideration to all of them.

* * * *

Q. In other words, your over-all judgment figures which you set forth in the conclusions did consider in one form or another all these elements of value?

A. That is correct.

Q. You speak on page 4 under the title 'Basis of Valuation,' "Although the several classes of preferred stock of Engineers Public Service are bought and sold on the New York Stock Exchange, the reported prices at the present time cannot be regarded as representative of fair value.'

Now, my question is: Can market value ever be regarded as representative of fair value or fair investment value, as you put it?

A. Well, that is a rather difficult question to answer. I think it would be a fair statement to say that in a free and unfettered market that on any given date the market prices as emanating from purchase and sales might or might not be the fair value, but that they tended to approach it, and stocks that are actively traded probably approach fair investment value very closely, unless by virtue of pronouncements by the management of the company, unless by virtue of circumstances that create either fear on the one hand or a favorable atmosphere on the other hand, through events that may or may not be permanent and as the result of those events unduly depress or unduly raise the price of stock, that in the case of actively traded stocks we frequently

have a close approach to fair investment value represented in the market prices of stocks.

Q. Using your expression 'Free and unfettered market' in your experience as an expert financial analyst have you ever noticed any stock or any time when the stock market was ever in a condition that you could say it was free and unfettered?

A. Well, I think it more closely approaches it at certain times than it does at other times. For example, in the period between 1929, and I might extend that period well into the '30s, we had a serious depression involving heavy liquidation of borrowings, which had been made by individuals to carry securities, and unquestionably market prices at that time were depressed, possibly very substantially below their true investment values because of necessitous liquidation. It is my opinion that for a considerable period time, and as the result of adverse political developments in respect to public utility stocks, that certain public utility stocks were selling below their fair investment value. There may be other periods, such for example as the present time, when a stock like this newly launched automobile firm, may be selling at above its fair investment value. That, of course, is a question that will take time to answer, but, on the other hand, stocks that are very actively traded, without any undue influences prevailing in a given time, presumably closely approximate their fair investment value.

That is about the only answer that I could give to that question.

Q. *But you would not, in your opinion, as an expert, substitute market values as a test to determine fair investment value in and of itself?*

A. *No, sir.*

Q. And would you say that preferred stocks similar to those of Engineers Public Service Company, or any preferred stock of a holding company which is under the jurisdiction of the Holding Company Act, has a free and unfettered market?

A. Well, I would say that many of them do not have a free and unfettered market.

Q. And with specific reference to the Engineers preferred stock?

A. That is true. I do not believe that that stock at the present time is enjoying a free and unfettered market and I think it is influenced, as I have stated, by the proposal of the company, and the threat of litigation in connection therewith, to pay off such stock at $100 a share." (Italics ours.)

Further evidence bearing on the question of investment value and substantiating the fact that the Commission did not restrict itself to valuing the preferred by reference to the single element of temporary market prices at a "haphazard moment", appears in the opinion of counsel for Engineers, in which he recommended the amendment of the plan to conform with the Commission's views, *i. e.*, to provide for the payment of the call prices to the three series of preferred stocks, and stated as follows:

"* * * the above mentioned finding that the investment value of the preferred stock apart from the Act is equivalent to the respective redemption prices is clear cut and finds substantial evidence in the record. Furthermore it is a fact which Engineers admitted at the hearing, in its brief and on the argument. It appears clear, there-

fore, that that fact finding must be accepted without question (R. 1953a)."[5]

2. Quality Ratings of Independent Analysts v. Expert Testimony.

Another example of the failure of Central-Illinois to give the Court a reasonably fair impression of the record relates to the references to Standard & Poor's "rating" of Engineers preferred stock of "C**".[6] Every effort is made to have this Court conclude that the Commission was misled or misguided in its finding the fair investment value equal to the respective call prices of the preferreds, because of this rating. On this score the interrogation of Dr. Badger by Engineers counsel as set forth below is very enlightening:

> "Q. What is the difference, Doctor, between a current investment rating and a current market rating? One for the short pull and the other for the long pull?
>
> A. No, sir; I believe that Standard Statistics

[5] Compare this admission of counsel for Engineers with the following statement of the District Court:

> "It is, of course, true that once the charter is not accepted as controlling, there is no reason why 100 is the necessary figure for a senior security holder to receive. It may be more or it may be less. But in this case, after consideration of all factors involved, I conclude that $100 would be fair and equitable (R. 288a, n. 2)."

Having concluded that the charter did not control the District Court's finding of $100 as the *value* of the stock had no foundation in the record whatsoever.

[6] Central-Illinois, Brief pp. 12-13 wherein it refers to the analysis of Engineers preferred rating of "C**", defined as follows:

> "'Preferred stocks with erratic dividend records which can be expected to make payments only under favorable conditions' (R. 1844a-1845a)."

found their method of investment ratings as applied to preferred stocks to be of little or no value and I believe for that reason they discontinued them.

They substituted in lieu thereof a series of ratings that could be maintained more up-to-date, that were more current, and were used to reflect those factors that give rise to, we will say, value determining factors, in respect to the several preferred stocks.

Q. Are you through?

A. Yes, sir.

Q. Now, Doctor, what do you base that belief on? You said you believe something. Were you informed by some official of Standard & Poors that that was the reason that they discontinued the ratings?

A. Yes, sir; I was.

Q. Who gave you that information specifically?

A. That information was contained in a bulletin that was put out by the Home Office of Standard Statistics and was supplied to all of their sub-offices, and I was furnished a copy of that bulletin from the Detroit office and I have the bulletin right here, as a matter of fact.

Q. Will you let me see the bulletin?

A. Yes, sir (R. 1124a-1125a)."

The document produced by Dr. Badger is preferred stockholders' Exhibit No. 35, R. 2120a, 2121a. It is dated April 25, 1945, almost nine months *before* Dr. Badger testified. The authors of the rating had this to say about their own estimate concerning the reliability of the preferred stock ratings:

"PREFERRED STOCKS, ALSO QUALITY RATINGS ON PREFERREDS.

"*We have wanted to drop preferred stock*

quality ratings for years. A quality rating on a preferred doesn't mean very much, as in the case of a bond, for the simple reason that the two are entirely different types of investments.

"We had an A rating on National Lead preferred while it fluctuated all the way between 60 and 170. That doesn't make sense. A *market* rating there was of highest importance. But for anybody foolish enough to disregard market prospects, the one important thing was dividend coverage. Well, the dividend was adequately covered during that tremendous fluctuation. And in a variable security, with no maturity date, that's the only quality feature that matters, while market performance and prospects are often of highest importance.

"That paragraph explains why we moved preferreds over into the Stock Guide where they belonged, and where we cover over 1,000 issues, and cover them properly and why we abandoned meaningless quality ratings to induce investors to use safer tests with more meaning in judging the investment quality of preferreds." (Italics ours.)

In the same vein is the following excerpt from the cross examination of Dr. Badger:

"Q. Well, Doctor, they say they stopped the stock rating, even high grade preferred stocks, because they fluctuated all over the map, didn't they, in effect?

A. They said that they ceased assigning investment quality ratings to preferred stocks because of the fact that their quality ratings were meaningless (R. 1134a)."

Thus it appears that the Central-Illinois reference to the so-called "quality rating" by an independent

analyst of "C**" to the Engineers preferred was misleading and did not establish error on the part of either Dr. Badger or the Commission. Although we recognize as has the Commission[7] that the reports of analysts, not subject to cross examination are not evidence *per se*, since counsel have attempted to disparage Dr. Badger's testimony by reference to such a report, we desire to call the Court's attention to the values placed on the three subsidiaries of Engineers by statistical houses of generally good repute. They illustrate the conservatism of Dr. Badger's conclusions. Set forth below is a list of these firms and their respective estimates which were introduced in evidence.[8]

Firm	Virginia	Gulf States	El Paso	Total
Ira Haupt & Co.	$70,600,000	$25,000,000	$ 6,000,000	$101,600,000
Carl M. Loeb, Rhoades & Co.	71,247,000	31,712,000	8,655,000	90,400,000
Bear Stearns & Co.	68,000,000	30,000,000	10,000,000	108,000,000
Duff and Phelps	80,000,000	35,000,000	10,000,000	125,000,000
Security Supervisors	70,000,000	30,000,000	9,000,000	109,000,000
Paine, Webber, Jackson & Curtis	83,000,000	44,000,000	8,000,000	135,000,000
AVERAGE	$73,608,000	$32,619,000	$ 8,609,000	$111,500,000
Per Share of Engineers Preferred				$284
Badger's Estimate[9]				$265

[7] *Engineers Public Service Co.*, 9 S.E.C. 84, 90 (1941).

[8] Pref. Exhs. 26-A–26-I, R. 1980a-2045a. These analyses were not offered as proof of the facts, but for the limited purpose of showing estimates of independent analysts. The management considered several of these reports in devising the plan. R. 945a, R. 1006a, R. 1007a.

[9] Pref. Exh. 29-A, R. 2106a.

3. Offer of Proof v. Actual Introduction of Evidence.

Another inaccuracy in the Central-Illinois Brief relates to the Puget Sound matter. The following assertion is made in the Central-Illinois Brief:

> "The District Court's findings as to the losses were based upon *uncontradicted evidence* that Engineers would have been able to obtain much higher prices if it had not been compelled to carry out the divestments, or alternatively would have received higher earnings if it had retained the assets (cf. Finding 37, R. 307a-308a)" (p. 61, n. 1). (Italics ours.)

Examination of Finding No. 37 discloses *inter alia*, the following statement:

> "* * * A formal offer of proof was made during the proceedings before the Court to establish that the equity owned by Engineers in Puget Sound prior to the recapitalization would presently have a cash value of $10,000,000 (R. 307a)."

The nature of the "offer"[10] is extremely interesting. No reference thereto appears in the record of the hearing before the District Court although that statement of "offer" is contained in the findings prepared for the District Court by Central-Illinois counsel. The

[10] It is well settled that enforcement proceedings are heard only on the administrative record and that the District Court cannot receive evidence not presented to the Commission. Streeter Brief, p. 73, n. 97. Counsel for White significantly recognizes this principle when he stated in his argument before the District Court as follows: "We are practically willing and we are prepared, if your Honor will give us the opportunity, to present testimony to the *Commission* of what the real investment value of this stock is" (R. 220a-221a). (Italics ours.) Contrast this admission with the so-called "offer of proof" in the District Court Brief of Central-Illinois.

only basis for the statement appears to be a footnote in the Central-Illinois Brief submitted to the District Court reading in part as follows:

> "Expert testimony *can be made available* to the Court that the Puget Sound common stock owned by Engineers would today have a value of approximately $10,000,000. based on conservative capitalization of earnings" (Brief dated February 11, 1947, p. 8, n. 12). (Italics ours.)

Apparently such was the nature of the offer of proof to establish the present cash value of Engineers equity in Puget Sound at $10,000,000 which would support the claim of loss. As a substitute therefor judicial notice of certain statistics was written into the findings by Central-Illinois counsel.[11]

4. 20-30% of Total Capitalization v. Virtual Ownership and Control.

The examples of failure to correctly present the state of the record could be multiplied. Thus although it is not denied that the common stockholders of Engineers received virtually all of the stock of the three underlying operating companies and had virtually complete control thereof, expressions are used that the common stock of these companies represent only 20-30% of the *capitalization*.[12] The implication from the Central-Illinois statement is that the Engineers common stockholders did not control the three underlying

---

[11] It should be noted in this connection that Rule 52(b) of the Federal Rules of Civil Procedure indicates that findings of fact in non-jury actions may be questioned as to the sufficiency of the evidence to support them regardless of whether or not an objection or a motion to amend has been made.

[12] Central-Illinois Brief, p. 7, n. 3; p. 39, n. 1.

subsidiaries after the preferred were ousted. This is, of course, inaccurate. It is also clear that a primary objective of the plan had been to eliminate the preferred from the enterprise in a manner permitting the common stockholders to obtain direct and complete ownership of the three subsidiaries. The testimony of the company's secretary demonstrates this truth (R. 819a). This objective is clearly established by the following testimony of the Company's secretary:

> "Q. Didn't you say that the record of activities on the part of the management of Engineers suggests a rather persistent effort during the last four years to get rid of the preferred stock in this situation?
>
> A. Yes (R. 733a)."

5. "Special Assessment" v. Bargain Purchase.

Central-Illinois also attempts to convey the impression that the Gulf States warrant program was in effect a "special assessment" on the common stockholders.[13] This is, of course, entirely untrue.[14] The common stockholders were under no obligation to exercise the warrants and had the privilege of selling them. In fact, the preferred stockholders vigorously opposed the proposal to issue the warrants to the common on the ground that it discriminated against them because they were excluded from the program. Moreover, the issuance of the warrants was a method chosen by the management to raise additional

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[13] Central-Illinois Brief, *i. e.*, p. 9, n. 1; p. 18; p. 60; p. 102.

[14] Central-Illinois was successful in confusing the District Court regarding the true nature of the warrant. See finding 12 (R. 297a) and finding 40 (R. 309a) where the Court refers to the program as a "sale" or "contribution".

cash needed to retire the preferred stock in Engineers, which had a prior claim on the Gulf States stock. In offering the common a chance to buy Gulf States stock at $11.50 per share the company was, in effect, declaring a property dividend to the common stockholders since the stock was worth considerably more than the market price (R. 748a).[15]

To be contrasted with the characterization of "special assessment" is the following statement:

> "A bargain purchase offered to stockholders by the corporation may be tantamount to a partial property dividend. * * * Similar cases are likely to arise where a corporation under legislation such as the Public Utility Holding Company Act, * * * finds it desirable to distribute a large block of assets to stockholders, but only if it is able partially to recoup its asset position by requiring stockholders to make a partial payment for the assets. In such bargain purchases, the difference between the price paid and the value of the assets received constitutes, of course, a dividend to stockholders * * *" (Kehl, *Corporate Dividends* (1941), p. 171).

6. Time Limit on Compliance.

Central-Illinois has asserted that the provisions of section 11(e) of the Act constituted a period of limitation which forced prompt action by the Company in complying with divestment orders of the Commission. It is clear, however, that section 11(e) is *not self-enforcing* and there is but one instance of its use and that was, in effect, at the request of the particular com-

[15] The Company's secretary testified, in effect, that these warrants were worth $4 to $5 each (R. 748a).

pany. The rarity of the use of section 11(c) is attested to by Mr. Milton Cohen, former Director of the Public Utilities Division, when in connection with a proposed amendment to section 11(c), he stated at a Congressional Hearing as follows:

> "The court, as I also said the other day, in answer to Mr. Winter's inquiry, would still not do anything in the way of enforcement under this statute, and the statute, as far as this section is concerned, *is not self-enforcing except* upon application by the Commission even after the expiration of the second-year period, and *such application for enforcement of a Commission's order has, up to the present time, never been made to a court for enforcement of one of these orders except in a single instance where the company, in effect, asked for such procedure in order to protect its maturities.*" (Hearings before the Securities Subcommittee of the House Committee on Interstate and Foreign Commerce, 79th Cong., 2nd Sess., p. 1091.) (Italics ours.)

In so far as Engineers itself is concerned, the complete answer to this innuendo of the element of "pressure of time" is seen from the fact that the Engineers proceedings were started in 1937 and in the entire record of *ten* years following, no order to liquidate was ever entered against Engineers.

7. Destruction of Values v. Preservation.

There is another contention made by Central-Illinois throughout its brief not borne out by the record that the common stockholders bore the brunt of the simplification of the Engineers system, and that the

liquidation resulted in the *aggrandizement* of the preferred, at the expense of the common.[16]

A long line of alleged hardships, sacrifices, and detriments flowing from the simplification of the Engineers system, is asserted to create equities for the common as against the preferred. The record indicates to the contrary.

It will not be disputed that the actual method of divestment was entirely a choice of the common stock management. The portfolio securities could have been used in exchange to retire the preferred had the Company not been pursuing a policy of getting rid of the preferred stock at a discount, by cash payments.[17]

Central-Illinois would have this Court believe that the enterprise was "whittled down", at great loss to Engineers in assets and earnings, because of the Commission's various divestment orders. Actually what happened was that Engineers pruned its system of dead wood and a few live twigs, at no net loss to the system but with the consequent tripling of earnings available to the stockholders, on a consolidated basis.

Subsequent to registering under the Act, Engineers took the following action with respect to its minor subsidiaries:

In October, 1941, The Western Public Service Company sold some property in Las Animas, Colorado to the city. In 1942, Engineers sold the common stock of Western to a public power district after having

[16] Central-Illinois Brief, pp. 18, 23, 60 and 116.

[17] In 1943 Engineers actually made an offer to the preferred stockholders to exchange a maximum of 25,678 shares of their stock for shares of El Paso Natural Gas Company plus cash. The plan failed because the aggregate amount offered in exchange totalled less than $100 per share whereas the market price of the preferred was in excess of that amount. H. C. A. R. Nos. 4421 (1943) and 4559 (1943).

first acquired the Wyoming properties and ownership of the subsidiaries of Western which owned properties in Missouri and North Kansas. A new subsidiary, The Western Public Service Company (Delaware) was formed to own and operate the Wyoming properties. The net proceeds were about $3,070,000 representing a loss of $1,124,000.[18] The Missouri properties were sold in 1945 at a loss of about $244,119.[19] The Western Public Service Company (Delaware) was sold in 1946 at a loss of $342,000.[20]

Baton Rouge Electric Co., Louisiana Steam Generating Corporation and Gulf States were consolidated in 1938. The bus properties were transferred to Baton Rouge Bus Co. Inc. and the bus company was sold later at a profit of $180,801.[21]

In 1943, Engineers sold its holdings in The Key West Electric Company at a profit of $386,528.[22] The transportation and bridge properties of El Paso were sold in 1943 at cost.[23]

In 1945, Engineers sold its holdings in Savannah Electric & Power Company at a profit of $221,535[24] and in March, 1944, the balance of the investment in El Paso Natural Gas Co. was sold at a profit of $1,095,325.[25]

In 1936 and 1937 after passage of the Act but before Engineers registered with the Commission, the Company had sold two blocks of stock in El Paso Natural Gas Company at an aggregate profit of $1,440,303.[26]

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[18] Engineers Exh. 37-I, R. 1575a.
[19] Engineers Exh. 37-L, R. 1625a, 1626a.
[20] 1946 Annual Report, Engineers Public Service Co., S. E. C. Form U5S, 1946.
[21] Engineers Exhs. 37-F, R. 1520a; 37-K, R. 1609a.
[22] Engineers Exh. 37-K, R. 1608a.
[23] Engineers Exh. 37-K, R. 1609a.
[24] Engineers Exh. 37-L, R. 1625a.
[25] Engineers Exh. 37-K, R. 1610a.
[26] Engineers Exh. 37-E, R. 1504a.

The net result asset-wise from these divestments was a profit to Engineers in the sum of $1,614,373.

Of the major subsidiaries in the Engineers' system all but Puget Sound Power & Light Co. were still part of the system when Engineers was dissolved and its holdings distributed to its own common stockholders pursuant to the plan. Puget had been a cancer in the system from the time of its acquisition in 1928.[27] It consistently failed to earn its own preferred dividend requirements and in 1938, Engineers voluntarily created a reserve to reflect the "depreciation" in this and other "investments", in the sum of $35,000, and embodying a "substantial allowance" for Puget Sound. In 1943, Puget was recapitalized[28] and by virtue of the application of the investment value theory, Engineers received 3% of the new common stock in the reorganized company. These securities were sold in 1944 for $777,475, resulting in a book loss to Engineers of $33,320,519.[29]

Even after the so-called "whittling" of the system the fact remains that the Company's assets as of June 30, 1945 aggregated $65,756,904 (R. 86a) as compared with assets in 1938 of only $60,909,703[30] before the

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[27] Engineers Exh. 37-P, R. 1663a.

[28] *Puget Sound Power & Light Co.*, 13 S. E. C. 226 (1943).

[29] Engineers Exh. 37-K, R. 1608a. In this 1944 Engineers Annual Report to Stockholders, appears the following significant statement:

"• • • The total loss was therefore $33,320,519, of which $29,297,000 was charged against the reserve created in 1938 for depreciation in the value of this investment, $75,358 was charged against earned surplus in December 1943, representing the loss on 1,200 shares sold in that month and $3,948,161 is provided for by a reserve set up in December 1943 through a charge to earned surplus to provide for the loss to be realized through the sale of the remaining investment in February 1944. *Based on the rates in the Revenue Act of 1943, enacted February 25, 1944, it is estimated that the annual saving in consolidated Federal income and excess profits taxes, by reason of the divestment of Puget Sound Power & Light Company, will amount to approximately $442,000.*" (Italics ours.)

[30] Engineers Exh. 37-E, R. 1525a.

priming began. Thus asset-wise, the appellees are woefully in error when they claim the enterprise has shrunk.

Moreover, on an earnings basis, the record is clear that the elimination of the various properties was, on the whole, of great benefit to the stockholders. The table set forth below[31] shows that the earnings of subsidiaries applicable to common stock owned by Engineers (and now owned directly by Engineers' common stockholders) more than doubled after the

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[31] EARNINGS OF SUBSIDIARIES APPLICABLE TO COMMON STOCK OWNED BY ENGINEERS FOR YEARS ENDED 1937, 1945 AND 1946

Name of subsidiary	Amount		
	a	b	c
	1937	1945	1946
f. Baton Rouge Electric Co.	$ 249,436		
f. Eastern Texas Electric Co.	882,260		
f. Louisiana Steam Generating Co.	397,465		
f. Gulf States Utilities Co.		$1,883,033	$2,400,000
g. El Paso Electric Co. (Delaware)	163,020		
El Paso Electric Co. (Texas)		525,600	633,400
h. Savannah Electric & Power Co.	144,482		
i. Virginia Electric and Power Co.	2,215,156	4,014,293	4,666,879
h. The Key West Electric Co.	1,575 d		
j. Puget Sound Power & Light Co.	359,875 d		
TOTAL	$3,690,370	$6,422,926 e	$7,700,279 e

a. From Eng. Exh. 37E, R. 1513a.
b. From Eng. Exh. 63, R. 1828a. Assumes disposition of The Western Public Service Co. in 1945.
c. From Eng. Exh. 63, R. 1829a, showing estimated earnings.
d. Red figures.
e. Does not give effect to reduction in Federal Income and Excess Profits taxes resulting from extraordinary non-recurring deduction items.
f. Consolidated as Gulf States Utilities Co.
g. Dissolved.
h. Sold.
i. Merged with Virginia Public Service Co.
j. Reorganized and Engineers' interest sold.

program of divestment was completed. And as further proof of the fallacious argument of Central-Illinois, that divestments caused a whittling down of the system in any substantive manner, it appears from its own statements that for the twelve months ended June 30, 1947 the three remaining subsidiaries reported earnings of $10,629,724.[32] In decided contrast, at the time of the enactment of the Act the balance of earnings applicable to Engineers' holdings in all its 17 subsidiaries was only $1,605,867.[33]

8. Idle Cash v. Capital Appreciation and Increased Equity:

The Central-Illinois attempt to show that the common stockholders had been altruistic in leaving cash in the enterprise,[34] is likewise not supported.[35] It is made to appear that the common stockholders were compelled to do what they did by virtue of the provisions of the Act. The record clearly establishes that the cash was accumulated designedly by the small group of controlling common stockholders of Engineers, in order to avoid high federal personal income taxes and provide the means for getting rid of the preferred stockholders. The withholding of dividends on the common stock was a matter dictated by the self-interest of the common stockholders. Rather did they prefer to make capital gains and also build up their equity. It is barely possible that the common might have been virtually excluded from the enterprise instead of the preferred, if the common had elected to receive income available to them, over the years. The circumstance that the preferreds were likewise helped does not necessarily support a claim of hardship on the common. The contention that divi-

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[32] Central-Illinois Brief, p. 101, n. 2.
[33] Engineers Exh. 37-C, R. 1473a.
[34] Central-Illinois Brief, p. 15, n. 1.
[35] Streeter Brief, pp. 119-120.

dends were withheld from the common stockholders so as to provide for the company's liquidation is therefore a complete distortion. On the contrary, a deliberate policy of cash accumulation had been pursued so that the preferred stockholders could be bought out piecemeal and at a discount. In this way the common stockholders received capital appreciation instead of taxable dividends. There was no need to withhold dividends to retire the preferred. Liquidating dividends in kind could have been paid to both preferred and common.

Furthermore, it appears that Gulf States had paid common stock dividends of approximately 50% of the balance available for common stock, from 1939 to June, 1945 (R. 36a). It further appears that the Engineers common had already received the benefit of retiring some 37,560 shares of preferred stock at substantial discounts (R. 39a) and that Gulf States could have been sold through competitive bidding, to yield at least $30,000,000 (R. 53a). Yet Engineers management was contented to let the common stockholders acquire this asset for approximately $22,000,000. The Engineers preferred had provided valuable leverage for the common and in 1945, with three prosperous operating companies in splendid condition, producing large income, the common no longer wished to tolerate the preferred in the enterprise. Engineers had accumulated large amounts of idle cash from previous property dispositions and retained earnings. As was pointed out by the Commission: "Ordinarily a company in this position would exercise its call privilege and redeem the preferred at its call price. However, Engineers has proposed to dissolve by paying off the preferred in cash and distributing the remaining assets to its common stockholders" (R. 60a).

Another advantage to the common (R. 70a) with respect to the Gulf States common stock as reclassified, is clear from the following comment by the Commission (R. 70a-71a):

> "* * * At $14 per share a dividend of $.80 would provide a yield of 5.72%, and on an earnings basis of $1.31 a share, the times earnings ratio would be 10.7 * * *
>
> "On the basis of earnings available for common stock for the 12 months ended June 30, 1945, the following effect on a share of Engineers' common stock will take place upon operation of the plan, assuming the bank loan were deleted and the warrant price increased to $14 per share:

TABLE XII

Per share of common stock	
Earnings on a consolidated basis	$ 3.16
Earnings on a consolidated pro forma basis	2.57
Decrease in Engineers' earnings	$0.59
Earnings on 1/5 share of El Paso	0.32
Net decrease in earnings	$0.27
Earnings per share of Gulf States	1.31
Net increase in earnings if Engineers' stockholder purchases Gulf States' common stock	$1.04"

There were many additional advantages to the common stockholders flowing from the simplification of Engineers. It was rid of the Puget Sound incubus.

The book loss has provided a cushion for Engineers for tax purposes in connection with the profits realized by the sale of Gulf States stock of over $8,000,000 with its federal income tax savings to Engineers and its common stockholders of over $2,000,000 and is a further cushion against the profit which may enure to Engineers, in the sale of its holdings, in Virginia (R. 990a).[36] It should also be noted that the Puget Sound book loss was used to offset Engineers capital gain originating from the sale of El Paso Natural Gas stock indicating a further huge tax saving (R. 616a).

The common sought and obtained the right to eliminate the preferred from the enterprise. Having gotten the benefit of the receipt of the securities in the underlying companies and profited thereby, they now seek to further diminish the preferred's rights in the enterprise. If the common thought it had been unduly burdened by the simplification proceedings it might have allowed the preferred to continue their participation. In this connection it cannot be overlooked that by eliminating preferred the common stockholders obtained absolute control of the underlying operating companies directly. This transaction was "tax free" to the common stockholders of Engineers and to the limited group of preferred stockholders who owned common stock (R. 620a).

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[36] Gains on future sales may still be applied against the book losses, under the carry-over provisions of the Internal Revenue Code until December 31, 1949.

PART ONE.

The Nature of the Liquidation.

I. Concerning the Contentions as to the Payment of Amounts in Excess of the Involuntary Liquidation Preferences upon an Alleged "Genuine Liquidation".

With respect to Point I of the Central-Illinois Brief, which urges the limitation of the preferred stockholders to $100 per share, allegedly pursuant to the provisions of the corporate charter, we shall demonstrate below that the dissolution of Engineers is not a "true liquidation" or a "genuine liquidation". The method employed by the common stock management which continued the common stockholders in control of the underlying companies had the same effect as a voluntary liquidation. The common stock management elected this method to keep the enterprise for the common stockholders and to get rid of the preferred stockholders by a cash payment on a basis similar to a voluntary liquidation. There appears no valid reason, other than self interest, for the common stock election to liquidate, and distribute the securities in the underlying operating subsidiaries, to the common and to exclude the preferred from the enterprise. It had all the earmarks of a voluntary liquidation and there is no reason why the call prices should not be paid to the preferred stockholders.[37] At all events Engineers' dissolution was not a "true" or "genuine" liquidation within the contemplation of the parties to the contract (charter). As has been

[37] The Commission stated: "Ordinarily a company in this position would exercise its call privilege and redeem the preferred at its call price (R. 60a)."

indicated elsewhere, this Court in the *Otis* case held that a liquidation under the Act was not the kind of liquidation envisaged by the charter and that Congress did not intend to mature the liquidation preferences in any event.

The attempted distinction in the Central-Illinois Brief between simplification and liquidation is untenable. The so-called liquidation of Engineers merely passes on to the common stockholders the securities in the underlying operating companies.

A. Concerning the Contention as to Payments in Excess of the Amounts of Contract Claims in the Light of Bankruptcy and Equity Reorganization Precedents.

The Central-Illinois group also asserts that the bankruptcy and equity reorganization decisions do not support payments to senior security holders of cash amounts in excess of their contractual claims applicable to involuntary liquidation or retirement of their security.[38] This assertion is inapplicable here. In the first place, any inference that the preferred are seeking more than their contract claims is unwarranted as well as "question-begging", for the basic issue is the value of these contract claims. In fact the Commission has limited the amount of the preferred compensation by the call provisions of the charter (R. 67a). In the second place, any implication that the involuntary liquidation provision of the charter is controlling in the instant case so as to limit the preferred claim to face value, is contrary to the *Otis* principle that the charter liquidation provisions are inoperative, in simplifications under the Act. Furthermore, while contract liquidation provisions are incho-

[38] Central-Illinois Brief, p. 34 ff.

ate and not controlling in simplifications under the Act so as to require valuation of the contract rights, the contract liquidation provisions are choate or matured in bankruptcy and equity reorganizations and hence conclusive as to the amount to be paid.[39] Into this latter category fall the cases[40] cited by the Central-Illinois counsel which involve claims matured in bankruptcy or equity reorganizations and which consequently are to be distinguished from the instant case involving an inchoate claim in a simplification under the Act.

Moreover if the Act were permitted to mature the preferred claim, as Central-Illinois seems to suggest, then the Act would create a windfall to the common since the Commission has found the fair investment value of the preferreds' claims, at least equal to the

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[39] As stated in the *Otis* case: "Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors" (323 U. S. 638).

[40] The cases of *Knight* v. *Wertheim & Co.*, 158 F. (2d) 838 (C. C. A. 2, 1946), cert. den., *sub nom. McGuire* v. *Equitable Office Building Corp.*, 331 U. S. 818 (1947) and *In the Matter of Childs Co.*, Corporate Reorganization Release No. 67 (1946) obviously involve corporate reorganizations under Chapter X of the Bankruptcy Act. In *Bailey* v. *Minsch*, 168 F. (2d) 635 (C. C. A. 1, 1948), cert. den., 91 L. Ed. 38 (1948) (Advance Sheets) which involved an equity receivership in connection with Investment Company Act of 1940, the Court expressly noted the *dicta* in several cases under the Act [See *e. g., Mass. Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424, 430 (C. C. A. 8, 1945), cert. den., 327 U. S. 795 (1946); *In re Consolidated Electric & Gas Co.*, 55 F. Supp. 211, 216 (D. Del., 1944); *In re North Continent Utilities Corp.*, 54 F. Supp. 527, 530 (D. Del., 1944)] that on premature retirement of bonds in simplification proceedings the Commission might find the equitable equivalent of the bonds to be more than the face amount but pointed out that "in the present case there has been no such finding, so the dicta in these cases is not pertinent" (168 F. (2d) 638). Also see discussion *infra*, p. 46.

call price or in excess of the involuntary liquidation amount and has concluded that the payment of such amount is fair and equitable. Such windfall or shift in values is to be avoided.[41]

Central-Illinois in the course of its discussion of the bankruptcy reorganization precedents apparently makes a significant admission.[42] Its counsel admits that payment may be made in new securities, rather than in cash but limits its concession to a case where "the enterprise is continuing". The brief then goes on to state that "because 'practical considerations' might make it 'impossible' for the reorganized enterprise to continue if the claims of the senior security holders are paid in cash (*Case* v. *Los Angeles Lumber Co., supra,* at 117), 'fairness and equity' authorize the senior security holders to be awarded the 'equitable equivalent', in new securities, of their contractual claims".[43] In other words, if it were convenient to pay the senior security holders in cash and eliminate them from the enterprise, the letter of the contract governs and the preferreds would be limited to $100. If on the other hand it was inconvenient (presumably because the cash was not available) the common stockholders at their option and for "practical considerations" might continue the preferred stockholders in the enterprise, in which event the senior security holders would get the "equitable equivalent" in new securities, for their contract claims. The effect of this would be to give $100 to senior security holders in a system like Engineers where ample cash and other assets were available to pay the call prices and

[41] *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 637 (1945); *American Power & Light Co.*, H. C. A. R. No. 6176, p. 8 (1945).

[42] Central-Illinois Brief, p. 34 ff.

[43] Central-Illinois Brief, p. 35.

In other holding companies less fortunately situated, the senior security holders might receive the equivalent of their rights in securities. Such a result was never intended by Congress and should not be countenanced by this Court. Furthermore, in the bankruptcy reorganization involved in the *Los Angeles* case, the liquidation provisions matured and determined the exact amount of the cash payment, the equivalent of which in terms of new securities remained to be ascertained. Consequently, any implication that the medium of payment—cash or securities—increases or decreases the *quantum* to be received is erroneous. Full compensatory treatment must be made regardless of the medium of payment.[44] Moreover, as has been pointed out above, as the involuntary liquidation preference did not mature in the instant simplification, the cash equivalent of the contract rights surrendered had to be determined on a going concern basis in accordance with the principles of the *Otis* case.

B. Concerning the Contention as to Applicability of the Involuntary Liquidation Preferences of the Charter to the Instant simplification.

The Central-Illinois assertion[45] that the involuntary liquidation provision is applicable to the instant situation and is a conclusive measure of the preferred stockholders' claim has been rejected by the courts below (R. 288a, R. 34) and the Commission (R. 61a) on the basis of the correct application of the principles of the *Otis* case. We have also demonstrated in our own brief[46] the inapplicability of the Engineers charter involuntary liquidation provision as being a matter not within the contemplation of the parties.

[44] Streeter Brief, p. 29, n. 159.
[45] Central-Illinois Brief, p. 37 ff.
[46] Streeter Brief, p. 95 ff.

We have also shown that the involuntary liquidation provisions are not matured as a matter of the Congressional intention. In that connection, we pointed out that any type of dissolution, liquidation or simplification or any method of system adjustment "adopted as a matter of administrative routine" would not fall within the coverage of the charter.[47] *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 639 (1945). Consequently, the Central-Illinois effort to distinguish the *Otis* case on the basis of the prescience of the draftsmen of the Engineers charter[48] and the type of liquidation or simplification or method of system adjustment involved is unavailing.

C. Concerning the Contention as to the Inapplicability of the *Otis* Case as to an Alleged "Authentic" Liquidation.

The Central-Illinois group also urges the applicability of the involuntary liquidation provisions of the charter to the instant situation because of an alleged "authentic" or "genuine" liquidation or "final termination".[49] In this connection an effort is made to distinguish the instant case from the *Otis* case on

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[47] Streeter Brief, p. 98.

We have also urged in our brief (pp. 99-103) that if the charter provisions are operative, the instant liquidation is voluntary and falls within the voluntary liquidation preference.

[48] It should be noted that the charter provisions which were held inoperative in the *Otis* case were drafted in 1929. *A fortiori*, the provisions of the Engineers charter drafted in 1925 (R. 1403a) must be deemed inapplicable.

On the same reasoning the dissolution, even if viewed as a reduction in capital would not, despite the contrary contention of the Central-Illinois group (Brief, p. 50) fall within the charter. It should also be noted that on a "voluntary" reduction in capital resulting in a distribution of the assets to the stockholders, the preferred are entitled to their respective call prices (R. 1412a), although Central-Illinois refers only to the provision for payment of $100 plus accrued dividends on a reduction in capital other than "voluntary". (Brief, p. 44).

[49] Central-Illinois Brief, pp. 45, *et seq.*

the ground that the *Otis* case involved a continuing enterprise as contrasted with an alleged "authentic" liquidation.[50] On the other hand, the court below, accepts the *Otis* principle that the charter provisions are not "dispositive", but criticizes (erroneously, we maintain) the Commission for allegedly disregarding the fact of the termination of the enterprise, which, in the opinion of the court below, "supplies the substantial difference between the instant case and the *United Light & Power Company* reorganizations [*Otis*]" (R. 36).[51] Thus the same alleged factual difference between the instant and *Otis* cases, *i. e.*, supposed "termination of enterprise" ("authentic" liquidation) vs. its continuance, provides the basis for a frontal assault by the Central-Illinois group and a lateral attack by the court below, upon the *Otis* principles. The discussion in our brief provides the same answer to these attempted distinctions and clearly exposes this fallacy.[52] It is clear from an examination of this Court's opinion in the *Otis* case that the fact that "the business * * * continues" is not material; that

[50] The following definition of a true liquidation has been suggested by Commissioner McConnaughey in the *El Paso* case where in dissenting he said:

> "'Liquidation' has various meanings depending upon the setting in which it is used. In its most generally accepted sense, as applied to corporate operations, the word describes a complete winding up that brings to an end the active participation in the going enterprise of all who theretofore had been associated together in it. Not only is the intangible corporate vehicle dissolved as is proposed here, but the rights and property with which the business had been conducted are disposed of and the proceeds distributed among all the participants in proportion to their interests. Thereafter none of them draws benefit from the continued operation of the enterprise. The interest of all participants is liquidated" (H. C. A. R. No. 5499, p. 14).

[51] The court below notes that in the "latter case [*Otis*] the security holder participation in the enterprise was shifted from the top holding company to a subsidiary holding company but the holding company enterprise as such continued" (R. 36).

[52] Streeter Brief, p. 96 ff., 138 ff.

charter preferences are not matured (as in a normal liquidation), "where liquidation is adopted as a matter of administrative routine"; that the dissolution under the Act and the Commission's administration thereof results in a "type of liquidation" entirely distinct from the "liquidation" envisaged by the charter provisions; and that the selection of one method of system of adjustment, to accomplish simplification "is an incident which ought not to affect rights". Procedural details, such as the selection of the method of system adjustment or of particular sequence should not affect substantive rights. It is certain that a "fortuitous"[33] choice of method and sequence should not have such an effect. *A fortiori,* a conscious, deliberate choice or selection of both time and method by a common stock management must be subjected to even more careful scrutiny to guard the rights of the preferred stockholders. Such caution is especially appropriate in the instant case, where the common stock management has made its choice[34] after considering and discarding a

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[33] See *In re Interstate Power Co.*, 71 F. Supp. 164, 168 (D. Del., 1947); *In re United Light & Power Co.*, 51 F. Supp. 217, 225 (D. Del., 1943). In the latter case, the same District Judge pointed out: "The choice of procedural alternatives should not affect the substantive rights of the common shareholders." The same principle must apply with the same force and effect to the "substantive rights" of the preferred stockholders.

[34] Commissioner Healy makes this interesting observation in his concurring opinion in *El Paso Electric Co.*, H. C. A. R No. 5499 (1944), p. 12:

> "* * * there may be such circumstances attending a liquidation put through by common stockholders as to require a holding that they are acting improperly or inequitably or attempting to euchre the preferred stockholders out of their redemption premium rights."

In the light of Commissioner Healy's foregoing statement the following quotation from the record is extremely relevant (R. 845a-846a):

> "Q. Mr. Benjamin, is it a fair statement to say that at the time last September 5 when the directors decided to

[Footnote continued on following page.]

wide variety of plans[55] and decided to liquidate Engineers even though the Commission did not *direct*

[Footnote continued from preceding page.]

pay the $100 a share to the preferred stockholders of Engineers that they did not have before them any graphs, charts, of data with respect to future earnings or prospective earnings of Virginia, Gulf, and El Paso? A. That is correct.

Q. Would you say that it was also a fair statement that it was the intent and purpose of the majority of the Board of Directors of Engineers to retain all future interests and increments in the enterprise for the common stockholders?

* * * * *

A. Yes.

Q. I believe you testified, first, this Commission has never directed Engineers to liquidate and, second, that the Board of Engineers might have decided to liquidate the Engineers Company voluntarily; is that correct? A. Yes.

* * * * *

The Witness: By that I assume you mean initiate action to cause the stockholders to voluntarily liquidate, yes.

* * * * *

Q. I believe you also testified that the Board of Engineers might have chosen to give the preferred stockholders a stake in the subsidiary companies had they so desired? A. Yes, I think I testified that they could have chosen other methods to meet the obligation of the preferred stock other than pay them in cash.

Q. In other words, the effect of what you are saying is that the Board of Directors of Engineers chose this method as a means of limiting the preferred as to the receipt of $100 and accumulated dividends to the date of deposit? A. I think that is right. In other words, the method followed by the plan provides for the payment in cash of the amount you stated and therefore limits them to that amount, yes, sir.

Q. The effect, Mr. Benjamin, of the Board's action in this respect would be to deprive the preferred stockholders of Engineers of any prospect of participating in the enterprise, its future earnings, and prospects. A. So far as this plan is concerned, yes.

Q. They will have no further interest in the going concern activities of Virginia, Gulf States, and El Paso? A. That is correct."

[55] See Streeter Brief, p. 9.

It is settled that the choice of appropriate method, from among available alternatives is left by the Commission to the Company, and here to a common stock management and that management exercises the dominant role in the presentation of a plan. See Streeter Brief, p. 140, n. 177.

the dissolution of the Company and a contemplated merger with its subsidiary, Virginia Electric and Power Company, would have been permissible.[56] This merger alternative, it should be noted, was dropped after ascertainment that a merger was not considered a dissolution within the meaning of the charter so that the statutory appraisal provisions of Delaware and Virginia might become applicable to the rights of the preferred stockholders.[57] Had this merger route been followed, the Central-Illinois contention as to the applicability of the charter involuntary liquidation preference to the instant situation and the attempted distinction of both courts below and Central-Illinois based upon the alleged termination of the enterprise, would of course have been unquestionably groundless and unmeritorious. The result cannot be different simply because the common stock management picks and chooses the steps and their sequence. This broad range of control which management (including the instant common stock management) possesses in the course of an 11(e) adjustment has been recognized in *S. E. C.* v. *Chenery*, 332 U. S. 194, 205, rehearing denied 332 U. S. 783 (1947), when this Court said:

> "* * * Added to these normal managerial powers, the *Commission pointed out that a holding company management obtains special powers in the course of a voluntary reorganization under §11(e) of the Holding Company Act. The management represents the stockholders in such a*

[56] It was not the Act which compelled the relinquishment by the preferred stockholders of their interests in the enterprise but the considered decision of the common stock management which denied the preferred the privilege of sharing the "risks", "penalties", "burdens" and the "hardships" of the enterprise with respect to which the Central-Illinois group so bitterly complains.

[57] Streeter Brief, pp. 10-14.

reorganization, initiates the proceeding, draws up and files the plan, and can file amendments thereto at any time. These additional powers may introduce conflicts between the management's normal interests and its responsibilities to the various classes of stockholders which it represents in the reorganization. Moreover, because of its representative status, the management has special opportunities to obtain advance information of the attitude of the Commission.

"*Drawing upon its experience, the Commission indicated that all these normal and special powers of the holding company management during the course of a § 11(e) reorganization placed in the management's command 'a formidable battery of devices that would enable it, if it should choose to use them selfishly, to affect in material degree the ultimate allocation of new securities among the various existing classes,* to influence the market for its own gain, and to manipulate or obstruct the reorganization required by the mandate of the statute.' * * *" (Italics ours.)

The various divestments[38] and the presentation of the '11(e) plan and its numerous amendments afforded the common stock management every opportunity, for the "battery of devices", placed in its command during the course of the instant simplification. By its action, the common stock management has excluded the preferred stockholders from the enterprise and terminated preferreds' (not common stock) interest in it through the device of retirement and acquired, for

[38] Of the seventeen companies many were small and inconsequential; several of the others were merged into one or more of the principal underlying subsidiaries. Puget Sound has been referred to elsewhere as an economic burden (R. 1608a). See Streeter Brief, p. 7.

the common, direct ownership[59] of the enterprise by the method of distribution to the common stockholders of the securities in the three underlying operating companies. On the dissolution of Engineers, in place of their previous indirect ownership,[60] the common stockholders obtained the entire enterprise lock, stock and barrel. Thus the Engineers enterprise continues, albeit in different form, through the media of three operating companies. In any event, as indicated in our Brief (pp. 138-9), the *Otis* rule applies equally to a "true" or "genuine" liquidation, assuming *arguendo* that that is the fact here.[61] This principle

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[59] The record is clear that the objective of the plan was to eliminate the preferred stockholders from the enterprise in a manner which would permit the common stockholders to obtain direct and complete ownership of the three subsidiaries (R. 819a). In fact Engineers had virtually 100% common stock control of these three companies and the handful of Engineers common stockholders owning 72% of Engineers common stock continued in the same relative position in these three companies. The enterprise was passed on perfectly to the Engineers common stockholders. Nevertheless, Central-Illinois in its brief (p. 7, n. 3; p. 39, n. 1) erroneously implies that the Engineers common stockholders did not gain complete control of the three operating companies, *i. e.*, Virginia, Gulf States and El Paso, by using the expression that the "common stocks of each company represent only a minority of the total capitalization of each company".

[60] *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, 116-7 (1946); *The North American Co. v. S. E. C.*, 327 U. S. 686, 709 (1946). Thus in the *North American* case, *supra*, this Court points out that a divestment or reorganization plan "may involve no more than a distribution of the securities among the existing shareholders of the holding company". Similarly in the *American Power & Light* case, *supra*, this Court indicates that a dissolution might "mean little more than the receipt of securities of the operating companies in lieu of their present shares" in the holding company and states: "Elimination of useless holding companies may be carried out by fair and equitable methods so as to destroy nothing of real value."

[61] At the time of his opinion in the instant case, the District Judge (Leahy) rejected this same argument that the plan involves a "true liquidation" as distinguished from a "fictitious

[Footnote continued on following page.]

of the *Otis* case was recently reaffirmed in *Schwabacher v. United States*, 334 U. S. 182, 199 (1948), where after noting that corporate charters and state laws "usually have been drawn on assumptions that time and experience have unsettled", the Court said:

> "* * * we have held * * * that, as a matter of federal law liquidation preferences provided by the charter do not apply. We said that, although the *company was in fact being liquidated* in compliance with an administrative order, the rights of the stockholders could be valued '*on the basis of a going business* and *not as though a liquidation was taking place*'. Consequently the liquidation preferences were only one factor in valuation rather than determinative of amounts payable [Citing *Otis & Co.*]" (Italics ours.)

Furthermore, while the *Otis* case renders charter provisions inapplicable to a broad and unlimited variety of methods of system adjustment in the achievement of the objectives of the Act (whether involving a liquidation or continuance of the enterprise), the *Schwa-*

[Footnote continued from preceding page]

liquidation" in the *Otis* case so that the charter provisions do apply. At that time he stated:

> "Although I have an entirely open mind on the question, *my present thought is that the rule of Otis & Co., applies also to a situation in which there is a true liquidation rather than a nominal or formal liquidation mainly because this is not a change in corporate form contemplated by the charter.* But counsel argue forcefully that Otis & Co. by its stress that the court was there concerned with a continuing enterprise impliedly holds that a different result would obtain in a true liquidation. I think that perhaps Otis & Co. was not intended to go that far. When a novel question is before a court, it frequently grabs any and all reasons in support of its conclusion. It does not follow, however, that any one of those facts is the *sine qua non* for the decision" (R. 288a, n. 2). (Italics ours.)

bacher case declares the corporate charter inoperative in the limited type of recapitalizations of a continuing nature, for which the Interstate Commerce Act expressly provides. It is clear that the *Schwabacher* case was not intended to limit the broad scope of the *Otis* rule, of inoperativeness of the charter provisions.

II. Concerning the Contention That an Alleged Long Series of Decisions Precludes Payment to the Preferred Stockholders of More Than $100 Per Share.

Before addressing ourselves to certain erroneous legal contentions made by the Central-Illinois Group, we consider it appropriate to urge that the *method* of liquidation employed by Engineers common stockholders, was in essence, a matter of form in view of the fact that the common stockholders came up with the same control of the three principal underlying operating subsidiaries as they had when Engineers was alive. The common stockholders freed themselves of the continued expenses of the holding company and eliminated the preferred as an act motivated by self interest.

Central-Illinois (Brief, p. 56) squarely urges that the senior security holders are entitled to a fair investment value of their interest only if they are "*forced*" to continue in the enterprise. Carried to its logical conclusion it is suggested that, assuming the application of the *Otis* case principles and applying the fair investment value doctrine to the liquidation of all intermediate holding companies in a system, except the top holding company, if, when and as the common stockholders decide to liquidate the last holding company in line, that the choice is theirs, either to pay the preferred $100 per share in cash or to con-

tinue the preferred in the enterprise; and in the latter event, albeit grudgingly, it is admitted that the preferred would have a right to a determination of the fair investment value of their interest. Stated bluntly Central-Illinois contends that under those circumstances the common have the choice of paying $100 in cash or giving the preferred, securities of a going concern value equivalent to the call price. We ask if this is equity? Can the common stockholders who control the reorganization process have the choice of methods and procedures and at their particular whim decide such a fundamental question? Furthermore, where as here, the common stockholders deliberately exclude the preferred from any possibility of participating in a continuation of the venture, *i. e.*, receiving a fair portion of the underlying securities, can the common be heard to complain if the Commission, completely cognizant of the common stockholders' decision, fixes the amount at a sum equal to the fair investment value of the preferred?

Throughout the Central-Illinois Brief (p. 59 ff.) the contention is made that the junior security holders have suffered deprivations of a far reaching character as the result of the liquidation of Engineers. These facts are not borne out by the record and are in effect, contrary to the findings of the Commission based on evidence in the record.[62] By way of illustration, the contention is made that huge losses were occasioned by the Act as a result of the divestment

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[62] The Commission found that the "retirement of the preferred stock will be of immediate benefit to the common stockholders" and that the elimination of the prior charge "is highly beneficial to the common" and "hastens the day when the common will begin receiving dividend income" (R. 69a).

by Engineers of Puget Sound.[63] In the first place, the investment in Puget Sound was made solely by the common stockholders. The preferred had no vote in the matter. In the second place, before the Engineers simplication proceedings had gotten under way before the Commission, the common stockholders created a reserve of $35,000,000 for the Puget Sound loss which had long been recognized as having in reality occurred at least prior to registration by Engineers with the Commission. Thirdly, such assumed "losses" would have all been previously absorbed and reflected in the present values of the common and preferred stocks. (For a detailed presentation of the true facts regarding Puget Sound, this Court is respectfully referred to the Commission's Brief, p. 59 *et seq.*)

On page 62 in Central-Illinois Brief, the contention is made that the preferred stockholders seek payment "for their 'disappointed expectations'". The preferred stockholders had a right to believe that the directors of the company were acting for all stockholders and not merely for the common. Implicit in the contract between the preferred stockholders and the company was the thought that a plan propounded by a management would give proper consideration to the rights of the preferred as well as the common. In this regard the common stock management utterly failed in the discharge of their fiduciary duties. It was this fact that impelled Thomas W. Streeter, an independent director, to insist that the preferred's rights be

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63 The alleged Puget Sound loss is discussed in the Streeter Brief, p. 120 ff. The nature of the proof of loss has been discussed *supra*.

protected. He knew, as did the Commission, that the preferred stockholders have a right or expectation to be treated like the common stockholders as far as participation in the underlying securities, was concerned. He felt it most unfair, as did the Commission, to leave to a common stock management the deliberate decision to exclude the preferred from participation in the underlying companies. One need not argue frustration or rescission. One need only to look at "what happened" to see where the real equities lie in this situation. In any event, as will be demonstrated below, the preferreds are not seeking compensation for "disappointed expectations", but the current going concern value of their contract rights in accordance with the principles of the *Otis* case.

The Central-Illinois suggestion that the Commission created a "new fictional doctrine * * * designed to free the Commission not only of the limitation stemming from the contractual arrangements of the parties, but also from the settled principles found in the 'fair and equitable' standard of 11(e) by the Commission and the Courts"[64] is a grave and ill-founded charge. The Commission created no new fiction but conscientiously followed the principles laid down by this Court in the *Otis* case. We ask the Court to compare the 60 page detailed carefully drawn opinion of the Commission (R. 25a-85a) in the instant case, representing the culmination of a 10 year background and the complete knowledge and familiarity of every fact relating to Engineers and its subsidiaries with the

[64] Central-Illinois Brief, pp. 64-5.

opinion of the District Court, referring as it did to the 4 items of colloquial equity.[65]

As we understand the Central-Illinois contentions, its argument amounts to something like this. The contract prevails and the preferred can only receive $100 per share, if the common stockholders want to pay cash and get a bargain by excluding the preferred and keeping all the benefits of the underlying securities upon the so-called liquidation of the top holding company. On the other hand if it is to the best interest of the common to permit the preferred to continue to have a stake in the enterprise, then and only then, can the preferred hope to receive its fair investment value. To state the contention is to supply the answer.

In addition to the foregoing general contentions, the Central-Illinois group also urges that the "rights of senior security holders to premium payments upon the forced liquidation of *their enterprise* or the retirement for *cash* of their securities, where the contractual provisions were deemed not applicable",[66] is to be determined by the doctrine of frustration of enterprise, which allegedly limits the preferred to $100 per share. Passing over the characterization of "premium", which is a favorite Central-Illinois method for begging the question, we hasten to agree that the *preferred stockholders have been forced out*

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[65] As far as we know the instant case is the one and only experience that the District Judge had with the entire Engineers proceeding. During the course of the divestment proceeding over approximately ten years, the Commission has had occasion to investigate and study factual and technical data pertaining to the entire Engineers' system. During this same period, as a result of various applications made, the Commission has had further opportunity to scrutinize the affairs of the subsidiaries of the Company. This wealth of knowledge provides the Commission with the requisite background for its action in the instant case. See Streeter Brief, p. 8; R. 69-70, *supra*, p. 17 ff.

[66] Italics ours. Central-Illinois Brief, p. 51 ff.

of the enterprise and compelled to accept cash instead of the "risk" of participating in the securities of the underlying operating subsidiaries, by the deliberate maneuverings of the common stock management, as a consequence of which the poor unfortunate common alone have become "burdened" with the direct ownership of three flourishing companies. In support of its position, Central-Illinois recites quotations from cases and S. E. C. briefs almost all preceding this Court's opinion in the *Otis* case, surrounding them with superficially impressive and detailed descriptions of the deprivations and losses which have been inflicted *solely* upon the common, who made a final noble "sacrifice" by forcibly ejecting the preferred from sharing the future "risks" and "losses" flowing from participation in the three excellent principal underlying companies. Certainly, if the doctrine of frustration is realistic and not fictional, it is not applicable here. It is self-evident that the real living enterprise has not been frustrated. Engineers has been technically eliminated but the enterprise has actually been passed along to the common stockholders.

Contained in the discourse of Central-Illinois is a concept, which is not too clearly delineated—*i. e.*, the impact of the doctrine of frustration upon the *Otis* case and vice versa. Central-Illinois claims in this connection that the "rationale of the *Otis* case certainly does not justify the abrupt rejection of the principle of 'frustration'" and contends that in the *Otis* case, "'fairness and equity' permitted the preferred stockholders to receive the 'equitable equivalent' of their claim on earnings because they remained investors in a continuing enterprise".[67] Central-Illinois

[67] Central-Illinois Brief, p. 65.

then seeks to give new life to and inject the doctrine of frustration into the law of corporate reorganization by virtue of this Court's "Cf" citation of *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. (2d) 274 (C. C. A. 2, 1942), cert. den. 318 U. S. 786 (1943), and *In re Laclede Gas Light Co.*, 57 F. Supp. 997 (E. D. Mo. 1944), in the *Otis* case. Examination of the context of the *Otis* opinion, in which the reference is made, clearly reveals its support of the principle of inoperativeness of the charter provisions in the light of the *unforeseeability* of the legislative policy, as enunciated by this Court. The stress is clearly upon the aspect of *unforeseeability* which is discussed in both the *New York Trust Co.* and *Laclede* cases. Certainly this Court did not intend to measure the rights of the parties in a simplification by the doctrine of frustration, as Central-Illinois urges. Moreover, despite any contrary Central-Illinois reference, the doctrine of frustration has historically not been "part and parcel" of the "fair and equitable" standards in the law of reorganization, although the doctrine of frustration is part of the law of equity. This supposed "apt solution", which is urged, would always result in the elimination of senior securities at face amounts (regardless of their intrinsic value) and would make mockery of the *Otis* doctrine of valuation on a going concern basis. In other words, Central-Illinois, despite its denial, seeks to substitute the doctrine of frustration (under which the contract provisions are admittedly inapplicable) for the *Otis* principles of full priority and valuation "on a going concern basis", or "as though in a continuing enterprise", in the measurement of the rights of security holders upon a simplification under the Act, and thus

again laterally attacks the *Otis* case. The mandate of this Court is clear that in the simplification of a holding company system, "the rights of the stockholders of a solvent company are to be evaluated on the basis of a going business" and not determined by the application of the doctrine of frustration. Furthermore, if the Central-Illinois analysis is correct, then the *Otis* case applies only where a common stock management elects to permit the preferred to remain in the enterprise or participate in the underlying companies, and not where the common stock chooses to pay the preferred off in *cash*. Such a personal choice by the common stock management was never intended to have the effect of altering valuable rights of nonvoting preferred stockholders. Moreover, compensatory treatment must be accorded the security holders, whether the medium of payment be cash or securities.[68] Contrary to the Central-Illinois interpretation of the *Otis* case that " 'fairness and equity' permitted the preferred stockholders to receive the 'equitable equivalent' of their claim on earnings because they remained investors in a continuing enterprise", our reading of the *Otis* case disclosed that the question there was whether the common, not the preferred, should receive *any* participation or "be deprived of its possibility for future earnings". The conclusion that the common should receive a participation was clearly based upon a valuation of the stockholders' rights "as though in a continuing enterprise."[69] As heretofore noted, the situation is quite reversed. The common has kept the enterprise and attempts to justify payment to the preferred of $100

[68] See Streeter Brief, p. 129, n. 159.

[69] The phraseology "as though" implies the possibility or contingency of the nonexistence of the continuing enterprise.

on the theory of "frustration". The Central-Illinois effort to substitute the doctrine of frustration for the concept of valuation on a going concern basis, and the principle of full priority as incorporated in the fair and equitable standard in simplifications, must be rejected as unsound and contrary to the views of this Court in the *Otis* case.

The Central-Illinois group also claims that this doctrine of frustration "was consistently applied by the Commission and the Courts to limit preferred stockholders and bondholders to the face amount of their securities".[70] However, it cannot be denied that under the application of the fair and equitable standard, the Commission and the courts also have permitted the retirement of senior securities at amounts in *excess* of their face values.[71] Therefore, neither the

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[70] Central-Illinois Brief, p. 55.

[71] For example, *The Western Public Service Co.*, H. C. A. R. Nos. 3175, 3230, 3245 (1942) and *El Paso Electric Co.* (Delaware), 8 S. E. C. 366 (1941), which were subsidiaries of Engineers; *Mississippi River Power Co.*, H. C. A. R. No. 5776 (1945); *The North American Co.*, H. C. A. R. No. 5796 (1945); *Minnesota Power and Light Co.*, H. C. A. R. No. 5850 (1945); *NY PA NJ Utilities Co.*, H. C. A. R. No. 5975 (1945); *Buffalo, Niagara and Eastern Power Corp.*, H. C. A. R. No. 6083 (1945); *Pennsylvania Power & Light Co.*, H. C. A. R. No. 6167 (1945); *Standard Gas and Electric Co.*, H. C. A. R. No. 6435 (1946), following the decision in *Standard Gas & Electric Co.*, 63 F. Supp. 876 (D. Del. 1945); *Community Gas & Power Co.*, H. C. A. R. No. 6436 (1946); *Scranton Spring-Brook Water Service Co.*, H. C. A. R. No. 6458 (1946); *Northern States Power Co.*, H. C. A. R. No. 6578 (1946); *Pennsylvania Edison Co.*, H. C. A. R. No. 6723 (1946); *Washington Railway & Electric Co.*, H. C. A. R. No. 7410 (1947), enforced June 16, 1947 (D. C. Dist. of Col.); *United Gas Corp.*, 58 F. Supp. 501 (D. Del. 1944); *Central & Southwest Utilities Co.*, 66 F. Supp. 690 (D. Del. 1945); *In re American and Foreign Power Company*, 80 F. Supp. 514 (D. Me., 1948); *Pennsylvania Edison Co.*, H. C. A. R. No. 8550 (1948).

Several cases have also pointed out that in some situations the

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face amount nor a premium should automatically be paid upon the retirement of a senior security. The factual situation determines the amount to be paid the security holder.[72] Thus in *Massachusetts Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424, 430 (C. C. A. 8, 1945), cert. den. 327 U. S. 795 (1946), the Court of Appeals for the Eighth Circuit pointed out:

> "Obviously, whether, upon retirement of outstanding bonds in the reorganization of an operating utility subsidiary, payment of principal, accrued interest, *and* redemption premiums is the equivalent of the bondholders' rights *depends upon the facts of each particular case.* The proper measure of such equivalence is for the determination of the Commission in the first instance, and its expert skill in appraising the facts to be considered must be accorded due weight by the court." (Italics ours.)[73]

Such approach permits the case by case evolution of the statutory standard.[74] In accordance with such

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Commission might find the equitable equivalent of the senior securities to be more than the face amount. See e. g. *Mass. Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424, 430 (C. C. A. 8, 1945); *In re Consolidated Electric & Gas Co.*, 55 F. Supp. 211, 216 (D. Del., 1944); *In re North Continent Utilities Corp.*, 54 F. Supp. 527, 530 (D. Del., 1944). The correctness of this view was also conceded by the District Court, as well as counsel for Central-Illinois (R. 223a-224a).

[72] *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, 203, rehearing denied 332 U. S. 783 (1947).

[73] The same view was expressed by the District Court in its opinion (R. 288a) as well as in the course of the hearing (R. 223a-224a).

[74] The *Otis* case which rendered inoperative charter provisions and required the valuation of the security interest on a going concern basis undoubtedly accelerated the evolutionary process.

[Footnote continued on following page.]

evolutionary process, it is clear that an automatic rule for the retirement in all cases at $100 would be unsound and inequitable. *American Power & Light Co.*, H. C. A. R. No. 6176 (1945). In that case, where the so-called frustration cases were distinguished, the Commission, in line with the foregoing reasoning correctly rejected the automatic rule for the payment of the face amount stating:

> "* * * As a result of the experience gained through consideration of a large number of later cases, we are persuaded that an automatic rule of 100 in all debt retirement cases would produce inequitable results and that it is necessary to inquire into the circumstances of the particular case to determine whether the payment of 100 is fair and equitable" (H. C. A. R. No. 6176, p. 12).

Accordingly, the Commission's decision in the instant case was merely an extension of the above principle to the retirement of the preferred stock. Moreover, if by the frustration cases, the Commission is deemed to have announced an automatic rule denying the pay-

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In the evolution of the appropriate principles to achieve the statutory objectives, it is not to be unexpected that the Commission counsel and the Commission, like the courts, may waver at times and evidence a measure of inconsistency over the span of time. Furthermore, although the briefs submitted on behalf of the Commission are interesting in litigation such as this affecting the public interest, it is likely that its views have not always been wholly and completely accepted by the courts, even where the Commission's action has been sustained. Hence the statements in the briefs submitted on behalf of the Commission in past litigation must be weighed in the light of views enunciated by the courts.

Furthermore, it is noteworthy that in many of the earlier cases no proof was offered to the Commission with respect to the going concern value or the fair investment value of the preferred stocks. *American Power & Light Company*, H. C. A. R. No. 6176 (1945), p. 11.

ment of any amount in excess of stated value, then its decision in *American Power & Light Co.*, H. C. A. R. No. 6176 (1945), plan enforced (S. D. N. Y., 1945) constituted the announcement and application of a new principle based upon administrative experience under the Act, the extension of which, to the retirement of the preferred was made in the instant case. Even if the Commission has thus announced a new principle, such action is not forbidden and is entitled to the greatest weight, since it reflects the informed expert judgment of the Commission and is the product of administrative experience, appreciation of the complexities of the problem and a realization of statutory policies.[75] Since the parties represent *ownership* interests, there is no more reason for giving to the preferred stockholders merely the sums paid in by them, than there would be to restrict the common to the amounts they have contributed. Moreover, since in the event of rescission, there are no governing provisions in the charter, an appraisal was in order and, in line with the requirements of "strict priority" and "fairness and equity", the Commission properly found the preferred to be entitled to the investment value of their stock.

III. Concerning the Contentions as to Alleged Serious Constitutional Questions.

The spectre of the Fifth Amendment, which the Central-Illinois group originally raised has apparently disappeared.[76] Its lack of merit must have finally become obvious to the Central-Illinois group. In any

[75] *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, 207, rehearing denied 332 U. S. 783 (1947).

[76] Central-Illinois Cross-Petition, p. 5.

event, such contention has been demonstrated to be unsound.[77] In place of the Fifth Amendment contention, the Central-Illinois group now urges an unconstitutional delegation of power because of the alleged absence of a standard to guide the Commission in the exercise of its power (presumably in violation of Article I of the constitution). The uncertainty of the fair and equitable standard which Central-Illinois suggests is imaginary and nonexistent. The fair and equitable standard under section 11(e) of the Act is as clearly ascertainable and definite as the standards under section 11(b)(2) which this Court has sustained. Accordingly, a ready answer to any contention of an unconstitutional delegation (as well as a supposed violation of the Fifth Amendment) is contained in the opinion of this Court in *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, 104-5 (1946).

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[77] Streeter Brief, p. 103 ff.

PART TWO.

The Valuation Process.

Throughout Part Two of its Brief, Central-Illinois seeks to bolster the District Court's erroneous valuation and technique and to reconcile the differences between the views of the courts below by reference to matters either outside the record, or to events subsequent not only to the decisions of the Commission and the two courts below, but subsequent to the actual consummation of the plan in the middle of 1947 (excepting the escrow arrangement). Presumably in accordance with the direction of the court below that the Commission ascertain and apportion earning power (R. 35) (which direction we have urged in our Brief is unwarranted), Central-Illinois counsel criticizes the Commission for its failure to make such ascertainment and apportionment, but passes over without comment the District Court's neglect to do so while arguing the need therefor and then proceeds to supply the supposed deficiency by his own "expert" evaluation. It is submitted that such Central-Illinois process of valuation can be no substitute for that made by the Commission. In order to focus attention on the valuation technique proposed by Central-Illinois, we shall first address ourselves to an over all discussion of the approach of the two courts below and their supplementation by Central-Illinois and will then comment briefly on the various erroneous legal contentions of Central-Illinois.

As noted elsewhere,[78] the District Court actually failed to value the three series of Engineers pre-

[78] Streeter Brief, p. 113.

ferreds. Although stating that the involuntary liquidation provisions did not govern, the learned District Judge fixed the value of the three series at $100 per share, which "happened" to be the involuntary liquidation price provided in the charter for all three series, even though they all carried different dividend rates. The District Court reached this conclusion by reference *inter alia*, to four colloquial equities heretofore discussed. It has been demonstrated that these elements were very carefully considered by the Commission and were entitled to far less weight than the current rights to earnings and assets which are entitled to primary emphasis.[79] Even the court below decided that the District Court had erroneously indulged in a "species" of valuation, which it decided the District Court could not do and by reason thereof remanded the proceedings to the Commission for redetermination on the question of valuation.

Central-Illinois has, in addition to attempting to support the District Court's opinion on valuation, another objective for the inclusion of the various financial data, computations, calculations, comparisons, etc., and that is to cast doubt on the so-called "predictions" made by Dr. Badger. The fact is disregarded that the District Court in May, 1947, specifically stated (R. 290a): "I accept Dr. Badger's values and, in the absence of a showing of changed circumstances, I shall assume that those values are applicable at the present time." Despite that statement, Central-Illinois consumes many pages and injects innumerable footnotes seeking to establish, by innuendo, that there have been such changes. If such changes have in fact occurred, they must, of necessity, have taken place subsequent to the consumma-

[79] Streeter Brief, p. 113, ff. 124.

tion of the plan in mid-1947. It is, of course, our view that no change of a material character has taken place. In this connection, it is again worthy of note that Central-Illinois not only does not seek a remand, but specifically opposes a remand to the Commission, and, in effect, asks this Court to substitute the District Court's valuation for the Commission's.

Recognizing, of necessity, the District Court's reference to the four colloquial equities as a basis for disapproving the Commission's detailed findings on value, to be hopelessly inadequate, Central-Illinois resorts to a great mass of statistics and calculations, hypothetical cases, newspaper articles, financial publications and current market prices of securities, much of the data being subsequent to the consummation of the plan in the middle of 1947, to suggest to the Court that $100 per share for the preferred stockholders in this case is "enough", and also to cast doubt on the validity of the valuations made by Dr. Badger and the Commission.

It is obvious to this Court that it is not possible to try this case over again in the briefs submitted, or in oral argument. It is extremely difficult to cull out from the Central-Illinois Brief the innumerable statements and conclusions which are both incompetent and irrelevant. It is our contention that the footnotes and so-called financial arguments based on matters occurring long subsequent to the Commission's decision, and many referring to events subsequent to the consummation of the plan, are entirely foreign to the issue before this Court. However, because of the great stress and the amount of space devoted to a consideration of these items by Central-Illinois, in its Brief, we felt impelled to show that the conclusions based upon such data, are entirely erroneous.

Before taking up in detail the various highlights of the Central-Illinois contentions regarding the general subject matter, it appears worthy of comment that counsel for Central-Illinois has freely given the Court the benefit of his "expert" opinion as to the relative merits of various preferred stocks, comparing them with Engineers and with other companies and engaging in the most widespread speculation leading to conclusions which are given an air of finality. A brief reference is made here and there to changes in the earnings of one or more of the underlying subsidiaries of Engineers with the implication that the poor common stockholders of Engineers had foisted upon them, the dregs of what was left, after the preferred took the cream from the top of the bottle. No effort is spared in the attempt to establish the "bad deal" the common got. It is suggested that the Commission and Dr. Badger failed to give any consideration to the future. Nearly everything that has happened in the last three years is literally dragged in, in an effort to show that the forecasts made by Dr. Badger were inaccurate.

Nowhere is it asserted in the Central-Illinois Brief that the three underlying operating subsidiaries, to wit, Virginia, Gulf States and El Paso, had retrogressed or changed so materially as to warrant a reopening of the instant proceedings on the ground of changed circumstances.[80] Dr. Badger testified in January, 1946, and a reasonable period was covered by his forecast (R. 2103a quoted *infra*, p. 55). As was said in *St. Louis Southwestern Ry. Co.* v. *Henwood*, 157 F. (2d) 337, 395 (C. C. A. 8, 1946), cert. den. 330 U. S. 836 (1947), rehearing den. 331 U. S. 870 (1947): "What were their 'prospective earnings' * * *, have

[80] Cf. *Insurance Group Committee* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607 (1947).

now become "actualities". Three years have gone by and yet, outside of an isolated reference or two to the underlying subsidiaries, nowhere in the Central-Illinois Brief is it asserted that the evidence of past earnings and past financial condition, with the voluminous evidence bearing thereon before the Commission and considered by it, differed in any material respect, from the earnings and financial condition of the three underlying companies for the period 1946, 1947 and 1948. Central-Illinois makes no claim that the assets, earnings, earnings ratios, equities and general financial condition of each of the three underlying companies are anything but satisfactory and in accord with the expectations of Dr. Badger and the Commission. The major exception to this is the reference to the decline in earnings of Virginia and the explanation for this appears at p. 60, *infra*. There is nothing asserted in the record to question the predictions made by Dr. Badger (R. 2103a) to the effect that the three underlying operating companies should continue in future years to register progress along with other units in the industry. Dr. Badger's testimony in this regard appears to be particularly pertinent:

> "This estimate of 1946 earnings indicates a continuation of the improvement in earnings shown for the 1940-1945 period, as coverage, both in respect to over-all charges and Parent Company preferred dividends, is estimated to be higher in the year 1946 than in any of the years 1940 through 1945.
>
> "The public utility industry has for many years been characterized by stability and by a strong growth trend. There are no peculiar economic characteristics in respect to the territories served

by the present subsidiaries of Engineers Public Service Company which would indicate that the earnings trend of these companies would go counter to that of the industry. It is a reasonable assumption, therefore, that this Company should continue in future years to register progress along with other units in the industry" (R. 2103a).

It appears that changes in economic conditions and money rates, down to December, 1948, have no bearing upon the fair investment value of the preferreds as of a date subsequent to the consummation of the plan. The increase in the yields of the various classes of securities referred to has been of modest proportions, and we submit that interest rates still are at historically low levels. The argument by Central-Illinois that the "percentage" increase in the yields of these securities presages a fundamental increase in the level of interest rates, appears unfounded. In effect, the past increases represent normal fluctuations and are not a forerunner of any fundamental change in money market conditions and of long-term interest rates.

The Chairman of the Board of Governors of the Federal Reserve System made the following significant statement on October 26, 1948:

> "When you consider that the public debt is one and a half times all other debt in the country combined, it seems obvious to me that the market for the Government debt securities must be one where investors can deal at all times with confidence, I remain of the conviction that for the foreseeable future the support program should be continued. This conviction is shared by all

> of the Board of Governors, ten members of the Federal Open Market Committee, and by the Treasury. It is also supported by the weight of financial opinion in the country."[81]

The Government, to finance its expenditures successfully, must maintain stable market conditions for its securities. Because such confidence is predicated upon maintaining the existing support prices on long-term Government bonds, it is improbable that the general level of interest rates will increase further. In fact, it appears quite possible that, in the near future, interest rates and preferred stock yields will recede from present levels. Apparently Dr. Badger's predictions in early 1946 that there was no indication of a substantial fundamental change in respect to money rates in the reasonably foreseeable future was correct.

We believe it might be helpful to the Court to comment on certain of the portions of the Central-Illinois Brief wherein are references to data from which the Court is asked to conclude that the value found by the Commission as being fair, just and equitable for the preferred stockholders, "could not exceed $100." This material refers mostly to arguments based on statistical data relating to matters allegedly occurring subsequent to the District Court's decision, which virtually coincided with the consummation of the plan, *i. e.*, about the middle of 1947. Thus, reference is made in the Central-Illinois Brief (p. 12) to the Federal Reserve Bank Index of Utility Stock Prices for the period from June, 1946, to December, 1947. This reference is made in the

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[81] As reported in *The Commercial and Financial Chronicle*, November 4, 1948, p. 40.

hope that this Court will assume that Engineers and its subsidiaries all followed the same trend and that there was, in effect, a 28 percent decline in "value" of underlying securities. This is the Central-Illinois "momentary market price" theory.

At page 14 of Central-Illinois Brief and elsewhere, as noted heretofore, a studied effort is made to persuade this Court that "market prices" chosen at a particularly haphazard time, were the *only* basis for the Commission's valuation. An attempt is made to imply something sinister in the Commission's considering market values of comparable listed securities as *one* of the many elements of an expert appraisal along with history of the enterprise assets, earnings, coverages, ratios, etc. Any expert or expert body that did not consider market value of listed securities as one of the elements of value, would not be doing its job correctly. Furthermore, the fact that market prices may fluctuate, does not in any way mean "intrinsic" or "economic" values, are to be redetermined on a "ticker tape" basis. That would not be "going concern" value. Actually, the changes in money rates have been comparatively insignificant and inconsequential, and the large cushion of investment value of the three series of preferred *above* their respective call prices as found by the Commission (R. 66a) should serve as an ample margin to take care of such changes.

On page 66 footnote 1 appears an example of Central-Illinois counsel giving their expert opinion as to the comparative investment values of many senior securities referred to in various Commission decisions. We are sure that the Commission is not unfamiliar with its own decisions and findings in the cases referred to, and must be deemed to have had them in

mind, in reaching their conclusion in the Engineers case.

Regarding comments appearing on pages 77 and 78, we have heretofore exposed the fallacy of the contention that temporary market prices, at a particularly haphazard moment, constituted the only element of value considered by the Commission. In footnote 1 on page 77, market price ranges of certain companies referred to by Dr. Badger in his report and taken from Moody's *Public Utilities, 1946* are presented to discredit the report of Dr. Badger and the Commission's findings. We think it may be fairly assumed that the Commission is no stranger to Moody's, and the reference thereto hardly justifies a complete reversal of the Commission's decision.

On page 81 and elsewhere the false assumption again appears "that the Engineers' preferreds had a value approximating the redemption prices based exclusively on market prices as of January 4, 1946 . . .," and the contention is made based upon hypothetical premises and "expert opinion" by counsel for Central-Illinois, that there was a failure to consider the element of "permanence" of the valuations as found by the Commission. The answer to these contentions would appear to lie in the complete absence of any showing by Central-Illinois that the three underlying operating companies have done other than prosper, during the last three years and amply justify Dr. Badger's predictions that he thought that these companies would progress as well as other units in the industry (R. 2103a).

At page 95, in footnote 1, Central-Illinois makes one of its few references to one of the underlying subsidiaries of Engineers. It then goes on to state that the common stockholders of Engineers received

1.45 share of Virginia common stock for each share of Engineers common owned. The footnote states:

> "* * * In 1946 * * * earnings available for Virginia's common stock were $5,027,740, equivalent to $1.71 per share of common (Moody's, Public Utilities 1948, p. 745). For the 12 months ended September 30, 1948, earnings available for Virginia's common were $4,062,427, equivalent to only $1.37 per share on the number of shares then outstanding, and additional shares are now being sold which will further dilute per share earnings (Moody's, Public Utilities, Current Supplement, Vol. 20, p. 1745)."

The unfairness of asking this Court to draw any conclusions from these isolated fragments from Moody's publication is clearly shown. What Central-Illinois does not state is what appears at page 9 of the Prospectus of Virginia Electric & Power Company dated November 15, 1948,[82] as follows:

> "It is estimated that the net sum of operating expenses and depreciation would have been reduced by $1,500,000 if the new Possum Point generating station had been in operation through the 12 months ended September 30, 1948. It is presently scheduled for operation in November or December, 1948."

It thus appears that by the company's own statement it can look forward to increased income of $1,500,000. It further illustrates the complete futility of this Court attempting to reach a decision on the matter of valuation, based upon fragmentary excerpts from periodicals and statistical documents, where, by ac-

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[82] Virginia has recently filed with the Commission a registration statement under the Securities Act of 1933 with respect to the shares of common stock referred to in the said Prospectus.

cepting isolated statements, taken out of context, a completely misleading impression of the factual situation, may result.

At page 96, the conclusion is asserted by counsel for Central-Illinois that whether the valuation of the preferred is viewed in the light of the record *subsequent* to Engineers dissolution or in the light of the entire record prior, as well as subsequent, to dissolution the Commission's valuation cannot be justified. We challenge that statement.

In effect, what Central-Illinois is asking this Court to do is to fix $100 valuation based upon a mass of confused and irrelevant data, a good portion of which is allegedly based on happenings after the common forced the preferred out and compelled them to take $100, took away their stock certificates, cut off their dividends while the litigation was pending, and are now attempting to apply a completely false theory of the current market price approach, to keep the preferred from receiving the fair value of their interest as found by the Commission.

At page 97 (which is a continuation of footnote 1 on page 96) another "hardship" argument is advanced that because of Engineers dissolution, it lost the advantage of filing consolidated tax returns with one or more of its subsidiaries. The reason for the filing of consolidated returns was related to the excess profits tax that was in existence at that time (R. 837a). It also appears that after the repeal of the Excess Profits Tax Law (1945), the advantage of Engineers filing a consolidated return with Virginia was rather slight (R. 833a, 834a, 835a). At all events, aside from the fact that this question of consolidated returns must have been carefully considered by the common stock management, it was the voluntary action of the common to do this. Furthermore, there are a

number of tax *advantages* to the common stockholders, which the Central-Illinois brief does not mention.

First, in the Virginia Electric & Power Company prospectus of November 15, 1948, page 28, it appears that Virginia expects a *tax refund for overpayment of Federal taxes on income of $1,831,182.79.*[83] This anticipated refund is a tidy sum, of which the common are the "residual" owners, as a result of apparently a $5,000,000 tax refund claim of Engineers, as to which there was a "dearth of evidence" in the record (R. 56a).

Second, it is clear that there was a profit realized by Engineers on the sale of warrants of Gulf States Utilities Company, whereby the Engineers common stockholders acquired common stock of Gulf States at $11.50 a share. This transaction was consummated in June, 1947, with a resultant profit to Engineers of nearly $8,000,000,[84] which would normally have been subject to a capital gains tax of 25 percent, except for the following facts. In 1944 Engineers had sold its common stock holdings of Puget Sound Power & Light Company with a resultant capital (book) loss of approximately $33,000,000, a portion of which capital loss was used to set off against capital gain originating principally from the sale of El Paso Natural Gas stock so as to leave available a net capital-loss carry-over from 1944 of approximately $31,000,000 (R. 616a). The capital gain from the sale of Gulf States rights would of course also be offset against the Puget Sound loss. Thus Engineers did not pay any Federal income tax on the profit realized through the sale of the Gulf States warrants. This involved a

[83] Prospectus of Virginia Electric and Power Company, dated Nov. 15, 1948, p. 28.

[84] R. 988a-989a. See discussion, *supra*, at p. 24.

saving for the common stockholders of almost $2,000,000.

Third, there still remains of the Puget Sound capital loss, a balance of approximately $23,000,000 available for set-offs of capital gains, for the taxable year of 1949, since carry-forwards of capital losses are continued for 5 years after the capital loss was incurred.

It is a fact that Enginers still retains 162,612 shares of common stock of Virginia Electric & Power Company.[85] If this stock is disposed of prior to December 31, 1949, any profit realized above the tax cost would be subject to a capital gains tax of 25 percent, but this could be in turn offset against the capital loss of approximately $23,000,000 remaining from the Puget Sound transaction, a further tax advantage for the common stockholders.

At page 98 of the Central-Illinois Brief, the following statement appears:

> "It is evident that if appropriate account is taken merely of the changes which have already occurred, even on the Commission's valuation formula the preferred stockholders could not be found entitled to more than $100 per share."

This statement is obviously incorrect and is predicated only upon opinion of counsel, based upon the so-called statistics.

At page 101 appears a rather bizarre contention, predicated upon using the total dividends normally payable to the preferred and employing this as a numerator and taking the *earnings* of Virginia, El Paso and Gulf States for 1947 as the denominator, and then allocating, on the basis of this fraction, 20

[85] H. C. A. R. No. 8631 (1948).

percent of the total assets, to the preferred stockholders, in payment of their claim. Magnanimously the Central-Illinois brief suggests awarding an additional 5 percent for the preferred "loss of position" making a total of 25 percent for the preferred. It is concluded from this that the preferred current cash value approximated $70 per share. If this "reasoning" were to be followed, it is apparent that the worse position a holding company was in, the higher percentage, up to 100, would the preferred get. In other words, if the earnings were high and the preferred dividend requirements are low, it would amount to the common stockholders paying the preferred out, with such percentage of the earnings of the system, as the annual dividend requirements of the preferred, bore to such earnings. We cannot recognize that this contention is advanced seriously. In addition to the utterly ridiculous character of it, it completely overlooks the fact of the preferred's priority. The same conclusions may be addresesd to the equally specious calculation in footnote 3 appearing at pages 101-102 of the Central-Illinois brief. There, applying the same 25 percent figure to the total estimated market value of the underlying securities, Central-Illinois concludes that the preferred would only be worth approximately $66 each. Such a calculation merits no reply.

On page 106, it is stated that the District Court "appraised" the proposed payment to the preferred stockholders both "intra the Act" and "ex the Act." How, we ask, did the District Court arrive at the amount of $100? What "method of appraisal" was applied to reach a result giving all three series of preferred stock having different interests rates the same amount, to wit, $100 per share? What equity

is there in that? What factors were decisive? How did he appraise the preferred *ex* the Act and *intra* the Act? Baldly stated, the District Court Judge felt that $100 was "enough". It is clear that his "valuation", regardless of the expressions in his opinion, went no deeper than that.

At page 112 is another "calculation" by counsel for the Central-Illinois Company predicated upon the assumption that in the supposed situation the senior securities might receive an amount which might wipe out the equity of common stockholders. In the suppositious case, it is suggested that the common stockholders would propose a plan to eliminate themselves entirely from either the enterprise or any equity therein. This is, of course, absurd. The hypothetical case suggests one in which the *Otis* principle would unquestionably be applied both by the common stockholders and by the Commission and the courts. It must never be overlooked that the decision as to the plan and its method of effectuation, rest entirely with the common stockholders.

At pages 118 and 119 there appear many statistics concerning the El Paso Natural Gas Company and the divestment of Engineers interest in this company is characterized as an additional hardship. The Commission in its main brief, at p. 63, *et seq.* have completely answered this erroneous contention.

There are other portions of Central-Illinois's Brief in which its counsel engage in calculations and hypothetical conclusions, interpersed freely with opinions of investment values. It is clear that all of the financial data are designed to discredit the Commission's valuation or point in the direction of alleged changed circumstances, although it is nowhere asserted that the change is so radical as to require a reopening.

The references to changed money rates and the rise and decline of stock market prices, appear to lack merit in the light of the facts considered by the Commission and the corroboration to be found in the events of the three years following the Commission's decision, as evidenced by complete failure on the part of Central-Illinois to adduce any contention to the contrary. Money rates may go up and they may go down. Market prices have been up and have gone down and may go up again. Both may fluctuate either one way or the other, but nothing has happened in the past three years to shake in the slightest degree, the soundness of the Commission's conclusions, on the problem of valuation.

IV. Concerning the contention as to the Commission's alleged failure to value on the basis of a continuing enterprise.

As demonstrated above, the various factual hypotheses upon which Central-Illinois bases its contentions are erroneous. Moreover, the principles and techniques of valuation which it urges are equally inapplicable and incorrect. Rather than restate at length the applicable principles and methods, we respectfully refer this Court to our original Brief (p. 105 ff.). However, we cannot let pass unnoticed, several erroneous contentions, but do not, by our silence, as to others, intend an acceptance of the Central-Illinois views.

A. Central-Illinois criticism that the Commission's determination of investment value merely represented momentary "transient market values"[86] is a complete distortion of the record. As shown above (p. 4),

[86] Central-Illinois Brief, p. 73 ff.

a variety of factors such as earning power, dividend record, history of company, asset coverage, etc., all of which criteria provide a proper basis of valuation,[87] were considered. The absence of definition[88] (although to be sure the Commission had Dr. Badger's definition before it) is inconsequential as long as all the requisite elements of value are considered, as they were by the Commission. There is little in the label. In short, the content or its characteristics, and not the label, are important. Furthermore, reference to *Schwabacher* v. *U. S.*, 334 U. S. 182 (1948), which involves an analogous problem of valuation, also discloses the use of a variety of combinations of the similar phrases by this Court, *i. e.*, "the present intrinsic values", "current worth", "present intrinsic or market value", "current values", "intrinsic or market values" and "intrinsic value". It is clear from the *Schwabacher* case that this Court measured the "intrinsic value" in terms of the "stock's past yield, present market value, and future prospects" (334 U. S. 200), all of which were considered by the Commission in the instant case. Consequently the Central-Illinois contention is merely an "exercise in semantics" and is wholly devoid of merit.

B. Central-Illinois also seeks to show the Commission's variance from the doctrine of equitable equivalents by an alleged measurement of preferred stockholders' rights by use of "momentary market price".[89] This contention is obviously lacking in merit, as the Commission made its valuation on the basis of appro-

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[87] *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 526 (1941).

[88] See definition of fair investment value, by Dr. Badger, *supra*, p. 4.

[89] Central-Illinois Brief, p. 86 ff.

priate and relevant economic data, as indicated above, and did not rely primarily upon the isolated so-called "transient values" as Central-Illinois contends. The facts speak for themselves, but not as stated by Central-Illinois.

Citing the *DuBois*[90] and *Group of Institutional Investors*[91] cases, Ceneral-Illinois makes this interesting observation:

> "It is fundamental that in valuation for reorganization purposes earning power and other relevant economic factors must be calculated *prospectively* on a normal going-concern basis, with due regard of the past" (Central-Illinois Brief, p. 86).

Then Central-Illinois stresses the phrase "investment value" as employed by this Court as connoting "values on a long range basis of both classes of stockholders predicated upon their relative rights to participate in the prospective earnings of the enterprise". The record clearly indicates that Dr. Badger did consider and prognosticate on the future of the three underlying operating companies of Engineers (R. 2103a). Furthermore, it is clear that the common insisted upon having distributed to it all of the stock in these three underlying companies. It is our position that consideration was given to prospective earnings of the three subsidiaries by Dr. Badger. On the other hand, in view of the determination of the common stockholders to secure the advantage of these three operating companies for themselves, it is quite obvious

[90] *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510 (1941).

[91] *Group of Institutional Investors v. Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523 (1943).

that they were satisfied that any long range forecast of prospective earnings was surplusage.

In place of the so-called "values on a long range basis" and prospective "earning power", as urged by Central-Illinois, the District Court verbalizes on the "colloquial" equities, or various nonvaluation criteria, the error of which we have already shown.[92] Yet at the same time, Central-Illinois apparently finds no fault with the Circuit Court's instruction "to ascertain the future earning power of the system" and "to apportion earning power between the preferreds and common based upon their respective claims to income" (R. 35). As the Circuit Court relies upon the same cases cited by Central-Illinois, the only error which Central-Illinois finds in the opinion of the court below is the direction for remand, implying in effect, that the two courts had applied the same principles of valuation. At this point, Central-Illinois counsel finds himself figuratively standing astride two horses pulling in diametrically opposite directions. Central-Illinois counsel provide an "apt solution" for this predicament by the introduction of their own "expert valuation" to overcome the divergent tugs. Thus a simple reconciliation is attempted between the two opinions below by means of numerous references to statistical data and arguments of counsel flowing therefrom, to show that the preferred could not get more than $100 in any event. Such expedient cannot sustain the basically inconsistent position that Central-Illinois has taken, even after the vain attempt to augment the District Court's findings. We contend as previously set forth, that both courts below erred. The standard of "colloquial equity", as enunciated by

[92] Streeter Brief, p. 113 ff.

the District Court, and as approved by the court below *sub nomine* "substantial equities", substitutes nebulous nonvaluation criteria for definite contract rights of security holders and results in a shift in emphasis, from such primary factors as current rights to earnings and assets, as proclaimed in the *Otis* and *Schabacker* cases.[93] Furthermore, the criticism of the court below, levelled at the Commission, for its failure to give substantial consideration to future earning power and ascertain and apportion it between the preferreds and the common (R. 35) is unwarranted, for the reasons as pointed out in our Brief.[94] The instant situation is materially different from that in the *Otis, DuBois* and *Group of Institutional Investors* cases and, as recognized in the *DuBois* case, the *facts* of each case determine the extent and method of inquiry necessary for valuation, based upon earning capacity. In the instant case, where past, present and estimated earnings (R. 1826a) were considered, and careful study discloses an amplitude of earnings coverage for the preferred, to which the common's claims are subordinate, and the available cash is not required for use to meet the dividend and interest requirements of flourishing operating subsidiaries (there being no interest or dividend arrearages), a hypothetical projection of earning capacity, far into the future, it is urged, is unnecessary and, in any event, speculative. As valuation for simplification purposes requires an appraisal of many factors which cannot be reduced to a fixed formula and entails a prediction of future events, "an estimate, as distinguished from mathe-

[93] Streeter Brief, p. 113 ff., 124.
[94] Streeter Brief, p. 132 ff.

matical certitude, is all that can be made". *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523, 542 (1943).

Central-Illinois also cites a series of cases (at pp. 89-91) suggesting that the Commission found valuation for the preferred in the instant case, based only on market prices, despite the fact that even in the matters quoted in the footnote the Commission has expressly negated any such policy. Those calculations of the preferreds' claims on the basis of "market prices" are irrelevant, as that criterion does not in fact, reflect the valuation technique used by the Commission. Furthermore, it should be noted that the various cases cited by Central-Illinois, in which the preferred claims were measured against future earning power, are to be distinguished from the instant case since they involve situations similar to the *Otis*, *DuBois* and *Group of Institutional Investors* cases.[95] Likewise, *Georgia Power & Light Co.*, H. C. A. R. No. 5568 (1945), enforced Civil Action No. 133 (M. D. Ga., 1945), cited by Central-Illinois (at pp. 93-4), is also similar to the *Otis* case in that dividend arrearages of the preferred, there involved, had to be valued, in order to insure fair and equitable treatment to the preferred. The fact that the *Georgia Power & Light Co.* case involved a projection of earnings for the purpose of valuing the preferred dividend arrearages is completely disregarded by Central-Illinois. Moreover, reference to the opinion discloses that no apportionment of the earning capacity was made. Under such circumstances the valuation technique in the two cases is reconcilable, since in both cases no apportionment was made, while a forecast was required in the

[95] See discussion, Streeter Brief, pp. 132-4.

Georgia Power & Light Co. case because of the dividend arrearages. In the instant case as there were no dividend arrearages and because the Commission and the common stockholders were, no doubt, completely satisfied with the future prospects of the three operating subsidiaries, no such claim was made either on behalf of Engineers or the common stockholders. Moreover, *in National Power & Light Company*, H. C. A. R. No. 8445 (1948), and *Pennsylvania Edison Co.*, H. C. A. R. No. 8550 (1948), short term forecast of future earnings (3-4 years) was made for certain specific purposes (*i. e.*, ability to meet dividend requirements, etc.), but in neither was any apportionment of earning capacity necessary. Likewise in the instant case, the Badger forecast was supplemented by a prediction as to the future earnings course of the underlying companies. There is virtually nothing in the Central-Illinois Brief, except references to the decline in market price of securities, changed money rates, etc., which in any way suggests that Dr. Badger's predictions were unjustified.[96] It should also be noted that although the equitable equivalent must be received regardless of the type of distribution—cash or kind—the valuation technique may be affected by such factors, either separately or combined, *i. e.*, the type of distribution, the existence of dividend arrearages, nature of the simplification (formation of a new company, recapitalization of the old, dissolution), the integrity and practicability of the new capital structure, and the propriety of junior security participation. As

[96] The Central-Illinois reference (Brief, p. 95, n. 1) to decline in earnings of Virginia has been answered at p. 60, *supra*. We, of course, believe that all such data, subsequent to the consummation of the plan are entirely irrelevant.

indicated above, the facts determine the nature and method of the valuation process. For the situation at hand, the requisite criteria, such as actual and estimated earning (with a prediction as to the future), dividend and earning records, asset coverage, etc. provided a proper basis for the valuation by the Commission.

C. We have already[97] demonstrated lack of merit in the criticism of the court below, which is also urged by Central-Illinois,[98] that the Commission allegedly adopted inconsistent techniques in valuing the preferred "*ex* the Act" and the common "*intra* the Act". In passing, however, it is appropriate to note our disagreement with the Central-Illinois assertion that the phrase "residual" claimants implies a "liquidation". On the contrary, an ordinary meaning of the word "residual" is "that which remains after subtraction".[99] In fact, that is the nature of the reciprocal valuation applied in the instant case. In other words, the Commission valued the preferreds on a going concern basis, and subtracted that value from the total enterprise (of which the preferreds and the common were the two claimants) with the result that the remainder went to the residual claimants, the common, as demanded by them. This reciprocal valuation which involved a dollar value for the preferred and the residuum for the common stock, results in findings of value for both the preferred and the common. Consequently, the criticism of the court below as to the

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97 Streeter Brief, p. 128 ff.

98 Central-Illinois Brief, p. 103 ff.

99 Funk & Wagnalls *New Standard Dictionary of the English Language* (1935), vol. 2, p. 2092.

absence of a finding of value for the common is without merit.[100]

The Commission, in determining the participation of the preferred, under the fair and equitable standard, on the basis of its intrinsic value did not ignore the rights of the common. It viewed the common as a residual security by its nature, in accordance with the terms of the contract, which created the priorities and made its rights subordinate. Despite the charge of the District Court in which Central-Illinois has joined,[101] that the Commission was "dealing cards off the top of a deck" (R. 291a), the Commission merely applied the doctrine of full priority, as incorporated in the fair and equitable standard.[102] Moreover, the Commission had not overlooked the rights of the common, but found the plan of immediate benefit to the common and fair to them (R. 69a).

V. Concerning the Contention as to Alleged Repugnancy of the Fair Investment Value, to the Strict Priority Principle and the Fair and Equitable Standard.

We have pointed out above (*supra*, p. 26) the fallacy of the Central-Illinois contention (Brief, p. 108) that the bankruptcy and equity receivership reorganization precedents do not support payments to senior security holders "in excess of their contract claims". First, no excess over the preferred contract

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[100] Streeter Brief, pp. 130-132.

In this connection Central-Illinois again finds itself in the unhappy plight of supporting the inconsistent views of both courts below: the Circuit Court criticizing the Commission for its failure to make a finding of value for the common and the District Court finding no fault on this score with the Commission's action. Central-Illinois sidesteps the issue.

[101] Central-Illinois Brief, p. 105.

[102] *Otis & Co. v. S. E. C.*, 323 U. S. 624 (1945).

claim is sought, but the equitable equivalent thereof. Second, bankruptcy or equity receiverships mature liquidation preferences, which consequently become the conclusive measure of the security holders rights, while in the instant case, the simplification did *not* mature the preferreds' claim and hence required the ascertainment of the amount to be received by the preferred, by a valuation of the rights surrendered, on a going concern basis. Thus, in the *Otis* case, this Court points out that the fair and equitable standard of section 11(e) incorporates the principle of full priority, in the treatment to be accorded various classes of security interests, and then indicates the need to recognize prior rights to earnings and assets in the following language:

> "* * * When by contract as evidenced by charter provisions *one class of stockholders is superior to another in its claim against earnings or assets that superior position must be recognized* by courts or agencies which deal with the earnings or assets of such a company. Fairness and equity require this conclusion. * * * This is the rule applied by the Commission in the simplification of corporate structure. The Commission recognizes and applies the doctrine of full priority by giving value to the rights of the preferred *in a going concern rather than as if by sale and distribution* * * *" (323 U. S. 634-5). (Italics ours.)

That superior position of the preferred must, under the mandate of the *Otis* case, be recognized on a going concern basis, not as urged by Central-Illinois, on a "liquidation" basis.

The investment value doctrine, as previously indicated,[103] connotes no fictional device, but signifies the

[103] Streeter Brief, p. 136.

measure of the bundle of rights surrendered—the end result of the valuation process, reflecting earning power, market history, dividend record, asset and earning coverages, priorities and other revelant factors,[104] all of which were considered by the Commission, and not "momentary peak market prices" as Central-Illinois implies. The reciprocal valuation protects both the common and the preferred. An over all dollar valuation or a dollar valuation for the common, suggested by Central-Illinois (Cf. Brief, p. 113) is not required and would merely create an illusion of certainty where none exists.[105]

VI. Concerning the Contention as to the Alleged Imposition of Supposed Additional Losses.

A. "Frustration" v. "Appropriation".

Baldly stated, Central-Illinois contends that the "deprivation" sustained by the prefered stockholders upon the compulsory retirement of their stock, by the payment of $100 per share, is not compensable and that the common stockholders did not "necessarily" become the beneficiaries thereof. In other words, the argument is that the contract has been frustrated by governmental action and therefore the preferred stockholders are not to be compensated for the valuable

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[104] *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 526 (1941).

[105] *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 486-8 (1943); *Group of Institutional Investors* v. *Chicago, Milwaukee, So. P. & P. R. R. Co.*, 318 U. S. 523, 564-566 (1943). In the latter case this Court in referring to the issue of compensatory treatment, comments as follows: "A decision on that issue involves a consideration of the numerous *investment features* of the old and new securities and a financial analysis of many factors" (318 U. S. 571). (Italics ours.)

rights surrendered. In support of this contention, Central-Illinois cites *U. S. ex rel. T. V. A. v. Powelson*, 319 U. S. 266 (1943). At the outset, it must be observed that the elimination of the preferred results from the conscious deliberate decision of the common stock management, and need not have occured, despite the Act, but for that decision. It cannot be asserted that the retirement of the preferred was occasioned *solely* by the sovereign act of the government. Clearly distinguishable from the instant situation is the *Powelson* case, which involves the exercise of the power of eminent domain by the T. V. A. and is wholly unrelated to the problem of respective rights of security holders on simplification under the Act. Thus in *The North American Co. v. S. E. C.*, 133 F. (2d) 148, 154 (C. C. A. 2, 1943), aff'd 327 U. S. 686 (1946), it was pointed out that "Compelling the holding company to dispose of its securities is not the same as condemning private property for public use without paying just compensation". Moreover, the *Powelson* case clearly recognizes that compensation must be made for the appropriation of a "going enterprise" (319 U. S. 282). It is also clear that the preferred stockholders must receive "just compensation" for their interest, or their equitable equivalents in accordance with the due process requirements.[106] Despite the Central-Illinois claim, the Commission has not confused " 'frustration with appropriation' ". On the contrary, as pointed out above (p. 43 ff.) the Commission must have recognized the difference and correctly refused to apply the doctrine of frustration, in the determination of the rights of security holders in a simplification under the Act. To have limited the

[106] *American Power & Light Company v. S. E. C.*, 329 U. S. 90 (1946); *The North American Company v. S. E. C.*, 327 U. S. 686 (1946).

preferred stockholders to the involuntary liquidation amount on the Central-Illinois theory, would have resulted in an "*appropriation*" of their rights for the benefit of the *common*, without compensation. Such treatment is forbidden by the principles of *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510 (1941), that full compensatory provision must be made for the bundle of rights surrendered. As stated by this Court:

> "* * * If they [creditors] receive less than that full compensatory treatment, some of their property rights will be *appropriated* for the benefit of stockholders without compensation. That is not permissible. The plan then comes within judicial denunciation because it does not recognize the creditors' 'equitable rights to be preferred to stockholders against the full value of all property belonging to the debtor corporation'." (312 U. S. 529).[107]

"In concrete terms", we contend and the Commission has held that the preferreds are entitled to the current going concern value of the bundle of rights (including *inter alia*, the prior rights to earnings) surrendered, namely, an amount at least equal to the redemption prices, and that to the extent that they receive less, the common will have profited.

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[107] *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523, 570 (1943). In the latter case this pertinent observation is made: "Unless that principle [of full priority] is respected, there will be serious invasions of the rights of senior claimants to the benefit of junior interests. The property of one group will be subtly appropriated to pay the claims of another while lip service is rendered the principles of priority."

B. Alleged "Frivolous Claim" of "Economic Benefit to the Common Stockholders".

The contention as to the absence of "economic benefit to the common" is not borne out by the record. It has been indicated elsewhere that the earnings and assets of Engineers had increased during the process of divestment (*supra*, at p. 20). It was also pointed out how the Puget Sound burden was eliminated, and how Engineers used a portion of its assets to acquire Virginia Public Service Co., merging it into Virginia and thereby materially increasing its underlying assets and earnings. Tax benefits have flowed to the common stockholders in the form of capital appreciation taxable at 25%, instead of ordinary income taxable at higher rates. *The common have obtained the direct ownership of three flourishing underlying operating companies by their exclusion of the preferreds.* The warrant program, erroneously labeled as a "special assessment", has provided the common stockholders with a benefit of $3-4 per share and an increase in earnings of $1.08 per ashare. Pertinent to the elimination of the preferred from the enterprise, is the following observation of the Commission:

> "* * * Under the circumstances the elimination of this prior charge is highly beneficial to the common. Moreover, in so far as the retirement of the preferred is a step toward bringing the Engineers system into complaince with the Act, it *hastens the day when the common will begin receiving dividend income*" (R. 69a). (Italics ours.)

It is no wonder that the Commission found, and rightly so, that the elimination of the preferred stock was of immediate benefit to the common (R. 69a). The characterization as "frivolous" is but a resort to adjective instead of fact.

PART THREE.

The Function of the Section 11(e) Court and the Direction for Remand.

VII. As to Contentions Whether the District Court Exceeded Its Power in Rejecting the Commission's Determination of Fairness.

Point I of the Streeter brief not only establishes the fallacy of the Central-Illinois contention on this score, but also clearly demonstrates the error in the views of the two courts below as to the power of the 11(e) court, to ignore the Commission's findings and determination of fairness and value, even though based upon substantial evidence and possessing warrant in the law and in the record. In that connection, we have shown that the District Court does not have the power to reject such findings and determination of the Commission, on the basis of its own discretionary weighing of so-called colloquial equities and in disregard of the doctrines of substantial evidence and administrative finality. That concept, as to the limitation upon the scope of review by the 11(e) court in passing upon the fairness of a plan, is borne out by the provisions of the Act, is consistent with the legislative history and analogous precedents in the law of reorganizations (Streeter Brief, p. 29 ff.), recognizes the correlation between sections 11(e) and 24(a) as alternate avenues of reviews (*Id.*, p. 68 ff.) and accords with the preponderant judicial authorities in deciding the issue (*Id.*, p. 77 ff.) under the Act and with decisional and statutory trends in administrative law (*Id.*, p. 90 ff.). The course of that discussion

indicates the lack of merit in the respondent's present contention. Rather than repeat our argument, we shall comment on various erroneous and unmeritorious contentions of Central-Illinois.

1. The Central-Illinois group formerly asserted that "the 'essence of the holdings of both Courts below was that the Commission's *conclusions* are without substantial evidentiary or legal basis; or, stated, in the restrictive terms for which Petitioners contend, that they 'lack rational or statutory foundation' ".[108] Now at last Central-Illinois counsel admits that the court below refused to apply the doctrines of administrative finality and substantial evidence (p. 124) (which refusal, we maintain is erroneous), and contends, nevertheless, that "even under the most restrictive view of the jurisdiction of the District Court in these matters, its judgment * * * was correct and should be affirmed since the conclusion of the Commission" as to the fairness of the plan was without "rational and statutory foundation".[109] In the first place, this contention is clearly contrary to the reasoning and approach of the District Court. No elaborate discussion is required to demonstrate that the District Court erroneously ignored the Commission's findings of fairness, mistakenly substituted its own determination for that of the Commission, in disregard of the doctrines of administrative finality and substantial evidence, made its own "valuation" of $100 per share of the preferred stock, amended the plan to that extent and enforced the plan, as so amended by it.[110] In fact, to the extent that the District Court substituted its valuation for that of

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[108] See Central-Illinois Brief in Opposition to Petitions, p. 9.
[109] Central-Illinois Brief, p. 125.
[110] Streeter Brief, p. 76 ff.; p. 154 ff.

the Commission and enforced the plan as amended by it; the court below concluded that the District Court erred (R. 39), with which conclusion we agree, assuming, *arguendo*, that the District Court's disapproval of the plan for unfairness was correct.[111] In the second place, even further assuming *arguendo* that the District Court had tested the Commission's conclusion of fairness, on the basis of the doctrines of substantial evidence and administrative finality, and had determined that the Commission's conclusion of fairness lacked rational and statutory foundation or that the Commission had plainly abused its discretion (both of which we dispute), then it would have been the duty of the District Court to reject the Commission's conclusion or reverse its judgment and remand to the Commission for a fresh determination. But in that event, the District Court, should not, as it did, enter its own judgment as to the fairness of the payment of only $100 per share to the preferred stockholders of all three series (R. 288a, n. 2, 320a). In effect, Central-Illinois seeks to distort the application of the doctrine of administrative finality by seeking to obtain the affirmance of the District Court's "independent" valuation of the preferreds' participation at the same time resisting any remand to the Commission. We have shown in our brief,[112] and the record clearly demonstrates that the Commission's findings and conclusion should have been sustained, since based upon substantial evidence and possessing rational and statutory foundation. In fact, even under the approach of the court below, the Commission's determination was not arbitrary or capricious

[111] This assumption we have challenged in Point III of our brief and demonstrated it to be erroneous.

[112] Streeter Brief, Point III-C, p. 142 ff.

and should have been upheld. Lastly, underlying this contention of the Central-Illinois group are statements that the District Court, in reaching its determination of unfairness "was not required to disturb, and did not disturb, any factual finding of the Commission" and that the "District Court differed with the Commission's ultimate conclusion, based upon the admitted and undisputed facts as set forth in the Court's opinion and findings".[113] These Central-Illinois statements, like the former assertions that the conflict between the District Court and the Commission relates primarily to legal conclusions and not the factual findings of the Commission[114] clearly contradict the District Court's definite rejection of "such findings and conclusions of the Commission [that] relate to or bear upon the payments of the premiums or are inconsistent with the Opinion dated May 15, 1947 or with the findings and conclusions of law filed with said Order" (R. 293a-294a).[115] Likewise the Central-Illinois effort to attribute accuracy to "the facts recited in the District Court's opinion or in its findings"[116] by virtue of the alleged absence of attack thereon is unavailing. The record is clear that Central-Illinois counsel at the suggestion of the District Court prepared the findings allegedly based upon the record

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[113] Central-Illinois Brief, p. 125.

[114] Central-Illinois Brief in Opposition to Petitions, p. 9.

[115] It can hardly be fairly claimed that the District Court's findings Nos. 36-38 (R. 307a-308a) are consistent with the Commission's findings (R. 69a-72a). The failure to recognize the conflict between the District Court's and Commission's findings is surprising as Central-Illinois counsel apparently prepared the findings for the District Judge (R. 377a, 385a).

[116] Central-Illinois Brief, p. 125. In fact, Central-Illinois counsel even opposed a hearing on the proposed findings (to no avail) as "it would be a rehearing of the entire case" and pointed out that the District Judge could satisfy himself on the basis of his annotation of the findings to the record (R. 368a).

before the Commission for signature by the District Judge (R. 368a). Some of these findings are consistent with and others inconsistent with the Commission's findings. One glaring factual difference[117] between

[117] Central-Illinois at several points seeks to cloak with finality certain allegedly concurrent findings of the two courts below on the basis of the principle recently reaffirmed in *Comstock v. Institutional Investors*, 335 U. S. 211, 214 (1948) that a "seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error". It is obvious that the instant situation is far different from that in the *Comstock* case as is clearly revealed in the opening recital of this Court's opinion in that case quoted as follows:

> "The issues of facts, contested in a long hearing, are not before us for review. Petitioner assured us, in support of the petition for certiorari here, that 'there is no factual controversy before this Court' and 'we assume the findings of the District Court. Our challenge is directed only to the legal import of these unchallenged facts.'"

Examination of the opinion in the *Comstock* case discloses unchallenged findings as to a basic issue of good faith which had never been raised before the Interstate Commerce Commission (such procedure of bypassing the Commission, according to this Court, is not to be encouraged).

In the instant case, on the basis of the rule as to concurrent findings, Central-Illinois claims finality for the District Court's findings as to losses arising out of divestments occasioned by the Act (p. 61, n. 1), and the "examination of relevant factors" (p. 125, n. 1), both supposedly affirmed by the court below. In the first place, there is a clear-cut conflict between the District Court and the Commission with respect to the cause of these losses as contrasted with the *Comstock* case where the basic finding as to which the two courts were in agreement, was unchallenged. In the second place, the court below, although sustaining the District Court's examination of the various factors, expressly refused to permit the District Court to substitute its valuation of $100 for that of the Commission. Furthermore, the rule of concurrent findings was clearly not intended to permit a disregard of the factual findings of the trier of facts, that is, the Commission, and none of the decisions cited by this Court in the *Comstock* case indicate such application of the rule. Rather has this Court on occasion sought to protect the findings of an administrative body by the application of this very same rule. *E. g., Columbus*

[Footnote continued on following page.]

the views of the District Court and those of the Commission, is the treatment of the alleged losses from divestments. While the Commission refused to accept the hypothesis "that the Act has caused the asserted losses" (R. 72a; n. 55), the District Court found that the "losses" arising from the divestments were occasioned by the Act (Findings Nos. 37-8, R. 307a, 308a).[118]

[Footnote continued from preceding page.]

Gas & Fuel Co. v. *Public Utilities Commission*, 292 U. S. 398, 414 (1934). In any event, "it is not a rule to be applied in a blind manner simply because a case involves a complex factual situation" as is aptly pointed out in the dissenting opinion in the *Comstock* case. Assuming arguendo, that there are concurrent findings that fall within that rule, it is here urged that "there is an exceptional error involved in the conclusions reached by the District Court and affirmed by the Circuit Court of Appeals, an error that is apparent on the face of the District Court's findings". In this connection, it should also be noted that the following status is attributed to the findings of the court under Rule 52(b) of the Federal Rules of Civil Procedure:

> "* * * When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

[118] Counsel for Engineers recognized the difference between its assertion and the Commission's views when he wrote:

> "The principal findings of fact involved therein we think have to do with * * * (2) the losses which Engineers claimed were suffered from the impact of Section 11 of the Act.
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> * * * * *
>
> "As to (2) above, it will be recalled that Engineers claimed certain losses which should equitably be borne by the preferred as well as the common. These included, among others, losses resulting from the forced sale of Puget Sound and El Paso Natural Gas, and that resulting from the fact that the impact of the Act had prevented the Company from refunding the preferred stock with its present relatively

[Footnote continued on following page.]

There is no need to multiply the examples of differences in the factual findings of the District Court and the Commission. The Central-Illinois effort to secure the review by this Court of the rational and statutory foundation of the Commission's decision in the light of the *findings* of the District Court, instead of the Commission's findings, must be rejected, since the premise as to the acceptance by the District Court of the Commission's findings (and vice-versa), upon which the Central-Illinois contention is based, lacks factual basis and is fallacious.

2. Central-Illinois counsel also *cautiously*[119] suggests that "the court below was perhaps overstating the effect" of *Lahti* v. *New England Power Ass'n.*, 160 F. (2d) 845 (C. C. A. 1, 1947), and *Mass. Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424 (C. C. A. 8, 1945), cert. den. 327 U. S. 795 (1946), in referring

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[Footnote continued from preceding page.]

high dividend rates on the basis of the lower dividend rates for comparable securities now prevailing (For details as to these claimed losses see pp. 12-15 of Engineers' brief). In order to sustain Engineers' claim respecting these losses, it is important that these losses be recognized and found to have been caused by the Act. Not only does the Commission not find that these losses were caused by the Act, but in footnote 52, [55] above quoted, they say they do not 'accept counsel's hypothesis that the *Act* that [has] caused the asserted losses'. It is not improbable that a reviewing court might say this was tantamount to a finding that the losses were not caused by the Act so directly, at least, as to be used as an offset to the payment of the premiums to the preferred stock" (R. 1953a-1954a).

The bracketed references are based upon the footnote as printed elsewhere in the record (R. 72a, n. 55).

[119] The Central-Illinois group in its Brief in Opposition to the Petitions at p. 13, n. 18, originally sought to discredit the recognition by the court below that the cited decisions "look the other way" as not based upon "an independent analysis of the decisions themselves".

to them "as 'cases which look the other way, and [which] are entitled to great consideration'".[120] Rather is the view of the court below an understatement, as examination of the *Lahti* and *Massachusetts Mutual* cases[121] will reveal a clear-cut conflict with the opinion below in the instant case and the recognition and application of those cases of the doctrines of substantial evidence and administrative finality, which represent the views of the majority of appellate and lower courts on this question.[122]

One of the respondents (White) may urge as a distinction that, in the instant case, the court below, in its review, considered the "function of the District Court, *vis-a-vis* the Commission" while in the *Lahti* and *Massachusetts Mutual* cases, the "Circuit Court was acting only as a review court and was bound by the findings of fact of both the District Court and the Commission".[123] The attempted distinction is devoid of merit. In both the case at bar and the *Lahti* and *Massachusetts Mutual* cases, the status of the Commission's findings or the treatment to be accorded them by a section 11(e) district court was at stake, and consequently affected the relative function of the district court and the Commission. Reference to the opinions of the respective District and Circuit Courts in these cases confirms the fact that the standard to be used by a section 11(e) court in reviewing the Commission's action, was involved, and that the First and Eighth Circuit Courts, contrary to the Third Circuit, adhere to the view that the Commission's findings and

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120 Central-Illinois Brief, p. 142.

121 The *Lahti* and *Mass. Mutual* cases are discussed in the Streeter Brief, p. 82 ff.

122 Streeter Brief, p. 76, n. 100.

123 See White Memorandum in Opposition to Petitions, p. 15.

determination must not be upset if supported by substantial evidence or unless shown to be without rational basis in fact and law.[124] Moreover, any doubt that the function of the District Court was in issue in the *Massachusetts Mutual* case[125] was recently removed by the decision of *In re Northern States Power Company*, 80 F. Supp. 193 (D. Minn., 1948). In the latter case, the District Judge recited the unsuccessful contentions of appellant in the *Massachusetts Mutual* case, as to the District Court's abdication of its independent duty and its acceptance of the Commission's conclusion[126] and commented that "the weight, therefore, that the court should attach to the Commission's factual findings was directly before the Circuit Court in that [*Massachusetts Mutual*] case" (80 F. Supp. 201). Furthermore, the recent decisions of the District Courts within the First and Eighth Circuits have adhered to the standards enunciated within their respective Circuits and refused to follow the decision of the Third Circuit in the instant case. *In re Northern States Power Company*, 80 F. Supp. 193 (D. Minn.,

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[124] Streeter Brief, p. 76 ff.

[125] The *Massachusetts Mutual* case is discussed in Streeter Brief, p. 82.

[126] In the *Northern States Power Company* case, the District Judge recited the contentions unsuccessfully urged in the *Massachusetts Mutual* case as follows:

> "'Section 11(e) of the Public Utility Holding Company Act of 1935 requires the District Court to independently determine whether the plan is fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act. The Court cannot, as if has done here, abdicate this independent duty to the Securities and Exchange Commission.'
>
> . . . . .
>
> "'The Court below failed to exercise the independent judgment required of it by the Act. Instead it completely accepted, and felt itself bound by, the conclusions of the Commission, which at best are advisory only'" (80 F. Supp. 201).

1948); *In re American and Foreign Power Company*, 80 F. Supp. 514, 522 (D. Me., 1948). In fact, in the *Northern States Power Company* case, the District Judge refused to reject the Commission's valuations and factual findings, since supported by substantial evidence and recognized the soundness of the "rational basis" rule of the Eighth Circuit. The views expressed in the *Northern States Power Company* case, were approved in the *American and Foreign Power Company* case, *supra*. Consequently, under the prevailing view, the section 11(e) court is required to accept (and not ignore) findings and determinations of the Commission, if based upon substantial evidence and having a rational basis in fact and predicated on no clear-cut error of law.[127] Under the majority doctrine, it is clear that a district court's rejection of the Commission's conclusion as to fairness, in disregard of the principles of substantial evidence and administrative finality would constitute reversible error. So, too, in the instant case, we urge that the court below committed error in sustaining the District Court's rejection of the Commission's conclusion as to fairness, where supported by substantial evidence and possessing rational and statutory foundation.

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[127] The disagreement in conclusion between the District Court and the Commission is attributable in part to the application of an erroneous standard by the District Court, for the review of the administration action. Moreover the difference in the standards of review as between the Third Circuit and the other circuits (First, Second and Eighth) is so substantial as to result in a disapproval of the Commission's decision on a section 11(e) plan in the Third Circuit, and its approval in the First, Second and Eighth Circuits.

VIII. Concerning the Contentions as to Remand.

We have already disposed of the Central-Illinois contentions,[128] opposing a remand to the Commission, in our brief.[129] The gist of our position briefly stated is that assuming *arguendo*, that the Commission erred in its valuation of the preferred stockholder's interest, the District Court did not, as the court below correctly found, have the power to amend the plan and substitute its valuation for that of the Commission, but is required to remand to the Commission for its initial determination.

Although our brief adequately answers the Central-Illinois contentions, for the convenience of this Court, we wish to point out the absurdity of the statement in the Central-Illinois brief which describes the District Court's determination as follows:

> "* * * The District Judge *did not determine that the Commission must award a specific sum to the preferred stockholders;* nor has it ruled that while the Commission might fairly and equitably award more than $100 to the preferred, a maximum of $100 was also 'fair and equitable' and in its judgment sufficient. In either of those cases it might be contended that the District Court was intruding upon the Commission's legitimate function under the Act. But here the Court has decided only that the Commission could not lawfully award more than $100; *i. e.*, it has examined the record made before the Commission in order to determine the outer limits of permissible Commission action on that record, and concluded that

[128] Central-Illinois Brief, p. 148 ff.
[129] Streeter Brief, p. 154 ff.

no more than $100 can 'fairly and equitably' be paid to the preferreds" (pp. 155-6). (Italics ours.)

In juxtaposition, we set forth the following language in the District Court's opinion:

> "It is, of course, true that once the charter is not accepted as controlling, there is no reason why 100 is the necessary figure for a senior security holder to receive. It may be more or it may be less. *But, in this case, after consideration of all factors involved, I conclude that $100 would be fair and equitable, but that the payment of premiums would not be fair and equitable*"[130] (R. 288a, n. 2). (Italics ours.)

Likewise, the court below recognized the error of the District Court's determination in the following statement:

> "* * * it [District Court] cannot value the securities, find equitable equivalents therefor and substitute its own estimates for those of the Commission requiring the plan as amended by it to be carried out" (R. 39).

Although the Central-Illinois group may deny that the District Court made a specific determination of $100 per share, the reality of the District Court's action cannot be concealed by the findings prepared by Central-Illinois counsel (R. 377a, 385a). Conse-

[130] Central-Illinois counsel chides the Commission for its use of the so-called "talismanic phrase"—"upon full consideration of the entire record", which is the Commission's conclusory statement following a full presentation of its reasoning, but finds no fault with the similar expression which appears in the quotation above from the District Court's opinion and frequently in its own Brief.

quently, the District Court, to use the language of Central-Illinois, "was intruding upon the Commission's legitimate function under the Act".[131] Such error would require remand.[132]

The Central-Illinois group also suggests[133] that the District Court should have the power upon examining the record to determine "the outer limits of permissible Commission action under the 'fair and equitable' standard". When this "outer limits" doctrine as submitted, is analyzed, it simply means that the District Court *may reduce* but not increase, the amounts awarded by the Commission, under the "fair and equitable" standard. This is, of course, grotesque. It further means that the District Court decision is final where the amount awarded by the Commission is reduced, and the Commission becomes a body of little, if any, consequence.

Central-Illinois also urges in the instant case there is no function left for the Commission "except formally to approve payment of 100 to the preferred". This clearly makes the Commission a rubber stamp and nothing else. Congress never intended any such result.

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[131] Central-Illinois Brief, p. 155.

[132] We have assumed *arguendo* an erroneous valuation by the Commission, but have urged, of course, the correctness of the Commission's decision in its performance of the valuation function.

[133] Central-Illinois Brief, p. 157.

Conclusion.

For the reasons advanced herein and in the Brief previously submitted, the judgment of the court below should be reversed, with appropriate direction to the District Court to enforce the plan as approved by the Commission insofar as it provides for the payment to the preferred stockholders of amounts equal to the respective redemption prices of their stock (less the sum already received plus adequate recompense for the delay in payment). If this Court concludes, however, that the Commission has erred in the valuation process, this case should be remanded to the Commission for reconsideration, in accordance with the instructions of this Court.

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Nos. 226, 227, 243, 266.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 226.

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 227.

THOMAS W. STREETER, *et al.*,
Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 243.

THE HOME INSURANCE COMPANY and TRADESMENS NATIONAL BANK AND TRUST COMPANY,
Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 266.

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, HOME INSURANCE COMPANY, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF THOMAS W. STREETER, *ET AL.* TO ANSWERING BRIEF OF CENTRAL-ILLINOIS SECURITIES CORP., *ET AL.* AND BRIEF FOR LUCILLE WHITE, *ET AL.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

Nos. 226, 227, 243.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE COMPANY, *et al.*,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM,

Respondents.

No. 266.

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE COMPANY, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF THOMAS W. STREETER, *ET AL.* TO ANSWERING BRIEF OF CENTRAL-ILLINOIS SECURITIES CORP., *ET AL.* AND BRIEF FOR LUCILLE WHITE, *ET AL.*

Preliminary.

This Brief[1] is devoted to replying to the various contentions raised in the Answering Brief of Central-Illinois Securities Corp., *et al.*, and in the Brief for

[1] The first Brief for Thomas W. Streeter, *et al.* and the Answering Brief of Thomas W. Streeter, *et al.* to Brief of Central-Illinois Securities Corp., *et al.* are hereinafter called the "Streeter Brief" and the "Streeter Answering Brief", respectively.

Lucille White, *et al.*[2] (hereinafter called "Central-Illinois" and "White", respectively).

I. Concerning the Contentions as to the Decision of the Common Stock Management to Eliminate the Preferred.

Despite the various Central-Illinois assertions[3] it cannot be denied that no 11(b) order was ever entered against Engineers directing its liquidation. Furthermore, the record establishes that the common stock management had a primary objective of retaining the underlying companies for the common stockholders and that a persistent effort was made to eliminate the preferred at $100 and to preclude their participation in any form whatsoever in the underlying operating companies.[4] These facts find their support in the following excerpts from the record:

> [Cross-examination of D. C. Barnes, President of Engineers]
>
> "* * * They have always felt that such a plan should preserve, as far as possible, the interests of the common stockholders in the companies in which they chose to invest, leaving to them the decision as to when and if they should sell their interest" (R. 627a).
>
> * * * *

[2] Answering Brief of Central-Illinois Securities Corp., *et al.*, and Brief for Lucille White, *et al.*, are hereinafter referred to as "Central-Illinois Answering Brief" and "White Brief", respectively.

[3] Central-Illinois Answering Brief, p. 3 ff.

[4] See excerpts from record quoted in Streeter Answering Brief, pp. 14 and 32-33 (R. 733a, R. 745a-846a, respectively). Also see R. 583a.

"Q. Mr. Benjamin testified that one of the principal factors considered by the Board of Directors in formulating the present plan was that the present Engineers common stockholders want to continue their interest in the three operating companies, namely Gulf, El Paso, and Virginia. Do you recall his testimony? A. Yes, I do recall his testimony.

Q. And I take it that is your opinion? A. I have so testified this morning" (R. 643a).

[Cross-examination of R. N. Benjamin, Secretary of Engineers]

"Q. Is it fair to state that the dominant principle that guided the Board in its decisions with respect to its several plans—and I do not mean formal plans, but considerations of plans—was to preserve for the common stockholders the equities in the going concerns that would be left if, as and when it became necessary to dispose of Engineers?

* * * * *

"The Witness: I think that is correct" (R. 687a).

* * * * *

"Q. Now, for the purpose of the record is it fair to state that in principle the one-stock plan, the package plan, and the partial exchange plan are more or less variations of the same concept of giving the preferred stock a stake in the continuing enterprise in one form or another? A. I think that is true.

[These and other plans were discarded by Engineers management because each might give the preferred a continuing interest. This is clear from the following testimony.]

The Examiner: I gather from your testimony,

Mr. Benjamin, that it was the idea of the management and of the Board as well that the preferred stock should be retired rather than treated otherwise. Is that the substance of your testimony?

The Witness: That is correct" (R. 719a).

* * * *

"A. * * *

I think that all of the plans that the Board has shown a desire to follow contemplates the retirement of the preferred stock at $100 per share and the distribution to the common stockholders of the underlying common stocks" (R. 723a).

* * * * *

"Q. Didn't you say that the record of activities on the part of the management of Engineers suggests a rather persistent effort during the last four years to get rid of the preferred stock in this situation? A. Yes."

* * * *

"Q. * * * Do you recall any thought of ever paying the preferred stockholders anything in excess of $100? A. No" (R. 733a).

* * * *

"Q. You testified several times with respect to an essential objective of the Board of Engineers to retain for the common stockholders their interest in the three companies, the operating companies. Do you recall giving that testimony in general? A. Yes, I do" (R. 819a).

It is equally true that the common stock management could have elected to merge Engineers with Virginia, an alternative which the original plan filed

in September, 1945, contemplated.[5] Had such merger method been followed, the Central-Illinois contentions that the involuntary liquidation provisions of the charter govern and that the *Otis* case is inapplicable, because of an alleged termination of the enterprise, could not have been asserted. The selection of the method of system adjustment, whatever form it may take, must not as this Court has stated in the *Otis* case, affect the rights of stockholders.[6] Consequently the common stock management's effort to curtail the rights of the preferreds is unavailing, for its conscious choice cannot make operative the involuntary liquidation provisions of the charter.

Furthermore, the efforts of Central-Illinois to suggest that in reality, it would have been more to the financial advantage of the common who own preferred to take the "premium" is completely baseless. This contention merely further emphasizes the partiality of the plan toward the common stockholders. The special status enjoyed by the select group of common stockholders also possessing preferred stock, is evidenced in the various calculations made by Central-Illinois in an effort to demonstrate that this select group would have fared better by the payment to the preferred, of the amounts in excess of $100.[7] This supposed "self sacrifice" on the part of the select preferred-common stockholders does not bear scrutiny. It would appear from the Central-Illinois calculation that whether the preferred are limited to $100 or found to be entitled to the amounts in excess thereof equivalent to the redemption price, the select pre-

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[5] See Streeter Brief, pp. 10-11.

[6] See Streeter Answering Brief, p. 30 ff.

[7] Central-Illinois Answering Brief, p. 18, n. 2.

ferred-common stockholder group[8] (with their co-common stockholders) obtain the same measure of control and ownership of the three underlying companies. In addition, while it is suggested that the premium cost, as characterized by Central-Illinois, is $1.70 per share of common stock, and that it would have been more advantageous to the select group of preferred stockholders (holding common) to take the premium, we submit that the argument is completely fallacious for two reasons: (1) that should the preferred stockholders prevail in the instant litigation, the select group of preferred-common stockholders will still get the amounts in excess of $100; and (2) that the cost of $1.70 per share for the common stockholders to eliminate the preferred stock from this entire enterprise would appear to be a very nominal sum for the achievement of the advantages, which are so obvious to the common stockholders under the instant plan.

II. Concerning the Contentions as to the Various So-called Colloquial Equities and Other Erroneous Criteria.

We have already demonstrated the lack of factual and legal basis for any special consideration to be given to such factors as (a) issue price and market history, (b) retention of earnings and (c) alleged losses from divestments.[9] Therefore, we shall point out certain erroneous legal conclusions and misstatements of fact.

[8] This same group of select preferred-common stockholders also received special privileges in connection with the Gulf States warrant program whereby they were permitted to acquire warrants using the preferred stock as payment if they wished (R. 119a). Such privilege was not afforded any other preferred stockholder, who was forced out and denied the opportunity to participate.

[9] Streeter Brief, p. 113 ff.

A. "Retained Earnings."

As we have already shown the absence of merit in the contention based upon the alleged colloquial equity arising from "retained earnings", we will only devote one attention to the Central-Illinois effort to analogize the instant situation to a claim of "double interest",[10] as involved in *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 165-7 (1946). In the *Vanston* case, a Kentucky District Court appointed an equity receiver for a debtor corporation and took custody of its assets and enjoined the payment of its debts. Thereafter interest fell due on the mortgage bonds which the debtor did not pay and the court did not direct the payment. The indenture trustee under the terms of the indenture declared the principal due and payable despite the assumption of custody of the estate by the federal court. Then the proceeding moved from an equity receivership through section 77B to Chapter X in the wake of statutory changes. The indenture provided for payment of interest on unpaid interest. The debtor was insolvent but had sufficient assets to pay the mortgage bond creditor in full including interest upon interest, but the payment of interest upon interest would have resulted in a greatly reduced share for "subordinate creditors" in the reorganized corporation. Under these circumstances this Court found it inequitable to pay interest upon interest.

That situation is far removed from the instant case. First, no double interest is involved. The assumption of Central-Illinois of the alleged "transfer of value" from the common to the preferred is baseless. The

[10] Central-Illinois Answering Brief, p. 34.

Commission has found the preferred entitled to a principal sum equal at least to the call prices, which Central-Illinois erroneously persists in characterizing as premiums. Obviously a principal right is not "interest". Second, much of the so-called accumulation of earnings in the Engineers system, which was motivated by tax and other reasons and added to the value of the common, did not accrue while Engineers was in "*custodia legis.*" Third, in the instant case, Engineers, as contrasted with the debtor in the *Vanston* case, has ample assets to pay the entire going concern value of the preferred without any reduction in payment. Engineers is free from debt and clearly solvent. Furthermore, even in the *Vanston* case, this Court recognized the fact that the rule would be different in a solvency situation; when, in a passage, preceding the quotation from the *Vanston* case appearing in the Central-Illinois Brief, this Court said:

> "* * * But where an estate was ample to pay all creditors and to pay interest even after the petition was filed, equitable considerations were invoked to permit payment of this additional interest to the secured creditor rather than to the debtor" (329 U. S. 164).

In effect, the *Vanston* case not only does not support the Central-Illinois contention, but sustains the claim of the preferred to the dividends that were prematurely cut off by District Court consummation of the plan, while the common litigated the payment of the full amount of the going concern value of the preferred.[11]

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[11] Streeter Brief, p. 147 ff.

B. Alleged Puget Sound Loss.

Central-Illinois and White have urged[12] that the alleged Puget Sound loss was occasioned by the Act. At several points, we have demonstrated the fallacy of this contention both legally and factually.[13] Moreover, we have already pointed out that the so-called "formal offer of proof" of present cash value of Puget Sound at $10,000,000 finds no basis in the record,[14] that no real pressure in making the divestment resulted from the statutory requirement of compliance,[15] that the rule of concurrent findings enunciated in the *Comstock*[16] case does not control in the instant situation[17] for various reasons, including the fact that such finding is not supported by the evidence in the record.[18]

The history of Puget establishes the fact that this investment was a fiasco from the outset and that this so-called "book" loss cannot be fairly attributed to

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[12] Central-Illinois Answering Brief, p. 39 ff.; White Brief, p. 36.

[13] Streeter Brief, p. 113, p. 120 ff.; Streeter Answering Brief, p. 16 ff.

[14] White counsel joins Central-Illinois in asserting on the basis of District Court finding No. 37 (R. 307a) that a "formal offer of proof was made before the Court to establish that the equity owned by Engineers in Puget Sound would presently have a cash value of $10,000,000" (White Brief, p. 36; Central-Illinois Answering Brief, p. 40). As previously indicated, we find no basis in the record for the Central-Illinois and White assertions nor for the statement in the District Court finding (Streeter Answering Brief, pp. 12-13). The District Court had no authority to make findings on material not in the record and subject to cross-examination. *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793 (1945); see *U. S.* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 288 (1924). It is interesting to note that White counsel points out in another connection: "No new proof was submitted by the common stockholders for considered by the Court" (White Brief, p. 16).

[15] Streeter Answering Brief, pp. 15-16.

[16] *Comstock* v. *Institutional Investors*, 335 U. S. 121 (1948).

[17] Streeter Answering Brief, p. 84, n. 117, p. 85.

[18] The Commission expressly refused to accept the hypothesis that this "book" loss was occasioned by the Act (R. 72a, n. 55).

the operation of the Act. In the interim between its acquisition in 1928 and 1938, various troubles beset Puget Sound—a drop in earnings in 1929 (R. 1673a, 1676a); unfavorable business conditions in 1930-1932 and the appearance of the threat of public competition (R. 1688a-1690a, 1702a-1703a, 1713a-1714a); new taxes and the approval of Grand Coulee and Bonneville projects in 1933 (R. 1435a); dividends not paid in 1934 (R. 1443a); business conditions in area of service subnormal in 1935 (R. 1448a); failure to earn dividends in 1935 to 1938 (R. 1469a, 1480a, 1500a, 1515a), the completion of one federal power project and anticipated completion of the other by 1942, and the creation or enlargement of public power districts for acquiring portions of private systems (R. 1505a).

Finally, in 1938, Engineers recognized the true condition of Puget Sound, by providing a reserve of $35,000,000 for depreciation in investments, embodying a substantial allowance for Puget (R. 1516a). The following excerpts from the Engineers Annual Report for 1938 adequately demonstrate the time of occurrence and cause of these so-called "book" losses:

> "The Company has made certain adjustments in its balance sheet as described more fully hereafter under 'Adjustment of Balance Sheet,' which included the *creation of a reserve for depreciation in investments in subsidiaries, embodying a substantial allowance for the Company's investment in the common stock of Puget Sound Power & Light Company.* Since this reserve has provided for a considerable period in advance, for losses which may be sustained because of the accrual of unearned cumulative dividends on the preferred stocks of the Puget Sound

subsidiary held by the public, it is unnecessary to deduct from current consolidated income the amount of the deficiency in earnings of this subsidiary. Accordingly, beginning with the January 1939 monthly report, the consolidated balance for the 12 months' period then ended applicable to stocks of Engineers Public Service Company is being set forth without deduction for such deficiency.

* * * * *

"As of May 31, 1938 the Directors of the Company authorized certain adjustments in the balance sheet, as follows:

* * * *

"(3) The creation of a $35,000,000 reserve for depreciation in investments in subsidiaries by a transfer from capital surplus in this amount. *This reserve was established to provide for losses which the Directors believed to have accrued at that date although such losses had not yet been taken. The principal factors causing the depreciation against which this reserve was provided, were reduced net earnings brought about largely by increased taxes, existing competition and the announced intention of certain power districts and other public authorities either to purchase or condemn certain properties of subsidiaries of the Company or to compete with such subsidiaries. These factors are largely covered in subsequent sections of this letter*" (R. 1516a, 1517a-1518a). (Italics ours.)

The foregoing statement was made in the Engineers annual report one year after registration under the Act, and not one word of blame for this loss was laid at the door of the Act, although reference was made in the

original report to the Act (R. 1519a). Thus the Puget loss had already occurred by 1938, but was not taken until a later date. Puget's past accurately forecast a dismal future—poor earnings record (R. 1536a, 1537a, 1553a, 1571a); pendency of condemnation proceedings against Puget's property and negotiation for its transfer (R. 1540a-1541a; 1559a-1560a, 1577a-1578a, 1594a-1595a); growth in public competition (R. 1559a, 1595a); and increased taxes (R. 1559a).

The foregoing recital of facts by the Engineers Company itself strikingly establishes that the Puget failure cannot be attributed to the Act, but was occasioned before the Act and by forces totally unrelated thereto and existing entirely independently thereof. The sale of Puget in 1944 was but the unhappy ending of an ill-fated venture, which was clearly foreshadowed by the creation of the reserve in 1938 and finally resulted upon disposition in 1944 in a book loss of approximately $33,000,000, charged against the 1938 reserve (R. 1608a). The foregoing circumstances definitely support the Commission's refusal to accept the hypothesis urged by Engineers counsel that the Puget Sound loss was occasioned by the Act and further clearly demonstrate that the District Court Finding No. 37 is not supported by evidence in the record and consequently must be rejected.[19] Likewise the White and Central-Illinois contentions based thereon must equally fail for lack of support in the record. In any event, that sale of Puget brought in its wake several significant tax benefits, such as (a) the immediate income tax saving of $442,000 (R. 1608a) until the repeal of the Excess Profits Tax Law in December 1945, which would in the absence of a repeal, have resulted in annual savings

[19] Rule 52 (b) of the Federal Rules of Civil Procedure.

and (b) an offset against capital gains arising from the sale of El Paso Natural Gas stock and the profits from the sale of Gulf States stock and any future sale of Virginia common stock.[20]

III. Concerning the Contentions as to Alleged Valuation on the Basis of Haphazard Market Prices, and "Boom Conditions" (Abnormal Earnings) and Inaccurate Predictions of Future Earnings.

Central-Illinois persists in its attack upon the valuation made by the Commission and Dr. Badger as allegedly based upon momentary market prices (Brief, p. 22 ff.). In addition, Central-Illinois and White complain that the valuation rests upon "the high earnings of the war and immediate post-war period"[21] and upon "two years of abnormal earnings" during a war (1943-1944).[22] Central-Illinois refers us to its mass of unrelated statistical data and calculations derived from newspaper articles, financial publications, current market prices, occurring long after consummation of the plan, all of which this Court is asked to judicially notice, in an attempt to discredit both the Commission and Dr. Badger. Similarly, White requests this Court to "take judicial notice of the fact that since January 1946 there has been a considerable decline in the market value of public utility company stocks (as well as of stocks generally) and that the price earnings ratio at which utility stocks are now valued, has declined considerably below the times earning ratio which existed in

[20] Streeter Answering Brief, pp. 24, 62-63.
[21] Central-Illinois Brief, p. 27.
[22] White Brief, p. 138.

January 1945."[23] At another point White refers to the advance in wages over and above the prediction of Barnes which was supposedly better than Badger's, and also states that it "is a matter of common knowledge, and this Court may take judicial notice of the fact, that while *gross* utility company earnings have increased since last year (owing to the present abnormally high rate of business activity), utility *net* earnings have decreased owing to the increases in labor costs, fuel and costs of replacement and repairs" and that at "the present time we are in the very midst of an acceleration of the 'inflationary spiral' * * * which are already adversely affecting utility company earnings."[24] White attacks Badger, as did Central-Illinois, for his prediction as to the continuance of low interest rates, making the general observation that it "is a matter of common knowledge and this Court may take judicial notice of the fact that interest rates since March 1947 down to the present time have steadily risen" (Brief, p. 41). It is thus apparent that both Central-Illinois and White have directed their attack upon Badger's valuation because of his alleged reliance upon "peak earnings" for a short period during the war or immediately thereafter and upon the continuance of low interest rates, the former by resort to a variety of so-called general financial data, calculations and comparisons and the latter by broad statements of a general character. The Central-Illinois and White objective for the inclusion of this mass of irrelevant data is not to support a request for remand, but to bolster the District Court's opinion on valuation and to discredit Badger's predictions. It is quite

[23] White Brief, p. 39.
[24] White Brief, p. 49.

obvious that the Central-Illinois and White Briefs cannot serve as a substitute for a trial record, with an opportunity to examine and cross-examine. Moreover, reference to the Badger report clearly demonstrates that one of Badger's studies deals with earnings for a seven year period[25] (1940-1945) including the 1946 estimate (R. 2098a, 2102a) (about which we shall have more to say later) and is not solely based upon a two year period, as contended by Central-Illinois and White. Furthermore, in reply to the Central-Illinois and White charge as to the period used, we refer to the acute observation of Judge Kennedy in the *Kings County Lighting Co.* case,[26] when in answer to a contention that the standards applied by the Commission in measuring the fairness of a plan were not sound, from a long range point of view, Judge Kennedy pointed out:

> "* * * But it [the objector] goes further and says that on the score of *potential earnings the federal commission is far too optimistic.* To point up this contention, the Public Service Commission supplies *figures showing that at December 31, 1946, the financial* condition of Kings had deteriorated as against its April 30th condition. In this fact the state commission finds confirmation for its belief not only that potential earnings as a standard of distribution furnish a treacherous guide, but also that at the date of hearing the underlying facts now demonstrate conclusively that the plan is unfair and inequitable.

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[25] It should also be noted that the Commission considered the Engineers earnings for the period from 1937 to 1945 (R. 64a-65a).

[26] *In re Kings County Lighting Co.*, 72 F. Supp. 767 (E. D. N. Y., 1947), aff'd *sub nom. Public Service Commission of N. Y. v. S. E. C.*, 166 F. (2d) 784 (C. C. A. 2, 1948), cert. den. 334 U. S. 838 (1948).

"But if earnings are to be used as a principal standard of recapitalization, *it will always be true that some particular accounting period may yield the conclusion that the standard used is unreliable* * * * *a conclusion that may lose its validity if a longer accounting period is used.* At best, there can be no mathematical certitude but only an estimate of how the plan will work, as the cases say. To paraphrase the language of *Consolidated Rock Co.* v. *Du Bois, supra,* 312 U. S. 510, 526, so long as the estimate is based on an informed judgment embracing all facts relevant to future earning capacity, taking into consideration the *nature and condition of the properties,* the past earning record, and all circumstances indicating whether or not that record is a reliable criterion, the Securities and Exchange Commission has properly discharged its function. And it has done so here.

"There is ample support in the record to sustain the findings of the commission, and its conclusion that the proposed plan, as amended and modified, is fair and reasonable. And I also find that it is" (72 F. Supp. 783). (Italics ours.)

Besides, Central-Illinois and White take an even more untenable position in the instant case than did the Public Service Commission in the *Kings County Lighting Co.* case, for instead of supplying any recent figures as to the earnings of the three underlying companies, they advert to a wide variety of isolated statistical and financial data of a vague and general character.

Although we have strongly urged that such material is entirely irrelevant to the issues before the Court, since both Central-Illinois and White have strenuously emphasized these subsequent events of a general nature, we have felt impelled to present this Court

with such facts as will demonstrate conclusively the fallacy and error of the Central-Illinois and White conclusions, based upon the data in their Briefs.

In order to answer these contentions and demonstrate their lack of factual basis, we have prepared data relating to economic conditions and money rates and to the actual status of the three operating companies which bring down to date a substantial portion of Dr. Badger's report (Pref. Exh. 29-A, R. 2088a) and are based upon matters of which this Court may wish to take judicial notice.[27] The data clearly demonstrate that Dr. Badger and the Commission were entirely correct and that their forecasts were not only amply justified by the events of the last three years, insofar as Virginia, Gulf States and El Paso were concerned, but also that the predictions of Dr. Badger were distinctly on the conservative side. In other words, as stated in the *Henwood* case, "What were then 'prospective' earnings * * * have now become actualities".[28]

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[27] *Insurance Group Committee* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607 (1947); *St. Louis Southwestern Ry. Co.* v. *Henwood*, 157 F. (2d) 337 (C. C. A. 8, 1946), cert. den. 330 U. S. 836 (1947); rehearing den. 331 U. S. 870.

[28] In the *Henwood* case, *supra*, n. 27, the Court of Appeals made the following pertinent statement at page 395:

"The Commission had before it evidence of past earnings and past financial condition with voluminous evidence bearing thereon. The report shows that earnings up to and including at least the first six months of 1941 were before the Commission. Also, the prospective war earnings were urged upon the Commission and denied as a basis for the long time requirements of a reorganization valuation, although the United States had been in the war for three months when the Supplemental Report was filed.

"What were then 'prospective' earnings for the last half of 1941 to 1944, inclusive, have now become actualities. Tables showing (1917 to 1944, inclusive) gross operating revenues and net railway operating income and (1923 to

[Footnote continued on following page.]

For the sake of convenient presentation, we have divided the subject into the following five categories:

A. Economic Conditions and Money Rates—December 1948.

B. Earnings Analysis—Consolidated Basis.

C. Balance Sheet Analysis—Consolidated Basis.

D. Analysis of Operating Performance of Three Former Operating Subsidiaries of Engineers for 1946, 1947 and 1948 Covering the Three Year Period Subsequent to Badger's Valuation (Pref. Exh. 29-A, R. 2088a).

E. Comparison of Engineers Actual Earnings for 1946 and Pro Forma Earnings for 1947 and

[Footnote continued from preceding page.]

1944, inclusive) income available for fixed charges are in the footnote. While statistics of almost every kind are subject to explanations which sometimes vitally affect the worth of deductions from them, yet a series covering many successive years of a business are quite likely to reveal, on their face, significant matters. A long series furnishes fairly solid foundation for deductions as to normals, abnormals and averages. Since reorganization proceedings must have the long range in view, such deductions are valuable. The statistics in the footnote are long range experience of the Debtor. They reveal clearly the abnormal character of the years 1942, 1943 and 1944."

Paraphrasing the above quotation, the Commission in the instant case had before it the entire earnings record of Engineers as set forth in all of its annual statements from 1925 through 1944 (Engineers Exhibits 37-A to 37-T, inclusive, R. 1432a ff.). In addition, the Commission had before it estimated income of Engineers and subsidiaries for 1946 (Exhibit No. 63, R. 1829a). The "prospective earnings" have been brought right down to date. As the court said, prospective earnings have now become "actualities". The results of those last three years are set forth below. The conditions have been improving steadily, as Dr. Badger testified they would (R. 2103a). The last three years certainly reveal no abnormal character of income of Engineers and its subsidiaries for the period from 1940 to 1945. In short, the data below even further highlights the inherent equities of the preferred stockholders in the instant case.

for the Twelve Months Ended September 30, 1948 with the Earnings Estimate for 1946 of Engineers (Engineers Exh. 63, R. 1828a-1839a).

A. Economic Conditions and Money Rates—December, 1948.

Money market conditions and interest rates have not changed substantially since January 24, 1946. Although the Federal Reserve System has allowed the rate on one-year Certificates to increase from ⅞% to 1¼%, it is still maintaining the 2½% rate on the long-term bank ineligible 2½s. The effect of this policy has been to keep interest rates at the historically low levels prevailing at January, 1946. This is indicated by the tabulations set forth in the footnote.[29]

The tabulations below show that the yield on taxable United States Government securities has increased .24 basis points from 1946 through 1948. Likewise, high-grade corporate bonds, which are purchased and sold in an uncontrolled market, have increased by .29 basis points. This increase is slightly greater than the increase in yields on taxable Governments. As might be

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[29] YIELDS ON UNITED STATES GOVERNMENT BONDS, HIGH-GRADE CORPORATE BONDS AND HIGH-GRADE PREFERRED STOCKS 1946-OCTOBER, 1948, INCLUSIVE.

	U. S. Governments (a)	Bonds (b)	Stocks (c)
	Taxable	High-Grade Corporate	High-Grade Preferred
1946	2.19%	2.51%	3.53%
1947	2.24	2.58	3.79
1948 Thru Oct.	2.43	2.80	4.15

Yield fluctuations governed by tax changes as well as by changes in money rates.

(a) Federal Reserve Bulletin, December 1948, p. 1499.

(b) Ibid.

(c) Ibid., p. 1500. Prices for high-grade preferred stocks as shown in this source converted into equivalent yields on basis of $7 annual dividend.

[Footnote continued on following page.]

expected; yields on high-grade preferred stocks have shown a greater increase, amounting to .62 basis points in the same period. The average yield of eleven high-grade municipal bonds has increased from 1.23% in 1946 to 2.14% in 1948, or .91 basis points. The increase in the yields of these classes of securities has been of modest proportions, and it may be concluded that interest rates currently still are at historically low levels.

It has been argued by Central-Illinois and White that the modest increase in the yields of these securities presages a fundamental increase in the level of interest rates. Events within the past month, however, have indicated that these past increases represent normal fluctuations and are not a forerunner of a fundamental change in money market conditions and long-term interest rates. A change of .29% in the average yield on uncontrolled high-grade, long-term corporate bonds over a two year period is indeed a very small change. Furthermore, the very modest tendency for yields to increase appears to be now

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[Footnote continued from preceding page.]

YIELDS ON

MUNICIPAL BONDS(d)

1946-NOVEMBER, 1948, INCLUSIVE

(Average of Yields on 11 High-Grade Municipal Bonds)*

1946	—	1.23%
1947	—	1.65
1948 (Nov.)	—	2.14
Nov. 4	—	2.22
" 10	—	2.18
" 18	—	2.14
" 24	—	2.12

(d) The Bond Buyer "The Bond Buyers Index of the Municipal Bond Market", November 27, 1948, p. 7. Annual yields are averages of monthly figures.

* Changes in yield affected in considerable part by lowering of tax rates, and hence change in value of tax exemption.

reversed. Since the election, United States Treasury bonds ineligible for purchase by banks, have been moving above their respective price support levels maintained by the Federal Reserve System. Confidence in the long-term Treasury 2½% rate has been greatly increased, which may well indicate that yields of strictly high-grade corporate issues have now reached their maximum spread from yields on Government bonds. In the first week following the presidential election the Reserve Banks purchased only $85.9 million of Treasuries maturing in five years or longer.[30] In the week ended December 1, 1948, the Federal Reserve System purchased only $7 million of bonds with maturities of five years or over.[31] This contrasts with the average weekly purchase of $363 million in the period from about mid-September to the election when confidence in the 2½% rate was clearly declining.[32] These reduced purchases of long-term Treasuries by the Federal Reserve System are indicative of the revived confidence of the investors in the present level of interest rates.

Current conditions in the corporate bond market also reflect this revived confidence by the investing public. Thus, Moody's Aaa bond yields stabilized at a yield of 2.82% for the week ended November 19, 1948, down from 2.87% on October 30.[33] As of November 23, 1948, the average yield on Standard Statistics high-grade preferred stocks was 4.15%, down from 4.28% in October.[34] The average yield of eleven bonds used in the index of municipal bonds declined from 2.22% on November 4, to 2.12% as of November

[30] Moody's Bond Survey, Nov. 15, 1948, p. 159.
[31] Moody's Bond Survey, Dec. 6, 1948, p. 125.
[32] Moody's Bond Survey, Nov. 15, 1948, p. 159.
[33] Moody's Bond Survey, Nov. 8, 1948, p. 182 and Nov. 22, 1948, p. 136.
[34] Federal Reserve Bulletin, December 1948, p. 1500.

24, 1948, and has since declined further. It is true, of course, that the recent decline in municipal bond yields may be partly attributed to the recent heavy demand arising from current fears regarding increases in Federal Income Taxes.

Statements by responsible officials of the Treasury Department and the Federal Reserve System indicate that there is no intention in the foreseeable future to lower the support levels on the long-term Treasury bonds. Thus, Mr. Thomas B. McCabe, Chairman of the Board of Governors of the Federal Reserve System, speaking before the annual stockholders' meeting of the Federal Reserve Bank of Boston, on October 26, 1948, stated: "When you consider that the public debt is one and a half times all other debt in the country combined, it seems obvious to me that the market for the Government debt securities must be one where investors can deal at all times with confidence. I remain of the conviction that for the foreseeable future the support program should be continued. This conviction is shared by all members of the Board of Governors, the members of the Federal Open Market Committee, and by the Treasury. It is also supported by the weight of financial opinion in the country".[35]

It is well known that financing through common stock equity since the 1946 stock market break has been small and costly, and therefore the pressure on senior financing has been accentuated. Practically any series of figures which one might care to use would show that new construction, plant expansion, etc. have been at maximum levels and that there is every reason to feel that from this point forward some

[35] The Commercial and Financial Chronicle, November 4, 1948, p. 40.

slackening in capital requirements may be witnessed. This would, therefore, tend to moderate the demand for new money, making for firm bond and preferred stock prices.

It may be said in summary that although interest rates and preferred stock yields have shown minor increases since the date of Dr. Badger's valuation, such increases are not indicative of any fundamental change in the general level and structure of interest rates and preferred stock yields. In fact, confidence has revived among the investing public since the election with respect to the continuance of present support prices on long-term Federal obligations. With the present administration committed to a high level of spending for operating expenses, farm crop supports, housing, re-armament, veteran's benefits, and European aid—all of which will probably require expenditures approximating $45 billion in fiscal 1950—it is quite possible that the Treasury Department may resort to deficit financing in the foreseeable future. To finance these deficits successfully, the Government must maintain stable market conditions for its securities. Because such confidence is predicated upon maintaining the existing support prices on long-term Government bonds, it is highly improbable that the general level of interest rates will increase further. In fact, it is quite possible that in the near future interest rates and preferred stock yields will recede from present levels. Dr. Badger's predictions of early 1946 that there was no indication of a fundamental change in respect to money rates seems to still stand.

B. Earnings Analysis—Consolidated Basis.

In analyzing the earnings record of Engineers subsequent to 1946, assumptions must be made regarding the character of its assets and the extent of its operations. In 1947 the Company divested itself of its 100% holdings of the common stock of El Paso Electric Company and Gulf States Utilities Company, and all but 162,612 shares of Virginia Electric & Power Company stocks.[36] Proceeds from the sale of the Gulf States stock, as well as other funds of the Company, have been used to pay $100 per share to each of the various classes of preferred stock. Therefore, in order to determine the current earnings available for dividends on Engineers Preferred, it is necessary to reconstruct pro forma income accounts for 1947 and 1948 on the assumption that the Parent Company had retained its investment in its former subsidiaries.

An income account analysis, on a consolidated basis, for Engineers for the period 1940-1946 has been prepared as Table 1, and is set forth in Appendix A, *infra*.

Analysis of the data in that table indicates that in the year 1946 the company experienced an improvement in earnings over 1945. Thus, total charges and preferred dividends of the consolidated companies were earned 1.85 times as contrasted to 1.51 times in 1945, and 1.54 times in 1944. This was accomplished in spite of an increase in the operating ratio from 61.30% in 1945, to 66.28% in 1946. The proportion of maintenance and depreciation expense to total operating revenues for 1946 was 14.9%, as contrasted

[36] See Moody's Public Utility Manual 1947, p. 1295, and 1948, p. 403.

to 14.3% in 1945, and 14.8% in 1944. Dr. Badger's testimony was predicated on the continuance of earnings on a basis at least as favorable as that of 1945. As a matter of fact, earnings actually *improved* substantially.

We have also set forth in Tables 2 and 3 (Appendix B and C, *infra*) an analysis of income account, on a pro forma basis, of Engineers and its former subsidiaries, Virginia, Gulf States and El Paso, for the year ended December 31, 1947, and for the 12 months ended September 30, 1948. In that consolidation it has been necessary to make assumptions regarding the operating expenses of the Parent Company. In order to reflect higher wage and material costs in 1947 and 1948, 1946 operating expenses were increased by 20% to obtain the 1947 estimate, and by 30% to obtain the estimate for the twelve months ended September 30, 1948. Such adjustments as have been made are minor and any error in these computations would exert no appreciable influence on any final figure.

Analysis of the pro forma statements indicates that the showing for 1946 was bettered in 1947 and equalled the twelve months ended September 30, 1948. Thus, all charges and preferred dividends were earned 2.01 times in 1947 and were earned 1.81 times in the twelve months ended September 30, 1948. The operating ratio in 1947 was 69.30% and for the twelve months ended September 30, 1948, was 73.16%. However, the increase in the operating ratio is not peculiar to the Engineers group, but reflects a condition existing throughout the public utility industry. It should be pointed out, however, that as new, efficient plants are placed in operation the operating ratio should decrease. Thus as previously mentioned in our

Answering Brief on page 9 of the Prospectus of Virginia Electric and Power Company, dated November 15, 1948 filed with SEC, it is estimated that savings amounting to $1.5 million would have been realized had the new 60,000 kw Possum Point power station been in operation for the twelve months ended September 30, 1948. This plant was scheduled to begin operation in December, 1948.

There has also been prepared and set forth in Table 4 (Appendix D, *infra*) an analysis of income data relative to Engineers for the years ended December 31, 1946 and 1947, and for the twelve months ended September 30, 1948, showing the times Parent Company preferred dividends earned. Data for the year 1947 and for the twelve months ended September 30, 1948, are based on the pro forma consolidations made in the preceding tabulations. It should be pointed out that the caption "Balance of Subsidiaries Earnings Applicable to Parent Company" represents the total earnings available to the common stocks of the subsidiary companies and includes not only earnings paid out as dividends but also the retained earnings of subsidiaries.

The data in Table 4 indicate improvement in respect to times Parent Company preferred dividends earned. In 1946 preferred stock dividends were earned 3.75 times, and in 1947 such dividends were earned 4.40 times. For the twelve months ended September 30, 1948, preferred stock dividends were earned 3.95 times.

On the basis of the above facts, it is clear that the earnings record of Engineers and its operating subsidiaries has *exceeded substantially* the improvement anticipated at the time of Dr. Badger's valuation. Consideration must be given to the growth in the

revenues of the operating companies, which, without exception, are characterized by rapid expansion. The earnings record per the pro forma consolidated earnings statement for the twelve months ended September 30, 1948, shows a slight decrease from that shown in 1947. It is evident from an analysis of the consolidated statements that such decline as did occur was attributable to Virginia which reduction was largely offset by increased earnings of the other subsidiaries. It is apparent in the case of Virginia that such decrease is temporary and will be offset as and when new plants and equipment are placed in operation. The facts indicating the foregoing appear in the Prospectus of Virginia dated November 15, the Registration Statement of Gulf States filed January 1949, and the application of El Paso to the Federal Power Commission to sell notes in the amount of $1,500,000 dated November 18, 1948, and filed November 23, 1948, which are discussed below in "D", *infra*, page 30 ff.

C. Balance Sheet Analysis—Consolidated Basis.

The consolidated balance sheet data for Engineers and subsidiaries, for the years 1942-1946, inclusive, have been set forth in Table 5 (Appendix E).

At December 31, 1946, Engineers showed a book value of equity per share of preferred stock of $252.10, which represents a substantial increase from the amount shown for 1944, namely $192.51. In 1946 preferred stock and subordinate items of the Parent Company constituted 40.99% of the total capitalization of the consolidated balance sheet, and 39.50% in 1945, a significant improvement over the figure of 31.74% for 1944. Also, the per cent of net quick assets to total prior obligations was 16.56% in 1946, and

16.78% in 1945, as contrasted to 10.55% for 1944. The improvement of the ratio of equity to total is largely the result of the favorable earnings record of Engineers (subsidiaries) since Dr. Badger's valuation in January 1946.

There has also been prepared a pro forma consolidated balance sheet of Engineers with its operating subsidiaries as of December 31, 1947 which is contained in Table 6 (Appendix F, *infra*). It was not possible to effect this consolidation by using orthodox accounting methods as there was not available certain information regarding the basis and the amount of certain inter-company eliminations, particularly those relating to consolidated earned surplus and consolidated capital surplus. It was, therefore, necessary to take the consolidated balance sheet items as of December 31, 1946 (see Table 5, Appendix E, *infra*), and indicate the changes which had taken place with respect to each of these items during the year 1947 for each subsidiary and for the Parent Company, thereby deriving the pro forma figures for December 31, 1947. The method of computation and the results are shown in this tabulation.

The data in Table 6 (Appendix F, *infra*) further substantiate the conclusions reached in the preceding table to the effect that the financial picture of Engineers, on a pro forma basis, has shown material improvement since Dr. Badger's valuation. Although the proportion of equity to total capital has not changed from the 1947 figure, book value of equity per share of preferred stood in the amount of $270.34 in 1947, a sizeable increase from the $252.10 shown for 1946 (see Table 5, Appendix E, *infra*). Moreover, the per cent of net quick assets to prior

obligations had declined to only 12.03%, in spite of the large construction programs which the operating companies were currently undertaking.

Another computation has been made in respect to the corporate balance sheet of Engineers, in which study a calculation is made of the value of preferred stock of Engineers on the basis of the market prices of the common stocks of its former operating subsidiaries. In making this computation it was necessary to use the balance sheet of the Parent Company as of December 31, 1946, and to add thereto estimated retained cash income for the years 1947 and 1948, after adjustment, to reflect the pro forma subscription in 1948 to the common stock issues of Gulf States and subscription to the convertible debentures issue of Virginia. The results of this analysis are shown in Table 6A, set forth in Appendix E.

On the basis of market prices of the common stock of the operating subsidiaries for the week ending November 22, 1948, and the price of the convertible preferred at November 26, 1948, the assets per share of preferred stock of Engineers stood in the amount of $279.22, which contrasts with the figure of $270.34 book value per share of preferred at December 31, 1947. The value of $279.22 exceeds the value which Dr. Badger found by making a similar computation in his valuation, which value then stood at $265.68. It should be pointed out, however, that the market price of the common stock of Virginia Electric & Power Company is currently depressed because of the recent issuance of 739,128 shares of new common stock at a subscription price of $14.25 per share.

In conclusion, it may be said that an analysis of data subsequent to the date of Dr. Badger's valuation indicates that from an asset standpoint the preferred

stock of Engineers has shown a decided improvement. This improvement has been indicated by an increase in the proportion of consolidated equity to consolidated total capital, by the increase in the book value per share of the preferred stock, and by an increase in the market value of assets per share of preferred stock. In view of this favorable showing it would appear that there is no justification for any statement to the effect that the credit position of Engineers could have deteriorated since Dr. Badger's valuation. (Pref. Exh. 29-A, R. 2088a *et seq.*)

D. Analysis of Operating Performance of Three Former Operating Subsidiaries of Engineers for 1946, 1947 and 1948 Covering the Three Year Period Subsequent to Badger's Valuation (Pref. Exh. 29-A, R. 2088a).

It is our position that the predictions of Dr. Badger embracing a period of three years have now become "actualities."[37] Events subsequent to the testimony of Dr. Badger in January, 1946, serve only to deepen the conviction that his estimates, as well as those of the Commission, were most conservative. In lieu of the generalities of the Central-Illinois and White groups and the vague and indefinite references to isolated fragments of statistical data, we have prepared and submitted to this Court, for such consideration as it deems appropriate, the record of performance of Virginia, Gulf States and El Paso for the years 1946, 1947 and 1948. No one can examine these without concluding that prediction has ripened into performance and the performance has exceeded any-

[37] *St. Louis Southwestern Ry. Co.* v. *Henwood*, 157 F. (2d) 347 (C. C. A. 8, 1946), cert. den. 330 U. S. 836 (1947), rehearing den. 331 U. S. 870.

one's expectation. The following data should completely eliminate from this case any contention by the common stockholders that the decision of the Commission in the instant case was unfair.

It is our position that the factual changes subsequent to the consummation of the plan (assuming *arguendo* their relevancy and the propriety of their recognition by judicial notice for the purpose of substitution by Central-Illinois and White, as valuation evidence, in lieu of the decision of the Commission) are not sufficiently significant to affect the Commission's valuation. In any event, these changes have not adversely affected the earnings and condition of the three underlying companies, which have materially improved and more than fulfilled Dr. Badger's estimate of value and prediction as to their continued progress.

It has been demonstrated that on the basis of past earnings performance of the companies comprising Engineers there has been a material improvement in earnings and asset position of the consolidation since the valuation made by Badger in January 1946 (Pref. Exh. 29-A). This improvement is, of course, the result of the improvement in the earnings position of the three operating companies. The tabulation set forth in Appendix G, *infra*, shows the record of earnings for each of the principal subsidiaries, *i. e.*, Virginia, Gulf States and El Paso.

The figures in Table 7 (Appendix G) show that substantial improvement in earnings available for common was experienced by each subsidiary in each of the years 1940 through 1947. In the case of Virginia, such net earnings were 35% greater in 1947 than in 1940. For Gulf States, the increase in earnings in

the same period was 85%, and for El Paso such increase was 147%. The following table combines the earnings figures of the subsidiaries into over-all earnings figures for selected years, as follows:

NET EARNINGS AVAILABLE FOR COMMON
SELECTED YEARS

	1940	1945	1947	12 mo. ended 9 30 48
Virginia	$3,954,352	$4,094,036	$5,324,075	$4,062,427
Gulf States	1,841,366	2,071,569	3,415,480	3,646,794
El Paso	471,256	691,482	1,030,761	1,107,301
Total	$6,266,974	$6,857,087	$9,770,316	$8,816,522
% to 1940	100	109	156	141
% to 1945	—	100	143	120

Combined earnings of the subsidiaries for the year 1947 and for the 12 months ended September 30, 1948, were 156% and 141%, respectively, of 1940. Likewise, earnings for these periods were 143% and 120%, respectively, of 1945 earnings. Steps have been taken by management to remedy the temporary earnings reduction in the case of Virginia, which steps will be described below. It may be concluded on the basis of the percentage increase in net earnings available for common that the three operating companies formerly subsidiaries of Engineers have experienced a substantial growth since 1940, with much of this growth occurring after 1945.

The earnings record of these companies in large measure is caused by their location in areas characterized by rapid expansion. Thus Virginia is located in a territory in which the major industries are tobacco and tobacco products, textiles (including rayon), ships, food and related prod-

nets, wood products, paper and pulp, and other commodities.[38] Many of these industries are characterized by a high rate of growth. Gulf States derives a substantial portion, approximately 12.1%, of its total operating revenues from sales of electric energy or steam directly to the oil industry for refining, pipe line pumping and well pumping and drilling. The production of chemicals, including synthetic rubber, also constitutes an important industry and sulphur, salt and a diversified list of agricultural commodities are other important products of its territory.[39] In connection with the future outlook of the company, it should be pointed out that contracts have recently been signed with Esso Standard Oil Company and Ethyl Fuel Corporation extending the original terms of contracts with these two firms to December 31, 1961, and May 1, 1960, respectively, whereby the maximum combined contract demands under both contracts have been increased by 43,000 kwh.[40] This tangible evidence of future growth taken in conjunction with the inherent growth characteristics of the industries located in the territories served by Gulf States indicates that the current record of this company regarding revenue and earnings cannot be considered a temporary phenomenon.

El Paso is also located in an area characterized by rapid industrial expansion. The City of El Paso has always been an active trading center in extensive farming and cattle raising regions. Industries in that vicinity include copper refining and smelting plants, railroad repair shops, and oil refineries.[41]

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[38] Prospectus of Virginia dated November 15, 1948, p. 12 (filed with SEC).

[39] Registration Statement filed with SEC in January 1949, p. 7.

[40] Ibid.

[41] Moody's Public Utility Manual, 1948, p. 283.

Evidence of growth is indicated in various operating statistics of these companies relating to gross dollar sales of electricity, kilowatt sales of electricity, and number of customers served. Current performance of these companies is compared to 1940, a measure of prewar performance, and to 1945, which was the last complete year preceding Badger's valuation. The balance of this section is devoted to such statistics and the analysis thereof.

The tabulation set forth in Appendix H is a comparison of gross sales of electricity of the operating subsidiaries classified according to type of customer, *i. e.*, residential and rural, commercial, industrial, and others for the year 1940 and for the years 1944 through September 30, 1948. Electricity sales have consistently accounted for over 90% of the gross operating revenues of each company. As indicated in Table 8 (Appendix H), each of the companies has shown a substantial growth in gross sales of electricity. Thus sales of Virginia increased from $23,754,357 in 1940 to $45,676,204 for the twelve months ended September 30, 1948, an increase of 94%. The increase from 1940 to the latter date for each of the customer classifications was substantial and consistent. The percentage increase in gross sales for each customer classification was 79% for residential and rural, 107% for commercial and 69% for industrial sales. Moreover, increases have been shown since the year 1945 which was the last year preceding Badger's valuation (Pref. Exh. 29-A). Thus gross operating revenues of Virginia have increased from $37,912,214 in 1945 to $45,676,204 for the twelve months ended September 30, 1948, which represents an increase of 20%. Analysis of each of the customer classifications moreover indicates that in-

creases were shown for each classification. Thus, sales to residential and rural customers increased 24% from 1945, commercial sales increased 11% over 1945 and industrial sales have increased 24% over 1945. As regards Virginia, the Central-Illinois and White contentions that revenues of Virginia at the time of Badger's valuation were *temporary* are not borne out by actual sales in the post-war era. Current revenues from sales of electricity have greatly exceeded the revenues obtained in 1940 and 1945.

Gulf States shows a similar growth from 1940 to the twelve months ended September 30, 1948. Its gross sales of electricity have increased from $9,740,738 in 1940 to $19,529,643 for the twelve months ended September 30, 1948, an increase of 100%. In that period, residential and rural sales increased 97%, commercial sales increased 34%, and industrial sales increased 97%. In other words, the Company currently has a dollar volume of sales twice as great as in 1940. Comparing the year 1945 with the twelve months ended September 30, 1948, reveals that this Company has undergone substantial growth in that period. Thus, gross sales of electricity increased from $15,888,915 in 1945, declined to $14,858,359 in 1946, and then increased through 1947 to $19,529,643 for the twelve months ended September 30, 1948. The gain from 1945 through 1948 represents a 23% increase. Residential and rural sales increased 39% and commercial sales increased 60% from 1945 to September 30, 1948, while industrial sales declined 6% in that period. Although Gulf States derived substantial revenues from sales to pipe line companies during the war, which sales decreased as ocean tanker service was resumed following the termination of hostilities, Gulf States had almost made up revenue

losses in the industrial category by September 30, 1948. Moreover this revenue loss was more than offset by increases in other directions.

El Paso Electric Company shows a growth characteristic of the two preceding companies in that its gross sales from electricity increased from $2,782,918 in 1940 to $5,268,555 for the twelve months ended September 30, 1948, an increase of 89%. In other words, the operating revenues of this company were nearly twice as great in 1948 as in 1940. A classification of sales by type of customers is not available for the later date. Comparison of sales by type of customer for the year 1947 with the year 1940 reveals that residential and rural sales have increased 50%, commercial sales have increased 59% and industrial sales have increased 85%. Likewise, comparison of gross sales of electricity for the twelve months ended September 30, 1948, with the year 1945 indicates that such sales have increased 30% with sizeable increases being recorded in each of the customer classifications from 1945 to 1947.

It may be concluded from this tabulation (Appendix II) that the increase in gross sales of electricity for each of the operating companies from 1940 through September 30, 1948, has been steady and consistent. Moreover, it is quite evident that the current record of such sales has, on the whole, greatly exceeded the records established during the war years. A sufficient period has now elapsed since the termination of hostilities to indicate that the "wartime" level of sales was not a temporary phenomenon.

A comparative study of kilowatt sales of electricity to customers of each subsidiary by total and by customer classification is contained in Table 9 (Appendix I), *infra*.

That tabulation indicates that each of the operating subsidiaries has sold increasing amounts of electric energy to each of its customer classifications since the year 1940 and since the year 1945. Virginia increased its sales of electricity from 1,966,142,000 kwh in 1940 to 2,360,465,000 kwh for the twelve months ended September 30, 1948, an increase of 21%. In that period, residential and rural sales increased 125%; commercial sales increased 179% and industrial sales increased 60%. Kilowatt sales increased from 1,934,267,000 kwh in 1945 to 2,360,405,000 kwh for the twelve months ended September 30, 1948, an increase of 22%. By the later date, residential and rural sales had increased 45% over 1945, commercial sales had increased 11% over 1945 and industrial sales had increased 23% over 1945. Gulf States likewise showed a remarkable growth in electricity sales. Thus, total sales of electricity increased from 705,744,000 kwh in 1940 to 1,622,556,000 kwh for the twelve months ended September 30, 1948, an increase of 130%. In that period, residential and rural sales increased 147%, commercial sales increased 213% and industrial sales increased 107%. The sales of 1,622,556,000 kwh for the twelve months ended September 30, 1948, contrast with sales of 1,434,579,000 kwh in 1945, which represent an increase of 13%. The relatively slight increase is accounted for by the fact that industrial sales which had decreased in 1946 had returned only to their 1945 level. However, it should be remembered that increases in other categories more than offset the decrease in the industrial category, for residential and rural sales increased 55% and commercial sales increased 69% during this period.

In the case of El Paso, there are no statistics available relative to kilowatt sales for the twelve months

ended September 30, 1948, the latest year for which such data is available being 1947. Kilowatt sales of electricity increased from 133,451,000 kwh to 292,016,000 kwh in 1947, an increase of 119%. Residential and rural sales increased 83%, commercial sales increased 93% and industrial sales increased 95%. Also a substantial increase in kilowatt sales was recorded from 1945 through 1947, which increase was from 223,117,000 kwh to 292,016,000 kwh or 33%. Again increases in sales were recorded for each customer classification from 1945 through 1947 with residential and rural sales increasing 38%, commercial sales increasing 61% and industrial sales increasing 27%. This is further indication that the sales of electricity during the war period were not a temporary and unrepresentative experience of the company at the time Badger made his valuation in January 1946.

It may be concluded on the basis of this tabulation (Appendix I) that the operating companies which formerly were subsidiaries of Engineers have shown an outstanding ability to market electric energy throughout the period under consideration. This record of increased revenue sales and kilowatt sales, especially from 1944 to the present, took place in spite of sizeable rate reductions during that period. As stated on page 14 of its Prospectus dated November 15, 1948 (filed with the S. E. C.), Virginia reduced rates on thirteen separate occasions, which reductions represented savings to consumers in the amount of $4,064,000 for these years. Likewise, in its registration statement filed with the S. E. C. in January 1949, Gulf States has made rate reductions from 1944 on. These reductions have effected savings to its customers amounting to $687,000 for the period. Moreover, because of their location in

territories characterized by rapid growth, these companies have been able to more than offset losses of sales to war time customers. It may be concluded that the current operating record of these companies is representative of their future ability to sell electricity at reasonable rates.

It should be pointed out that these companies have substantially increased their residential kilowatt sales and revenues. Thus for Virginia the average annual use of electric energy per residential customer (including rural customers on residential rates) was 1,682 kwh for the twelve months ended September 30, 1948 as compared with 1,134 for 1940. Corresponding average annual billings per residential customer were $49.72 and $42.22 respectively. The average amount billed to residential customers was 2.96 cents per kwh for the twelve months ended September 30, 1948 and 3.72 cents per kwh for 1940.[42] Similar statistics may be cited for Gulf States. The average annual use of electric energy and average annual billings per residential customer for the twelve months ended September 30, 1948 were 1,363 kwh and $44.54 as compared with 1,021 kwh and $41.89 for 1940. The average rate billed to residential customers was 3.27 cents per kwh for the twelve months ended September 30, 1948 and 4.10 cents per kwh for 1940.[43] Likewise El Paso has shown a substantial increase in residential customer usage of electricity. For this company the average annual use of electric energy and average annual billings per residential customer for the year ended December 31, 1947 were 1,649 kwh and $44.52 as compared with 1,221 kwh and $39.06 for 1940. The average rate billed to resi-

[42] Prospectus of Virginia filed with the SEC dated Nov. 15, 1948, p. 13.

[43] Registration Statement filed with SEC January 1949, p. 13.

dential customers was 2.7 cents per kwh for 1947 and 3.2 cents per kwh for 1940.[41]

The tabulation, included in Appendix J, indicates the growth in number of consumers of the operating subsidiary companies, Virginia, Gulf States and El Paso from 1940 through the twelve months ended September 30, 1948.

The figures in Table 10 (Appendix J) indicate that there has been a substantial increase in the total number of customers served by these subsidiary companies. Thus Virginia was serving a total of 424,792 customers at September 30, 1948 in contrast with 284,084 in 1940, an increase of 50%. For the same two dates residential and rural customers increased 51%, commercial customers increased 40% and industrial customers on a reclassified basis decreased 41%. It should be pointed out, however that total kwh sales to industrial customers had increased 50% in this period. Comparing the number of customers of Virginia at September 30, 1948 with the number of customers in 1945 shows that the total number of customers had increased 20% with residential and rural customers increasing 19%, commercial customers increasing 20% and industrial customers increasing 9%. Gulf States also showed sizeable gains in customers from 1940 to September 30, 1948, the total number increasing from 92,132 in 1940 to 170,250 at September 30, 1948, an increase of 85%. In this period, residential and rural customers increased 88%, commercial customers increased 68% and industrial customers increased 53%. If the year 1948 is compared with the year 1945, we see that the total number of customers increased from 124,902 on the earlier date to 170,250 on the later date, an increase of 36%. In this postwar

[41] Moody's Public Utilities Manual, 1946, p. 914 and 1948, p. 284.

period residential customers increased 35%, commercial customers increased 40% and the number of industrial customers increased 30%. El Paso conformed to the experience of the above companies. Thus the total number of customers increased from 30,341 in 1940 to 41,966 in 1947, an increase of 38%. Residential and rural customers increased 36%, commercial customers increased 45% and industrial customers increased 45%. If a comparison is made between 1945 and 1947 it will be noted that the total number of customers increased from 37,544 in 1945 to 41,966 in 1947 or 19%. Residential and rural customers increased 15%, commercial customers increased 43% and industrial customers increased 100%.

In summary it may be said that the expanding character of the territory is reflected by the substantial increases in number of customers of these former subsidiaries occurring from 1940 and 1945 to 1948.

The substantial increase in the number of customers served by these subsidiaries since 1945 has greatly exceeded the expectations of company officers at the time of Badger's valuation (Pref. Ex. 29-A). As an indication of this, we may note that the Registration Statement of Gulf States, filed with the S.E.C. in January 1948, states on p. 14 as follows:

> "* * *. At the end of the war a substantial reduction in load was expected and further increase in capacity did not appear necessary. *However such reduction did not materialize*, as such cutbacks as did occur from military establishments and war industries were more than offset by the general increase in business and the addition of new customers". (Italics ours)

On p. 19 of the Prospectus of Virginia, dated November 15, 1948, filed with the S.E.C., general refer-

ence is made to the fact that the rate of growth in system loads has increased greatly due to the general increase in business and the addition of new customers. In fact, the company has had to rely greatly on interconnections to meet its existing requirements.

Although Virginia showed a decline in net earnings available for common in the twelve months ended September 30, 1948, its management has taken steps to remedy this situation. Beginning September 1, 1948, the temporary 5% discount applicable to certain classes of customers was eliminated and in August 1948 the application of fuel clause riders in certain of its customers filed rates, was broadened. The estimated annual increases in revenues because of these two changes, based on the level of use by customers at the respective times such changes were made, was $1,750,000.[45] Moreover, in a footnote on page 9 of the prospectus referred to above, it is estimated that the net sum of operating expenses and depreciation would have been reduced by $1,500,000 had the new Possum Point generating plant been in operation through the twelve months ended September 30, 1948. This plant was scheduled to be in operation by the end of 1948. Finally, increases in gas rates in the Norfolk-South Norfolk and Newport News-Hampton areas became effective on November 1, 1948. These rates were designed to produce additional revenues amounting to $500,000 annually.[46]

Admittedly, the earnings for the twelve months ended September 30, 1948 do not fully reflect the increased coal and wage cost which have occurred in 1948. Thus, on p. 14 of the Prospectus of Virginia dated November 15, 1948 (filed with the S. E. C.), it

[45] Prospectus of Virginia filed with the SEC dated Nov. 15, 1948, p. 14.

[46] Ibid., p. 16

is estimated that fuel costs for the twelve months ended September 30, 1948, would have been $800,000 greater had the present average contract price of coal been in effect for the full twelve months. In addition, wage increases granted during the twelves months ended September 30, 1948, amounted, on an annual basis, to approximately $779,000, of which $275,000 is reflected in the income statement for the above period. Finally, the income statement for this period does not fully reflect the annual interest expense of the $11,459,000 3⅛% convertible debentures issued in April, 1948, which expense on an annual basis is $367,306.

For the convenience of the Court, there is presented a tabulation showing the net effect of these anticipated increases in income and expenses of Virginia, on an annual basis as follows:

Increase in Gas Rates	$ 500,000
Discontinuance of Temporary Discounts and Application of Fuel Clause Riders	1,750,000
Savings Arising from Operation of Possum Point Plant	1,500,000
Total Increase in Income	$3,750,000
Deduct: Increased Expenses	
Increase in Fuel Costs	$ 800,000
Annual Interest Requirements on 3⅛% Conv. Deb.	367,306
Increased wage costs not reflected in Income Statement as of 9/30/48	504,000
Estimated Increase in Net Income before Federal Income Taxes	$2,078,694
Deduct 38% Federal Income Tax	789,904
Estimated Increase in Net Income	$1,288,790

Adding this anticipated increase in net income to t
earnings available for common as of September
1948, in the amount of $4,062,427 would produce es
mated net earnings of $5,351,217, which would
slightly greater than the earnings for the year end
December 31, 1947. This contrasts with 1945 earnin
of $4,094,036, the latest earnings figure available at t
time of Badger's valuation, which was predicated
the maintenance of earnings at that level. There
every reason to believe that the past increase in ki
watt sales will be maintained, which would result
an even greater increase in earnings available f
common.

In conclusion, it should be remembered th
Badger's conclusions relative to the value of Eng
neers preferred (Pref. Exh. 29-A) were predicat
upon the continuance of the earnings of subsidiari
at the then-existing level. Data in this section, ho
ever, shows that the earnings performance anticipat
at the time of his valuation has been *greatly exceed*
and, unlike the innuendoes of Central-Illinois ar
White, such earnings did not recede to pre-war leve
in the post-war periods. Furthermore, it has be
shown that current sales of electricity are well abo
their levels for 1940 and 1945, whether they a
measured in dollars or in kilowatt hours. Moreov
it has been shown that the growth of the territori
served by these companies has been reflected in th
substantial increases in number of customers serv
from 1940 and from 1945.

E. Comparison of Engineers Actual Earnings for 1946 and Pro Forma Earnings for 1947 and for the Twelve Months Ended September 30, 1948 With the Earnings Estimate for 1946 of Engineers (Eng. Exh. 63, R. 1828a-1829a).

Statements have been made above to the effect that Badger's valuation of the preferred stocks of Engineers was not based upon temporary and inflated wartime earnings, as contended by Central-Illinois and White, but upon earnings reasonably permanent in character. It will be recalled that his valuation was predicated upon the maintenance of the consolidated earnings of Engineers at their then-existing level. Badger's valuation was made on January 24, 1946. The best tangible evidence of anticipated earnings at that time was to be found in an exhibit of Engineers (Engineers Exh. 63, R. 1828a-1829a). For the convenience of the Court a comparison of that estimated income statement with both the actual consolidated income statement found in Table 1 (Appendix A, *infra*) and with the pro forma consolidated income statements for the year ended December 31, 1947 and for the twelve months ended September 30, 1948, shown as Tables 2 and 3 respectively (Appendix B and C, *infra*) has been prepared and set forth in Table 11 (Appendix K, *infra*).

That table shows conclusively that the earnings *estimate* for 1946 has been substantially exceeded in 1946, 1947 and for the twelve months ended September 30, 1948. Thus, the estimated earnings statement establishes that total charges and preferred dividends of the consolidation, which includes dividends on Engineers' preferred stock, were covered 1.85 times in 1946, 2.01 times in 1947, and 1.81 times for the twelve months ended September 30, 1948. The cover-

age expectation at the time of Badger's valuation (1.68, R. 1829a) has been excelled in all of the three subsequent years. Furthermore, it has been shown in the preceding section dealing with performance of operating companies that there is every indication that the coverage rate of 1.81 for the twelve months ended September 30, 1948 will be bettered in the foreseeable future. Therefore, the tabulation contained in Appendix K is further proof that Badger's valuation was based upon earnings, reasonably permanent in character.

Conclusions Respecting Present Applicability of Badger's Valuation.

The material presented, *supra*, has proved conclusively that Badger's valuations of Engineers preferred stocks at January 1946 were not based upon transitory factors as regards interest rates and earnings and asset coverages. It has been amply demonstrated that interest rates and preferred stock yields have remained relatively close to their levels at January 1946 and that such increases as have occurred represent relatively minor fluctuations. There is every expectation that the present level of interest rates will be maintained in the foreseeable future. It has been and will be the established policy of the Federal Reserve Board and the Treasury Department to peg, at par, the price of the long-term bank ineligible 2½% Treasury Bonds. Following the November election, investor confidence has been increased with respect to the ability of the Federal Reserve Board to maintain this rate with the result that interest rates and preferred stock yields have consequently declined. It has also been shown that the consolidated earnings record of Engineers (on a pro forma basis) has substantially

improved subsequent to Badger's valuation. In fact, consolidated earnings have materially exceeded the best estimates of anticipated earnings available at January 1946 and prove conclusively that Badger's valuation was predicated upon earnings permanent in character. In addition, the improved record of earnings has resulted in giving Engineers preferred on a pro forma basis a substantially increased asset coverage, whether such coverage be measured in terms of consolidated book value per share or pro forma net assets per share at market values (Tables 6 and 6A, Appendix F). Finally, the operating record and characteristics of the three operating subsidiaries of Engineers establish that, without exception, these companies are characterized by rapid growth. This growth was measured by comparing gross income, current earnings, sales of electricity, both in dollars and in kilowatt hours and number of customers, with similar statistics for 1940, a pre-war year, and 1945, the last year previous to Badger's valuation in 1946. It was there shown (1946 estimate) that the indicated increases will be continued into the future. In view of these demonstrated facts and conclusions, namely that interest rate presently remain at historically low levels, that the earnings and asset coverage of Engineers has shown substantial improvement since 1946, and that the operating companies are characterized by ever increasing expansion, it is amply evident that, were the preferred stocks of Engineers presently outstanding and being currently traded in the open market, such stocks would be selling at or near their respective call prices. Were there no call features attaching to these preferreds, they would be selling at prices materially in excess of their call prices.

In addition, assuming *arguendo* that this Court

may take judicial notice of the variety of statistical data, general utility trends and economic conditions[47] selected from various publications, and occurring long after consummation of the plan, and concludes that such subsequent changes discredit or undermine the Commission's valuation (which we deny), it is urged that in such event the Central-Illinois and White Briefs cannot serve as a substitute for the Commission's initial valuation and the subsequent review by the District Court. That function has, by statute, been allocated to the Commission and remand for its consideration would then be required.[48] Consequently, it would be the duty of this Court to return this case to the Commission for a fresh determination. Similarly, assuming for the sake of argument that there has been a substantial radical change not envisaged or foreseen which would warrant a reopening upon an express request or otherwise,[49] then it is equally true that this Court should direct a remand and not make its own valuation. On this score it must be pointed out that Central-Illinois and White have never claimed a radical and substantial change nor have they sought a remand—well knowing, no doubt, that such request would lack both factual and legal basis. Nor for that matter did the two courts below find the record stale, even though the same

[47] Cf. *Insurance Group Com.* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607, 620 (1947).

[48] *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943); *Schwabacher* v. *United States*, 334 U. S. 182 (1948).

[49] *R. F. C.* v. *Denver, Rio Grande W. R. Co.*, 328 U. S. 495, 521-522 (1946); *Insurance Group Committee* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607, 611-612 (1947); *Group Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523, 542 (1943); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943), rehearing den. 318 U. S. 803 (1943).

type of material was presented in the briefs there.[50] In any event, it is a rare occasion[51] when this Court will reopen a case long pending before an administrative body and the courts on the basis of a substantial and radical change in economic conditions, even upon express request, and then only if substantial injury to the party affected can be clearly established.[52] Any other rule would result in interminable litigation and would encourage objectants to prolong the proceeding in the hope that economic conditions would materially change to their advantage. Even more so is this salutary principle applicable in the instant case where the plan has been virtually consummated with the approval of Central Illinois and White who, among others, opposed any stay (such as was sought by Streeter) and yet, at this time, indirectly imply significant economic changes. By virtue of such opposition to a stay which was denied by the two courts below and a Justice of this Court, and, in fact, because of the demand by counsel for Engineers for the immediate execution of the plan, in order to insure the success of the warrant program in view of the market conditions then existing (R. 374a-375a) the District Court directed the plan to be carried out.[53] That consummation resulted in the termination of the preferreds rights to dividends and

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[50] The Circuit Court was certainly familiar with the rule requiring a remand to the Commission for its reconsideration where the record furnished the court has grown stale (R. 264) and the District Court expressly accepted Dr. Badger's values and assumed their applicability at that time on May 15, 1947 "in the absence of a showing of changed circumstances" (R. 290a).

[51] *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 514-515 (1944); *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 534-535 (1946).

[52] *Insurance Group* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607, 619 (1947).

[53] In fact the dissolution of Engineers has taken place and the directors have been constituted trustees pursuant to the provisions of Delaware corporation law (R. 15).

left them without any tangible transferable evidence of their interest in the escrow, while the common stock litigated the payment of the full amount as approved by the Commission. It ill becomes the common who urged consummation, and cut off the preferreds rights and obtained the benefits of such consummation, to urge a revaluation by this Court on the basis of so-called statistics in their Briefs, without any opportunity to other parties to subject that data to examination and cross-examination. The Central-Illinois and White Briefs are no substitute for evidence and hearing nor is this Court the proper place for a trial of the facts solely on the basis of briefs. The rights of the parties became fixed as of the time of consummation and should not be subjected to reappraisal at this time. It is seriously doubted that any court has gone so far as to permit a reopening at such a late date as this—and even the general principle that equity speaks as of the date of the entry of the decree does not support such view—for its decree has already been entered and more than that, *de facto* consummation has occurred. The *de facto* consummation was clearly recognized by the court below, which in directing a remand to the Commission for the valuation noted that in view of the denial of the stay of consummation, "the escrow agreement accordingly delimits the area in which the plan to be approved by the Commission and district court must fall" (R. 40). What justice or equity rests with the common who have obtained the result sought, that is, to pass on the underlying companies and cut off the preferred dividend rights and at the same time urge alleged changes in economic conditions, in an effort to obtain a valuation by this Court on the basis of their Briefs? Such procedure should not be sanctioned by this Court, especially where the Commission's determination has been amply sup-

ported not only by the facts prior,[51] but also subsequent, to the consummation of the plan.

(We cannot let go unnoticed several statements made in the Central-Illinois Briefs and have found it necessary to discuss them in an addendum hereto.)

Conclusion.

For the reasons stated herein and in the Briefs previously submitted, the judgment of the Court of Appeals for the Third Circuit should be reversed with appropriate mandate to the District Court to enforce the plan as approved by the Commission insofar as it provides for the payment to the preferred stockholders of amounts equal to the respective redemption prices of their stock (less the sum already received) plus adequate recompense for the delay in payment. If this Court determines however, that the Commission has erred in the valuation process, this proceeding should be returned to the Commission for a fresh determination, in accordance with the instructions of this Court.

Respectfully submitted,

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[51] In *Public Service Commission* v. *S. E. C.*, 166 F. (2d) 784, 788 (C. C. A. 2, 1948), cert. den. 334 U. S. 838 (1948), the following pertinent comment is made: "There was certainly some basis for the valuation of the SEC when the order of the District Court was entered on July 16, 1947. How far later events may have thrown doubt upon the plan, as then approved, we cannot consider; we pass upon the order as of the time when it was entered."

Addendum.

1. Accepting *arguendo* the Central-Illinois valuation of the enterprise of $103,700,000 (Central-Illinois Brief, pp. 101-102), according call prices to the preferred would result in allocating to them 40.9% of the enterprise and to the common 59.1% of the enterprise. If the valuation of the enterprise made by Badger of $118,000,000 is accepted (R. 1163a), the preferred will receive under the plan, 36% of the enterprise and the common will receive 64% of the enterprise. It is apparent therefore that the preferred are in a position where the major portion of the enterprise provides a cushion against any decline in value. This is significantly different from the situation in the *Otis* case where the preferred stock interest in the enterprise was valued at 95% and the common stock at only 5%.

2. The Central-Illinois Answering Brief contains the following statement (at p. 26): "The record establishes that when adjustment is made for such balance sheet items, the asset value of the Engineers preferred stocks barely approximate $100 per share." The authority for this statement is Engineers Exhibit 77 (R. 1851a). That conclusion is not supported by this Exhibit. Engineers Exhibit 77 supports and confirms Dr. Badger's conclusion that the book value or equity per share for the preferred stock of Engineers before deducting reserves was $192.51 and after deducting reserves, $181.31.

In the event that Central-Illinois was referring to Engineers Exhibit 78 (R. 1852a) for its conclusion,

we respectively point out (1) that the Exhibit was entirely irrelevant and incompetent, and (2) that the conclusions set forth therein were completely disclaimed by Dr. Badger (R. 1162a *et seq.*). Engineers' Exhibit 78 showed that after excluding certain reserve items, there was only available for the preferred the sum of approximately $39,000,000 (R. 1851a). Dr. Badger, in commenting upon this Exhibit to which objection was made by the preferred stockholders, pointed out that after adding up the $16,000,000 of cash, $65,000,000 for Virginia (which was Barnes' appraisal), $30,000,000 for Gulf States and $7,000,000 for El Paso, in "giving a valuation of these assets, in accordance with the evidence and/or records in this case" the value of the assets of Engineers was equal to $118,000,000 (R. 1163a). He characterized as "ludicrous" the value of $39,000,000 which appeared in Engineers Exhibit 78.

APPENDIX A - TABLE 1

COMPARATIVE INCOME ACCOUNT ANALYSIS - CONSOLIDATED BASIS
ENGINEERS PUBLIC SERVICE COMPANY, INC., AND SUBSIDIARIES
YEARS ENDED DECEMBER 31, 1940-1946, INCLUSIVE (1)

	1940	1941	1942	1943	1944	1945	1946
Operating Revenues	$57,093,653.	$64,739,518.	$73,836,543.	$59,570,893.	$72,031,423.	$63,801,247	$61,287,542.
Operating Expenses	37,150,113.	41,270,211.	45,999,623.	35,696,623.	44,729,384.	39,111,592(2)	40,623,973(2)
Net Operating Revenues	$19,943,540.	$23,469,297.	$27,836,920.	$23,874,270.	$27,302,039.	$24,689,655.	$20,663,569.
Other Income and Expense - Net	d168,997.	d28,539.	d252,924.	141,627.	40,300.	d222,120.	38,798.
Total Income before Taxes	$19,774,543.	$23,440,758.	$27,583,996.	$24,015,897.	$27,342,339.	$24,467,535.	$20,624,771.
Deduct - Fed. Inc. & E.P. Taxes, Net	2,590,241.	6,312,320.	10,641,147.	12,282,112.	13,420,186.	11,466,235(3)	6,194,756(3)
Balance	$17,184,302.	$17,128,437.	$16,942,849.	$11,733,785.	$13,922,153.	$13,001,300.	$14,430,015
Add Holding Co. Income Less Expense	34,028.	d122,193.	d187,723.	d107,249.	d320,881.	d 886,978.(4)	d 893,452(4
Available for Debt, Pfd.Div. & Min.Int.	$17,218,330.	$17,006,244.	$16,755,126.	$11,626,536.	$13,601,272.	$12,114,322.	$13,536,563.
Total Debt, Pfd.Div. & Minority Int.	14,149,364.	14,117,296.	13,733,442.	8,287,496.	8,824,808.	8,019,466.(5)	7,327,784.(5)
Balance to E.P.S.Co.	$ 3,068,966.	$ 2,888,948.	$ 3,021,684.	$ 3,339,040.	$ 4,776,464.	$ 4,094,856.	$ 6,208,779.
x Charges & Pfd. Div. Earned	1.22	1.20	1.22	1.40	1.54	1.51	1.85
Operating Ratio	65.07%	63.75%	62.30%	59.92%	62.10%	61.30%	66.28%
% Depreciation:Total Operating Revenue	11.1	10.5	9.2	9.1	7.8	7.4	8.0
% Maintenance:Total Operating Revenues	6.7	6.5	6.8	6.4	7.0	6.9	6.9
% Mctce. & Deprec: Total Operating Revenues	17.8	17.0	16.0	15.5	14.8	14.3	14.9

(1) Data for 1940-1944 taken from Preferred Stockholders Exhibit No. 29-A, p. 2098 a. Figures rounded to nearest dollar. Data for 1945 and 1946 taken from Moody's Public Utility Manual 1947, pages 1295-7 for that year.

(2) Figure represents sum of detailed operating expenses other than Federal Income and Excess Profits taxes and amortization of plant acq. adj. as shown in Moody's Public Utilities.

(3) Does not give effect to reduction in Federal Income and Excess Profits Taxes resulting from extraordinary non-recurring deductions, amounting to $7,528,290 in 1945 and $540,247 in 1946, as indicated in note (e) to comparative consolidated income account in Moody's for 1947 p.1296. If such items were used to reduce taxes accordingly, overall coverage would be 2.45 in 1945.

(4) Holding Company expenses not segregated. Amounts shown represent amortization of plant acquisition adjustments.

(5) Detail in Moody's Public Utility Manual for 1947, p.1295-6:

	1945	1946
Interest on Long-Term Debt	$3,443,610.	$2,818,270.
Other Interest	80,068.	626,537
Amort. Debt Disc. and Exps.	325,220.	363,197.
Subs. Pfd. Stock Div.	2,042,856.	2,042,856.
Div. on Pfd. Stk - E.P.S.	2,119,092.	2,119,093.
Minority Interest $17,074.	$10,905	
Less: Adjustment to reflect reduction arising from special charges in lieu of Fed. Inc. Taxes. See Tab. "Equity in Earnings of Subs. Year Ended 12/31/45", in Moody's Pub. Util. Man. 1947, p. 1297. 8,454.	8,620.	10,905.
TOTAL CHARGES	$8,019,466.	$7,327,784.

APPENDIX B - TABLE 2

PRO FORMA CONSOLIDATED INCOME ACCOUNT
ENGINEERS PUBLIC SERVICE COMPANY, INC., AND FORMER SUBSIDIARIES (1)
YEAR ENDED DECEMBER 31, 1947

	Virginia	Gulf States	El Paso	Combined	Engineers Public Service	Inter-Company Eliminations	Consolidated
Operating Revenues	$44,991,724.	$19,572,356.	$ 4,803,385.	$69,367,465.	$5,900,348. (2)	d$5,900,348.	$69,367,465.
Operating Expenses							
Operating Expenses and Maintenance	25,436,622.	9,143,033.	2,252,549.	36,832,204.	327,552. (3)	—	37,159,756.
Depreciation	3,111,201.	1,849,298.	323,333.	5,283,832.	—	—	5,283,832.
Taxes - Other	3,579,497.	1,547,453.	484,660.	5,611,610.	20,000. (3)	—	5,631,610.
Total	$32,127,320.	$12,539,784.	$3,060,542.	$47,727,646.	$ 347,552.	—	$48,075,198.
Operating Income	$12,864,404.	$7,032,572.	$1,742,843.	$21,639,819.	$5,552,796.	d$5,900,348.	$21,282,267.
Add: Other Income	d 6,159.	d53,675.	26,683.	d33,151.	177,585 (3)	—	144,434.
Balance	$12,858,245.	$6,978,897.	$1,769,526.	$21,606,668.	$5,730,381.	d$5,900,348.	$21,436,701
Deduct Federal Income Taxes	3,148,200.	2,150,652.	480,000.	5,778,852.	271,732. (4)	—	6,050,584.
Amortization of Plant Acq.Adj.	693,168.	201,316.	—	894,484.	—	—	894,484.
Miscellaneous Deductions	117,699.	—	23,167.	140,866.	—	—	140,866.
Available for Charges	$8,899,178.	$4,626,929.	$1,266,359.	$14,792,466.	$5,458,649.	d$5,900,348.	$14,350,767.
Charges and Preferred Dividends	3,585,751.	1,211,449.	235,598.	5,032,798.	2,119,093.	—	7,151,891.
Available to E.P.S.	$5,313,427.	$3,415,480.	$1,030,761.	$ 9,759,668.	$3,339,556.	d$5,900,348.	$ 7,198,876.
x Charges and Preferred Dividends							
x Parent Co. Pfd. Dividend Earned							
Operating Ratio							2.01 4.40 69.30%
Interest and Amortization	$ 2,127,747	$683,349.	$ 168,097.	$ 2,979,293.	$ —	$ —	$ 2,979,293.
Subsidiary Preferred Dividend	1,447,355	528,000.	67,501.	2,042,856.	—	—	2,042,856.
Minority Interest	10,649 (5)	—	—	10,649. (5)	—	—	10,649. (5)
Parent Co. Pfd.Div. Requirements	—	—	—	—	2,119,093.	—	2,119,093.
Total	$ 3,585,751.	$1,211,449.	$ 235,598.	$ 5,032,798.	$2,119,093.	—	$ 7,151,891.

(1) Statistics for subsidiaries appear in Moody's Public Utilities Manual, 1948, Virginia Electric at p. 743-4, Gulf States at p. 820-1, and El Paso at p. 284. As the Parent Company was placed in liquidation in 1947, it did not prepare an income account for 1947. Therefore, the Parent Company's statement for year ended December 31, 1946, Moody's Public Utilities Manual, 1947, p. 1297, has been used with adjustments as noted in Footnotes (2) and (3)

(2) Compiled as follows:

Company	Total Common Dividends	Pro Rata Share to E.P.S.Co.	Amount to E.P.S.Co.
Virginia Elec.& Pwr.Co.	$3,673,031.	99.80%	$3,665,685.
Gulf States Utilities Co.	1,623,473.	100.00	1,623,473.
El Paso Electric Co.	611,190.	100.00	611,190.
		Total.	$5,900,348.

(3) 1946 Operating Expenses of $272,960. increased by 20% to reflect higher materials and wage costs. Other taxes assumed to increase to $20,000 from $16,451 in 1946. Other income assumed to be the same as in 1946.

(4) Computation of Federal Income Taxes

Dividend Income	$5,900,348.
Less:85% Dividend Inc. Credit	5,015,296.
Taxable Dividend Income	$ 885,052.
Other Income	177,585.
Total Tax Income	$1,062,637.
Less:Expenses and Other Taxes	347,552.
Taxable Net Income	$ 715,085.
Federal Income Tax at 38%	$ 271,732.

(5) Minority interest computed as follows:

Earnings Available for Charges		$8,899,177.
Less: Interest & Amortization	$2,127,747.	
Subsidiary Pfd. Dividend	1,447,355.	3,575,102.
Earnings Available to Common		$ 5,324,075.
Percent Minority Interest		0.02%
Minority Interest		$ 10,649

APPENDIX C - TABLE 3

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PRO FORMA CONSOLIDATED INCOME ACCOUNT
ENGINEERS PUBLIC SERVICE COMPANY, INC., AND FORMER SUBSIDIARIES (1)
TWELVE MONTHS ENDED SEPTEMBER 30, 1948

	Virginia	Gulf States	El Paso	Combined	Engineers Public Service	Inter-Company Eliminations	Consolidated
Operating Revenues	$48,575,136.	$22,004,260.	$ 5,268,555.	$75,847,951.	$ 5,449,187.	$d5,449,187.	$75,847,951.
Operating Expenses							
Operations	$26,283,513.	$ 8,352,662.	$ 2,224,445.	$36,860,620.	$ 354,858.(3)	—	$37,215,478.
Maintenance	3,893,876.	2,017,730.	278,580.	6,190,186.	—	—	6,190,186.
Depreciation	3,257,988.	2,201,798.	338,376.	5,798,162.	—	—	5,798,162.
Taxes - Other	3,924,971.	1,805,159.	531,818.	6,261,948.	25,000.(3)	—	6,286,948.
Total	$37,360,348.	$14,377,349.	$ 3,373,219.	$55,110,916.	$ 379,858.	—	$55,490,774.
Operating Income	$11,214,786.	$ 7,626,911.	$ 1,895,336.	$20,737,035.	5,069,329.	$d5,449,187.	$20,357,177.
Add:Other Income & Expense	d71,613.	d28,833.	43,394.	d57,052.	177,585.(3)	—	120,533.
Balance	$11,143,175.	$ 7,598,078.	$ 1,938,730.	$20,679,983.	$ 5,246,914.	$d5,449,187.	$20,477,710.
Deduct Income Taxes	2,559,493.	2,279,898.	586,600.	5,425,991.	226,010. (4)	—	5,652,001.
Amortization of Plant Acq.Adj.	693,166.	201,316.	—	894,484.	—	—	894,484.
Available for Charges	$ 7,890,514.	$ 5,116,864.	$ 1,352,130.	$14,359,508.	$ 5,020,904.	$d5,449,187	$13,931,225.
Charges and Pfd.Dividends	3,836,212.	1,470,069.	244,830.	5,551,111.	2,119,093.	—	7,670,204.
Available for Common	$ 4,054,302.	$ 3,646,795.	$ 1,107,300.	$ 8,808,397.	$ 2,901,811.	$d5,449,187.	$ 6,261,021.
x Charges and Preferred Dividends Earned							1.81
x Parent Company Preferred Dividends Earned							3.95
Operating Ratio							73.16%
Interest and Amortization	$ 2,380,732.	$ 764,569.	$ 177,330.	$3,322,631.	$ —	$ —	$ 3,322,631.
Subsidiary Pfd.Dividends	1,447,355.	705,500.	67,500.	2,220,355.	—	—	2,220,355.
Minority Interest	8,125. (5)	—	—	8,125.	—	—	8,125.
Parent Company Pfd.Div.Req.	—	—	—	—	$2,119,093	—	2,119,093.
Total	$ 3,836,212.	$ 1,470,069.	$ 244,830.	$ 5,551,111	$2,119,093	—	$ 7,670,204.

(1) Compiled from Moody's Public Utilities Weekly Cumulative Index, 1948, Vol. 20, No. 31, p. 1745, No. 32, p. 1731, No. 33, p. 1722-3. As the Parent Company was in liquidation, it had not prepared any income statement. Consequently, the Parent Company income statement for the year ended December 31, 1946, Moody's Public Utilities Manual, 1947, p. 1297, has been used, with adjustments as indicated in Footnotes (2) and (3)

(2) Compiled as follows:

Company	No. Shares Outstanding 9-30-48	Current Dividend Rate	Estimated Div. Payments	Pro Rata Share to E.P.S.Co.	Amount to E.P.S.Co.
Virginia Elec.& Pwr.Co.	2,956,109	$ .90	$2,660,498.	99.80%	$2,655,177.
Gulf States Utilities Co.	2,182,820	1.00	2,182,820.	100.00	2,182,820.
El Paso Electric Co.	381,994	1.60	611,190	100.00	611,190.
Total					$5,449,187.

(3) 1946 Operating Expenses of $272,960. increased by 30% to reflect higher materials and wage costs. General taxes assumed at $25,000. Other income assumed the same as in 1946.

(4) Federal Income tax computed as follows:

Dividend Income from Subsidiaries	$5,246,914.
Less:85% Dividend Income Credit	4,449,877.
Taxable Dividend Income	797,037.
Miscellaneous Income	177,585.
Total Taxable Income	974,622.
Less: Expenses	379,858.
Taxable Net Income	$ 594,764.
Federal Income Tax at 38%	$ 226,010.

(5) Minority Interest computed as follows:

Earnings Available for Charges		$7,890,514.
Less:Interest & Amortization	$2,380,732.	
Subsidiary Preferred Dividend	1,447,355.	3,828,087.
Earnings Available for Common		$4,062,427
Percent Minority Interest		0.02%
Minority Interest		$8,125.

APPENDIX D - TABLE 4

ANALYSIS OF INCOME DATA
ENGINEERS PUBLIC SERVICE COMPANY, INC., (1)
YEARS ENDED DECEMBER 31, 1946, and 1947,
and
TWELVE MONTHS ENDED SEPTEMBER 30, 1948

	1946	1947(Est.)	Sept. 30 1948(Est.)
Bal.Subs.Earn.Applic. to Parent Co.	$8,327,874.	$9,759,668.	$8,808,397.
Earnings from Other Sources - Net	177,585.(2)	177,585.	177,585.
Total	$8,505,459.	$9,937,253.	$8,985,982.
Less Expenses, Taxes & Interest	560,800.(2)	619,284.	605,868.
Balance for Stocks of Engineers	$7,944,659.	$9,317,969.	$8,380,114.
Preferred Dividend Requirements	2,119,093.	2,119,093.	2,119,093.
Available for Common	$5,825,566.	$7,198,876.	$6,261,021.
x Preferred Dividends Earned	3.75	4.40	3.95

(1) Data for 1946 taken from Moody's Public Utility Manual 1947, p. 1295-7.

Data for 1947 and 1948 estimated from pro forma consolidated income statements made in Tables 2 and 3.

(2) Detail for 1946 taken from Moody's as follows:

Revenues from Misc. Investments	$ 129,240.
Misc. Revenue	48,345.
Total earnings from other sources	$ 177,585.
Operating Expenses	$ 272,960.
Federal Income Taxes	$ 271,389.
Other Taxes	16,451.
Total Expenses, Taxes & Int.	$ 560,800.

APPENDIX E - TABLE 5

COMPARATIVE CONSOLIDATED BALANCE SHEET - SUMMARY ANALYSIS
ENGINEERS PUBLIC SERVICE COMPANY, INC., AND SUBSIDIARIES (1)
DECEMBER 31, 1942-1946, INCLUSIVE

	1942	1943	1944	1945	1946
Subs. Debt and Notes	$148,981,500.	$ 87,755,000.	$117,224,471.	$ 96,781,812. (2)	$ 99,550,000. (2)
Subs. Pfd. Stock, Premium & Accrued Dividends	88,751,369.	34,672,338.	45,175,063.	42,787,720. (3)	42,787,720. (3)
Minority Interests	291,644.	72,836.	50,917.	68,521.	78,041.
Total Preceding Claims	$238,024,513.	$122,500,174.	$162,450,451.	$139,638,053.	$142,415,761.
Engineers' Preferred	$ 41,801,500.	$ 41,801,500.	$ 39,245,500.	$ 39,245,500.	$ 39,245,500.
Common Stock (1,909,968 Shares)	$ 1,909,968.	$ 1,909,968.	$ 1,909,968.	$ 1,909,968.	$ 1,909,968.
Reserves for Investment Loss	14,352,830.	4,350,471.	4,394,705.	3,160,760.	2,000,000.
Capital Surplus	24,877,635.	19,661,146.	18,843,979.	19,819,868.	20,637,665.
Earned Surplus	11,382,849.	12,701,846.	11,157,691.	27,018,931.	35,145,042.
Total Common and Surplus	$ 52,523,282.	$ 38,623,431.	$ 36,306,343.	$ 51,909,547.	$ 59,692,675.
Total Investment	$332,349,295.	$202,925,105.	$238,002,294.	$230,793,100.	$241,353,936.
Book Value Equity Per Share Pfd.	$225.65	$192.40	$192.51	$232.27	$252.10
Net Quick Assets	$ 14,491,331.	$ 14,579,270.	$ 17,146,619.	$ 23,426,481.	$ 23,588,122.
% Net Quick: Prior Obligations	6.09%	11.90%	10.55%	16.78%	16.56%
% Prior Obligations:Total Capital	71.62%	60.37%	68.26%	60.50%	59.01%
% Pfd. & Subord.Items:Total Capital	28.38%	39.63%	31.74%	39.50%	40.99%

(1) Data for years 1942-1944 taken from Preferred Stockholders Exhibit No. 29-A, p. 2103a. Data for 1945 and 1946 taken from Moody's Public Utilities Manual - 1947 Edition, p. 1297.

(2) Detail in Moody's as follows:

	1945	1946
Contract Payments	$ 81,812.	$ —
Bonded Debt	92,800,000.	92,000,000.
Notes Payable (non-current)	3,900,000.	7,550,000.
	$ 96,781,812.	$99,550,000.

(3) Detail in Moody's as follows:

Preferred Stock	$42,447,100.	$42,447,100.
Premium on Stock	340,620.	340,620.
	$42,787,720.	$42,787,720.

APPENDIX F - TABLE 6

PRO FORMA CONSOLIDATED BALANCE SHEET
ENGINEERS PUBLIC SERVICE COMPANY, INC.
DECEMBER 31, 1947

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	Consolidated 12-31-46	Changes in Subsidiaries (1) Virginia Electric	Gulf States Utilities	El Paso Electric	Engineers ~~(2)~~	Pro Forma Consolidated 12-31-47
Subsidiary Debt and Notes	$99,550,000.	+$4,350,000.	+$200,000.	$ --	--	$103,700,000.
Subs.Pfd.Stock, Premium & Accrued Dividends	42,787,720.	--	+5,000,000.	--	--	47,787,720.
Minority Interests	78,021.	+ 3,286.(3)	--	--	--	81,307.
Total Prior Claims	$142,415,741.	+$4,353,286.	+$4,800,000.	--	--	$151,569,027
Subs.Common Stock	--	--	+ 3,410,650.(2)	--	$(-3,410,650.)	--
Engineers' Pfd.Stock	39,245,500.	--	--	--	--	39,245,500.
Engineers' Common "	1,909,968.	--	--	--	--	1,909,968.
Reserve for Investment Loss	2,000,000.	--	--	--	--	2,000,000.
Capital Surplus	20,637,665.	--	--	--	--	20,637,665.
Earned Surplus	35,145,042.	+1,639,753.(3)	+ 1,762,150.	+419,570.	$ 3,339,556. (4)	42,306,071.
Total Common and Surplus	$ 59,692,675.	+$1,639,753.	+ 5,172,800.	+ 419,570.	$ -71,094. (5)	$ 66,853,704.
Total Investment	$241,353,916.	+$5,993,039.	+$9,972,800.	+$419,570.	$ -71,094.	$257,668,231.
Book Value Equity Per Share						270.34
Net Quick Assets	$ 23,588,122.	- $7,554,426.	+$2,693,127.	- $410,294.	-$71,094. (5)	$ 18,245,535.
%Net Quick: Prior Obligations						12.03%
%Prior Obligations: Total Capital						58.43%
%Pfd. & Subord.Items: Total Capital						41.57%

(1) Changes based on balance sheet data contained in Moody's Public Utility Manual, 1948:
Gulf States Utilities, p. 821
Virginia Electric p.744-5
El Paso Electric p.285

(2) Represents proceeds from sale of subscription 272,852 shares of common stock at $12.50 per share, shown in Moody's as follows:

Common Stock - 1947	$11,592,587.
Less: Common Stock-1946	11,101,125.
	$ 491,462.
Capital Surplus for 1947 (Now in 1946)	2,919,188.
	$ 3,410,650.

(3) Computed as follows:

Earnings available to Common - V.E.P.Co. 1947	$ 5,324,075. (See Table 2, Appendix B)
Add: Misc.Surp. Credits	43,654.
	$ 5,367,729.
Deduct: Common Dividends	3,673,031.
Misc.Surp.Debts	51,659.
	$ 3,724,690.
Net Increase in Surplus V.E.P.Co. 1947	1,643,039.
Proportion to Minority Interest	0.02
Amount Surplus Increase to Minority Interest	3,286.
Amount Surplus Increase to Engineers	$1,639,753.

(4) Represents retained cash income of Parent Company as shown in detail of pro forma consolidated income statement as of December 31, 1947. (See Table 2, Appendix B)

(5) Pro forma reduction in net quick assets on assumption that Parent Company would subscribe for entire increase in common equity of Gulf States Utilities, as follows:

Increase in Common Stock-Gulf States Utilities	$3,410,650.
Less: 1947 Retained Dividend and Interest Income of Parent Company	3,339,556.
Deficiency from Working Capital	$ 71,094.

APPENDIX F - TABLE 6A

60

RECONSTRUCTED CORPORATE BALANCE SHEET
ENGINEERS PUBLIC SERVICE CORP., INC.
SUBSIDIARY COMMON STOCKS AND CONVERTIBLE DEBENTURES VALUED AT
AVERAGE MARKET PRICE - WEEK OF NOVEMBER 20, 1946
(BASED ON PARENT COMPANY BALANCE SHEET AT DECEMBER 31, 1946, AND
ADJUSTED FOR ESTIMATED CASH INCOME FROM DIVIDENDS AND OTHER SOURCES)

	High	Low	Av'e.	No. Shares	Value
Common Stocks (2)					
Virginia Electric and Power Co.	15-1/2	14-1/2	15	2,952,196	$44,252,940.
Gulf States Utilities Co.	17	16-1/4	16-5/8	2,182,820	36,289,383.
El Paso Electric Co.	25-1/2	23	24-1/4	381,904	9,263,355.
					$89,805,678.
V.E.P.Co. 3-1/8% Conv.Deb.1963 at 107 (price as of 11/26/48)					92,576,566.
Net Quick Assets Not Invested (See Note)					7,223,513.
Total Reconstructed Assets					$189,605,757.
Less: Contracts and Tax Reserve (1)					24,570.
Reconstructed Net Assets Available for Preferred					$189,581,187.
Call Value Preferred Stocks (392,455 shs.)					122,450,395.
Balance to Common					$ 67,130,792.
Pro Forma Net Assets per Share Preferred at Market Values					$274.22

NOTE: Estimated Retained Cash Income of Parent Company

1947 Estimated (Appendix B - Table 2)		$3,239,566.
Twelve months ended 9/30/48 Estimated (Appendix C - Table 3)	$2,901,811.	
Adjustment to Estimate for 9 mo.period by 75%		2,176,358.
Estimated Retained Cash Income 9 mo. 1948		35,515,924.
Add: Net Quick Assets 12/31/46 (1)		16,372,247.
Total Funds Available for Investment		$22,387,763.
Deduct: Subscriptions to Securities of Subsidiaries -		
Gulf States Utilities - 272,852 sh. at $12.50 per sh.		$3,410,650.
V.E.P.Co.-Conv. Deb. at 100		11,753,800.
Total Subscriptions		$15,164,450.
Estimated Net Quick Assets 9/30/48		$ 7,223,513.

(1) Data for "Net Quick Assets" and "Contracts and Tax Reserve" taken from Moody's Public Utility Manual 1947, p. 1298.

(2) Market Prices for Virginia and for Gulf States taken from Commercial and Financial Chronicle, Nov. 22, 1948. Market Prices for El Paso taken from Wall Street Journal, Nov. 15-19, 1948.

APPENDIX G - TABLE 7

61

EARNINGS AVAILABLE FOR COMMON
VIRGINIA ELECTRIC AND POWER COMPANY, GULF
STATES UTILITIES CO. AND EL PASO ELECTRIC
COMPANY - YEARS 1940 to 1947 AND TWELVE
MONTHS ENDED SEPTEMBER 30, 1948.

Year	Virginia Electric and Power Co. (1)	Gulf States Utilities Company (2)	El Paso Electric Company (3)
1940	$ 3,954,352	$ 1,841,366	$ 417,256
1941	3,783,320	1,318,652	585,649
1942	3,199,710	1,118,203	438,871
1943	4,315,834	1,624,132	543,721
1944	4,756,785	1,645,361	605,823
1945	4,094,036	2,071,569	691,482
1946	5,038,066	2,933,352	859,894
1947	5,324,075	3,415,480	1,030,761
12 Mo. ended 9/30/48	4,062,427(4)	3,646,794	1,107,301
% Inc. 1947 over 1940	35%	85%	147%

(1) 1940-44: Preferred Stockholders Exhibit 29-A (R. 2115a)
1945-9/30/48: Prospectus dated 11/15/48, p. 9.(filed with S.E.C.)
Earnings are before giving effect to extraordinary reductions in taxes.

(2) 1940-43: Moody's Public Utility Manual, 1946, p. 917.
1944-48: Registration Statement filed with S.E.C. in January, 1949.
Earnings are before giving effect to extraordinary reductions in taxes.

(3) 1940: Moody's Public Utility Manual, 1946, p. 913.
1941-47: Moody's Public Utility Manual, 1948, p. 284.
1948: Moody's Public Utility Weekly Cumulative Index Vol. 20, No. 33, p. 1722-3.

(4) Based on information in company prospectus dated November 15, 1948, a calculation has been made on p. 4 supra ~~a subsequent page in this section~~ showing that annual income available for common in the next year should be increased in the amount of $1,286,790.

APPENDIX H - TABLE 8

62

COMPARATIVE STUDY OF OPERATING REVENUES
VIRGINIA ELECTRIC AND POWER COMPANY, GULF STATES UTILITIES COMPANY, AND EL PASO ELECTRIC COMPANY
1940 AND 1944 TO SEPTEMBER 1948

	1940	1944	1945	1946	1947	12 Mo. Ended 9/30/48	% Increase 1947 over 1940	% Increase 1947 over 1945	% Increase 12 Mo. Ended 9/30/48 over 1940	% Increase 12 Mo. Ended 9/30/48 over 1945
Virginia Electric and Power Co.(1)										
Residential and Rural	$ 9,740,473	$13,418,484	$14,032,103	$14,072,272	$16,149,736	$17,454,755	--	--	79%	24%
Commercial	7,163,762	11,737,683	13,388,376	13,275,701	13,929,728	14,844,420	--	--	107%	11%
Industrial	4,939,476	7,561,480	6,725,955	6,576,267	7,564,469	8,365,617	--	--	69%	24%
Other Sales	1,704,198	3,256,083	3,592,595	3,512,429	4,299,493	4,784,909	--	--	--	--
Other Electric Revenues	206,448	185,744	173,185	178,648	372,808	226,703	--	--	--	--
Total Sales	$23,754,357	$36,159,474	$37,912,214	$37,615,317	$42,316,234	$45,676,204	--	--	94%	20%
Gulf States Utilities Company (2)										
Residential and Rural	$ 3,106,397	$ 4,156,130	$ 4,429,623	$ 4,643,040	$ 5,386,330	$ 6,144,015	--	--	97%	39%
Commercial	2,288,661	3,032,527	3,341,770	3,799,602	4,622,932	5,358,028	--	--	134%	60%
Industrial	3,479,823	7,551,911	7,304,711	5,565,980	6,436,142	6,856,201	--	--	97%	-6%
Other Sales	865,857	743,771	812,811	849,837	917,168	1,171,369	--	--	--	--
Total Sales	$ 9,740,738	$15,484,339	$15,888,915	$14,858,459	$17,362,572	$19,529,643	--	--	100%	23%
El Paso Electric Company (3)										
Residential and Rural	$ 1,062,556	$1,319,747	$ 1,420,506	$ 1,421,337	$ 1,586,891	N.A. (4)	50%	12%	--	--
Commercial	897,017	1,009,531	1,095,516	1,234,869	1,420,072	N.A.	59%	30%	--	--
Industrial	596,514	876,268	851,955	820,662	1,104,350	N.A.	85%	30%	--	--
Other Sales	226,831	644,184	680,469	697,819	689,366	N.A.	--	--	--	--
Total Sales	$ 2,782,918	$ 3,849,729	$ 4,048,446	$ 4,174,706	$ 4,800,679	$ 5,268,555	--	--	89%	30%

(1) Virginia Electric and Power Co. - Prospectus dated November 15, 1948, p. 9 (Filed with S.E.C.)

(2) Gulf States Utilities Company - 1940: Moody's Public Utility Manual 1946, p. 916
1944-8: Registration Statement filed with S.E.C. in January 1949, p. 12

(3) El Paso Electric Company - 1940: Moody's Public Utility Manual 1946, p. 913
1944-7: Moody's Public Utility Manual 1948, p. 284
1948: Application to Federal Power Commission for Leave to Issue Notes, dated November 18, 1948, and filed Nov. 23, 1948, Exhibit I, p. 1. See also Moody's Public Utility Weekly Cumulative Index, November 13, 1948, pp. 1722-3.

(4) N. A. - Not available

APPENDIX I - TABLE 9

COMPARATIVE STUDY OF KILOWATT SALES TO CUSTOMERS, VIRGINIA ELECTRIC AND POWER CO., GULF STATES UTILITIES COMPANY, AND EL PASO ELECTRIC CO. 1940 AND 1944 TO SEPTEMBER 1948

	1940	1944	1945	1946	1947	12 mo. ended 9/30/48	%Increase 1947 over 1940	%Increase 1947 over 1945	%Increase 12 mo. ended 9/30/48 over 1940	%Increase 12 mo. ended 9/30/48 over 1945
Virginia Electric and Power Co. (000 Kwh)										
Residential and Rural	261,619	373,941	405,658	452,110	520,503	590,590	--	--	125%	45%
Commercial	231,072	542,470	636,337	581,324	594,634	643,829	--	--	179%	11%
Industrial	451,569	643,226	584,825	585,906	677,807	723,685	--	--	60%	23%
Other Sales	121,882	289,488	307,447	297,285	375,971	402,365	--	--	--	--
Total Sales	1,066,142	1,849,125	1,934,267	1,916,625	2,168,915	2,360,465	--	--	21%	22%
Gulf States Utilities Co.(000 kwh)										
Residential and Rural	75,702	111,202	120,987	138,351	162,634	188,001	--	--	147%	55%
Commercial	63,824	110,249	118,831	137,206	167,949	200,274	--	--	213%	69%
Industrial	536,914	1,149,755	1,104,713	859,540	1,036,448	1,110,337	--	--	107%	0
Other Sales	29,304	90,948	90,048	95,017	91,813	123,944	--	--	--	--
Total Sales	705,744	1,462,154	1,434,579	1,230,114	1,458,844	1,622,556	--	--	130%	13%
El Paso Electric Company (000kwh)										
Residential	31,667	42,267	45,476	51,886	58,456	N.A.	83%	38%	--	--
Commercial	27,661	33,614	36,911	44,017	54,166	--	93%	61%	--	--
Industrial	60,471	93,010	87,491	81,793	118,189	--	95%	27%	--	--
Other Sales	13,652	49,476	53,239	55,525	61,205	--	--	--	--	--
Total Sales	133,451	218,367	223,117	233,221	292,016	--	119%	33%	--	--

Sources of Data:

Virginia Electric and Power Co. - Prospectus dated Nov. 15, 19[illegible], p.10

Gulf States Utilities: 1940 - Moody's Public Utility Manual 1946 p. 916
1944-8 - Registration Statement filed with S.E.C. in January 1949, p. 12

El Paso Electric Co.: 1940 - Moody's Public Utility Manual 1946 - p. 913
1944-7 - Moody's Public Utility Manual 1948 p. 684

N. A. - Not available

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APPENDIX J - TABLE 10

COMPARATIVE STUDY OF NUMBER OF CUSTOMERS SERVED ~~ELECTRIC LIGHT AND POWER COMPANY~~, VIRGINIA ELECTRIC AND POWER COMPANY, GULF STATES UTILITIES COMPANY, AND EL PASO ELECTRIC COMPANY
1940, AND 1944 TO SEPTEMBER 30, 1948

	1940	1944	1945	1946	1947	12 Mo. Ended 9/30/48	% 1947 to 1940	% 1947 to 1945	% Increase 12 Mo. Ended 9/30/48 over 1940	% Increase 12 Mo. Ended 9/30/48 over 1945
Virginia Electric and Power Company (1)										
Residential and Rural	240,007	295,491	303,606	319,201	344,054	363,047	--	--	51%	19%
Commercial	41,208	44,996	47,745	51,806	55,462	57,635	--	--	40%	20%
Industrial (4)	971	935	528	559	600	577	--	--	- 41%	9%
Other	1,898	2,337	2,572	2,999	3,288	3,533	--	--	--	--
Total	284,084	343,759	354,451	374,565	403,404	424,792	--	--	50%	20%
Gulf States Utilities Company (2)										
Residential and Rural	77,197	99,215	107,046	118,950	133,906	145,299	--	--	88%	35%
Commercial	14,275	15,576	17,070	19,969	22,338	23,929	--	--	68%	40%
Industrial	539	599	633	603	658	825	--	--	53%	30%
Other	121	131	153	161	186	197	--	--	--	--
Total	92,132	115,521	124,902	139,683	157,088	170,250	--	--	85%	36%
El Paso Electric Company (3)										
Residential and Rural	25,931	30,834	32,238	34,638	35,454	N.A. (5)	36%	15%	--	--
Commercial	4,097	4,152	4,973	5,567	5,974	N.A.	45%	43%	--	--
Industrial	127	90	141	144	185	N.A.	45%	100%	--	--
Other	186	192	192	192	353	N.A.	--	--	--	--
Total	30,341	35,268	37,544	40,541	41,966	N.A.	38%	19%	--	--

(1) Virginia Electric and Power Co.: Prospectus dated Nov. 15, 1948 p. 9 (filed with S.E.C.)

(2) Gulf States Utilities Co.: 1940 - Moody's Public Utility Manual 1946, p. 918 -- 1944-8 - Registration Statement filed with S.E.C. in Jan. 1949, p. 12

(3) El Paso Electric Co.: 1940-Moody's Public Utility Manual 1946-p.913
1944-7 " " " " 1948-p.264

(4) Reflects reclassifications

(5) N.A. -- not available

APPENDIX K - TABLE 11

COMPARISON OF ACTUAL EARNINGS PERFORMANCE WITH ESTIMATED EARNINGS PERFORMANCE - ENGINEERS PUBLIC SERVICE CO., INC. AND FORMER SUBSIDIARIES (EARNINGS STATEMENTS FOR YEARS ENDED DECEMBER 31, 1946 AND 1947 AND PRO FORMA EARNINGS STATEMENT FOR TWELVE MONTHS ENDED SEPTEMBER 30, 1948, COMPARED TO ESTIMATED INCOME STATEMENT FOR YEAR ENDED DECEMBER 31, 1946)

	1946 Estimated(1)	1946 Actual(2)	1947 Pro Forma(3)	12 mo. ended 9/30/48 Pro Forma(4)
Operating Revenues	$57,374,800	$61,287,542	$69,367,465	$75,847,951
Operating Expenses				
Operating Expenses and Maintenance	28,101,000	--	37,159,756	43,405,664
Depreciation	4,850,000	--	5,283,832	5,798,162
Taxes - Other	5,166,518	--	5,631,610	6,286,948
Total	$38,117,518	$40,623,973	$48,075,198	$55,490,774
Operating Income	19,257,282	20,663,569	21,292,267	20,357,177
Add: Other Income	(-111,500)	(-38,798)	144,434	120,533
Balance	$19,145,782	$20,624,771	$21,436,701	$20,477,710
Deduct: Federal Income Taxes	5,700,386	6,194,756	6,050,584	5,652,001
Amortization of Plant Acq.Adj.	893,800	893,452	894,484	894,484
Miscellaneous Deductions	--	--	140,866	--
Available for Charges	$12,551,596	$13,536,563	$14,350,767	$13,931,225
Charges and Preferred Dividends	7,494,897(5)	7,327,784	7,151,891	7,670,204
Available to E.P.S.Common	$ 5,056,699	$ 6,208,779	$ 7,198,876	$ 6,261,021
Charges and Preferred Dividends Earned	1.67	1.85	2.01	1.81

(1) Engineers Exhibit No. 63, R. 1828-9a. Figures combined to conform to terminology shown in Tables 2 and 3, supra.

(2) See Table 1.

(3) See Table 2.

(4) See Table 3.

(5) Comprised of following:

Interest and Amortization	$3,322,200
Preferred Dividend Requirements of Sub.	2,043,500
Minority Interests	10,121
Preferred Dividend Requirements of Engineers	2,119,076
Total	$7,494,897

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Nos. 266, 227.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 266.

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE CO., *et al.*

No. 227.

THOMAS W. STREETER, *et al.*,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORP., C. A. JOHNSON, LUCILLE WHITE, and FRANCES BOEHM.

BRIEF OF THOMAS W. STREETER, *ET AL.* IN OPPOSITION TO CROSS-PETITION OF CENTRAL-ILLINOIS SECURITIES CORP., *ET AL.* AND IN REPLY TO BRIEFS OPPOSING PETITION OF THOMAS W. STREETER, *ET AL.*

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MILTON MAURER,
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IN THE

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OCTOBER TERM, 1948.

Nos. 266, 227.

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Opinions Below.

The opinion of the Court of Appeals (R. 12) and the opinion denying the prayers of the petitions and cross-petitions for rehearing (R. 138) are reported in 168 F. (2d) 722. The opinion of the District Court (R. 283a) is reported in 71 F. Supp. 797. The findings and opinion (R. 25a) and supplemental findings and opinion of the Securities and Exchange Commission (R. 128a) have not yet been officially reported but are set forth in the Commission's Holding Company Act Releases Nos. 7041 and 7119, respectively.[1]

[1] As the jurisdictional statement and the statute involved appear in the Streeter petition, pp. 2-5, it is requested that they be deemed incorporated herein.

Statement.

The petition previously filed on behalf of Thomas W. Streeter, *et al.* contains a complete statement of the case, to which the attention of this Court is respectfully directed and which it is requested be deemed incorporated herein.[2]

While it is not appropriate to argue the merits of the case at this time, we believe that we can assist the Court in its consideration of the three petitions by commenting, even if only briefly, on several of the major contentions in the two opposing briefs, independently submitted on behalf of two groups of common stockholders.[3] As demonstrated in the aforesaid three petitions, two issues basic to the proper administration of the Public Utility Holding Company Act,—the function of the district court vis-a-vis the Commission and the significance of the fair and equitable standard—have been raised and require resolution by this court. Furthermore by indirection the cross-petition filed by the common stockholders, Central-Illinois Securities Corp. *et al.*,[4] constitutes an admission that the decision below raises "substantial issues in the administration

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[2] *Thomas W. Streeter, et al.* v. *Central-Illinois Securities Corp., et al.*, October Term, 1948, No. 227, (hereinafter called the "Streeter petition"), pp. 7-16. In addition, petitions have also been filed on behalf of the Securities and Exchange Commission and The Home Insurance Company, *et al.*, Nos. 226 & 243, respectively.

[3] Memorandum of Respondents Lucille White and Frances Boehm in Opposition to Appellants' Petitions and Brief of Respondents Central-Illinois Securities Corporation and C. A. Johnson, in Opposition (hereinafter called the "White opposition brief" and the "Central-Illinois opposition brief", respectively.)

[4] *Central-Illinois Securities Corp., et al.* v. *Securities and Exchange Commission, et al.*, October Term, 1948, No. 266 (hereinafter called the "Central-Illinois cross-petition").

of the Public Utility Holding Company Act" and a recognition that "important questions arising from the judgment"[5] of the court below exist. In addition, since the Central-Illinois cross-petition raises questions on which the views of the preferred stockholders have hitherto not been set forth for this Court, we believe that the presentation of the position of the Streeter group will serve a purpose in assisting the Court in its consideration and facilitating its disposition of that cross-petition. Accordingly, this memorandum will be devoted to presenting the Streeter group's views (I) in opposition to the Central-Illinois cross-petition and (II) in reply to the briefs opposing the Streeter petition.

I. In Opposition to Central-Illinois Cross-Petition.

A. Questions Presented.

1. Did the court below properly vacate the decree of the District Court and remand the proceedings to the Securities and Exchange Commission for appropriate action where the plan was disapproved as not being fair and equitable within the purview of section 11(e) of the Public Utility Holding Company Act?

2. Does a fair and equitable plan under section 11(e) which provides for the payment to the preferred stockholders of an amount equal to the redemption price established as the equitable equivalent of the rights surrendered contravene the Public Utility Holding Company Act or the Fifth Amendment to the Constitution, where the involuntary liquidation clause

---

[5] Central-Illinois cross-petition, p. 18.

of the charter limits the preferred stockholders to face value?

B. Reasons for Denying Writ.

The Central-Illinois cross-petition raises no substantial issues affecting the administration of the Public Utility Holding Company Act (hereinafter called the "Act"). Its cross-petition primarily questions the propriety of the remand on the valuation aspect. In this respect, no conflict between the decision of the court below and the decision of other courts of appeals is disclosed. The cross-petition cites no decision of any court directly in point that conflicts with the opinion of the court below as to the requirement of remand. Likewise, no substantial issue exists with respect to the alleged violation of the Act or Fifth Amendment.[6]

C. Argument.

1. Assuming *arguendo* the unfairness and inequity of the plan, the court below properly vacated the decree of the District Court and directed the remand of the proceedings to the Securities and Exchange Commission.

The Streeter group maintains that the Securities and Exchange Commission (hereinafter called the "Commission") correctly determined that the preferreds have a fair investment value at least equal to the call price and that fairness and equity require the payment to the preferreds of that amount. If, however, this Court concludes that the Commission erred in its valuation, then the question of remand comes to the fore. Accordingly, the Streeter group has assumed, only for the sake of argument, that the payment to the preferreds of an amount equal to the call

[6] The same contention made by the White group (opposition petition, p. 8) is likewise without merit.

prices is not fair and equitable, but have challenged this determination in the petition.[7]

Granting *arguendo* the District Court's determination "that because of the provision for the payment of premium,[8] the plan does not meet the requirements of fairness and equity" (R. 292a), nevertheless the District Court had no power to rewrite or amend the plan so as to reduce, on the basis of its own estimates and valuation, the quantum of participation accorded to the preferred stockholders under the plan submitted by the Commission, and then to approve and enforce the plan as so amended by it. In other words, since the District Court had in effect disapproved the plan submitted as unfair and inequitable,[9] it had no choice but to reject the plan, deny enforcement and remand to the Commission for appropriate action. Its failure so to do constituted a reversible error, for

[7] In addition to challenging the significance of the fair and equitable standard as determined by the court below, the Streeter petition also questions the standard of review as applied in testing the valuation reached.

[8] The reference of the District Judge (Leahy, *J.*) to "premium" is an inaccurate characterization, as the plan does not call for the payment of a "premium" as such, but an amount equivalent to the redemption price. Such reference reflects a "nominal" approach which, although begging the question, is frequently used by the common stockholders. Moreover, the same District Judge on another occasion in his decision in *In re Cities Service Co.*, 71 F. Supp. 1003 (D. Del., 1947) rendered shortly after his opinion in the instant case views the payment of the amount in excess of the face value as "premium" only where the equitable equivalent is cash, and not other securities, even though such securities are deemed the equivalent of money; and in the same opinion, payment of the excess in the form of securities was justified on the basis of the medium used to satisfy the claim. This distinction in treatment based upon the medium of payment—cash or kind—is without substance and was properly rejected by the court below (R. 38). It is well settled that compensation may be made either in cash or kind (Streeter petition, p. 39, n. 30).

[9] In its opinion on rehearing, the court below indicated that the "District Court found the plan to be unfair and inequitable and rejected it" (R. 143).

which the court below correctly vacated the District Court's decree and directed the remand to the Commission for its action (*i. e.*, valuation).[10] Such was the determination of the court below when it said:

> "Though a district court of the United States sitting pursuant to the provisions of Section 11(e) may reject a plan, it cannot value the securities, find equitable equivalents therefor and substitute its own estimates for those of the Commission requiring the plan as amended by it to be carried out. To put the matter briefly, a district court may reject but not amend the plan. The court below, therefore, erred in one particular. It entered an order approving and enforcing the plan as amended by it. It was without power to do this. The provisions of Section 11(e) make it clear that the Commission in the first instance must approve the plan and find it to be fair and equitable. If, as here, the district court disagrees with the conclusion of the Commission that the plan is fair and equitable, it must refuse to approve the plan and 'remand' the record to the Commission for further and appropriate action by it" (R. 39).

The principle enunciated by the court below that a section 11(e) court may disapprove and reject a plan, but not amend and then approve it has been uniformly applied by the courts. *In re Laclede Gas Light Co.*, 57 F. Supp. 997 (E. D. Mo., 1944), aff'd *sub nom. Massachusetts Mutual Life Ins. Co. v. S. E. C.*, 151 F. (2d) 424 (C. C. A. 8, 1945), cert. den. 327 U. S. 795; *In re Kings County Lighting Co.*, 72 F. Supp. 767 (S. D. N. Y., 1947), aff'd *sub nom. Public Service*

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[10] In referring to the action to be taken by the Commission, the court below said:

> "* * * The problem is and will remain, until its disposition by the Commission, one of valuation of the securities of Engineers, *viz.*, the preferreds and the common" (R. 40).

Commission of N. Y. v. *S. E. C.*, 166 F. (2d) 784 (C. C. A. 2, 1948); *In re Electric Bond & Share Co.*, 73 F. Supp. 426 (S. D. N. Y., 1946). A district court cannot (as the instant District Court attempted) approve a plan in part and disapprove it in part.[11] Furthermore, it cannot rewrite the plan and then approve.[12] Accordingly, the District Court in the case at bar did not have the power to amend the plan so as to reduce the compensation proposed to be paid to the preferred stockholders any more than it could change the method of payment from cash to kind, or modify any other part of the plan.[13] Nor was it free to change any of the provisions as to the stockholders'

[11] Thus in the *Laclede Gas* case, *supra*, the District Court said:

"* * * The Court of Appeals may—'affirm, modify, or set aside such order, in whole or in part.' No such power is given to this Court under Section 11(e) proceedings. This Court can only 'approve' or disapprove of the plan" (57 F. Supp. 1002).

[12] Thus in *In re Electric Bond & Share Co.*, *supra*, it was held:

"The province of the District Court in a §11(e) enforcement proceeding is that of a reviewing authority. *Okin* v. *S. E. C.*, 2 Cir., 1944, 145 F. 2d 206. The Court cannot *amend* or *modify* the plan and then enter an order of approval since §11(e) provides that the plan must in the first instance be approved by the Commission. The function of the Court is to approve and enforce the plan of reorganization submitted to it, if it finds such plan fair and equitable and appropriate to effectuate the purposes of the Act. To do this the Court must examine the plan and the record upon which the Commission's approval of the plan was based. To judge the plan on any other record would run counter to the procedure expressed in the statute" (73 F. Supp. 443). (Italics ours.)

[13] That such amendment is not permitted is evident from the following statement by the District Court in the *Kings County* case, *supra*:

"* * * I agree thoroughly with the position taken by counsel for the State Commission that, under my narrow

[Footnote continued on following page.]

rights under the plan.[14] Unquestionably, any change in the quantum of participation to be accorded the stockholders necessarily alters substantial rights. That fact cannot be changed by the mere repetitious assertion that the feature of the plan affecting stockholders' participation does "not go to the heart of the plan".[15] The history of the litigation in the instant case[16] and

[Footnote continued from preceding page]

statutory jurisdiction I could not *amend* a proposed plan. For example, I could not, in the case at bar approve the plan on condition that Long Island receive, not 7½% of its present common stock holding, but 3¾%, this representing a compromise between the views expressed by the two commissions. Any such disposition would be wholly without jurisdiction" (72 F. Supp. 774).

[14] In the *Public Service Commission* case, *supra*, which affirmed the *Kings County* case, *supra*, the Court of Appeals for the Second Circuit apparently imposed a stricter limitation upon the district judge's power of approval, stating:

> "We will take up the last objection first. We may assume for argument that the judge's power was limited to an approval or a rejection of the plan, as it stood. He held that, nevertheless, the condition that the plan should be submitted to the PSC for its approval was not an 'essential' part of the plan, and that for this reason he was free to disregard it. *In this he was right, not indeed because he would have been free to change any of those provisions for the issue of securities or the alteration of shareholders' rights which made up the plan, which he thought not to be 'essential';* but because, as we shall show, §11(e) did not require the consent of the PSC, and because submission to that commission was not part of the plan at all; but, as it itself declared, only one of the 'steps to be taken to make the amended plan effective'." (166 F. (2d) 786). (Italics ours.)

[15] Central-Illinois cross-petition, pp. 20, 22.

[16] This feature has been sharply litigated before the Commission and the two courts below. Thus, in the first instance, inadequate compensation to the preferred resulted in the Commission's refusal to approve the plan unless and until amended to increase the participation of this group (R. 73a). In turn this increased participation gave rise to objection by two common stock groups before two courts below to the enforcement of the amended plan.

in the other cases arising under section 11(e) amply demonstrates the significance of this issue concerning the treatment of stockholders' claims. Central-Illinois' efforts to minimize the importance of the compensatory aspect of the plan is manifestly ridiculous.

Likewise, this principle limiting the district court's power to amend a plan has been applied to analogous situations arising under section 77 of the Bankruptcy Act. Thus in section 77 proceedings, where the district court's approval is required in all cases, that court can only pass upon such plans as are certified to it[17] and has no power to amend the plan,[18] but is limited to approval or disapproval, in which latter event it must either dismiss the proceedings or refer the plan to the Interstate Commerce Commission.[19] Furthermore, even the "interest of speed" or expedition does not justify the judicial amendment or modification of a plan submitted by the Commission. *In re Alton R. Co.*, 159 F. (2d) 200 (C. C. A. 7, 1947);[20]

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[17] *In re New York, N. H. & H. R. Co.*, 27 F. Supp. 392 (D. Conn., 1938), aff'd 104 F. (2d) 1018 (C. C. A. 2, 1939).

[18] *In re New York, N. H. & H. R. Co.*, 54 F. Supp. 595 (D. Conn., 1943), aff'd in part and rev'd in part on other grounds 147 F. (2d) 40 (C. C. A. 2, 1945) cert. den., 325 U. S. 884 (1945).

[19] *In re Erie R. Co.*, 37 F. Supp. 237 (D. Ohio, 1940).

[20] Thus, in the *Alton* case, *supra*, where the District Court in the interest of speed rewrote certain provisions of the plan after its approval by the Interstate Commerce Commission and the security holders, the Court of Appeals reversed the District Court order, rejecting the argument as to the District Court's authority to rewrite in connection with its supervision of the execution of the plan.

The *Alton* case, we believe, cannot be distinguished from the instant case, in which the plan as approved by the Commission and submitted to the court contained none of the provisions concerning the treatment of the preferred stockholders which were incorporated by Paragraph 6 of the court's order (R. 321a). Nor does the District Court's desire for speed in the instant case justify its attempt to change the plan any more than in the *Alton* case.

In re Chicago, R. I. & P. Ry. Co., 162 F. (2d) 257 (C. C. A. 7, 1947).

In addition, the Commission's amendatory order of February 11, 1947 and the District Court's adoption of the escrow resulted in the restoration of the splitting features of the original plan,[21] after they had been withdrawn, by separating part of the plan it disapproved and so constituted substantive changes of valuable rights[22] without authority in law so to do, as indicated above (pp. 7-8). In any event the Commission's amendatory order and its consent to the escrow do not satisfy the statutory requirement of approval by both the Commission and the district court.[23] Nor can this requirement be waived by either the Commission or the district court. So stated the court below in the following language:

> "* * * we are of the opinion that neither the Commission, nor the District Court, nor this court possesses the power to waive the provision of Section 11(e) providing for approval of a plan of reorganization as fair and equitable by the Commission and by the District Court. Moreover, we cannot treat the Commission's amendatory order of February 11, 1947 or its approval of the escrow agreement as a rejection of the role imposed on the Commission by Congress. The cor-

[21] Although counsel for Engineers had made a motion to separate Parts I and II of the plan and for an order permitting the consummation of Part I, the Commission found that it could not grant the motion to split the plan, but stated that it would approve an amendment to provide for escrow in the event of further litigation as to the rights of the preferred stockholders (R. 75a).

[22] The Commission does not view the amendatory order as an amendment to the plan (R. 169a, 389a).

[23] The Central-Illinois group has implicitly recognized in its opposition brief (pp. 13-14), that the Commission has not approved the plan in the form approved and enforced by the District Court despite their present elaborate argument as to the existence of the concurrent approval in its cross-petition (pp. 22-23). See also White opposition brief, p. 15.

rectness of our position in this regard is demonstrated by the fact that the amendatory order of the Commission provides that the escrow agent may make payment to the preferred stockholders only when the order of the District Court has become final and not subject to appeal. What the Commission intended to effect by the order was nothing more than the establishment of a means for expediting the execution of the plan of reorganization when the approval required by the statute had been attained" (R. 139).

As the District Court has disapproved the plan as unfair and inequitable and the requisite concurrent approval is lacking, the District Court was required to remand the cause to the Commission for appropriate action. This procedure which the court below correctly ordered has been uniformly followed. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80 (1943); *Schwabacher* v. *U. S.*, 334 U. S. 182 (1948). Both of these Supreme Court cases involved the treatment to be accorded stockholders under a statutory reorganization plan. Thus in the first *Chenery* case, *supra*, where an order of the Commission approving a reorganization plan under the Act was reversed as based upon inapplicable judicial precedents, this Court directed the remand to the Commission for appropriate action in accordance with its opinion. Similarly, in an analogous situation in the *Schwabacher* case, *supra*, this Court again directed a remand to the Interstate Commerce Commission for reconsideration as that Commission may have failed to consider the effect of certain rights of stockholders upon the "intrinsic or market values". In view of the foregoing authorities, as to which no conflict has been shown to exist, the decision of the court below correctly requires the remand to the Com-

mission for valuation in accordance with its opinion where the plan has been disapproved.[24]

2. The Act and Fifth Amendment do not bar payment to preferred stockholders under a fair and equitable plan of an amount equal to the redemption price established as the equitable equivalent of the rights surrendered, in the face of the limitation of the preferred to stated value under the charter involuntary liquidation provision.

The standard of fairness and equity incorporated in section 11(e) of the Act imposes the outer limits upon plans thereunder. By adoption of that standard, Congress has in substance decreed that in achieving the objectives of the Act a plan must not produce unfair results. If adherence to charter provisions, such as an involuntary liquidation clause, has that effect, such provisions may not stand in the way of the Congressional objectives.[25] However, the threat of the due process barrier of the Fifth Amendment to the Constitution is in the instant case unwarranted. The constitutional question is no more "reached" here than in *Otis & Co.* v. *S. E. C.*, 323

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[24] As noted above, the question of remand has been argued on the assumption that the disapproval of the plan was correct, but that disapproval has been challenged in the Streeter petition.

[25] *North American Company* v. *S. E. C.*, 327 U. S. 686, 705 (1946); *Continental Insurance Co.* v. *U. S.*, 259 U. S. 156, 171 (1922). In the *North American* case, *supra*, this Court said:

> "This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co.* v. *United States*, 196 U. S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act."

U. S. 624 (1945). Even if it were, the short answer to such argument is found in *American Power & Light Company* v. *S. E. C.*, 329 U. S. 90 (1946) and the *North American Company* v. *S. E. C.*, 327 U. S. 686 (1946).[26] The implication from these cases is clear that where under a plan security holders receive "just compensation" for their interest, the due process requirements are satisfied. The substitution of the equitable equivalent for contract rights surrendered involves no destruction of values but merely a change in the form of investment to another of equal value. Accordingly, neither the Act nor the Constitution forbids payment to the preferred of an amount equal to its redemption price established as the equitable equivalent of the rights surrendered under a fair and equitable plan.

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[26] In the *American Power & Light* case, *supra*, this Court rejected the argument that Section 11 (b) (2) may affect the rights of investors in holding companies in violation of the Fifth Amendment, and stated:

> "Our decision in *North American Co.* v. *Securities & Exch. Commission*, *supra*, largely disposes of the objections to §11 (b) (2) on the basis of the due process clause of the Fifth Amendment.
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> "Section 11 (b) (2), like §11 (b) (1), materially affects many property interests of holding companies and their investors; * * *. But Congress carefully considered these various interests and found them 'outweighed by the political and general economic desirability of breaking up concentrations of financial power in the utility field too big to be effectively regulated in the interest of either the consumer or the investor and too big to permit the functioning of democratic institutions'. It is not our function to reweigh these diverse factors or to question the conclusion reached by Congress. Nor can we say that §11 (b) (2) on its face authorizes or necessarily involves any destruction of any valuable interests without just compensation. The legislative policy and the statutory safeguards pointed out in the *North American* case negative that argument" (329 U. S. 106).

Thus, the constitutional issue, which has been raised in the Central-Illinois cross-petition (at p. 5) and the White opposition brief (at p. 8) has in reality been resolved.

II. In Reply to Common Stockholders' Briefs in Opposition to Streeter Petition.

A. As to Contentions Respecting the Function of a Section 11(e) Court vis-a-vis the Commission.

The laborious efforts of the common stockholders to confuse the issues prove unavailing. The erroneous contention is made by the common stockholders that there is no conflict among the courts of appeals with respect to the scope of review by a section 11(e) court as to the fairness and equity of a plan.[27]

At the outset, it must be pointed out that the common stockholders' assertion that the conflict between the District Court and the Commission relates primarily to the legal conclusions and not the factual findings of the Commission[28] clearly contradicts the District Court's definite rejection of "such findings and conclusions of the Commission [that] relate to or bear upon the payments of premiums or are inconsistent with the Opinion dated May 15, 1947 or with the findings and conclusions of law filed with said Order"[29] (R. 293a-294a). The foregoing evidence of the District Court's disagreement with the Commission's findings brings into focus the issue as to the status of the Commission's findings or the treatment to be accorded them by the district court in the performance of its function under section 11(e).

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[27] Central-Illinois opposition brief, p. 13 ff.; White opposition brief, p. 15.

[28] Central-Illinois opposition brief, p. 9; White opposition brief, p. 17.

[29] It can hardly be fairly claimed that the District Court's findings Nos. 36-38 (R. 307a-308a) are consistent with the Commission's findings (R. 69a-72a). The failure to recognize the conflict between the District Court's and Commission's findings is suprising as Central-Illinois counsel apparently prepared the findings for the District Judge (R. 377a, 385a).

The Commission's findings in respect to the value of the preferred claim (with which the District Court disagrees) are "in the realm not of mathematical demonstration, but of forecast, based upon expert analysis and weighting of a complex array of factors, in which the informed judgment of the Commission counts heavily".[30] Therefore, those findings, according to the decisions in the First, Second and Eighth Circuit Courts should not be upset, if supported by substantial evidence or unless "shown to be without a rational basis in fact or to be predicated upon a clear-cut error of law".[31] In the aforesaid three circuits, the scope of review by a section 11(e) court is delineated in terms of the doctrines of substantial evidence and administrative finality. Contrariwise, the two courts below have in effect viewed the section 11(e) enforcement proceedings as substantially a trial *de novo*.[32] Under that approach, a section 11(e) court is at liberty to exercise its affirmative and independent duty to examine the evidence as if *de novo* (Cf. R. 26) and make findings of fairness, and is then free to reject the Commission's findings, even if supported by substantial evidence and even if possessing a rational basis in fact and based upon a reasonable

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[30] *Lahti* v. *New England Power Ass'n*, 160 F. (2d) 845, 851 (C. C. A. 1, 1947).

[31] *Lahti* v. *New England Power Ass'n, supra*; *Public Service Commission of N. Y.* v. *S. E. C.*, 166 F. (2d) 784, 788 (C. C. A. 2, 1948); *Mass. Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424, 430 (C. C. A. 8, 1945) cert. den. 327 U. S. 795 (1946). See Streeter petition, pp. 17-20.

[32] In the same spirit the decision below erroneously sustains the right of a section 11(e) court to reopen the administrative record and receive additional evidence respecting the fairness and equity of a plan (R. 26). Such unlimited reopening of the administrative record is contrary to the weight of authority. See Streeter petition, pp. 23-24. Also see *In re Eastern Minnesota Power Corp.*, C. C. H., Fed. Sec. Serv., Par. 90,399-1 (D. Minn., 1947), *infra*, at p. 19, n. 39.

view of the law. Thus the views of the two courts below are clearly in conflict with those of the First, Second and Eighth Circuit Courts.

It would seem that the Central-Illinois group implicitly recognizes that the First and Eighth Circuit Courts sustains the district court's application of the doctrine of substantial evidence and administrative finality in testing the Commission's findings as distinguished from a "trial *de novo*" approach or the principle of the so-called "independent check",[33] but contends[34] that these appellate holdings "cannot be

[33] This criterion of "independent check" is apparently the same as the "full and independent judgment" established by the court below under which a section 11(e) court is free to reject administrative findings in disregard of the doctrine of substantial evidence and administrative finality. However, an entirely different significance has been ascribed to the concept of "independent judgment" in *St. Joseph Stockyards* v. *U. S.*, 298 U. S. 38, 53 (1936), where this Court in a confiscation case stated:

> "* * * this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency."

It is thus apparent that the issue concerns the extent to which a district court is free to reject or is required to accept the findings of an administrative agency based upon substantial evidence or possessing a rational and statutory foundation.

[34] Any attempted distinction by the common stock groups based upon the presence of the concurrent approval of both the District Court and the Commission in the *Lahti* and *Massachusetts Mutual* cases and its absence in the instant case is also lacking in merit. We maintain that that difference in result is attributable to the difference in the treatment accorded the findings of the Commission by the section 11(e) district courts in the First and Eighth Circuits, as contrasted with the Third Circuit, and would not have

[Footnote continued on following page.]

construed as holdings that the district courts are *required* in performing their statutory function to approve and enforce determinations of the Commission which they deem erroneous".[35] No such contention has been made. Instead, the Streeter group have urged that under the prevailing appellate view, the section 11(e) district courts must in performing their statutory duty sustain the administrative findings unless shown to be without rational basis in fact or to be predicated upon a clear-cut error of law. Such standard of review conflicts with the doctrine of the district courts' "full and independent judgment" implying a trial *de novo,* as announced by the two courts below.

The Central-Illinois group also claims that "the 'essence of the holdings of both Courts below was that the Commission's *conclusions* are without substantial evidentiary or legal basis; or, stated in restrictive terms for which Petitioners contend, that they 'lack rational or statutory foundation' ".[36] To no avail does it seek to convey the impression that the courts below applied the doctrines of substantial evidence and administrative finality. The ready answer to such

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[Footnote continued from preceding page.]

occurred in the instant case if the District Court had applied, or had been directed by the court below to apply, the correct standard for testing the Commission's findings.

The Central-Illinois effort (opposition brief, p. 13, n. 18) to discredit the recognition by the court below that the cited decisions "look the other way", as not based upon "an independent analysis of the decisions themselves", discloses incredible omniscience that can hardly be accepted in the light of a fair and independent examination of the opinion below and the "searching and detailed analysis" asserted by Central-Illinois to have been made by the court below in another respect.

[35] Central-Illinois opposition brief, pp. 13-14.

[36] *Sic.* Central-Illinois opposition brief, p. 9.

attempt is the language of the court below when it said:

> "In the light of the foregoing we *cannot hold*, as the Commission contends we must, that unless the conclusions of the Commission lack rational or statutory foundation they may not be disturbed by the Section 11(e) court, or that a reversal of the Commission's judgment by the court may not be effected save where the Commission has plainly abused its discretion" (R. 34). (Italics ours.)
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> "* * * The Court [in the second *Chenery* case] stated that its duty of examination is at an end '* * * when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress * * *' *Ibid.* at p. 207. The Chenery decision in our opinion cannot be deemed to be controlling in the case at bar" (R. 33).

On the other hand, the White group urge as a distinction that, in the instant case, the court below, in its review, considered the "function of the District Court *vis-a-vis* the Commission" while in the *Lahti* and *Massachusetts Mutual* cases, the "Circuit Court was acting only as a review court and was bound by the findings of fact of both the District Court and the Commission".[37] The attempted distinction is devoid of merit. In both the case at bar and the *Lahti* and *Massachusetts Mutual* cases, the status of the Commission's findings or the treatment to be accorded them by a section 11(e) district court was at stake, and consequently, affected the relative function of the district court and the Commission. Reference to the opinions of the respective District and Circuit Courts confirms the fact that the standard to be used by a section 11(e)

[37] White opposition brief, p. 15.

court in reviewing the Commission's action was involved and also that a conflict exists with respect to the standards enunciated among the circuits.[38] Further confirmation of this conflict appears in two recent[39] District Court decisions within the First and Eighth Circuits, decided since the filing of the Streeter petition, both of which cite the opinion of the court

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[38] Despite the contrary assertion by the White group, additional evidence appears that the function of the district court was in issue in the *Massachusetts Mutual* case. Thus in the recent decision in *In the Matter of Northern States Power Company*, unreported, decided August 30, 1948 (D. 4th D. Minn.) Civil Action No. 2673, the District Judge, after quoting the "rational basis" statement from the *Massachusetts Mutual* case, recites the contentions apparently unsuccessfully urged by the appellant in that case as follows:

> "'Section 11(e) of the Public Utility Holding Company Act of 1935 requires the District Court to independently determine whether the plan is fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act. The Court cannot, as it has done here, abdicate this independent duty to the Securities and Exchange Commission.'
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> * * * * *
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> "'The Court below failed to exercise the independent judgment required of it by the Act. Instead it completely accepted, and felt itself bound by, the conclusions of the Commission, which at best are advisory only.'". (Mimeographed opinion, p. 15).

The District Court then commented: "The weight, therefore, that the Court should attach to the Commission's factual findings was directly before the Circuit Court in that case * * *."

[39] Nor can the Third Circuit's view be reconciled with the acceptance of the substantial evidence rule in earlier decisions of District Courts within the First and Eighth Circuits. *In re Eastern Minnesota Power Corp.*, C. C. H. Fed. Sec. Service, par. 90,399-1 (D. Minn., 1947); *In re New England Public Service Company*, 73 F. Supp. 452, 456 (D. Me., 1947). For example, in the *Eastern Minnesota* case, *supra*, the District Judge said:

> "* * * The power of the Court is too limited and circumscribed to set aside the Findings and Order of the Commission on the record here controlling. The Court cannot exercise any general supervision of the Commission, nor can it direct the administrating of the Act. *City of North Miami Beach, Fla.* v. *Federal Water & Gas Corp. et al.*, 151 F. 2d 420.

[Footnote continued on following page.]

below and note the difference in the standard enunciated in their own respective circuits as contrasted with that of the Third Circuit.[40] *In the Matter of Northern States Power Company,* unreported, decided August 30, 1948, Civil Action No. 2673 (D. 4th D. Minn.); *American and Foreign Power Company,* unreported, decided Sept. 21, 1948, Civil Action No. 490 (D. S. D. Me.): Thus in the *Northern States Power Company* case, *supra,* where the contentions were made that "the court should reject the Commission's valuations and estimates and forecasts * * * regardless of the fact that there may be substantial evidence in support of the Commission's findings" and that "the findings of fact of the Commission supported by substantial evidence are not binding upon the court, although such findings should be treated with respect",[41] the District Judge (Norbye, *J.*) notes the Third Circuit's rejection of the administrative finality doctrine and comments as follows:

"* * * But Judge Biggs' decision in that case

[Footnote continued from preceding page.]

"That a contrary conclusion may have been reached by the Court if the Act permitted a hearing *de novo* is of no avail to objectors. Nor is the wisdom of the conclusion reached by the Commission of any concern of the Court. *Board of Trade* v. *United States,* 314 U. S. 534. The duty of the Court ends if the record submitted in the present case is convincing that it supports the findings of the Commission by substantial evidence, consistent with the authority granted by Congress. *National Broadcasting Co., Inc.* v. *United States,* 319 U. S. 190. The record of the instant case, in my opinion, will not permit a finding that the Amended Plan was not fair and equitable. *Mass. etc. Co.* v. *S. E. C.* (8 C. C. A.) 131 F. 2d 424" (at pp. 91, 100-101 of the Service).

[40] Central Illinois in its citation of these two recent cases (opposition brief, p. 14, n. 21) glosses over the difference in views between the circuits. Nor can a resort to phraseology such as "independent duty" hide that difference.

[41] The District Court in the *Northern States Power Company* case refused to accept these contentions which were apparently urged upon the basis of the opinion below.

must be considered by this Court in the light of the particular facts and circumstances therein involved, and by his recognition that *Lahti* v. *New England Power Association*, 1 Cir., 160 F. 2d 845, and *Massachusetts Mutual Life Ins. Co.* v. *S. E. C.*, 8 Cir., 151 F. 2d 424, in affirming *In re Laclede Gas Light Co.*, D. C. E. D. Mo., 57 F. Supp. 997, 'look the other way.' Presumably, Judge Biggs had reference to Judge Thomas' statement in the *Massachusetts Mutual Life Ins. Co.* case (p. 430, 151 F. 2d). * * * [quotation from *Massachusetts Mutual* case omitted and also the recital of appellant's contentions in that case, quoted *supra* p. 19, n. 38].

* * * *

"The weight, therefore, that the Court should attach to the Commission's factual findings was directly before the Circuit Court in that case, and it seems clear that the view of the Eighth Circuit is that such findings should be given considerable weight where there is a rational basis therefor, particularly where it appears that the Commission has given its careful and conscientious consideration to the many complex and involved questions presented by the record. * * * The limited authority vested in the Court, which has either to approve or disapprove the plan, would seem to lend weight to the *soundness of the views of the Eighth Circuit as to the duty of a Section 11(e) court where there is a 'rational basis' for the Commission's findings.* * * *

"I conclude, therefore, that the exercise of my independent judgment in passing upon the fairness of the plan to the parties involved must be made in recognition of the experience, skill and facilities of the Commission in considering and appraising the facts before it in the lengthy hearings and voluminous testimony during the past

five years. *Due weight should be accorded its findings and conclusions in factual matters where there is substantial evidence in support thereof.*" (Italics ours.) (Typewritten opinion, pp. 15, 16, 17.)

Similarly in the *American and Foreign Power Company* case, *supra*, which arose within the First Circuit, the District Court refers to the attitudes of the First, Third and Eighth Circuits as enunciated in *Lahti, Engineers* and *Massachusetts Mutual* cases and discussion of them in the recent *Northern States Power Company* case, *supra*, from which it quotes, and then concludes as follows:

> "While this Court is not convinced that there is any real difference between not acting 'capriciously' (to use the words of Judge Biggs in the *Engineers* case) and recognizing a 'range of tolerance' (to use Judge Magruder's language in the *Lahti* case) it should of course look *primarily to standards set forth in this Circuit.*" (Italics ours.) (Mimeographed opinion, p. 15.)

It is apparent from the foregoing recent District Court decisions within the First and Eighth Circuits that the standard within these two circuits differs from that applied in the Third Circuit respecting the extent to which a section 11(e) court is bound by findings of the Commission supported by substantial evidence or having a rational and statutory basis. Moreover, that difference is sufficiently substantial so as to result in the approval or disapproval of a section 11(e) plan dependent upon the circuit in which its enforcement is sought. The opinion of the court below has thus generated confusion which this Court should dispel.

B. As to Contentions Regarding the Valuation Process.

Numerous broad statements of fact and law appear in the opposition briefs that are lacking in basis and merit. Accordingly, only major contentions will be considered below.

1. Significance of fair and equitable standard.

The fair and equitable standard in a simplication under the Act under the *Otis* principles requires full compensation for senior securities for the contract rights surrendered on a "going concern" and not liquidation basis prior to the payment of junior securities.[42] On the other hand, the court below, in its approach to the problem of valuation, stresses the nebulous criteria of "factors" and "equities" clearly extrinsic to the contract rights in the light of the supposed termination of the enterprise. It is thus readily apparent that the views of the court below conflict with the principles of the *Otis* case, as set forth above.

2. Fair investment value doctrine.

The Commission is charged with applying the investment value doctrine in the instant case "to require premiums to be paid to the Engineers' pre-

[42] *Otis & Co.* v. *S. E. C.*, 323 U. S. 624 (1945). In conformance with this mandate, the Commission valued the preferred claim in the light of the applicable charter provisions (such as dividend rate, call prices and liquidation preferences) and an analysis of the financial condition of the company (R. 62a) and refused to hold the charter liquidation provisions (voluntary or involuntary) "conclusive" and to permit the Act to transform the existing value of the security in a going concern into a matured claim. The Central-Illinois contention (opposition brief, p. 18) that the Commission clearly ignored the charter liquidation provisions is groundless. The court below recognized that the Commission had properly considered them as not "dispositive" (R. 34).

ferreds" without even the "slightest reference" to an alleged long line of decisions denying "premiums" under the fair and equitable standard of section 11(e).[43] Apart from the inaccurate characterization of "premiums" for an amount "at least equal to the respective call prices", which was found by the Commission to be the fair investment value of the preferreds (R. 67a-68a), that assertion by the Central-Illinois group is distortional[44] and groundless like many of its other misstatements. It completely disregards the Commission's citation, in its Findings and Opinion (R. 67a), of the *American Power & Light Co.*, H. C. A. R. No. 6176 p. 11 ff. (1945); in which the Commission adequately distinguished the so-called frustration cases and accordingly, had no further reason to discuss them in the instant case. Moreover, despite any contrary implication from the Central-Illinois assertion, the Commission and the courts have in many section 11(e) cases permitted companies voluntarily to retire senior securities at amounts in excess of 100.[45] But even if by the so-called frustra-

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[43] Central-Illinois opposition brief, pp. 15-18. Also see White opposition brief, p. 14.

[44] Torn from its context by Central-Illinois is the claimed concession of the Commission with respect to precedents supporting the retirement of bonds and preferred stocks without payment of the call prices. Contrast the Commission's statement in its petition, p. 9 with the Central-Illinois distortion in its opposition brief, p. 15.

[45] For example, *The Western Public Service Co.*, H. C. A. R. Nos. 3175, 3230, 3245 (1942) and *El Paso Electric Co.* (Delaware), 8 S. E. C. 366 (1941), which were subsidiaries of Engineers; *Mississippi River Power Co.*, H. C. A. R. No. 5776 (1945); *The North American Co.*, H. C. A. R. No. 5796 (1945); *Minnesota Power and Light Co.*, H. C. A. R. No. 5850 (1945); *NY PA NJ Utilities Co.*, H. C. A. R. No. 5975 (1945); *Buffalo, Niagara and Eastern Power Corp.*, H. C. A. R. No. 6083 (1945); *Pennsylvania Power & Light Co.*, H. C. A. R. No. 6167 (1945);

[Footnote continued on following page.]

tion cases, the Commission is deemed to have announced an automatic rule denying the payment of any amount in excess of face or stated value, then its decision in *American Power & Light Co.*, H. C. A. R. No. 6176 (1945) certainly constituted the announcement and application a new principle based upon administrative experience under the Act. In that case the Commission said:

> "* * * As a result of the experience gained through consideration of a large number of later cases, we are persuaded that an automatic rule of 100 in all debt retirement cases would produce inequitable results and that it is necessary to inquire into the circumstances of the particular case to determine whether the payment of 100 is fair and equitable" (H. C. A. R. No. 6176, p. 12).

Hence, the Commission's decision in the instant case was merely an extension of the above principle to the retirement of the preferred stock. In its application

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[Footnote continued from preceding page.]

Standard Gas and Electric Co., H. C. A. R. No. 6435 (1946), following the decision in *Standard Gas & Electric Co.*, 63 F. Supp. 876 (D. Del. 1945); *Community Gas & Power Co.*, H. C. A. R. No. 6436 (1946); *Scranton Spring-Brook Water Service Co.*, H. C. A. R. No. 6458 (1946); *Northern States Power Co.*, H. C. A. R. No. 6578 (1946); *Pennsylvania Edison Co.*, H. C. A. R. No. 6723 (1946); *Washington Railway & Electric Co.*, H. C. A. R. No. 7410 (1947), enforced June 16, 1947 (D. C. Dist. of Col.); *United Gas Corp.*, 58 F. Supp. 501 (D. Del. 1944); *Central & Southwest Utilities Co.*, 66 F. Supp. 690 (D. Del. 1943); *In the Matter of American and Foreign Power Company*, unreported, decided Sept. 21, 1948 (D. S. D. Me.) Civil Action No. 490.

Several cases have also pointed out that in some situations the Commission might find the equitable equivalent of the senior securities to be more than the face amount. See e. g. *Mass. Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424, 430 (C. C. A. 8, 1945); *In re Consolidated Electric & Gas Co.*, 55 F. Supp. 211, 216 (D. Del., 1944); *In re North Continent Utilities Corp.*, 54 F. Supp. 527, 530 (D. Del., 1944).

of this new principle, if it be a new principle, the Commission's action is to be tested like any ordinary administrative order and is not to be disturbed except for plain abuse of discretion by the Commission since based upon an "informed, expert judgment of the problem".[46]

Thus, once the automatic denial of an amount in excess of face is no longer the rule, it is incumbent upon the Commission to determine the fair and equitable payment. As the liquidation provisions are not determinative in a simplification under the Act, the Commission measures the investment worth of the securities, based on the bundle of rights surrendered.[47] This investment value doctrine, whether novel or not, has recently received judicial sanction within the First Circuit. Thus, in *In the Matter of American and Foreign Company*, unreported, decided Sept. 21, 1948 (D. S. D. Me.), Civil Action No. 490, the District Court said with reference to the values assigned to certain preferred stocks under a section 11(e) plan:

> "* * * But it is clear that the Commission arrived at these figures not from a conception that this was a 'call' but from a *consideration of what was the fair investment value of these stocks*, in accordance with the overriding policy of *Otis & Co. v. S. E. C.*, 323 U. S. 624." (Italics ours.) (Mimeographed Opinion, p. 30.)

Such acceptance of the investment value doctrine in the First Circuit cannot be reconciled with its rejection in the Third Circuit.

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[46] *S. E. C. v. Chenery Corp.*, 332 U. S. 194, 207 (1947), rehearing denied, 332 U. S. 783 (1947).

[47] Streeter petition, pp. 42-43.

3. Bankruptcy and equity reorganization precedents.

The Central-Illinois group also asserts that the bankruptcy and liquidation decisions do not support payments to senior security holders of amounts "in excess of their contract claims".[48] This assertion is inapplicable here. In the first place, any inference that the preferred are seeking more than their contract claims is unwarranted as well as "question-begging", for the basic issue is the value of these contract claims. In fact, the Commission has limited the amount of the preferred compensation by the call provision of the charter (R. 67a). In the second place, any implication that the involuntary liquidation provision of the charter is controlling in the instant case so as to limit the preferred claim to face value is contrary to the *Otis* principle that the charter liquidation provisions are inoperative in simplifications under the Act. Lastly, while contract liquidation provisions are inchoate and not controlling in simplifications under the Act so as to require valuation of the contract rights, the contract liquidation provisions are choate or matured in bankruptcy and equity reorganizations and hence conclusive as to the amount to be paid.[49] Moreover if the Act were permitted to mature the preferred claim, as Central-Illinois seems to suggest, then the Act would create a windfall to the common since the Commission has found the fair investment value of the preferred claim at least equal to the call price or in excess of the involuntary liquidation amount and has concluded that the payment of such amount is

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[48] Central-Illinois opposition brief, p. 24.

[49] As stated in the *Otis* case, "Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors" (323 U. S. 638).

fair and equitable. Such windfall or shift in values is to be avoided[50] and is certainly not sanctioned by the doctrine of rescission which Central-Illinois claims to be applicable to the instant situation.[51] The Central-Illinois quotation of this principle is most eloquent by virtue of what is omitted. The statement in its entirety is set forth below, with the part omitted by Central-Illinois in italics:

> "Since there is no fault on either side, the loss due to impossibility or frustration must lie where it falls. Neither party can be compelled to pay for the other's disappointed expectations. *But on the other hand, neither can be allowed to profit by the situation.*"[52]

Furthermore, since in the event of rescission, there are no governing provisions in the charter and the parties represent *ownership* interests, an appraisal was in order and, in line with the requirements of "strict priority" and "fairness and equity", the Commission properly found the fair investment value of the preferred to be an amount at least equal to the call price.

4. Continuance of the holding company "enterprise" and "system".

The court below also considered highly significant the supposed termination of the holding company enterprise in the instant case as contrasted with its alleged continuance in the *United Light & Power Company* reorganization, in which there was merely

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[50] *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 637 (1945); *American Power and Light Co.*, H. C. A. R. No. 6176, p. 8 (1945).

[51] Central-Illinois opposition brief, pp. 18-19.

[52] American Law Institute, *Restatement of the Law of Contracts*, Sec. 468 (comment on Subsection 3, p. 887).

a shift of participation in the enterprise from the top holding company to a subsidiary holding company. This attempted distinction which Central-Illinois likewise urges[53] is not valid. Granting *arguendo* that the present Engineers' plan is a "real liquidation" (as contrasted with a "nominal liquidation"), then the claimed distinction disregards the caution of this Court in the *Otis* case: "The reason [for its decision] does not lie in the fact that the business of Power continues in another form. That is true of bankruptcy and equity reorganization". In fact, the Commission viewed the dissolution in the *United Light & Power (Otis)* case as an actual dissolution and not merely the "peeling" off of a company in a holding company system.[54] In any event, a "real liquidation" of the enterprise has not occurred in the instant case, for the business of Engineers' continues in the operating companies which are now owned directly by the common stockholders instead of indirectly since the elimination of Engineers' (R. 1397a).[55]

Likewise any inference from the views of the court below that the applicability of the *Otis* case depends upon the continuation of the underlying holding company system (which was the fact in the *United Light & Power* reorganization) does not stand analysis.

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[53] Central-Illinois opposition brief, p. 26.

[54] In the reorganization of Puget Sound Power & Light Co., a former subsidiary of Engineers', the Commission referred to its views in the *United Light & Power* decision (13 S. E. C. 1, H. C. A. R. No. 4215) (1943) as follows: "These views were expressed in the course of our discussion of a proposal which contemplated an actual liquidation" [13 S. E. C. 226, 246 (1943)].

[55] In *American Power & Light Company* v. *S. E. C.*, 329 U. S. 90, 117 (1946), this Court has pointed out that the dissolution of a holding company means little more than the receipt of securities of the operating company in lieu of their present shares in the holding company.

The *Otis* rule has in fact been applied in simplification proceedings under section 11, regardless of whether or not there has been a continuing holding company system.[36] Moreover, the emphasis upon the continuation of the holding company system, if carried to its logical conclusion, places a premium upon the sequence of simplification and makes stockholders' rights contingent upon the procedure of system adjustment. But such procedural decisions should not affect rights any more than the selection of a particular method of system adjustment, as this Court cautioned in the *Otis* case.

Conclusion.

I. The remand for valuation was proper, assuming *arguendo* a correct disapproval of the plan by the District Court. The decision below in respect to the remand is in accordance with the applicable decisions of this Court and other courts of appeals. Furthermore, the constitutional questions have been settled. For these reasons, the cross-petition (No. 266) for writ of certiorari to the Court of Appeals for the Third Circuit should be denied.

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[36] For example, in *Puget Sound Power & Light Company*, 13 S. E. C. 226 (1943), Puget Sound had no holding company system beneath it when Engineers filed the plan for it. Also in *Southern Colorado Power Co.*, H. C. A. R. No. 4501 (1943), enforced in Civil Action No. 670 (D. Colo., 1944), aff'd sub. nom., *Disman* v. *S. E. C.*, 147 F. (2d) 679 (C. C. A. 10, 1945), cert. den. 325 U. S. 863 (1945), the holding company interest was wiped out so that Southern Colorado was no longer in a holding company system. Also see *Northern States Power Co.* (Del.), H. C. A. R. No. 5745, p. 21 (1945), where the Commission appropriately said: "While the plan contemplates a formal dissolution of Delaware as a separate corporate entity, the actual business enterprise represented by the securities of Delaware, is being continued."

II. The opinions of the courts below are in conflict with decisions of the First, Second and Eighth Circuits respecting the function of a section 11(e) court vis-a-vis the Commission. The decision below has also made uncertain the status of the Commission's findings. In addition, the views of the courts below conflict with the applicable decisions of this Court and other courts of appeals as to the significance of the fair and equitable standard. For these reasons as set forth above and previously presented, the petition (No. 227) for writ of certiorari to the Court of Appeals for the Third Circuit should be granted.

Dated: New York, N. Y., October 8, 1948.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1948.

Nos. 226, 227, 243.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE COMPANY, et al.,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE, and FRANCIS BOEHM,

Respondents.

No. 266.

CENTRAL-ILLINOIS SECURITIES CORPORATION, and CHRISTIAN A. JOHNSON,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE COMPANY, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

ANSWERING BRIEF FOR THE HOME INSURANCE COMPANY AND TRADESMENS NATIONAL BANK AND TRUST COMPANY AS RESPONDENTS IN NO. 266.

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Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ANSWERING BRIEF FOR THE HOME INSURANCE COMPANY AND TRADESMENS NATIONAL BANK AND TRUST COMPANY AS RESPONDENTS IN NO. 266.

OPINIONS BELOW.

The opinion and judgment of the Court of Appeals for the Third Circuit (R. 12), and the opinion denying

petitions and cross-petitions for rehearing (R. 138) are reported at 168 F. 2d 722 (C. A. 3, 1948). The opinion of the District Court is reported at 71 F. Supp. 797 (D. C. Del., 1947) (R. 283a). The findings and opinions of the Commission dated December 4, 1946, and January 8, 1947, have not yet been officially reported. They are set forth in the Commission's Holding Company Act Release Nos. 7041 (R. 25a) and 7119 (R. 128a).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 835 (15 U. S. C. 79y). The judgment of the Court of Appeals for the Third Circuit was entered on March 19, 1948. Petitions and cross-petitions for rehearing were denied on June 11, 1948. The petition of Central-Illinois Securities Corporation, et al. for a writ of certiorari was filed September 8, 1948, and granted on October 25, 1948.

STATUTES INVOLVED.

Sections 11 (d), (e) and (f), Section 18 (f), Section 24 (a) of the Public, Utility Holding Company Act of 1935 (15 U. S. C. 79k (d), (e) and (f); 79r (f); 79x) and Section 77 (e) of the Bankruptcy Act (11 U. S. C. 205 (e)) are set forth in the Appendix at pages 45 to 54, inclusive, in the main brief of The Home Insurance Company, et al., in No. 243.

ANALYSIS OF ISSUES AND SUPPLEMENTARY STATEMENT.

The limited purpose of this sub-division is to clarify the issues, which we think have become confused by certain fundamental inaccuracies and omissions in the statement and argument in the brief of Central-Illinois Securi-

ties Corporation et al. The importance of the deficiencies and their correction may be more readily comprehended if they are considered in relation to the respective contentions of the opposing sides, particularly the contention of each side that it is entitled to succeed as a matter of law without remand to the Commission.

Summary Analysis of Central-Illinois' Contentions.

The Central-Illinois group of common stockholders contends that the preferred stockholders are not entitled to any amount in excess of $100 per share plus accrued dividends as a matter of law on six bases, namely: (1) the *Otis* case (323 U. S. 624) is distinguishable and the involuntary liquidation preference in the charter is controlling (pp. 33-50, 106-113); (2) if the involuntary liquidation preference is not controlling, nevertheless, the enterprise has been frustrated by Section 11 (b) of the Holding Company Act and the preferred stockholders should, on a theory of rescission, be limited to the amounts which they or their predecessors contributed to the enterprise, theoretically (sic) mirrored by the face amount of the security (which in this case must mean the applicable stated capital, since the shares have no par value) (pp. 51-67, 114-123, part, 57); (3) the Commission's valuations represent only transient market values and the preferred stocks cannot properly be valued at any amount in excess of $100 per share on the basis of any collection of relevant financial factors or evaluation of the correlative rights of the two classes of stockholders (pp. 72-106); (4) the District Court is not bound to give effect to the findings and conclusions of the Commission (pp. 124-148), and in any event the Commission abused its discretion (p. 125); (5) the District Court decided only that the Commission could not lawfully award more than $100 per share as the outer limits of permissible action by the Commission on the record, and the Court of Appeals erred in holding that the District Court valued the preferred stocks or substituted any valuation of its own

for that of the Commission (pp. 154-156); and (6) the escrow agreement and related orders of the Commission constitute advance approval by the Commission of the plan as modified by the District Court and remand is therefore inappropriate (pp. 148-153).

The common stockholders seek corroboration for these end results in the findings and conclusions of one or more of the three tribunals, and in the marshalling of such evidence, within or without the record,[1] as furnishes or seems to furnish support for the argument. Apart from such basic questions of law as the effect of the involuntary liquidation preference, or the existence and application of the frustration doctrine, the common stockholders have the considerable task of showing that there is no factual basis to support a valuation of more than $100 per share and that no other conclusion is permissible. Only in this way can the related factual questions be converted into questions of law and the impact of the substantial evidence rule avoided. Recognizing this necessity, the common stockholders, make the following assertion (p. 125):

> "To reach its determination that the plan as approved by the Commission was not fair and equitable, the District Court was not required to disturb, and did not disturb, any factual finding of the Commission. Virtually all the facts upon which the District Court rested its conclusion had been found by the Commission. No attack was made in the courts below, and so far as we are aware none is made here, by any party, upon the accuracy of the facts recited in the District Court's opinion or in its findings. The District Court differed with the Commission's ultimate conclusion, based upon admitted and undisputed facts as set forth in the Court's opinion and findings. And, where the *conclusion* of the Commission upon the facts is, as here,

[1] See, e. g. footnotes, pp. 12, 41, 43, 69, 76, 77, 78, 86, 90, 95, 96, 97, 101, 102, 118, 119.

> either without rational basis or contrary to law, even a 'review' court exercising the most limited review functions would have the power to set aside the conclusion."

Thus the common stockholders set for themselves the task of disqualifying the valuations of the Commission in their factual as well as legal aspects. As part of this undertaking they attempt to show that these valuations are merely transient or speculative market values as of January, 1946; that "the Commission merely accepted Badger's estimate of the hypothetical market prices at which the preferred stocks would have sold at the time of his testimony, assuming liquidation were not to take place," and that Badger's opinion "was not based on the intrinsic merit of the preferred stocks as an investment, but admittedly upon the unprecedentedly low money rates then prevailing" (p. 14).[2] They couple this with argument that the market values could not possibly exceed $100 per share and imply that the Courts so found, presumably on the basis of undisputed facts and as a matter of law. Having thus excised the valuations of the Commission, they say the District Court necessarily examined all the factors *in the record* (italics supplied) which could be deemed relevant under any standards recognized in the statute and judicial decisions. They say that these factors could lead to no other conclusion than that reached by the District Court and there is no valid basis for remand, since the Commission has already approved the result under the escrow agreement.

In contrast, the Commission and preferred stockholders contend that they are entitled to the amounts approved by the Commission as a matter of law on three[3] main bases,

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[2] The same idea is restated in numerous ways throughout the brief (e. g. pp. 74-79).

[3] The Streeter group is also contending that the retirement of the preferred and the liquidation are voluntary (Streeter Brief, pp. 99 et seq.).

namely: (1) the involuntary liquidation preference in the charter is not controlling and the preferred stockholders are entitled to receive the value of the preferred stocks on a going concern basis with full priority as the equitable equivalent of the rights surrendered; (2) the Commission's valuations of the preferred stocks are based on the consideration and weighing of all relevant factors, and conversely, the decision of the District Court is based on irrelevant factors; and (3) since the findings of the Commission are supported by substantial evidence and have rational foundation in law; they are binding on the District Court. Remand to the Commission would be necessary only if, as a matter of law, the Commission failed to consider relevant factors, or considered irrelevant factors, or abused its discretion.

We have, therefore, at the factual base a sharp cleavage in approach and evaluation of facts, with the common stockholders striving to show that the Commission abused its discretion in the area of fact finding and also lost sight of the law. Certain major inaccuracies and omissions in statements of fact and characterization bear importantly on the definition of the real issues and their ultimate resolution. Their correction will serve to define more clearly the issues as presented by the opposing sides, to eliminate certain issues or sub-issues posed by the common stockholders, and aid in bringing out the real facts relevant to the real issues.

Supplementary Statement.

The corrections are grouped according to the related issues.

(1) *Statements regarding the charter involuntary liquidation preference and the frustration doctrine.*

Preliminarily we note here the concurrence of the common stockholders in our analysis of the process actually

used by the District Court in reaching its decision. In our main brief we stated that, while the District Court seems to agree that the involuntary liquidation preference is not controlling, the Court, nevertheless, treated it as a ceiling for the compensation to the preferred stockholders or at least a major premise for rejecting the findings of the Commission (R. 291a, 316a, Conclusion 4) (Home Brief, pp. 8, 22, 23). The Central-Illinois brief states that the District Court summed up its conclusions by formally finding that the enterprise has been frustrated and terminated by governmental action; that there was no valid basis for hypothesizing a "continuing enterprise" or "going concern" (Central-Illinois Brief, p. 19).

(a) The common stockholders assert that, while the Commission held the involuntary liquidation preference to be a factor to be taken into account, the Commission disregarded it entirely and prescribed the payment of the voluntary liquidation premiums (Central-Illinois Brief, pp. 10, 11, 69). They imply that the dissolution of Engineers was of the type contemplated by the charter (pp. 41-44), and that the Commission was unable to make, and did not make, any finding that the liquidation was not an involuntary liquidation within the meaning of the charter (pp. 39, 44, 45).

The Commission did not disregard the charter provision. The Commission took note of Engineers' statement that it would not be dissolving if Section 11 had not been passed and would have continued into the future for many years (R. 61a, n. 42; See also R. 256a, 635a, 636a, 1240a, 1241a). It found that ordinarily a company in the position of Engineers would exercise its call privilege and redeem its preferred stock at call prices (R. 60a). These considerations completely outweighed the involuntary liquidation factor under the Commission's interpretation of the *Otis* case.

The Commission expressly stated that it must consider all provisions of the charter applicable to the preferred

stocks, such as the dividend rate, call price and liquidation preferences, and must analyze the financial condition of the company with particular regard to the asset and earnings coverage of the stock (R. 62a). It stated it could not accept any argument that the preferred claim is matured by the liquidation and that the involuntary liquidation provision of the charter is the conclusive measure of the claim (R. 61a). Engineers had previously contended that the involuntary preference was not controlling, but only one of many factors to be considered. *The Western Public Service Company*, 12 S. E. C. 804, 814 (1943).

(b) The common stockholders state that the Commission held that the company must pay the preferred stockholders the redemption premiums payable under the charter only on voluntary liquidation or redemption (Central-Illinois Brief, p. 10). This characterization only confuses the issues. The Commission used the call prices as stoppers in reaching its valuations (R. 67a, 68a) and never required the payment of premiums as such.

(2) *The Commission's valuations.*

We have pointed out above (supra, p. 5) how the common stockholders seek to excise the Commission's valuations from the record by first asserting that the Commission did not make any valuations of its own, but merely adopted Badger's valuations, and then characterizing Badger's valuations as irrelevant, transient or speculative market values based upon the low money rates then prevailing and not on the intrinsic merit of the preferred stocks as an investment (Central-Illinois Brief, p. 14). They state (pp. 83, 84) that both Courts so found (R. 310a-315a; 17). They also state that the District Court was not required to disturb, and did not disturb, any factual finding of the Commission (p. 125). The purpose is to make it appear that the record supplies no primary facts or permissible inferences on which the Commission's valuations could be

founded, and conversely, that the record compels valuations not in excess of $100 per share.

Contrariwise, the Commission and preferred stockholders have disputed, and continue to dispute, any characterization of the Badger valuations and Commission valuations as transient or speculative market values not based on intrinsic worth. The characterization of the Commission's valuations as transient or speculative values on the one hand or intrinsic values on the other hand is in itself a fact-finding operation.

Neither the District Court nor the Court of Appeals found that the Commission did not use its own competence in making valuations or that its valuations are not supported by substantial evidence. The Court of Appeals said the District Court treated the Commission's findings and conclusions with respect as was proper (R. 34), which in itself refutes any conclusion that they are not supported by substantial evidence. The District Court, however, went its own way, supplied its own concepts of legal and factual relevance, and its own weight and emphasis to factors deemed relevant by it, on the legal theory that it was not bound by the findings of the Commission even though based on substantial evidence. The Court of Appeals said that the ultimate conclusion of the District Court was at least not clearly erroneous, that is, within some permissible margin of error (R. 39).

Neither the Court of Appeals nor the District Court found that the values of the Commission are in fact transient or speculative values, although the Court of Appeals thought the District Court had found the money rate used by Badger too low (R. 19; Cf. R. 313a, 314a). Neither Court ventured to predict for the foreseeable future an increase in money rates which would invalidate the valuations.

The District Court in its original decision accepted the valuations in the absence of proof of change, and then excised them for entirely different reasons (R. 290a). The attack on the values was first introduced in the findings of

fact and conclusions of law prepared by the common stockholders and adopted by the Court after the opinion was filed (Home Brief, pp. 7-14). For further discussion see *infra* pp. 18-20.

The Court of Appeals said, "We think that it is apparent on a careful examination of the testimony of the two men (Badger and Barnes) that each was testifying to values as of May, 1946, *ex* the Act." (R. 17) The Court does not make any finding that these valuations are not intrinsic values as of the time of valuation, and it could not very well do so on the basis of a careful examination of the testimony. The common stockholders fail to point out that repeatedly Badger stated that he was appraising the intrinsic values of the preferred stocks, and resorted to current market values and yields of comparable stocks and other factors as tests (R. 1014a, 1015a, 1019a, 1033a, 1175a-1177a, 1184a).

In substance the common stockholders are contending that the valuations were stale at the time of the decision of the District Court (Central-Illinois Brief, p. 97). This contention is based on the assembly of financial data outside the record without the benefit of cross-examination of the authors or any opportunity to present countervailing evidence (e. g., R. 314a; Brief, pp. 95-97). Although the District Court accepted the valuations in the absence of any showing of change, the common stockholders are in effect now asking this Court to find as matter of law that the valuations of the Commission were, nevertheless, stale in May, 1947, and are now stale and must be revised to conform to the date of a final decree in this proceeding. This decree, they say, must take into account the "*material supervening changes, not foreseen or allowed for in the Commission's findings*" (italics supplied) and, presumably as a matter of law, direct the Commission to value the preferred stocks at not exceeding $100 per share (p. 98).

We cite these variable contentions and the nature of the evidence proffered in their support because of the as-

sertion that the District Court "was not required to disturb, and did not disturb, any factual finding of the Commission" and that "virtually all the facts upon which the District Court rested its conclusion had been found by the Commission" (Brief, p. 125), although the result depends upon *material supervening changes not foreseen by the Commission and not found to exist by the District Court.*

We think these citations bring back into focus the issues centering on the nature of the valuations of the Commission and the substantial evidence rule. We submit that they completely dispose of the contentions that the Commission's valuations were merely transient market values and not intrinsic values and its findings were irrational and not based on substantial evidence.

(3) *The alleged advance approval by the Commission of the Plan as modified by the District Court.*

The common stockholders state that remand is unnecessary because the Commission had given prior consideration and advance approval to the plan in the form approved and enforced by the District Court's order of May 29, 1947 (Central-Illinois Brief, pp. 16, 157).

This statement is the forerunner of another statement that the Commission correctly recognized that the basic issue was one of legal and statutory interpretation, as to which the last word was not in the Commission but in the Courts (p. 152). The purpose is to by-pass the Court of Appeals conclusion that "the problem is and will remain, until its disposition by the Commission, one of valuation of the securities of Engineers" (R. 40). The contention is based on two incomplete citations from the record at page 150 and 151 in the Central-Illinois Brief designed to make it appear that no further proceedings before the Commission were contemplated in any contingency. The material omissions show just the opposite and are supplied below in italics.

ESCROW AGREEMENT (R. 328a).

"4. Upon delivery to you of an opinion of independent counsel ....., accompanied by a certified copy of the order or decree involved, to the effect that *an order of the Commission in the above mentioned proceedings now pending before it or in any other proceedings under section 11 (b), section 11 (d) or section 11 (e) of the Public Utility Holding Company Act of 1935, or* an order or decree of any court having jurisdiction, has been entered, has become final and is no longer subject to appeal, which *Commission order or* court order or decree determines or finds that the holders of Preferred Stock are not entitled to receive any amounts in addition to the amount of $100 per share plus accrued dividends to be allowed to Preferred Stockholders. . . ."

This paragraph 4 complements corresponding provisions in paragraphs 2 and 3 of the escrow agreement relating to additional amounts found payable to the preferred stockholders (R. 325a-327a).

COMMISSION'S PETITION FOR REHEARING (R. 44).

"If the ruling is that the Commission is bound by the District Judge's determination as to amount, then we believe that no remand to the Commission would be necessary, because the Commission has already contingently approved an alternative allocation of cash to preferred stockholders at the amount of the liquidation preference if as a result of the processes of review in the District Court and on appeal therefrom this should be judicially determined fair and equitable." (Footnote 1)

The Court of Appeals has rejected this contention of the common stockholders, pointing out that the escrow agent may make payment only when the order of the District Court has become final and not subject to appeal (R. 139).

We believe this corrected statement of the facts effectively disposes of the issue without further argument.

In this connection the common stockholders state that the District Court did not make any valuation of the equitable equivalent of the rights surrendered by preferred stockholders or substitute any valuation of its own or that of the Commission. The District Court, they say, decided only that the Commission could not lawfully award to the preferred stockholders more than $100 as the outer limits of permissible Commission action on the record (Central-Illinois Brief, pp. 155, 156).

If the common stockholders mean by their ambiguous statement that the District Court reached its conclusion on the basis of the controlling effect of involuntary liquidation preference in the charter or the frustration doctrine applied with equivalent effect, then their assertions would be correct. But the Court of Appeals said that the problem continues to be one of valuation of the preferred and common stocks, and in this context, any statement that the District Court did not substitute its own valuation for that of the Commission is incorrect. The District Court could not on this theory approve and enforce the payment to the preferred stockholders of $100 per share without making a valuation, whatever its theory.

They also assert that the Court of Appeals "squarely affirmed the determination of the District Court that the provision of the plan for the payment of the premiums was unfair and inequitable" (pp. 21, 154-156).

Further the Court of Appeals never made any finding which prohibits valuations in excess of $100 per share.

ARGUMENT.

Much of the argument in the Central-Illinois brief has been anticipated and answered in the main briefs of the Commission and the preferred stockholders and will not be repeated here. Certain points are further answered in our Analysis of Issues and Supplementary Statement (*supra*, pp. 2-13). The purpose of this argument is to answer certain points raised by the common stockholders and in this respect, this argument supplements the anticipatory arguments.

I.

The Contention That the Charter Involuntary Liquidation Preference and the Frustration Doctrine Preclude Payment of More than $100 Per Share.

We believe that the briefs of the Commission and Streeter Group effectively dispose of the contention that the involuntary liquidation prices for the preferred stocks prescribed by the charter are controlling as a matter of law or equity, and of the attempts by the common stockholders to take Engineer's plan out of the orbit of the *Otis* case. We shall comment here principally on the frustration doctrine.

Central-Illinois cites two cases for the proposition that in reorganizations the equitable equivalent for senior securities "can never exceed the cash amount of the claim", and states that it is not aware of any decision suggesting that the involuntary liquidation claim may be exceeded (p. 36). These cases support neither the proposition nor the statement in reference to this situation.

One case is *Bailey v. Minsch*, 168 F. 2d 635 (C. A. 1, 1948), cert. den. 69 Sup. Ct. 83 (1948). During an equity receivership and while an order to liquidate an investment trust was outstanding, certain debentures were retired at the insistence of the debenture holders in cash.

The Court denied the payment of call premiums and ordered payment at the face amount plus accrued interest. Subsequently the order was revised to permit the continuance of the enterprise on a reduced basis and the motion for payment of premiums was revived. The District Court granted the motion (76 F. Supp. 614) and the Court of Appeals reversed on appeal. The grounds for the limitation were that there was no finding by the District Court of the value of the old debentures or that it was necessary to award the premium to give the equitable equivalent of the old debentures (p. 637); the debenture holders were not being deprived of a favorable investment (p. 638). The Court referred to cases under the Holding Company Act where the possibility of payment of more than the face amount of securities in some situations was recognized, but reiterated that there had been no qualifying finding in this case. Nowhere did the Court say payment in cash could never exceed the face amount of the security.

The other case is *Knight v. Wertheim & Co.*, 158 F. 2d 838 (C. A. 2, 1946), cert. den. sub. nom. *McGuire v. Equitable Office Bldg. Corp.*, 331 U. S. 818. This was a reorganization under Chapter X of the Bankruptcy Act. The original plan provided for payment of debentures partly in convertible bonds and partly in stock. The old debentures appreciated in value above their face amount in anticipation of the consummation of the plan, and the debtor then proposed to amend the plan to pay off the debentures at their face amount in cash. The debenture holders wanted to hold on to the advantages accruing under the first plan and objected. The amendment was allowed. Cases under the Bankruptcy Act are, of course, not in point, since the claims mature.

Bailey v. Minsch (*supra*, p. 14) is a prelude to the "equitable doctrine of frustration" which Central-Illinois advances as an alternative to the involuntary preference (Brief, pp. 51-67; 114-123). It derives from impossibility of performance of contracts by reason of governmental

edict and is characterized by Central-Illinois as a species of rescission by operation of law (p. 57). Central-Illinois then argues that the preferred stockholders are entitled only to the amount contributed by them or their predecessors to the enterprise (pp. 53, 57, 62), which is said to be "theoretically" mirrored by the face amount of the security. The same test is not applied to the common stock, probably for the simple reason that the common stockholders claim all the excess.

This one-sided approach leads to a considerable distortion. Both classes of stockholders are being deprived of the opportunity of sharing in a profitable enterprise. Each class is being deprived of the opportunity of enjoying a pool of capital and its earning capacity. The common stockholders enjoy a leverage through the use of senior capital with limited dividends. The preferred stockholders enjoy a greater security at the cost of a reduced participation in earnings. Each hired the capital of the other for the purpose of exploiting the opportunity. Each is now being deprived of the use of the capital of the other. The common stockholders want to take in addition to the capital amounts contributed by them, all the excess value in the enterprise, that is, the surplus and unrealized appreciation [4] which reflects the strength of the enterprise built by the combined capital. The future stake which the preferred stockholders have in that excess and the earning power is involved in the frustration just as much as is the continuing opportunity of the common stockholders to enjoy the leverage afforded by the preferred capital at the applicable rates or cheaper rates obtainable on refunding.

Incidentally, the common stockholders state (Brief, p. 118) that had Engineers continued, they would have been free to retain the preferred capital ($39,000,000) without limitation of time at an over-all cost of approximately

[4] This unrealized appreciation is substantial. See, for example, valuations of subsidiary stocks by Barnes, (R. 981a-983a; also p. 497a).

5.40%, while realizing some 12½% on this capital (pp. 117-118). The 12½% rate is based on alleged current market values for common stock, and of course, the company would not earn 12½% on the preferred capital; the average rate for the entire capital would be lower.

Since the common stockholders claim all the excess without regard for the amount of capital contributed by them or their predecessors, they must do so on the theory that contractually the common stock is entitled to such excess. They do not, however, accept this theory with respect to alleged losses realized on divestments or lost opportunities arising from divestments, which are cited as reasons for limiting the preferred stockholders to their "theoretical" contribution.

The considerations which lead the Court to adopt the principle of equitable equivalents in the *Otis* case are equally valid under any doctrine of frustration. We are not here dealing with an executory contract but with the product of approximately 20 years of operations. The original contributions of the limited partners and general partners are not true measures of their relative positions in the enterprise at the time of its dissolution in June, 1947. Talk about disappointed expectations on one side or the other accomplishes nothing. The disappointments are mutual. As the Court of Appeals said the problem continues to be one of valuation of the respective claims.

In this case the common stockholders have elected to take the stocks in the operating companies and the other residual assets and pay off the preferred stockholders in cash. They selected the form of the remedy. They seek to take the whole excess over the involuntary liquidation preference of the preferred stocks by maturing their claims as common stockholders, and thereby deprive the preferred stockholders of a position found to have value at least equal to the voluntary redemption prices as the equitable equivalent of the rights surrendered. The windfall would go to the common stockholders.

II.

The Contention That the Preferred Stocks Could Not Be Valued at More Than $100 Per Share.

We have already described the nature, purpose, and to some extent the quality of this effort (Central Illinois Brief, pp. 72-106) in the Analysis of Issues and Supplementary Statement (*supra*, pp. 3-5, 8-11). By an admixture of data selected from record and non-record sources, assumptions, characterizations, and computations on variable bases, we are told that a present price for the preferreds would probably be less than $90 per share on a comparable yield basis (Brief, pp. 95-96, n. 2) and approximately $70 per share on the basis of normal earnings capitalized (p. 101, incl. n. 2). The purpose, of course, is to make it appear that payment of $100 per share was liberal treatment (p. 96). The subjective nature of the processes and the weaknesses of the techniques and results are readily apparent on reading. We will not, therefore, undertake a detailed exposure and will continue to rely on the special competence of the Commission as reflected in its findings and the acceptance of the Badger values by the District Court (R. 290a).

We will, however, comment on the use made by the common stockholders of Findings Nos. 41 to 54, inclusive, of the District Court (R. 310a-315a). Included in these findings are certain findings (Nos. 49-54, inclusive) of prospective import. They include an enumeration of factors which might in the future adversely affect the valuations of the preferred stocks. They include statistics relating to declines in market prices of securities in the terms of averages and a concomitant trend toward somewhat higher money rates (R. 314a). These findings are cited as proof that the District Court based its decision on such factors (Central Illinois Brief, pp. 85, 97).

In our main brief we pointed out the difference in the approach and findings of the District Court in its opinion

as compared with the subsequent findings (Home Brief, p. 7). In the opinion the District Court accepted the Badger valuations, but scaled them down to $100 per share because of other off-setting factors not in any way related to market conditions or money rates (R. 290a). The Court did not in its opinion charge that the Commission valuations or the Badger valuations were transient market values or challenge the stability of the prevailing money rates. Actually the Court used the low money rates to challenge the fairness of the preferred dividend rates as excessive and to scale down the preferred contract for the purpose of evaluating the equities on its own scales (R. 291a) (Home Brief, pp. 23, 24). In this way the low money rates were integrated in the Court's findings.

In Finding No. 52 the District Court said (R. 314a):

> "Continuance for two or three years of the trend indicated over the past year could substantially reduce or wholly eliminate the differential in the current yield rate over dividend rate in the case of preferred stocks of the type of Engineers."

The common stockholders ask that this observation be accepted as a prophecy come true (Central-Illinois Brief, pp. 97-98). We submit that it cannot now be demonstrated that there has been any substantial departure of a permanent nature from the money rate levels prevailing at the time the valuations were made, or that any increases which may have occurred substantially reduce or wholly eliminate the differential between the dividend rates for the preferred stocks of Engineers and the yield rate of 4.6% adopted therefor by Badger. Certainly such speculations should not now be substituted for valuations based on substantial evidence and applicable when the preferred stocks were surrendered in June, 1947.

Findings such as No. 52 are susceptible to subtle applications on appeal. They can be brought into play whenever the indicated trend seems to have set in. Whether

or not the indicated trend has set in and is something more than a fluctuation of temporary nature is usually determined by hindsight. We submit that the supplemental findings of the District Court should be evaluated with relation to the original decision of the District Court, which on its face was based on a wholly different theory. The following observation in *Matton Oil Transfer Corp. v. The Dynamic, et al.*, 123 F. 2d 999, 1001 (C. A. 2, 1941) is appropriate:

> "We agree fully with the spirit and the terms of the resolution passed by a majority vote of the judges at our Judicial Conference of last June recommending 'that the trial judge make brief, pertinent findings in respect to contested matters and file the same in connection with his opinion.' This puts the emphasis where it should be, namely, on brief and pertinent findings of contested matters, and also upon a finding made as a part of the judge's opinion and decision, rather than the delayed, argumentative, over-detailed documents prepared by winning counsel after the event which often appear in appellate records, though they are not effective aids to adjudication."

See also *United States v. Forness*, 125 F. 2d 928, 942 (C. A. 2, 1942).

III.

The Contention That the District Court May Exercise Its Independent Discretion and Is Not Bound by Findings of the Commission Based on Substantial Evidence and Having Rational Foundation in Law.

The common stockholders have said that "the disagreement of the District Court with the Commission as to the payment of premiums was basically a disagreement as to applicable legal principles" (Central-Illinois Brief, p. 16). As pointed out above (pp. 4-5, 8-11) they include in this characterization of the issues, the postulate that as mat-

ters of law there is no evidence or no substantial evidence to support a valuation of more than $100 per share for the preferred stocks, and the contention that even if there is substantial supporting evidence for the valuations of the Commission, the substantial evidence rule does not apply to the District Court in Section 11 (e) proceedings. It is not clear whether they would consider findings of fact by the District Court based on substantial evidence binding on the Commission, but looking in that direction is the statement of the Court of Appeals that the District Court's decision should stand if not clearly erroneous. (R. 39).

The Commission and preferred stockholders contend that, as matters of law, the substantial evidence rule does apply and that there is substantial evidence to support the valuations of the Commission. We are, therefore, in agreement that the difference between the District Court and the Commission was basically a disagreement as to applicable legal principles, but for different reasons. If the Commission failed to consider and weigh any factors legally relevant, then, of course, further fact-finding operations by the Commission will be necessary.

The existence of substantial evidence to support the findings of the Commission has been demonstrated in the main briefs of the Commission and the preferred stockholders. In our supplementary statement we have exposed and corrected the postulates of the common stockholders in this respect (*supra*, pp. 4-5, 8-11). Likewise, the respective roles of the Commission and District Court and the standing of administrative findings in Section 11 (e) have been thoroughly covered and the arguments of the common stockholders anticipated and answered.

We have said that the resolution of this question is largely a matter of attitudes (Home Brief, p. 39). Congress has set up a statutory plan for carrying out the integration and simplification of holding company systems and it may fairly be assumed that it intended to have a workable plan. If the district courts are to exercise inde-

pendent, full, self-contained, plenary judgment, if they are to exercise independent discretion and be sustained so long as their conclusions are not clearly erroneous, we do not have a workable plan. Sincere and objective fact-finding is exposed and subordinated to the need for workability and for results which then can only be obtained by compromises.

We return to the suggestion that the stature of the findings of the Commission is as great in the District Court as in the Court of Appeals where such findings are conclusive if based on substantial evidence.

Respectfully submitted,

FRANCIS H. SCHETZ,
Attorney for The Home Insurance Company, et al., Petitioners-Respondents.

January 5, 1949.

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No. 227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

THOMAS W. STREETER, *et al.*,
Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORP., C. A. JOHNSON, LUCILLE WHITE, and FRANCES BOEHM.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

THOMAS W. STREETER, *et al.*,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORP., C. A. JOHNSON, LUCILLE WHITE, and FRANCES BOEHM.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Thomas W. Streeter, *et al.*, the petitioners herein, pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Third Circuit vacating the decree of the United States District Court for the District of Delaware with directions to enter an order disapproving the plan as not being fair and equitable within the purview of section 11(e) of the Public Utility Holding Company Act and to remand to the Securities and Exchange Commission which had approved the plan.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 12) and the opinion denying the prayers of the petitions and cross-petitions for rehearing (R. 138) have not yet been reported. The opinion of the District Court (R. 238a) is reported in 71 F. Supp. 797. The findings and opinion (R. 25a) and supplemental findings and opinion of the Securities and Exchange Commission (R. 128a) have not yet been officially reported but are set forth in the Commission's Holding Company Act Releases Nos. 7041 and 7119, respectively.

Jurisdiction.

The judgment of the Circuit Court of Appeals (R. 41) was entered on March 19, 1948. A petition for rehearing (R. 140) was denied on June 11, 1948. The jurisdiction of this Court is invoked in section 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. §347) and made applicable by section 25 of the Public Utility Holding Company Act of 1935 (15 U. S. C. §79y).

Statute Involved.

Section 11(e) of the Public Utility Holding Company Act of 1935 [15 U. S. C. §79k(e)] provides as follows:

> "In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control,

securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

Section 24(a) of the said Act [15 U. S. C. §79x(a)] provides as follows:

"Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his prin-

cipal place of business or in the United States Court of Appeals for the District of Columbia by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any for the modification or setting aside of the original order. The judgment and decree of the court

affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended [28 U. S. C. §§346 and 347]."

Questions Presented.

The holding company which is being liquidated in compliance with section 11 is solvent. Under its charter, the three classes of preferred stock have a call or redemption price higher than their (involuntary) liquidation preference. Each of the three classes of preferred shares has an investment value at least equal to the call price. The following questions are presented:

1. Did the Commission properly apply the "fair and equitable" standards of section 11(e) of the Public Utility Holding Company Act as interpreted in *Otis & Co.* v. *S. E. C.*, 323 U. S. 625, in approving a plan which would pay the preferred stockholders cash equal to the current going concern value of their shares but not in excess of the call price, where this amount exceeds the (involuntary) liquidation preference of such shares under the charter?

2. Where preferred stockholders are accorded the going concern value of their rights surrendered in the liquidation of a holding company pursuant to section 11(e) of the Public Utility Holding Company Act, is the Commission required to reconstitute the history of the company so as to determine whether there have been any losses as a result of divestments or other action taken by the common stock management by reason of the Act, with a view to charging those losses in whole or in part to preferred stockholders?

3. Where a plan under section 11(e) of the Public Utility Holding Company Act satisfies a preferred stockholder's senior claim in cash and the Commission (a) equates the cash received to the value of the interest surrendered by the preferred, and (b) finds that the residual common stock interest is benefited through the retirement of the preferred and that the plan is fair to the common stockholders, is the Commission required to put a cash value on what the common stockholders should receive and surrender?

4. Where a plan under section 11(e) of the Public Utility Holding Company Act is sought to be enforced in a district court and there is no dispute as to the sufficiency of the evidence upon which the Commission based its finding of fairness, is the court authorized to reject such finding on the basis of a discretionary weighing of alleged equities without reference to the limitations upon the scope of judicial review which this Court has held apply to a circuit court of appeals in direct review of a plan under section 24(a) of the Act?

5. Is the scope of review by a district court which has been requested to enforce a plan approved by the Commission pursuant to section 11(e) of the Public Utility Holding Company Act so broad that the district court may substitute its judgment as to the fairness of the plan for that of the Commission?[1]

---

[1] Questions 1-4 have been substantially adopted from the statement of questions in Commission's petition for writ of certiorari. In addition, if certiorari is granted, we shall also argue (1) that the retirement of the preferred stock was voluntary within the meaning of the charter and that therefore the voluntary liquidation preferences were controlling, as an alternative to question 1 above; (2) that where the undisputed investment values are greater than the voluntary redemption prices but the Commission restricts the participation of senior security holders

[Footnote continued on following page.]

Statement.

History of Proceedings.

A proceeding was instituted in the United States District Court for the District of Delaware by the Securities and Exchange Commission ("the Commission") pursuant to sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935 ("the Act")[2] to effectuate a section 11(e) plan of liquidation and dissolution filed by the Engineers Public Service Company ("Engineers")[3] with the Commission, which plan, as subsequently amended, was approved by that body on January 8, 1947 (R. 141a).

On May 15, 1947, the district court filed an opinion (R. 283a) approving the plan except as to that por-

[Footnote continued from preceding page.]

to amounts equal to the call prices fixed in the Company's charter, the plan is not fair and equitable which permits termination of the dividend rights of those security holders while the common stockholders are contesting the payment of the aforesaid full amounts; (3) that the modification or amendment of the plan to provide for the deposit in escrow of the difference between the stated values and the respective call prices of the preferred was improper as it was accomplished without notice and an opportunity to be heard in disregard of pertinent provisions of section 11(e) of the Act.

[2] Act of Aug. 26, 1935, c. 687, Title I §33; 49 Stat. 838, 15 U. S. C. §§79-79z-6, §79k in particular.

[3] Engineers was incorporated in Delaware in 1925 (R. 1403a) primarily to acquire and own public utility properties. The Engineers' system which was put together by Stone & Webster, Inc., an engineering firm, sprawled over many states and was composed of a great many separate corporate entities. Although there were over 12,000 common stockholders, 338 or 2.52% of them owned 72.54% of the stock and of this amount the greatest number of shares was owned directly or indirectly by members of the Stone and Webster families (R. 567a-570a).

tion of it which proposed to retire the outstanding three series of preferred stocks at amounts equal to the respective call prices fixed by the charter (R. 292a). The district court found the preferred stockholders entitled to only $100 per share—the amount specified in the charter as payable in the event of involuntary liquidation. On May 29, 1947, the district court entered its order adopting certain changes in the plan, including the creation of an escrow of the amount in excess of $100 per share and directing the retirement of the preferred stocks at $100 per share and the immediate consummation of the plan as so changed.

On May 29, 1947,[1a] the petitioners filed their appeal from the district court order in the Circuit Court of Appeals for the Third Circuit from which order appeals were also subsequently taken on behalf of the Commission and the Home Insurance group of preferred stockholders. On March 19, 1948, the Circuit Court of Appeals filed its opinion (R. 12), affirming the decision of the district court that the plan as submitted by the Commission was unfair and inequi-

[1] The applications by the petitioners herein for a stay of this order of consummation, pending appeal, were denied in turn by the district court on May 29, 1947 (R. 335a), by the United States Circuit Court of Appeals for the Third Circuit on June 2, 1947 (R. 14) and a Justice of the United States Supreme Court on June 4, 1947. Since then the plan has been consummated except for the distribution of the fund deposited in escrow pursuant to the district court order (R. 39-40).

[1a] One of the petitioners herein is Thomas W. Streeter, a director and preferred stockholder of Engineers, who dissented from the initial plan as unfair in its proposal to retire the preferred stock at $100 per share. At Streeter's insistence the Board of Directors authorized the preferred stockholders to employ independent counsel to insure that the rights of those stockholders would be adequately represented before the Commission and in the courts (R. 473a).

table and vacating the decree of the district court approving the plan as amended, with directions to enter an order of disapproval and to remand to the Commission for further and appropriate action by it. On June 11, 1948, the Circuit Court of Appeals filed its opinion denying the prayers of the petitions and cross-petitions for rehearing (R. 138).

Proceedings before the Commission.

On September 10, 1945, during the pendency of an action before this Court to test the validity of the Commission's divestment orders under section 11(b)(1)[5] of the Act, the Company filed a plan (R. 1307a) under section 11(e) of the Act which was designed to effect compliance with those divestment orders and which also provided for the elimination of Engineers although such action had not been required by the Commission. This plan was the cul-

[5] On February 21, 1938, Engineers registered with the Commission and on February 28, 1940, the Commission instituted integration proceedings under section 11(b)(1) of the Act. In 1941 the Commission ordered the Company to dispose of its interests in two subsidiaries. The Company did not contest this order. On September 16, 1942, and October 6, 1942, the Commission issued other divestment orders which were set aside by the Court of Appeals for the District of Columbia, the cause being remanded to the Commission. *Engineers Public Service Co. v. S. E. C.*, 138 F. (2d) 936 (App. D. C., 1943) cert. granted, 322 U. S. 723 (1944). Certiorari was granted by the Supreme Court, but disposition was not had because of the lack of a quorum. In the meantime, Engineers disposed of the properties which were the subject of Commission's orders, in the consummation of the plan, approved and enforced by the district court's order dated May 29, 1947, the stay of which, as noted above, had been denied in turn by the district and circuit courts and a Supreme Court Justice. On October 20, 1947, the Supreme Court dismissed the appeals as moot [332 U. S. 783 (1947)].

mination of efforts of management stemming from about 1941, during which period several types of plans were considered and discarded, including distributions in kind, a one stock reorganization, a "package" distribution, a partial payment plan, a voluntary exchange plan, etc.[6] After consultation with the major common stockholders, the primary objective was set at the ultimate elimination of the preferred stockholders from the enterprise so as to give the common stockholders direct ownership of the underlying companies.[7]

Accordingly a plan was fashioned (I) to provide for the immediate retirement of the three series of outstanding preferred stocks[8] at the involuntary liquidation price of $100 per share plus accrued dividends by a deposit of that amount by Engineers in favor of the stockholders, the remaining assets thereafter to be distributed to the common stockholders; (II) to permit the later determination of the question as to whether the preferred stockholders were entitled to any amount in excess of $100; and (III) to eliminate Engineers, either by way of dissolution or by merger with one of its subsidiaries (R. 1310a), the merger alternative being removed by amendment by the company during hearings before the Commission.

On December 4, 1946, the Commission issued its findings and opinion (R. 25a, H. C. A. R. No. 7041), in which it found, among other things, that although

[6] R. 475a, 481a, 482a, 675a, 688a, 689a, 691a, 707a, 709a, 715a, 717a, 718a.

[7] R. 583a, 643a, 687a, 719a, 723a.

[8] $5 series, $5.50 series and $6 series. Engineers had no debt. The pertinent charter provisions are set forth at R. 1412a.

the plan was necessary to effectuate the provisions of section 11 of the Act, it was unfair to the preferred stockholders in its proposal to retire their stock at $100 per share. The Commission was of the view that under the principles enunciated in *Otis & Company* v. *S. E. C.*, 323 U. S. 624 (1945), the preferred stockholders were entitled to the current investment value of their securities and that such value was at least equal to the respective call prices of the three series of outstanding preferreds, namely, $105 for the $5 preferred and $110 for both the $5.50 preferred and $6 preferred. The Commission reached this conclusion after (a) consideration of "all provisions of the charter applicable to the preferred, such as the dividend rate and the call price, as well as the liquidation preferences", (b) analysis of "the financial condition of the company, with particular regard to the asset and earnings coverage of the preferred" (R. 62a), and (c) reference to the undisputed testimony of both the preferred stockholders' and the Company's witnesses that the intrinsic values of the preferred were considerably in excess of the call prices (R. 67a). However, the Commission was of the opinion that the call prices placed a ceiling on the right of the preferred to participate in the distribution of the assets (R. 67a).

The Commission stated, also, that it would approve an amendment to permit the deposit in escrow of the amount in excess of $100 per share in the event of further litigation as to the rights of the preferred stockholders (R. 75a). The Commission indicated that the plan would be disapproved unless it were amended to provide for retirement of the preferred at amounts equal to their respective call prices (R. 73a, 299a).

Within the time specified, Engineers filed an amended plan proposing to retire the preferred at amounts equal to their respective call prices (R. 102a). On January 8, 1947, the Commission issued its supplemental findings and opinion and order among other things (a) approving the plan as amended, (b) directing its counsel, in accordance with Engineers' request, to proceed with court enforcement, and (c) finding it fair and equitable to provide an escrow arrangement subject to the enforcement court's jurisdiction in the event of delay due to further litigation (R. 128a, 141a).

Court Proceedings.

In accordance with the Commission's direction, an application (R. 4a) was filed on January 9, 1947 with the United States District Court for the District of Delaware. During the pendency of the aforesaid application, the Commission, pursuant to a request by the President of Engineers (R. 271a, 394a), entered without notice to the preferred stockholders or an opportunity to be heard thereon a so-called order of amendment[9] on February 11, 1947 (R. 165a) permitting the consummation of the plan by an alternative method through the use of an escrow.

On May 15, 1947, the district court filed an opinion in which it concluded "that because of the provision for payment of premium, the plan does not meet the requirements of fairness and equity. With the exception of the payment of redemption premiums, the plan is approved including the Escrow Agreement" (R. 292a). It was the district court's view that a "§11(g) court has the affirmative and independent

[9] It is the Commission's view that the Order of Amendment did not constitute an amendment to the plan (R. 166a, 389a).

duty to consider and find whether a proposed plan, which has been approved by the Securities and Exchange Commission, is fair and equitable" (R. 286a). Stating that the quantum of participation to be allowed the preferred stockholders under §11 was to be measured by standards of "colloquial equity", the district court found that the investment value of the preferred stock was not controlling but was just one of the elements to be considered and that "after consideration of all factors involved" (including issue price, market history, losses due to divestments, "past sacrifices", etc.), it concluded "that $100. would be fair and equitable, but that the payment of premiums would not be fair and equitable" (R. 288a).

On May 29, 1947, the district court entered its findings of fact and conclusions of law (R. 293a) and an order (R. 318a), among other things, (a) adopting the alternative method of consummation via an escrow arrangement, (b) directing the retirement of the preferred stock at $100 per share [despite the Commission's finding that such treatment was unfair] and (c) the immediate consummation of the plan, except for the proposed allowance of the so-called premium. In accordance with this order, the plan has been carried into effect, except for the distribution of the fund deposited in escrow (R. 39-40).

On the appeals filed by the Commission and the Home Insurance and Streeter groups of preferred stockholders, the circuit court affirmed the decision of the district court that the plan, as approved and submitted by the Commission was unfair and inequitable, and vacated the district court's decree for its error in amending the plan to substitute its own estimates of values and approving and enforcing the plan as so amended. It directed the return of the record

for further and appropriate action by the Commission, the remaining problem being one of valuation. The circuit court also noted that in view of its denial of the Streeter motion for a stay made shortly after the entry of the district court's order of approval and enforcement, the plan had been carried into effect except for the payment of the fund deposited in escrow (R. 39-40).

The rationale of the circuit court's decision hinges primarily upon two concepts—(1) the function of a section 11(e) court, and (2) the standards of valuation for determining equitable equivalents. With respect to the first concept the circuit court after an extensive analysis concluded that a "Section 11(e) court must exercise its full and independent judgment as to the fairness and equity of the plan" (R. 33). The circuit court held that the findings and conclusions of the Commission are not binding upon the district court and expressly refused to apply the substantial evidence rule to a section 11(e) proceeding (R. 33), and also refused to follow the principles that "unless the conclusions of the Commission lack rational or statutory foundation they may not be disturbed by the section 11(e) court, or that a reversal of the Commission's judgment by the court may not be effected save where the Commission has plainly abused its discretion" (R. 34).

In reference to the standards of valuation, the court below held that "all pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached by the approach *ex* the Act or the approach *intra* the Act" (R. 38). It stated that the Commission has "misunderstood the principle of equitable equiva-

lents' enunciated by the Supreme Court in the *Otis & Co.* case"; that "the new doctrine of investment value * * * may not be substituted for the doctrine of equitable equivalents"; and that "investment value is and can be only one of a series of factors to be used in arriving at equitable equivalents" (R. 38, 39). The court below also criticized the Commission for its alleged errors in (a) failing to give adequate consideration to such "equities" and "factors" as losses occurring to Engineers by virtue of the divestitures compelled by the Act, future earning power, etc.; (b) adopting inconsistent techniques in valuing the preferred "*ex* the Act" and the common "*intra* the Act"; (c) making "no finding as to the 'value' of the common stock"; and (d) disregarding the fact that "the holding company enterprise is at an end, both for the preferred and common", which fact (according to the court below) differentiates the instant case from The United Light & Power Company reorganizations (R. 35, 36).

Petitions for rehearing were filed on behalf of the Commission and the Home Insurance and Streeter groups of preferred stockholders for the reason, among others, to obtain clarification of various aspects of the opinion below relating to the functions of a section 11(e) court vis-a-vis the Commission and the standard of valuation in simplification proceedings. Answers and cross-petitions were filed on behalf of two groups of common stockholders. The court below denied the prayers of the petitions and cross-petitions, stating that "neither the Commission, nor the district court, nor this Court possesses the power to waive the provision of section 11(e) providing for approval of a plan of reorganization as fair and equitable" (R. 139). It refused to treat the Commission's amendatory order

of February 11, 1947 or its approval of the escrow agreement as a rejection of Commission's statutory role—the order (according to the court below) being merely a device to expedite execution of the plan of reorganization after the requisite statutory approval. In view of its affirmance of the district court's disapproval of the plan as unfair and inequitable, the court below directed the Commission to reconsider the problem presented in the light of its opinion or "procure the review" thereof by this Court (R. 140).

Reasons for Granting the Writ.

The case at bar poses two major issues—the division of functions between the district court and Commission and the significance of the fair and equitable standard in simplification proceedings under the Act—which, together with several subsidiary questions, loom large in the proper administration of the Act. Both major issues directly affect the uniform and practicable enforcement of the Act and their resolution by the court below renders difficult the achievement of uniformity and imposes an impossible administrative burden upon the Commission in the performance of its duties under the Act. The decision of the court below is difficult to comprehend and impossible to apply. It has created confusion and complexity where none previously existed. Moreover, the rights of stockholders under other similar plans may be affected.

I.

1. The decision of the court below appears to be squarely in conflict with decisions of the Circuit Courts of Appeals for the First, Second and Eighth Circuits in respect to the scope of review by a section 11(e) court as to the fairness and equity of a plan. *Ladd* v. *Brickley*, 158 F. (2d) 212, 216 (C. C. A. 1, 1946) cert. den. 330 U. S. 816 (1947); *Lahti* v. *New England Power Ass'n.*, 160 F. (2d) 845, 850-1 (C. C. A. 1, 1947); *Public Service Commission of N. Y.* v. *S. E. C.*, 166 F. (2d) 784, 788 (C. C. A. 2, 1948); *Mitss. Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424, 430 (C. C. A. 8, 1945) cert. den. 327 U. S. 795 (1946). In the case at bar, the court below held "that a Section 11(e) court must exercise its full and independent judgment as to the fairness and equity of the plan" (R. 33) and that the findings and conclusions of the Commission are not binding upon it but should be treated "with respect". It refused to apply the substantial evidence doctrine to the Commission's findings and to hold that the Commission's conclusions may not be disturbed by a section 11(e) court unless they lack "rational or statutory foundation" or that the Commission's judgment may not be reversed by such court except for a clear abuse of discretion (R. 33, 34).[10] In the course of its opinion,

[10] The district judge's view in the instant case as to his "affirmative and independent duty" to consider the fairness and equity of the plan, which the circuit court has in substance adopted, is of relatively recent vintage, and does not square with his own earlier expressions and other decisions within the Third Circuit which are in accord with the majority doctrine of substantial evidence. *E. g., In re Central & South West Utilities Co.*, 66 F. Supp. 690, 692 (D. Del. 1946); *In re Standard Gas and Electric*

[Footnote continued on following page.]

the court below recognized its disagreement in this respect with other circuit courts, stating: "There are decided cases which look the other way and these are entitled to great consideration" (R. 31).

The contrary standard as indicated in the opinion below, has been enunciated in *Mass. Mutual Life Ins. Co.* v. *S. E. C.*, *supra*, where the Eighth Circuit Court said:

"Obviously, whether, upon retirement of out-

[Footnote continued from preceding page.]

Co., 59 F. Supp. 274, 283 (D. Del. 1945), reversed on other grounds, 151 F. (2d) 326 (C. C. A. 3, 1945); *In re United Light & Power Co.*, 51 F. Supp. 217 (D. Del. 1943). Thus in the *Standard Gas* case, *supra*, the same district judge said:

> "* * * Under the substantial evidence rule, we are required and should follow the 'informed' judgment as articulated in the Commission's findings.
>
> * * * *
>
> "Examination of testimony and documentary proofs presented to the Commission demonstrates manifestly there was substantial evidence to support the Commission's findings as to the value of the securities to be disfributed to the Noteholders under the plan. * * *"

In the same spirit, the Third Circuit Court of Appeals, although reversing in the *Standard Gas* case, *supra*, on a point of law, declared:

> "This case does not come to the court as the result of agreement between the parties or the action of a special master approving a plan in the common form of reorganization proceeding. It comes following a thorough consideration by the Securities and Exchange Commission which has a very broad grant of power from Congress in the premises.
>
> "It can be set out as a well established rule of administrative law that the action of an expert administrative body in determining the particular remedial measures demanded in an individual case is not to be overturned by court action unless the administrative body has lost sight of the law. The more technical the subject matter before the administrative tribunal, the more reluctant the court should be, we think, in disagreeing with it on a matter which is a question of judgment" [151 F. (2d) 331].

standing bonds in the reorganization * * * payment of principal, accrued interest, *and* redemption premiums is the equitable equivalent of the bondholders' rights depends upon the facts of each particular case. The proper measure of such equivalence is for the determination of the Commission in the first instance, and its expert skill in appraising the facts to be considered must be accorded due weight by the Court.

"Since there is a 'rational basis' in fact for the finding of the Commission and no 'clear-cut' error of law by either Commission or court, we are not inclined to disturb the conclusion that retirement of the bonds at principal and accrued interest amounts to the 'equitable equivalent of the rights surrendered.'" [131 F. (2d) 430].

Similarly in *Lahti* v. *New England Power Ass'n., supra,*[11] the First Circuit Court sustained the Commission's finding of equivalence saying:

"Appellants' real challenge is to the correctness of the finding by the Commission and the district court that the plan is fair and equitable to the persons affected by it. This finding cannot be upset by us unless it is shown to be without rational basis in fact or to be predicated on a clear-cut error of law.

* * * * *

"* * * We are here in the realm not of mathematical demonstration, but of forecast, based

[11] The district court in this same case [66 F. Supp. 378, 382 (D. Mass. 1946)], said:

"In truth, any court charged with a review of the findings of the Securities and Exchange Commission, in a matter so complex in its nature as is the present proceeding, should accept the findings of the expert body unless it concludes that an error of law has been committed or the findings are of an arbitrary or capricious nature."

upon expert analysis and weighting of a complex array of factors, in which the informed judgment of the Commission counts heavily. It could not be otherwise" [160 F. (2d) 850-1].

The same principle, although not as clearly articulated, appears to have been applied by the Second Circuit Court in the *Public Service Commission* case, *supra*,[12] where the court said:

> "* * * Whether there was any evidence to support the conclusion that the old common shares had any value, based upon the future earning power of the Kings County Company, is an inquiry into which we are not disposed to enter. Any opinion is at best a guess, dependent, among other things, upon what rates the Company will be allowed to charge. There was certainly some basis for the valuation of the SEC when the order of the District Court was entered on July 16, 1947" [166 F. (2d) 788].

Moreover, the standard of "'full and independent judgment'" established by the court below is in conflict with the applicable general principle of review that

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[12] The Second Circuit Court is apparently endorsing the doctrine as announced by the District Court in the same case [72 F. Supp. 767, 783 (S. D. N. Y. 1947)] in the following language:

> "As far as I am concerned, my duty is at an end when I find, as I do, that the action of the Securities and Exchange Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. I do not pretend to have either technical competence or legal authority to pronounce upon the wisdom of the course taken by either commission. *Board of Trade* v. *United States*, 1942, 314 U. S. 534, 548, 62 S. Ct. 366, 86 L. Ed. 432; *National Broadcasting Co.* v. *United States*, 1943, 319 U. S. 190, 224, 63 S. Ct. 997, 87 L. Ed. 344; both of which cases are cited in *Securities and Exchange Commission* v. *Chenery Corp.*, 67 S. Ct. 1575."

courts will uphold an administrative order, if based upon substantial evidence, and not arbitrary nor erroneous as a matter of law as recently reaffirmed by this Court in *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, 208 (1947), and as continually applied in analogous situations.[13]

The second *Chenery* case, *supra*, expounds a doctrine of judicial review of administrative action, which, although deemed not controlling in the case at bar by the circuit court, we submit, is applicable here and at variance with the circuit court's position and affords the correct test of administrative action, whether judicial review occurs via section 11(e) as in the instant case, or via section 24(a)[14] of the Act as in the second *Chenery* case. In the language of this Court in the second *Chenery* case:

> "The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern. * * * Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress. See *National Broadcasting Company* v. *United States*, 319 U. S. 190, 224. . .

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[13] For instance: *National Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 224 (1943); *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 139, 140, 145, 146 (1939); *U. S.* v. *Morgan*, 307 U. S. 183, 199 (1939); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 473 (1943); *RFC* v. *Denver & Rio G. W. R. Co.*, 328 U. S. 495, 508-9 (1946); *Dobson* v. *Commissioner*, 320 U. S. 489 (1948).

[14] Section 24(a) of the Act [15 U. S. C. §79x(a)] provides in pertinent part as follows: "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

"We are unable to say in this case that the Commission erred in reaching the result it did. The facts being undisputed, we are free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation. In that connection, the Commission has made a thorough examination of the problem, utilizing statutory standards and its own accumulated experience with reorganization matters. * * *

"* * * The 'fair and equitable' rule of §11(e) * * * [was] inserted by the framers of the Act in order that the Commission might have broad powers to protect the various interests at stake. * * * The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters" (332 U. S. 207-8).

Hence the scope of review of administrative action is no different, even where, assuming *arguendo*, as the court below suggests, the Commission has announced and applied a "new" "formula" of "investment value" in the evaluation of the rights surrendered in the simplification of a holding company system. Such action is entitled to the "greatest amount of weight", as it lies primarily in the informed discretion of the Commission and is a judgment, of the type which the Commission is especially equipped to make, being based upon statutory standards and its own accumulated reorganization experience. As stated in the second *Chenery* case: "The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight. * * *. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the

type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. * * * Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb" (332 U. S. 209).

Moreover, the decision of the court below is also at variance with, and sanctions the departure by the district court from, the customary standards of judicial review as codified in section 10(e)(B)(1) and (5) of the Administrative Procedure Act [60 Stat. 243, 5 U. S. C. § 1009(e)(B)(1) and (5)]. These codified rules, which have been held declaratory of existing law of judicial review,[15] require the reviewing court to "(B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "(5) unsupported by substantial evidence in any case * * * reviewed on the record of an agency hearing provided by statute". Instead of applying the foregoing codified standards to the Commission's action, the court below maintains that a section 11(e) court is entitled to exercise its own independent judgment in determining the fairness and equity of the plan.

2. A subsidiary question arises from the statement by the court below that a section 11(e) court may "receive evidence *aliunde* the Commission's record respecting the fairness and equity of a plan", and "may decide upon the new evidence and upon that contained in the Commission's record that the plan is unfair and inequitable and remand the proceeding

[15] *Olin Industries* v. *N. L. R. B.*, 72 F. Supp. 228 (D. Mass. 1947).

to the Commission for further consideration". Such unlimited reopening of the administrative record for the receipt of additional evidence is fraught with danger as it permits in effect a trial *de novo* by the district court and is contrary to the rule uniformly and generally applied by the courts in other circuits to section 11(e) proceedings under the Act[16] and implicitly recognized in the cases applying the substantial evidence rule (*supra*, at p. 17). Thus in *In re Electric Bond and Share Company, supra,* the district court said, in quoting from the case of *In re Laclede Gas Light Co., supra*:

> "* * * we can see no more reason for permitting evidence to be offered, other than the record made before the Commission in a hearing under Section 11(e) than in a hearing under Section 24(a) of the Act, and especially do we believe this should be the rule when the Court of Appeals may "modify" or "set aside" order of the Commission "in whole or in part" and yet is restricted in the receipt of evidence, solely to send the case back to the Commission to hear such additional evidence. A reasonable interpretation of the Act does not permit a more liberal rule on hearing additional testimony in a case before the Court under Section 11(e) than under Section 24(a) of the Act." (73 F. Supp. 443).

3. In sanctioning the substitution of the district court's judgment for that of the Commission, the disregard of the Commission's findings and the reopening of the administrative record, the decision of the

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[16] *In re Electric Bond & Share Co.*, 73 F. Supp. 426, 443 (S. D. N. Y., 1946); *In re Laclede Gas Light Co.*, 57 F. Supp. 997, 1002 (E. D. Mo., 1944), aff'd *sub nom. Massachusetts Mutual Life Ins. Co. v. S. E. C.*, 151 F. (2d) 424 (C. C. A. 8, 1945), cert. den. 327 U. S. 795; *In re Jacksonville Gas Co.*, 46 F. Supp. 852 (D. Fla., 1942).

court below, relegates the Commission to a position of comparative insignificance and distorts the legislative division of functions between the Commission and the district court. Cf. *Scripps Howard Radio* v. *F. C. C.*, 316 U. S. 4, 11 (1942). Such distortion of the statutory scheme results from a mistaken rejection of the doctrines of substantial evidence and administrative finality. Yet the Commission's action, when tested by every theoretical and practical reason for administrative finality, is entitled to the highest credit in the courts—its independence, expertness, procedures, staffing, the complexity of the subject, etc.

Furthermore, the consideration of a uniform and expeditious administration of the Act requires that the Commission be given all the credit to which it is entitled under the law and that its decisions receive identical treatment. The dispersal of section 11(c) enforcement proceedings to district courts all over the country tends inevitably to produce conflicting decisions[17] and the concomitant lack of uniformity, particularly if every district court is given the power to substitute its judgment for that of the Commission. Uniform application of the Act can only be accomplished by the coordination of the standards of review under section 11(e) and section 24(a) on the basis of the substantial evidence rule and the doctrine of administrative finality as enunciated by this Court.

[17] It is not inconceivable that such a conflict as suggested in the instant case might lead to a stalemate and a consequent frustration of Congressional intent.

II.

The opinion of the court below is in conflict in several respects with the applicable decisions of this Court, particularly *Otis & Co.* v. *S. E. C.*, 323 U. S. 624 (1945), and *Schwabacher* v. *United States*, 334 U. S. 182 (1948).[18] Paying lip service merely to the *Otis* principles, the court below has in reality strayed far afield from the rules established by this Court and has enunciated the following conflicting doctrine in evaluating the rights surrendered upon simplification under section 11(e) of the Act:

> "* * * All pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached by the approach *ex* the Act or the approach *intra* the Act. The new doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equitable equivalents enunciated in the *Otis & Co.* decision" (R. 38).

1. These criteria, apart from their nebulous and ambiguous character, represent only a mirage of consistency with this Court's views and in reality, reject the conception that the phrase "fair and equitable" as used in section 11(e) of the Act imports the principle of full priority as developed in the receivership and bankruptcy reorganization cases. In place of the principle of full priority, the court below proposes a variable and uncertain theory of "all pertinent factors and all substantial equities"—apparently simi-

[18] In a letter dated May 11, 1948, during the pendency of the rehearing, General Counsel of the Commission drew the circuit court's attention to the *Schwabacher* case decided on May 3, 1948, by this Court.

lar to the principle of "colloquial equity"[19] by which the district court in the instant case sought to measure the participation of the security holders. Such non-technical significance of the phrase "fair and equitable", resulting as it does in a substitution of indefinite considerations for the well-defined rights of the security holders, is entirely at variance with the technical definition of that expression, as words of art, in the *Otis* and *Schwabacher* cases which require that full priority in treatment be accorded various classes of security interests—creditors and stockholders and various classes of stockholders *inter sese*,—so that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered. The entire bundle of rights must be determined as though in a continuing enterprise—a going concern apart from the pending reorganization. These principles are announced by this Court in the *Otis* case in the following terms:

> "Like the bankruptcy and reorganization statutes, the Public Utility Holding Company Act, in providing that plans for simplification be 'fair and equitable', incorporates the principle of full priority in the treatment to be accorded various classes of security interests. This right to priority

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[19] This standard of colloquial equity has been articulated, on several other occasions in addition to the instant case by the same district court, *e. g., In re Community Gas & Power Co.*, 71 F. Supp. 171 (D. Del. 1947); *In re Cities Service Co.*, 71 F. Supp. 1003 (D. Del. 1947). In *In re United Light and Power Co.*, 51 F. Supp. 247 (D. Del. 1943), which eventually became the *Otis* case, the same district court announced a similar view, suggesting that the "expression 'fair and equitable' should be given its ordinary non-technical meaning". Despite the district court's statement as to the application of the standard of colloquial equity in the *Otis* case neither this Court nor the circuit court adopted any such nebulous theory.

in assets which exists between creditors and stockholders, exists also between various classes of stockholders. When by contract as evidenced by charter provisions one class of stockholders is superior to another in its claim against earnings or assets that superior position must be recognized by courts or agencies which deal with the earnings or assets of such a company. Fairness and equity require this conclusion. * * * This is the rule applied by the Commission in the simplification of corporate structure. The Commission recognizes and applies the doctrine of full priority by giving value to the rights of the preferred in a going concern rather than as if by sale and distribution * * *" (323 U. S. 634-5).

This *Otis* doctrine, it should be noted, has recently been reaffirmed in the *Schwabacher* case where this Court said:

"In construing the words 'fair and equitable' in a federal statute of very similar purposes, we have held that although the full priority rule applies in liquidation of a solvent holding company pursuant to a federal statute, the priority is satisfied by giving each class the full economic equivalent of what they presently hold, and that, as a matter of federal law, liquidation preferences provided by the charter do not apply. We said that, although the company was in fact being liquidated in compliance with an administrative order, the rights of the stockholders could be valued 'on the basis of a going business and not as though a liquidation was taking place'. Consequently the liquidation preferences were only one factor in valuation rather than determinative of amounts payable. *Otis & Co.* v. *Securities & Exchange Commission*, 323 U. S. 624" (334 U. S. 199).

2. Moreover, reference to various "factors" and "equities" which, in the opinion of the court below, merit special consideration, reveals further deviations from the applicable decisions of this Court. Thus, the court below requires the Commission to consider and weigh into the calculation "substantial losses which occurred to Engineers by virtue of divestitures compelled by the Act".[20] Even assuming *arguendo* that these losses can be traced and attributed to the operation of the Act, this requirement is not only in conflict with the *Otis* principle of "full priority" as indicated above but, in compelling a re-examination of divestments and other transactions executed pursuant to the Act, it constitutes a collateral attack in violation of the salutary policy underlying the doctrine of *res judicata,* upon final decisions, such as the *Puget Sound* divestment, in which the plan proposed by a common stockholder management has already been enforced by the United States District Court for the

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[20] After disposing of Engineers' insubstantial contention to restrict the preferred to $100 because of the alleged *Puget Sound* "loss", supposedly caused by the Act, the Commission commented:

> "In passing, we should point out that we do not accept counsel's hypothesis that the *Act* has caused the asserted losses. In all of its divestments, Engineers has been free in its choice of methods, and, within limits, to choose the time for divestment. All sales have been negotiated by Engineers at arm's-length. If, as in the case of *Puget Sound*, the sale brought less than the carrying value on the books of Engineers, the indication is that the carrying value was excessive and not that the sales price was low. It is significant that the market price of Engineers' common when the plan was filed was the highest since 1932 and that the price has been rising steadily since 1942 when the program of simplification got under way. As shown in Footnote 45, *supra*, Engineers' common reached a low of 1⅛ in 1935. By 1945, when the plan was filed, it had reached a high of 37" (R. 72a, fn. 55).

District of Massachusetts.[21] Such suggested re-examination clearly flies in the face of the well-settled doctrine of *res judicata* as enunciated in the recent cases of *Commissioner* v. *Sunnen*, 333 U. S. 586 (1948) and *Sherrer* v. *Sherrer*, —— U. S. ——, 92 L. Ed. 1055 (1948).

Furthermore, the effect of weighing the alleged losses arising from divestments for the benefit of the common, as the court below directs, results in substance, in the subordination of the claim of the preferred to that of the common to the extent of such losses, even though the history of Engineers reveals no "spoliation, mismanagement and faithless stewardship" by the preferred. The voting common, not the preferred, have occupied a position of complete control. Accordingly, the subordination of the preferred stockholders would constitute a misapprehension and misapplication of the "Deep Rock Doctrine", as recently restated in *Comstock* v. *Institutional Investors*, —— U. S. ——, 92 L. Ed. 1360, 1370 (1948), citing *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, 83 L. Ed. 669 (1939) and *Pepper* v. *Litton*, 308 U. S. 295, 84 L. Ed. 281, 290 (1939). Nor do the public preferred stockholders in the instant case fall within the ban of the principle established by the Commission and sustained by this Court in *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194 (1947), under which management insiders are limited to cost on their purchases of securities during a reorganization.

Other "factors" and "equities" to be considered in view of the circuit court's affirmance of the district

[21] *Puget Sound Power & Light Co.*, 13 S. E. C. 226 (1943), plan approved and enforced, civil action No. 2308 (D. Mass. 1944).

court's views, although not expressly mentioned in the opinion below, are, in the language of the district court, the so-called "past sacrifices and contributions of the common", including such historical "factors" and "equities", as issue prices, market prices, brief period of dividend omission, retained earnings, etc. This approach involves a shift in emphasis to factors entitled under the decisions to but little weight and away from elements, such as current rights to earnings and assets which are entitled to primary weight. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523 (1943); *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 632 (1945); *Lahti* v. *New England Power Assn.*, 160 F. (2d) 845 (C. C. A. 1, 1947); *Phillips* v. *S. E. C.*, 153 F. (2d) 27 (C. C. A. 2, 1946), cert. den. 328 U. S. 860 (1946). It in effect, seeks to restore "values * * * already lost under the operation of economic forces" contrary to the principle proclaimed as follows in the *Schwabacher* case:

> "* * * Public regulation is not obliged and we cannot lightly assume it is intended to restore values, even if promised by charter terms, if they have already been lost through the operation of economic forces. Cf. *Market Street R. Co.* v. *Commission*, 324 U. S. 548. In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good" (334 U. S. 199).

Accordingly, the circuit court's rejection of the technical definition of "fair and equitable" as embodying the principle of "full priority" described above

and its application of the standard of "all pertinent factors and all substantial equities" constitute a misconception of the *Otis* case and are at variance with the *Otis* and *Schwabacher* cases. Moreover, its substitute criteria, under which the extent of participation is measured by irrelevant factors extrinsic to the contract rights of the security holders, affords no rational basis for the administration of the Act upon a uniform national basis and will necessarily create a lack of uniformity in view of its dependence upon determinations of the weight of various intangible factors by different enforcement courts all over the country.

3. The court below also states that "No particular, specific approach [to the problem of valuation] is to be nailed to Commission's head" and suggests that an approach either "*intra* the Act" or "*ex* the Act" could "lead to just and appropriate valuations". Such choice of alternative methods of valuation is erroneous and contrary to the opinions of this Court in the *Otis* and *Schwabacher* cases. The approach "*intra* the Act" requiring valuation as if the liquidation pursuant to the Act falls within the coverage of the charter liquidation provisions would violate the *Otis* rule of "inoperativeness" as enunciated in the following statement from this Court's opinion:

> "* * * We think, however, the charter preference is inoperative in simplification under §11(b)(2). The provision having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a 'simplification' under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated 'liquidation' within the meaning of Power's charter provision. * * * The Commission in its enforcement of the

policies of the Act should not be hampered in its determination of the proper type of holding company structure by considerations of avoidance of harsh effects on various stock interests which might result from enforcement of charter provisions of doubtful applicability to the procedures undertaken. Where pre-existing contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate. * * *" (323 U. S. 634-8).[22]

Moreover, the foregoing interpretation of "*intra* the Act" would appear to be inconsistent with the circuit court's statement that the charter provisions are "not dispositive of the issues presented".[23] But even assuming the proper application of the *Otis* rule of "inoperativeness" in view of the circuit court's express statement in this connection, the phrase "*intra* the Act" would seem to imply valuation "as if the Act had been passed" or the converse of the phrase "*ex* the Act", as defined in at least one place in the opinion of the court below to mean "as if the Act had *never* been passed". A literal application of this interpretation would involve the reconstitution of Engineers' assets by recording and appraising the effects of the operation of the Act for the past 10 years upon the Engineers' system and possibly the whole public utility industry. Since such reconstruction is at variance with the applicable decisions of this Court, imposes an impossible administrative burden upon the Commission, and is based upon a misconception by the court below of the significance of the phrase "*ex* the Act", as will be demonstrated *infra* at p. 35

[22] Engineers was incorporated in Delaware in 1925 (R. 1403a).
[23] R. 34.

ff., this definition of "*intra* the Act" must necessarily be found to be erroneous.

It may be that the above interpretation of the expression merely harks back to the following quotation from the opinion of the district court to which the court below refers as "the greatest difference between the respective approaches of the court and the Commission to the problem of valuation":

> "'I do not consider the argument advanced [by the Commission] as to what these series of preferreds would be worth if there were no Public Utility Holding Company Act. I do not think it profitable to consider an argument based on unreality *for there is a Public Utility Holding Company Act.* Unless one subscribes completely to the doctrine of foreordination things might always be different from what they are.'" (R. 20).

Under such view, an appraisal "*intra* the Act" would require the rights of the security holders to be measured in terms of the situation created by the statute, *i. e.*, as though a liquidation were taking place and not in terms of the situation terminated by it.[24]

[24] This statement is the converse of a quotation from the opinion of the Commission in *United Light and Power*, H. C. A. R. No. 4215 p. 13 [13 S. E. C. 12] (1943), which appears as follows in the opinion of this Court in the *Otis* case:

> "'Under the circumstances, fair and equitable compensation will be given to all of the claimants if their rights are measured not in terms of the situation created by the statute but rather in terms of the situation terminated by it—*i. e.*, as though no liquidation were to take place. In this way each class of stock will be accorded its proportionate share of the benefits to be gained from the elimination of a useless and expensive corporate entity and from the receipt of a security representing a more direct investment in the underlying assets and earnings of the system.'" (323 U. S. 635, fn. 17).

Accordingly, this concept runs counter to the *Otis* case under which the preferred and the common were given the equivalent of their participation "as though in a continuing enterprise instead of in liquidation".

It is clear that, under the *Otis* case, contrary to the above implication of "*intra* the Act", as used by the court below, one class of security holders is not permitted to take advantage of a situation created by Congress to secure a benefit at the expense of the other, and both are held to the value of their bargains *inter sese* without reference to the liquidation or reorganization process in accordance with the policy expressed as follows in the *Otis* case: "Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders" (323 U. S. 637).

In short, the approach "*intra* the Act" does not under any conceivable interpretation establish a sound standard for determining equitable equivalents and is also inconsistent with the views of this Court as indicated above. In any event, it is nowhere explained with sufficient clarity to provide the Commission with an adequate guide for valuation. Indeed the attempts by appellants (including petitioners herein) to secure clarification on rehearing by the court below, were unavailing (R. 140).

4. The alternative approach "*ex* the Act" signifies in the opinion of the court below valuation "as if the Act had never been passed". This significance of "*ex* the Act" appears to require an historical review of the past 10 years' activities in the Engineers' system and the public utility industry, with an eye toward the elimination of the effects of the Act and

the reconstruction of Engineers on that basis.[25] A retroactive readjustment of benefits and detriments (or profits and losses) so as to eliminate the effects of numerous orders of the Commission, interspersed among a variety of independent and possibly unrelated causal factors as the economic, political and scientific forces of the times, creates an infinite assignment impossible of fulfillment, and imposes an overwhelming burden upon the Commission, in its administration of the Act. Furthermore, such re-examination represents a collateral attack upon final judicial and administrative decisions in disregard of the doctrine of *res judicata*, as indicated above. Lastly, this valuation "*ex* the Act", predicated upon the aforesaid historical analysis, is not reconcilable with the "current worth" rule of the *Schwabacher* case and the "going concern" doctrine of the *Otis* case. In other words, the phrase "*ex* the Act" must mean "apart from the reorganization compelled by the Act", or "on the basis of a going business and not as though a liquidation were taking place", in the language of the *Otis* case as applied by the Commission, and cannot possibly be construed to mean "as though the Act had never been passed", the approach suggested by the court below. As this Court said in the *Otis* case:

> "We reach the conclusion that the Securities and Exchange Commission applied the correct rule of law as to the rights of the stockholders inter sese. That is to say, when the Commission proceeds in the simplification of a holding company system, the rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stock-

[25] Converse of the interpretation of "*intra* the Act" discussed at pp. 33-35 of this Petition.

holders may be evaluated on the basis of a going business and not as though a liquidation were taking place" (323 U. S. 633).

5. In addition, the court below criticizes the Commission for its alleged disregard of what it conceives to be a substantial difference between the instant case and the *United Light and Power* reorganizations, namely, the termination of the holding company enterprise both for the preferreds and the common in the former[26] and the continuance of the holding company enterprise in the latter, there being merely a shift of "the security holder participation in the enterprise from the top holding company * * * to a subsidiary holding company". Thus the court below approves the district court's valuation in the instant case "of the securities '*ex* the Act', considering the holding company enterprise to be at an end, as it is in fact" (R. 36).

In the first place the attempted distinction overlooks this Court's admonition in the *Otis* case that "The reason [for its decision] does not lie in the fact that the business of Power continues in another form". Secondly, the statement of the court below when carried to its logical conclusion results in improper emphasis upon the procedural sequence of simplification, even though, as this Court has said in the *Otis* case, values should not "be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the device of merger or consolidation". Procedural deci-

[26] In contrast, the district judge considered the *Otis* rule to apply to a situation in which there is a true liquidation rather than a nominal or formal liquidation (R. 288, fn. 2).

sions, such as the selection of a particular sequence in or method of system adjustment (especially since in the case at bar the choice has been made by the common stock management of Engineers[27]), should not affect rights.[28] So said this Court as follows in the *Otis* case:

> "* * * Satisfaction of the great-grandfather clause might have been obtained in this or other holding company systems by an order for merger, consolidation or recapitalization between top holding companies or between associate companies in the lower tiers of the corporate hierarchy. Such procedure would avoid the liquidation of Power. * * * The selection by the Commission of one method of system adjustment to accomplish simplification rather than another is an incident which ought not to affect rights" (323 U. S. 631).

6. The court below, having apparently misconceived the meaning of "*ex* the Act," as indicated above, unjustly censures the Commission for allegedly adopting inconsistent techniques or methods in valuing the preferreds "*ex* the Act" and the common "*intra* the Act". In reality the Commission valued both the common and preferreds "*ex* the Act" or apart from the reorganization in accordance with the principles enunciated in the *Otis* case. Applying the doctrine of full priority, the Commission first valued the preferreds, and consequently, in valuing the preferreds apart from reorganization or on a going concern basis, necessarily reciprocally valued the com-

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[27] R. 718a, 719a.

[28] Under section 11(e) of the Act the choice of an appropriate method of compliance from available alternatives is left by the Commission to the company or as in the instant case to the common stock management of Engineers. *Commonwealth & Southern Corp.* v. *S. E. C.*, 134 F. (2d) 747, 751 (C. C. A. 3, 1943).

mon, by the same standard. In other words, since the total enterprise is to be divided between two claimants, the preferreds and the common, once the preferreds have been valued on a going concern basis and that value subtracted from the total, it appears obvious that the residual value is thereby established for the common, on the same basis. The preferreds are entitled, according to the Commission, to amounts equal to their redemption prices as the equitable equivalents of the rights surrendered,[29] and the common entitled, in exchange for their rights, to the remaining assets or the securities in the operating companies, there being no need to place a dollar value on the securities thus received in exchange.[30]

The Commission, in determining fair and equitable treatment for the preferred in the instant case, has applied the usual technique in valuing senior securities, such as bonds, upon retirement unaccompanied by the liquidation or dissolution of the particular holding company.[31] In both situations, namely, the

[29] Common stock management selected the type of distribution (*i. e.*, cash for the preferreds and underlying securities for the common). The preferreds were not permitted to participate or retain a stake in the continuing enterprise in any form whatsoever (including the underlying securities) as the common stock management wanted to retire or treat the preferreds otherwise (R. 719a).

[30] Full compensatory treatment may properly be made in either cash or securities by both the I. C. C. and the Commission. *Standard Gas & Electric Co.*, 151 F. (2d) 326 (C. C. A. 3, 1945); *Georgia Power & Light Co.*, H. C. A. R. No. 5568, plan enforced (M. D. Ga. 1945); *New York, N. H. & H. R. Co.*, 147 F. (2d) 407, 47 (C. C. A. 2, 1945), aff'g 54 F. Supp. 595, cert. den. 325 U. S. 884 (1945); *Chicago Railways Co.*, 160 F. (2d) 59 (C. C. A. 7, 1947).

[31] The analogy is clear when the Engineers' plan is viewed as embracing two separate phases or transactions, (1) the retirement of the preferred stock; and (2) the subsequent dissolution of Engineers, resulting in the distribution of securities in the underlying operating companies to the common stockholders.

elimination of the preferred in the instant case and the retirement of bonds, a dollar value is placed upon these senior securities, while the junior securities or the common stock receive the residual value, consisting of securities in the operating companies as in the instant case, in view of the dissolution of Engineers. The same result is achieved by the common stockholders' acquisition of the complete ownership of the holding company enterprise in the situation where retirement of the senior securities occurs without dissolution.[32] Therefore the circuit court's criticism that the Commission "made no finding as to the 'value' of the common stock" is without substance,[33] for the Commission merely did not place a dollar sign on the rights surrendered by the common[34] but has expressly found that the "plan is fair to the common stockholders" and that the "retirement of the preferred stock will be of immediate benefit to the common stockholders". Hence the Commission has determined that the residual value of Engineers, namely the securities in the operating companies received in exchange, is the equitable equivalent of the rights surrendered by the common. In such a case a distribution may properly be made without dollar valuation. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523, 565 (1943); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 482 (1943); *Otis & Co.* v. *S. E. C.*, 323 U. S. 624

[32] A dissolution of a holding company means little more than the receipt of securities in the operating company in lieu of the present shares in the holding companies. *American Power and Light Company* v. *S. E. C.*, 329 U. S. 90 (1946).

[33] No such absence of a finding of value for the common was mentioned by the district judge.

[34] As stated in the *Standard Gas* case: "Actually it was not incumbent upon the Commission to reduce the result to dollars and cents in the process of valuation" [151 F. (2d) 333, n. 12].

(1945). A requirement that dollar values be put upon the rights surrendered and the *quantum* received "would create an illusion of certainty where none exists and would place an impracticable burden upon the entire simplification process." Practical adjustments are required rather than a rigid formula. Accordingly, such determination need not be made by the use of any mathematical formula or with mathematical certitude. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. and P. R. R. Co.*, *supra*, at pp. 565-6.

7. In addition the court below finds fault with the Commission for attempting to substitute "the new doctrine of investment value * * * for the doctrine of equitable equivalents enunciated in the *Otis & Co.* decision";[35] and maintains that "investment value is and can be only one of a series of factors to be used in arriving at equitable equivalents." Even assuming

[35] Certainly novelty is not revealed in the following rationale in the Commission's decision in the instant case:

> "It is settled that in a Section 11 reorganization a security holder must receive, in the order of his priority, from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered. Since under the circumstances of this case, we do not think it proper to regard the liquidation provisions of the charter as conclusive in determining those rights, we must consider all provisions of the charter applicable to the preferred, such as the dividend rate and the call price as well as the liquidation preferences, and we must analyze the financial condition of the company with particular regard to the asset and earnings coverage of the preferred" (R. 62a).

After reviewing the financial data and expert testimony the Commission concluded:

> "It is apparent that the preferred has an investment value at least equal to the respective call prices. * * *

[Footnote continued on following page.]

arguendo that the Commission has by its decision herein announced and applied a novel principle of valuation, such action is not forbidden and is entitled to the greatest weight since it reflects the informed expert judgment of the Commission and is the "product of administrative experience, appreciation of the complexities of the problem, realization of statutory policies and responsible treatment of uncontested facts." *S. E. C. v. Chenery Corp.*, 332 U. S. 194, 209 (1945). Yet despite the statement of the court below, novelty cannot be ascribed to the investment value doctrine in view of its recognition by this Court in the *Otis* case. There it was pointed out that once it is concluded, as it has been here, that the dissolution results in a type of liquidation entirely distinct from the liquidation envisaged by the charter provisions, the Commission is permitted "to examine the investment values of the common and preferred stockholders". In reality the doctrine of investment value connotes no novel technique but reflects the measure of the stockholders' rights determined in the simplication of a holding company system on the "basis of a going business", as recognized in the *Otis* case.

[Footnote continued from preceding page.]

"Upon a full consideration of the record * * * the fair and equitable standard would require the payment [to the preferred] of an amount equal to the call prices of the securities, plus accrued dividends" (R. 67a-68a).

This latter quotation is to be contrasted with the following statement from the opinion of the court below:

"* * * We conceive that the Commission could make a finding under certain circumstances that investment value was the equitable equivalent to the security holder. The Commission in the instant case, however, has not made such a finding * * *" (R. 38).

It should also be noted that the district court does refer to the Commission's finding of the investment value of the preferreds (R. 299a).

It has been a settled principle at least since the *United Light & Power Co.*, 13 S. E. C. 1 (1943)[36] (the original *Otis* case) and recently reaffirmed in another aspect of that simplification,[37] that the present investment worth of a security, based on the bundle of rights surrendered, must be the measure of its participation in a section 11(e) plan. In short, present investment value or worth is not a substitute for equitable equivalent but its measure. It is not "one of a series of factors" to be used in valuation, but is the end result, the final product of the valuation process based on the bundle of rights surrendered and reflecting the earning power, market history, dividend record, asset priorities, and all other relevant factors. Such criteria provide a proper basis of valuation. *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 526 (1941).

8. A further criticism is directed by the court below at the Commission on the basis of the *DuBois*, the *Group of Institutional Investors*, and the *Otis* cases for its failure "to give any substantial consideration to the future earning power of Engineers and its subsidiaries", and its neglect "to ascertain the future earning power of the system" or "apportion earning power between the preferreds and common based upon

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[36] In the words of the Commission: "It is our conclusion that we must judge the fairness of the plan according to legitimate investment values existing apart from the duty of liquidation imposed by the statute" (13 S. E. C. 11) The Commission then proceeds to a discussion of the "bundle of rights" affecting normal value.

[37] *United Light & Power Co.*, H. C. A. R. No. 6603 (1946).

their respective claims to income".[38] Reference to these cases reveals that in each, the reorganization involved the formation of a new corporation and the appropriate allocation of the securities therein on the basis of the apportionment of the earning capacity among the claimants. Hence earning capacity was projected far into the future and ascertained in order to insure the ability of the new corporation to meet the interest and dividend requirements of the new securities "as a *sine qua non* to the determination of the integrity and practicability of the new capital structure", and in order to avoid the "indefensible participation of junior securities in plans of reorganizations" in violation of the well established "absolute priority" rule.[39] It would therefore seem that the criticism of the court below reflects a misapplication of the principle of these cases since the instant case, in contrast to the decisions cited by the court below, does not involve the formation of a new corporation upon the dissolution of Engineer's nor consequently the allocation of securities therein nor the "indefensible participation of junior securities". Accordingly, the criterion of earning capacity which was originally fashioned as a shield to protect the preferred from "indefensible participation" of the common in a new corporation "in satisfaction of the absolute priority rule" has by the court below been converted improperly into a weapon in the hands of the

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[38] Apparently the district court disagrees with the circuit court in this respect as the district court nowhere in its opinion refers to any inadequate consideration of earning power.

[39] *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 525-6 (1941).

common against the preferred in disregard of the aforesaid rule. In effect the court below has attempted to restrict the preferred by its misapplication of the doctrine of full priority. Moreover, in view of the differences between the instant case and the cases cited by the court below in support of its criticism, there is no need for a hypothetical projection into the indefinite future of the earning capacity nor for an apportionment thereof. Where, as here, a careful study indicates the amplitude of earnings coverage for the preferred, it does not appear necessary to go further as the common's claims to income would be subordinate to those of the preferred stockholders. "The extent and method of inquiry necessary for a valuation based on earning capacity are necessarily dependent on the facts of each case." *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527 (1941).

Conclusion.

The views of the courts below tend to cause confusion and enlarge the areas of uncertainty and dispute with respect to the powers and jurisdiction of the district court *vis-a-vis* the Commission, as affecting the fair and equitable standard and the scope of review in the simplification process. Appropriate guides to valuation must be provided and a proper allocation of function between court and agency made. The expeditious and uniform administration of the Act is at stake.

For the reasons stated, this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit should be granted.

Dated: New York, N. Y., August 16, 1948.

Respectfully submitted,

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1948.

No. 243

THE HOME INSURANCE COMPANY and
TRADESMANS NATIONAL BANK
AND TRUST COMPANY,
Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION,
C. A. JOHNSON, LUCILLE WHITE, and
FRANCES BOEHM,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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THE HOME INSURANCE COMPANY AND TRADESMENS NATIONAL BANK AND TRUST COMPANY,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION; C. A. JOHNSON, LUCILLE WHITE, AND FRANCES BOEHM,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Home Insurance Company, a New York corporation, and Tradesmens National Bank and Trust Company, a national banking association, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a final order and judgment of that Court, entered March 19, 1948 (R. 41),[1] vacating a decree of the United States District Court for the District of Delaware and remanding the cause to the District Court with directions to enter an order disapproving a plan filed by Engineers Public Service Company (Engineers) under Section 11 (e) of the Public Utility Holding Company Act

[1] Record references are in parenthesis.

of 1935 as not being fair and equitable within the purview thereof, and to return the record to the Commission to the end that it may take such action as the facts and the law may require (R. 40). The petitioners seasonably filed with the Circuit Court of Appeals their Petition for Rehearing (R. 92), which petition was denied by order entered June 11, 1948 (R. 140). A certified transcript has been furnished in accordance with Rule 38, Paragraph 1, of the Rules of this Court, having been filed by the Securities and Exchange Commission on behalf of itself and preferred stockholders participating in the proceedings below and pursuant to Stipulation of Counsel (R. 41).

INTEREST OF PETITIONERS.

The Home Insurance Company and five affiliated companies, namely, City of New York Insurance Company, National Liberty Insurance Company of America, The Homestead Fire Insurance Company, The New Brunswick Fire Insurance Company, and The Georgia Home Insurance Company, and Tradesmens National Bank and Trust Company, collectively, were the owners of 7400 shares (having a stated value of $740,000) of preferred stock of Engineers, and as preferred stockholders have participated in the proceedings before the Commission and in the District Court and the Circuit Court of Appeals. When the plan was consummated in June, 1946, each preferred stockholder received payment of $100. per share plus accrued dividends on account of its shares of preferred stock, retaining under the plan and accompanying escrow arrangement a claim for such additional amount as may ultimately be found payable on its shares of preferred stock. On June 1, 1948, the four affiliates first above-named were merged into The Home Insurance Company as the surviving corporation, and on June 30, 1948, The Home Insurance Company acquired by purchase the assets of the fifth affiliate, thereby succeeding to the surviving claims of the five affiliates as preferred stockholders of Engineers.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R.12), and the opinion denying the petitions and cross-petitions for rehearing (R. 138) have not yet been reported. The opinion of the District Court is reported at 71 F. Supp. 797 (R. 283a). The findings and opinions of the Commission dated December 4, 1946, and January 8, 1947, have not yet been officially reported, but are set forth in the Commission's Holding Company Act Release Numbers 7041 (R. 25a) and 7119 (R. 128a).

JURISDICTION TO REVIEW.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C., Sec. 247 (a)), made applicable by Section 25 of the Public Utility Holding Company Act of 1935. The date of the order and judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed was entered March 19, 1948. The petition for rehearing was denied on June 11, 1948.

STATUTE INVOLVED.

Section 11 (e) of the Public Utility Holding Company Act of 1935 provides as follows:

> "In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for

hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, whefever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

Section 24 (a) of the same Act provides as follows:

"Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the

Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. *The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.*[2] If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. *The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive,*[2] and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

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[2] Italics supplied.

STATEMENT OF FACTS.

Preliminary.

The Commission has heretofore filed a Petition for Certiorari in this Court for the purpose of obtaining a review of the order and judgment of the Circuit Court of Appeals. Its petition includes a Statement (pp. 7-12) setting forth the features of the plan relevant to the surviving dispute, the history of the formulation of the plan, and the history of the proceedings. The petitioners respectfully request this Court to consider this Statement against the background furnished by the Statement of the Commission.

The Plan.

Engineers' amended plan as filed by it provided for satisfaction of the claims of its preferred stockholders in cash, distribution of the remaining assets, consisting of the common stocks of operating utility companies, in kind to the common stockholders, and dissolution of Engineers. The amounts to be paid to the preferred stockholders were $110. per share for the $6. and $5.50 dividend series and $105. per share for the $5. dividend series, plus accrued dividends in each case. In order to obtain the balance of cash needed to pay off the preferred stockholders, Engineers was to distribute to its common stockholders purchase warrants for the purchase of common stock of one of its operating companies and sell in the open market the shares not purchased by its common stockholders under the warrants. The amended plan was filed by Engineers after the Commission, following extensive hearings, had disapproved as unfair and inequitable a previous plan providing for payment to the preferred stockholders of $100. per share plus accrued dividends, and had held that the preferred stockholders were entitled to the larger amounts now provided in the amended plan in exchange for their rights surrendered.

Summary of Opinion of the District Court.

The Commission approved the amended plan, and at the request of Engineers pursuant to Section 11 (e) of the Act, filed enforcement proceedings under Section 18 (f) of the Act. The District Court approved the plan as fair and equitable, except for any allowance to preferred stockholders in excess of $100. per share and accrued dividends, and entered an order enforcing the plan as amended by it. Cash in an amount equal to the difference between the plan as approved by the Commission and as amended by the District Court was placed in escrow and the portion of the plan so approved was consummated, subject to reservation of the disputed issue.

The District Court found that the liquidating preference of the preferred stocks set forth in Engineers' charter was not dispositive, but only one of the factors to be considered in evaluating the preferred stocks. It, nevertheless, disapproved the payment of anything in excess of the liquidating preference on the basis of "colloquial equity." Among the factors entering into the District Court's conception of colloquial equity were such items as the original issue prices, underwriting costs, market prices and dividend records of the preferred and common stocks during the existence of the enterprise, market purchases of preferred stocks by Engineers, earnings retained in the system, losses said to have been sustained by Engineers in making previous divestments in compliance with Section 11 (b) of the Act. The District Court also scaled down the claim of the preferred stockholders by some indefinite amount because it considered the dividend rates for the three series of preferred stock "excessive," saying that fairness and equity do not require that preferred stockholders be paid an additional sum for the theoretical future deprivation of their "present excessive dividend rates"—which are part of the very claims to be evaluated under

any plan (R. 291a). The Court accepted the Commission's valuations of the preferred stocks as applicable at the time under consideration but refused to recognize them as the equitable equivalent of the preferred stocks because of the possibility of future decline and the off-setting factors entering into the "colloquial equity" (R. 290a).

Chronologically the District Court first filed its opinion in which it simply arrived at a value of $100. per share for the preferred stock as a matter of "colloquial equity." Certain "off-setting" factors were used to scale down the present going concern values for the preferred as found by the Commission and conceded by the Court to $100. per share, thus eliminating what the Court called the premium. Subsequently the Court filed findings of fact and conclusions of law (initially prepared by the common stockholders) adhering to the concept of colloquial equity, but reversing the approach. The Court started with the premise that payment of the maximum amount originally contributed by the preferred stockholders or their predecessors, without deduction for any underwriting expenses or discount, is fair and equitable, and failed to find any special facts or circumstances in connection with the issuance of the preferred stocks or their subsequent history, or the relationships of the preferred and common stockholders, which would create any equitable circumstances warranting payment to the preferred stockholders of amounts in excess of $100. per share plus accrued dividends (R. 316a).

It is not possible to discover from the District Court's opinion, findings of fact, or conclusions of law the extent to which the several factors deemed relevant by the Court entered into its ultimate conclusion or how such factors were evaluated. All we know is that these factors absorbed exactly the excess of the going concern value over the involuntary liquidating preference of $100. per share plus accrued dividends.

Summary of Opinion of the Circuit Court of Appeals.

The gist of the opinion is that a district court in a proceeding under Section 11 (e) must exercise its independent plenary judgment as an equity reorganization tribunal in every matter relating to the fairness and equity of the plan; the court is not bound by the findings and conclusions of the Commission as an administrative tribunal, and while a district court may not substitute its valuations for those of the Commission, it may reject valuations even though based on substantial evidence; in this case the District Court Judge weighed the numerous elements involved in the case on his own scales, and in the exercise of his independent judgment, arrived at the conclusion that the plan was not fair and equitable; the weight and emphasis applied by the District Court and the Commission to the various factors in the case go to two primary considerations on which the two tribunals differed, namely, (1) the Commission did not determine and apportion the earning power of the enterprise between the preferred and common stocks based on their respective claims as it did in the *United Light & Power Company* case (*Otis & Co. v. S. E. C.*, 323 U. S. 624), and (2) the Commission failed to consider and give effect to losses said to have been sustained by Engineers on previous divestitures compelled by the Act; the Commission's "investment value" for the preferred stocks did not give effect to all the pertinent factors and substantial equities; the District Court's conclusion was not clearly erroneous; however, the District Court cannot amend a plan and enforce it and the record should have been remanded to the Commission for further and appropriate action.

We have, therefore, a situation where the Commission and the District Court used different weights and measures to arrive at opposite conclusions, and the Circuit Court of Appeals, favoring in substance the "colloquial equity" concept of the District Court, has held that the Commission should have considered and given effect to an allocation of

future earning power and historical losses. The Commission did consider the loss factor and found it irrelevant in law and in fact (R. 64a, 65a, 72a, n. 55). The Commission did consider the future earning power in determining the going concern value of the preferred stocks, but did not allocate earning power between the preferred and common stocks for the simple reason that, under the plan, the common stockholders received the full benefit of the residual earning power through the distribution in kind of the common stocks of the operating companies, augmented by the decrease in expenses resulting from the dissolution of the enterprise.

In passing the Circuit Court of Appeals recognized that its conclusion as to the function of a district court and the scope of review in proceedings under Section 11 (e) conflicts with decisions in other circuits, citing *Lahti v. New England Power Ass'n.*, 1 Cir., 160 F. 2d 845, 858, and *Massachusetts Mutual Life Ins. Co. v. S. E. C.*, 8 Cir., 151 F. 2d 424, 430, affirming *In re Laclede Gas Light Co.*, D. C. E. D. Mo. E. D. 57 F. Supp. 997, 1004. It distinguished its own decision in *In re Standard Gas & Electric Co.*, 3 Cir., 151 F. 2d 326, by saying the question here presented was not in focus in that case, but we respectfully suggest that an adjustment of the judicial lens would bring it in focus and classify the decision with the other Circuit cases just cited (R. 31, 32).

QUESTIONS PRESENTED.

1. Did the Commission properly apply the fair and equitable standards of Section 11 (e) of the Public Utility Holding Company Act in approving as part of a plan payment to preferred stockholders of cash equal to the current going concern value of their shares, not exceeding the voluntary call prices therefor.

2. May the Commission, in applying fair and equitable standards to a plan under Section 11 (e) of the Public Utility Holding Company Act, be required to determine

whether there have been any losses as a result of prior divestments or other action taken by the Company in compliance with Section 11 (b) of the Act and charge such losses in whole or in part to preferred stockholders generally, and particularly when the amounts to be paid the preferred stockholders for their rights surrendered do not exceed the going concern value thereof based on the residual enterprise.

3. Where the Commission finds that a plan filed under Section 11 (e) of the Public Utility Holding Company Act is fair and equitable to the persons affected thereby and such finding is based on substantial evidence and has rational foundation in law, may the District Court reject such finding on the basis of an independent discretion in view of the principles generally applicable to findings and conclusions of administrative tribunals and particularly in view of Section 24 (a) of the Act which, recognizing the stature and competence of the Commission, makes its findings as to the facts, if supported by substantial evidence, conclusive on any direct review of a plan by a Circuit Court of Appeals?

REASONS FOR GRANTING THE WRIT.

1. The Circuit Court of Appeals has decided an important question of Federal law in conflict with the decision in *Otis & Co. v. S. E. C.*, 323 U. S. 624, or in conflict with the proper application of that decision to the facts in this case.

While the Court agreed that the liquidation preference of the preferred stocks set forth in the charter is not dispositive, it indicated that the Commission should have determined the future earning power of the Engineers' system and valued the common stock presumably with reference to that earning power, as was done in the *Otis* case which involved the allocation of a single class of stock between preferred and common stockholders. Here it was conceded that the preferred stocks have going concern

values at least equal to the call prices [the amounts payable under the plan (R. 296a)] and that the preferred stocks would have been redeemed by refunding operations at lower dividend rates had the enterprise continued (R. 920a, 921a). The only problem was to determine the amount payable to the preferred stockholders according to their priorities for the rights being surrendered by them under a plan which gave to the common stockholders all the residual assets and the earning power thereof by distribution in kind.

Having commanded the Commission to ascertain the future earning power of the enterprise and to allocate it between the preferred and common stockholders, the Court also commands the Commission to determine and give effect to prior losses. The Court does not make it clear what losses must be considered, or how such losses are to be related to the future earning power. Is the future earning power to be determined on the basis of the residual system or a reconstructed system incorporating the divested companies, and if the latter, what are to be the capital structures of the reincorporated companies. How are such losses to be related to, or integrated in, the future earning power, or how are they to be separately allocated between the preferred and the common stockholders? The implication is that no matter how strong the preferred stocks may be or become after the losses have occurred, something must be charged to the preferred stockholders. It is clear that the task is impossible. This concept also ignores the fundamental nature of the common stock. While the common stockholders are thus to be protected the prices paid by the original preferred stockholders are the continuing burden of the present preferred stockholders no matter how seasoned or strong the preferred stocks have become.

2. The Circuit Court of Appeals has decided a question of law in conflict with *Securities Commission v. Chenery Corp.* (the second Chenery case), 332 U. S. 194, and the principles generally applicable to the findings of administrative tribunals.

This Court was not passing on the powers and duties of a Section 11 (e) court in the *Chenery* case. The case had gone to the Circuit Court of Appeals on direct appeal from the Commission under Section 24 (a) of the Act, which provides that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive". This Court did not expressly allude in its opinion to the provisions of Section 24 (a), and sustained the findings of the Commission on the ground that the very breadth of the statutory language precludes a reversal of the Commission's judgment, save where it has plainly abused its discretion in "these matters." These matters expressly related back to the application of the "fair and equitable" rule of Section 11 (e) and the standard of "what is detrimental to the public interest or the interest of investors or consumers" under Sections 7 (d) (6) and 7 (e) of the Act. This Court said further that the application of those criteria necessarily requires the use of informed discretion by the Commission.

The Circuit Court of Appeals has also rejected the more conservative rule that findings of the Commission as an administrative tribunal should not be set aside if based on substantial evidence and consistent with law.

The stage is thus set for an impasse in any situation where there may be a reasonable difference of opinion as to valuations and fairness and equity, unless the Commission stultifies itself under the pressure of a veto by the district court. If the decision of the Circuit Court of Appeals is correct, then in any conscientious stand-off between the Commission and a district court in the area of rationality, there is no tribunal in a position to cast a deciding vote. If, on the other hand, the findings and conclusions of the Commission have in the district court the usual stature of the findings and conclusions of administrative tribunals, then the appellate courts would have the problem only of determining whether the Commission had committed error in law or abused its discretion in the area of fact

finding. This function, so limited, would be consistent with the function of a Circuit Court of Appeals under Section 24 (a). By way of contrast the Circuit Court of Appeals in this case favored the District Court on the ground that the finding of the District Court was not clearly erroneous (R. 39). Surely the reverse of this approach is more consistent with the purpose of the Congress and the Act. Also, the net result of the decision of the Circuit Court of Appeals is that the findings of the Commission have different stature depending on procedural accident, that is, whether the proponents of a plan seek enforcement under Section 11 (e), or proceed without enforcement, leaving an aggrieved person to his remedy under Section 24 (a).

The special competence of the Commission lies in comprehending the problems, investigating the facts, selecting facts according to their relevance and importance, evaluating facts, and reaching ultimate conclusions in accordance with equitable principles. The Commission has the front line problem of discerning whether any fact or combination of facts invoke any principles of law or equitable considerations and then applying such principles and considerations with due weight and with regard for the inter-play of factors in complex situations, exercising its discretion wherever it has a choice. It has the duty of making an equitable valuation of the whole according to its judgment, and the function of a district court under Section 11 (e) should be defined with regard to the wide powers granted the Commission.

The special competence of the Court lies in determining whether applicable principles of law have been violated or disregarded by the Commission in the equitable evaluation of a plan and whether the facts found by the Commission are supported by substantial evidence. While Section 11 (e) gives the district court the independent duty of determining whether plans are fair and equitable before lending its aid to enforcement, its function in this respect is necessarily circumscribed. Congress could never have intended

that the district court should reach over into the area reserved for the special skills of the Commission and substitute its judgment for that of the Commission, provided the Commission's findings and conclusions have a rational basis in fact. While the question of relevance of factors may be so clear in some instances as to become a question of law, the relevance and impact of economic factors in complex situations are more often questions of fact more readily to be resolved in the area allotted to experienced tribunals. Any other division of labor can lead only to confusion and deadlock.

3. The Circuit Court of Appeals has decided a question of Federal law in conflict with the decision of other Circuit Courts of Appeal on the same subject matter.

As stated in the preceding paragraph, the Circuit Court of Appeals has held that the District Court, in passing upon the fairness and equity of the Plan under Section 11 (e) of the Public Utility Holding Company Act, may exercise its independent judgment or discretion and is not bound to any extent by the findings of fact and conclusions of law of the Commission even though based on substantial evidence and consistent with law. As conceded by the Circuit Court of Appeals (R. 31), this is in direct conflict with the decisions of the 1st Circuit Court of Appeals in *Lahti v. New England Power Association*, 160 F. 2d 845, and the 8th Circuit Court of Appeals in *Massachusetts Mutual Life Insurance Co. v. S. E. C.*, 151 F. 2d 424, affirming *In re Laclede Gas Light Company*, D. C. E. D. Mo., 57 F. Sup. 997.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Judicial Circuit, sitting at Philadelphia, Pennsylvania, to the end that the case may be reviewed and determined by this Court; that the order and judgment of the Circuit Court of Appeals be reversed; and

that your petitioners be granted such other and further relief as may seem proper.

THE HOME INSURANCE COMPANY,
TRADESMENS NATIONAL BANK AND
TRUST COMPANY,

By FRANCIS H. SCHEETZ,
Attorney for Petitioners,
1335 Land Title Building,
Philadelphia 10, Pennsylvania.

August 20, 1948.

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SUPREME COURT, U.S.

No. 266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE CO., et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ALFRED BERMAN,
Attorney for Petitioners; Central-Illinois Securities Corporation and Christian A. Johnson; Common Stockholders of Engineers Public Service Co.,
30 Pine Street,
New York 5, N. Y.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE CO., et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Central-Illinois Securities Corporation and Christian A. Johnson pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered on March 19, 1948 vacating a decree of the United States District Court for the District of Delaware entered May 29, 1947, with the direction to enter an order disapproving in part a plan under Section 11(e) of the Public Utility Holding Company Act as not being fair and equitable within the purview of Section 11(e) of said Act and to return the record to the Securities and Exchange Commission to the end that it may take such action as the facts and the law may require.

Petitioners are respondents with respect to three petitions for certiorari which have been filed by the respondents named herein to review the same judgment (Nos. 226, 227, 243), and petitioners will file a timely brief in opposition to said petitions. The certified transcript of the record and the requisite number of copies of the printed record have been furnished in accordance with paragraphs 1 and 7 of this Court's Rule 38, having been heretofore filed by the Securities and Exchange Commission in No. 226 on behalf of all the parties pursuant to stipulation of counsel (R. 41).

Opinions Below

The opinion and judgment of the Court below (R. 12) and the opinion denying petitions and cross-petitions for rehearings (R. [illegible]) are reported at 168 F. 2d 722. The opinion of the District Court is reported at 71 F. Supp. 797 (R. 283a), but its detailed Findings of Fact and Conclusions of Law (R. 293a-317a) are not reported. The Findings and Opinion of the Commission dated December 4, 1946 and January 8, 1947 have not yet been officially reported but are set forth in the Commission's Holding Company Act Releases Nos. 7041 (R. 25a) and 7119 (R. 128a).

Jurisdiction

The judgment of the Circuit Court of Appeals for the Third Circuit was entered March 19, 1948, and its judgment denying petitions and cross-petitions for rehearing was entered June 11, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 803 (15 U. S. C. 79 *et seq.*).

Statute Involved

Section 11(e) of the Public Utility Holding Company Act of 1935 provides as follows:

> "(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

Questions Presented

1. Did the Circuit Court properly order the vacating of the District Court's decree and the remand of the proceedings to the Securities and Exchange Commission where:

(a) The Commission had recognized that if the rationale on which it predicated an award of redemption premiums to preferred stockholders in a final liquidation under Section 11(e) of the Public Utility Holding Company Act were judicially determined to be invalid, that payment to the preferred stockholders of $100 per share plus dividends would be "fair and equitable"; and had entered an order alternatively approving such amount if the District Court found (as it did) payment of the premiums unfair and inequitable, and its determination were either not appealed or were affirmed upon appeal;

(b) The Commission had urged the District Court not to remand the proceedings to it by reason of finding the provision for payment of the premiums unfair and inequitable, but instead to enter its decree approving and enforcing the remainder of the plan and to authorize establishment of an escrow fund for the premium payments, pending appellate review of the District Court's determination respecting such premiums, which determination the Circuit Court affirmed;

(c) On the facts and the law as found by the District Court and affirmed by the Circuit Court, and further on the basis of supervening changes in applicable money rates, no amounts can be found payable to the preferred stockholders in addition to the $100 per share plus dividends already received, without violating the "fair and equitable" standard of Section 11(e);

(d) Remand of the proceedings to the Commission will result in substantial further expense and will seriously delay the distribution of approximately $4,000,000 to the common stockholders who have made large sacrifices in order to effect the complete liquidation of their enterprise in obedience to the requirements of the Public Utility Holding Company Act?

2. Does the Statute authorize, and the Fifth Amendment of the Constitution permit, applicable corporate charter provisions to be overridden where not reasonably necessary to effectuation of the Congressional objectives embodied in the Statute?

Statement

These proceedings relate to a plan of liquidation filed with the Securities and Exchange Commission by Engineers Public Service Company ("Engineers"), in order to effect final compliance with a series of mandatory orders previously issued against Engineers by the Commission under Section 11(b)(1) of the Public Utility Holding Company Act of 1935 ("the Act"). The cumulative net effect of these Section 11(b)(1) orders, when taken in combination with the provisions of Section 11(b)(2) of the Act, was to require the complete and final dissolution of Engineers and its entire holding company system (R. 47a-48a, 139a-140a). The Engineers system, which at the time of the passage of the Act had comprised some seventeen electric, gas and other utility and non-utility companies throughout the United States, had been whittled down to only three operating companies in the course of Engineers' compliance with the Commission's mandatory divestment orders; and Engineers was required by outstanding Commission divestment orders to dispose of two of these remaining three.

When the dissolution plan was filed Engineers' capital structure consisted of common stock and preferred stock, the latter all having a stated book value of $100 per share (increased in 1938 from $96 per share, R. 301a) but being divided into three series carrying different dividend rates ($5, $5.50 and $6), and all being entitled in the event of "liquidation, dissolution, winding up" or any "reduction of its capital stock resulting in any distribution of its assets to stockholders", to $100 per share plus accrued dividends in preference to any payments to the holders of the common stock. However, if such liquidating acts were "voluntary", the preferred holders would in addition be entitled to the redemption premiums of each series (i.e., $5 per share for the $5 series, and $10 for the others). Under the provisions of the charter, the preferred stocks were callable at any time at the option of the company upon payment of these redemption amounts (R. 1403a-1431a).

Engineers' plan, so far as here material, provided in substance: (1) that the common stockholders of Engineers should initially pay $22,000,000 in cash into Engineers' treasury by purchasing the stock of one of the three remaining subsidiaries; (2) that this money plus treasury cash on hand (representing the proceeds of other property sales and retained earnings) would be used to effect the retirement in cash of all the preferred stock of Engineers at the charter liquidation amount of $100 per share plus dividends to the date of payment; (3) that promptly thereafter, the remaining assets of Engineers would be distributed among the approximately 13,000 common stockholders of Engineers as a final liquidating dividend, and Engineers would be dissolved.

Commission Decision

In its Findings and Opinion issued December 5, 1946, the Commission held that the dissolution of Engineers was an involuntary dissolution made necessary by the mandatory provisions of Section 11 of the Act (R. 48a, 139a-140a). Unlike the dissolution involved in *Otis & Co.* v. *S. E. C.*, 323 U. S. 642, Engineers' liquidation would effect the dissolution not only of the holding company, but the final and complete disintegration of the entire holding company system.

Despite its finding that the dissolution of Engineers and its system was not voluntary, the Commission nevertheless held that the company must pay the preferred stockholders the redemption premiums which the charter provided were payable only in the event of a voluntary liquidation or redemption. These premiums totalled $3,204,795 in excess of the amounts specified by the charter as payable to the preferred holders in the event of liquidation, dissolution, winding-up or reduction of the corporation's capital stock resulting in any distribution of its assets to stockholders."

In reaching this result, which was directly contrary to a long line of Commission and Court decisions,[1] the Commission's initial postulate was that *Otis & Co.* v. *S. E. C.*, *supra*, established the proposition that charter liquidation provisions were not controlling in any liquidations under the Holding Company Act, but were merely one factor to be taken into account.[2] For that reason, the

[1] See note 21, *infra*.

[2] The Commission made no attempt to compare the complete and definitive dissolution of the Engineers system with the pseudo-liquidation involved in the *Otis* case, despite the plain reliance in the majority opinion of this Court upon the Commission's emphatic argument that the liquidation there involved (relating as it did merely to the top layer of a multi-tiered holding company structure) left essentially unchanged a vast holding company enterprise (See Commission Brief filed with this Court in *Otis & Co.* v. *S. E. C.*, p. 78.)

Commission stated the liquidation provisions of Engineers' charter could not be regarded as "conclusive" in determining the rights of the stockholders (R. 61a-62a). It thereupon proceeded to disregard these charter provisions entirely.

The amount which the preferred stockholders must receive, the Commission held, was "the investment value of their stock on a going-concern basis", and as though no liquidation were taking place (R. 67a-68a). The Commission noted that two witnesses (Badger, a witness on behalf of certain preferred holders, and Barnes, president of Engineers) had testified that "if there were no Holding Company Act, or if the Act were to be repealed today" they believed Engineers' preferred stock would sell on the market at or about their redemption prices and would probably be called and redeemed by the company.[3] The Commission thereupon stated that it was "conceded" and "unchallenged" that "the preferred has an investment value at least equal to the respective redemption prices"; and it held that this was the amount they must be paid (R. 67a-68a).

No mention was made by the Commission of Barnes' repeated and emphatic testimony that such "values" merely reflected the inflated stock market prices current at that

[3] Barnes, one of the two witnesses referred to, pointed out that "if there were no Holding Company Act, or if the Act were to be repealed today" so that Engineers were not compelled to liquidate, it would, of course, take advantage of the current low money rates to replace its outstanding preferred stock with preferred stock carrying a much lower dividend rate, thereby benefiting the common stockholders substantially (R. 522a-525a, 633a). The Commission's opinion made no reference to this portion of Barnes' testimony.

moment,[4] and could by no means be deemed the "fair value" of the stock for any representative period of time in the light of its very poor past record and future uncertainties. Despite the fact that the amounts to which the Commission held the Engineers preferreds entitled were admittedly the maximum which could be awarded if the stock were the highest grade of "gilt-edge" security, no mention was made by the Commission of Badger's admission that the Engineers preferreds were not "high grade" but at best "medium grade" (R. 1133a, 1485a); nor of Barnes' testimony that on the basis of the criteria customarily employed by financial analysts they are "closer to a low-grade preferred" (R. 1133a, 1140a); nor of the evidence establishing that during the period the preferreds were outstanding they were accorded by the leading independent analysis an investment rating of only C**, defined as "Preferred stocks with erratic dividend records which can be expected to make payments only under favorable conditions" (R. 1844a-1845a).[5]

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[4] The testimony of Badger and Barnes was given at various times over the period December 1945 through February 1946, at which time stock market prices (including those of public utilities) stood at the highest point since 1931. Barnes warned "we are in a boom period", and stressed its temporary nature (R. 667a). The Federal Reserve Bank Index of utility stock prices which stood at 130 in June 1946 subsequently declined to 94 by the end of 1947, indicating an average decline of about 28% (cf. Federal Reserve Bulletin).

The Commission has itself referred to the period of Barnes' and Badger's testimony as "the peak of the post-war market", and has admitted that "investment values" computed on the basis of yields and market prices then prevailing have since been adversely affected to a substantial extent. (*The United Light and Railways Company-American Light & Traction Co.*, Holding Company Act Release No. 7951, Dec. 31, 1947.)

[5] In an earlier portion of its opinion, the Commission did summarize statistically evidence in the record establishing that the preferred stocks had been in arrears of dividends for several years and had sold for considerable periods of time as low as $10-$14 per share for all series, and that the overall market price through the entire period from the time of issuance to the date of the testimony

Although the Commission purported to be determining the value of the preferred stock "on a going-concern basis" and "as though no liquidation were taking place", it did not determine or even consider what would be the value of the preferred stock for any period of time in the future if the liquidation compelled by the statute actually were not to take place and the preferred were permitted to remain outstanding as part of a continuing enterprise or "going-concern". On the theory adopted by the Commission, this would have necessitated consideration not only of normal prospective earning power, such as is fundamental in valuation for reorganization purposes,[6] but also of the prospective yields applicable to preferred stocks having investment characteristics comparable to those of Engineers. For the very essence of Badger's "expert opinion" (which the Commission simply adopted) that the preferred stockholders were entitled to receive more than the par value of their stock was that the unprecedentedly low money rates prevailing at that time enhanced the market value these preferred stocks would have (absent the liquidation) to an amount at least

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was only $63-$67 per share for all series (R. 62a); but no reference was made to these factors at the point where the Commission discussed the so-called "investment values".

Similarly, although the Commission's computations showed that these preferreds were actually a speculative *junior security* (being junior to 66.2% of the system's capitalization, R. 64a), no allusion to the significance of this factor is to be found anywhere in the opinion; nor is allusion made to the significance of the slim coverage for charges and dividends over the past decade (R. 64a) nor of the fact that for several years continuously charges and dividends had not been fully earned.

These omissions are all the more inexplicable in view of the fact that in the long line of decisions in which the Commission theretofore had refused to approve payment of premiums upon retirement of senior securities, it had repeatedly stressed all of these very factors. (See decisions cited n. 21, *infra*.)

[6] Cf. *Consolidated Rock Products Co.* v. *Dubois*, 312 U. S. 510, 526; *Group of Institutional Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 565-6.

equal to their redemption prices.[7] Further, while allegedly determining values "ex the Act" ("apart from the impact of liquidation compelled by the Act"), neither the Commission nor Badger made allowance for the many important factors which came into existence directly as the result of this very statutory requirement for liquidation.[8] None of the other drastic impacts of the Act upon the common stockholders received consideration; nor did the Commission attempt to "find" the so-called "investment value" or any other value of the common stock on "a going-concern basis" ("apart from the necessity for liquidation") or otherwise.

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[7] Thus, Badger stated: "Except insofar as a preferred stock may be callable at a specific price, preferred stocks are in the nature of perpetual annuities; and should be valued by capitalizing their dividend rates at rates of capitalization which give full weight to inherent investment risk and money rates at the date of valuation" (R. 2062a). With respect to the then prevailing money rates (which he employed without modification in "valuing" the Engineers preferreds) he testified "* * * yields on preferred stocks are at the present time, the lowest which they have been in the history of our country, or, conversely * * * the prices of such stocks are at the highest levels ever experienced. The permanency of this situation will depend on the permanency of low interest rates" (R. 2065a). Several months from the time this testimony was given (and many months prior to the issuance of the Commission's findings and opinion) money rates and preferred stock yields commenced the sharp upward climb, and preferred stock prices the concomitant decline, which has been in progress ever since (see District Court Finding No. 52, R. 314a, and R. 122).

[8] For example, no allowance was made for approximately $24,500,000 which had accrued to the equity of the common stockholders of Engineers and which had been withheld from them largely because of the necessity of providing for this very liquidation (R. 306a, 469a-471a, 1395a). Instead this entire amount (equivalent to 60% of the preferreds' stated value) was credited to the preferred in determining its so-called "investment value *ex* the Act" (R. 306a, 312a).

The District Court's Decision

After consideration of extensive oral argument and briefs by counsel for the Commission and all the other parties,[9] the District Court (to which the Commission had applied pursuant to Section 11(e) for entry of a decree approving and enforcing the plan) held that the provision of the amended plan for the payment of the amounts in excess of $100 per share (the premiums) was not consonant with the "fair and equitable" standard of Section 11(e), but that in all other respects the plan met the statutory requirements. The Court thereupon followed the course strongly urged by the Commission's attorneys,[10] of not remanding the proceedings to the Commission, but instead of approving and enforcing the plan except as to the premium payments, and requiring the latter to be deposited in an escrow fund approved by the Commission pending review of the District Court's determination. The Commission's opinions had expressly advocated this course (R. 75a, 136a), and its order of February 11, 1948 (R. 165a), had provided formal advance approval for it.

The disagreement of the District Court with the Commission as to the premium payments was basically a disagreement as to applicable legal principles. The Court regarded as erroneous and devoid of judicial support the Commission's thesis that the rights of security holders of a holding company enterprise which is being entirely and definitively liquidated pursuant to governmental edict should

[9] The company refrained from taking a position on the premium issue either before the District Court or the Circuit Court on the theory that it was in essence "a neutral stakeholder" in a controversy between its stockholders (R. 200a). Two groups of common stockholders (including petitioners) who had given timely and detailed notification to the Commission of their opposition to this phase of the plan (R. 135a, 2150a) independently presented their objections to the Court.

[10] R. 257a-261, 281a-282a.

be approached on the purely fictional hypothesis that "the enterprise continues", and the claims of the preferred holders (but not the common) measured "on a going concern basis", and "as though there were no Holding Company Act or as if the Act were to be repealed today" (R. 292a, 314a, 315a-316a).[11] The District Court was of the view that this recently evolved and mis-named "investment value" doctrine, as sought to be applied by the Commission in the case at bar, contravened firmly rooted decisions of at least four circuit courts of appeal and many district courts, as well as a long line of decisions of the Commission itself (R. 288a, 292a). These decisions uniformly hold that where retirement of senior securities is not the result of voluntary action by management of the junior security holders, but is mandatory by virtue of Section 11 of the Act, the equity holders must not be penalized by being made to pay premiums to the senior security holders as though a "call or redemption" were being effected on a normal "going-concern" basis.[12]

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[11] It may be noted that the District Judge (Judge Leahy) had been the first court to pass upon and approve the United Light plan subsequently upheld by this Court in *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, the decision relied upon in the instant case by the Commission as support for the proposition here rejected by the District Court. Judge Leahy's cogent understanding of the issues involved in the *Otis* case is attested by his decision therein (51 F. Supp. 217, D. Del. 1943). Similarly, Judge Biggs, who wrote the Circuit Court's opinion in the instant case, was also the author of that Court's opinion in the *Otis* case (*In re Securities and Exchange Commission* (*Otis & Co.*), 142 F. 2d 411, C. C. A. 3, 1943).

[12] Decisions cited at n. 21, *infra*. Judge Leahy had himself repeatedly and uniformly upheld the Commission's determination that such premiums were not payable, although envisaging that a contrary view might possibly be justified upon proof of "a different fact situation" (*In re North Continent Utilities Corp.*, 54 F. Supp. 527, D. Del.). As the Circuit Court had occasion to point out (R. 30, 39) Judge Leahy, commencing with the earliest enforcement cases under the Act and continuously ever since, has had exceptionally specialized experience with Section 11(e) reorganizations, the Commission having applied to him for approval and enforcement of almost 50% of all Section 11(e) plans which have been brought to the Courts for enforcement.

Upon examination of the record which had been filed by the Commission with the Court, the District Judge ascertained a number of factors of which the Commission's opinion gave little or no inkling and which he found strongly corroborative of his view that payment of the premiums to the preferred would result in unfairness and inequity in a "colloquial" sense, as well as in its technical statutory sense; that Badger's "values" were largely "market" values (R. 310a) admittedly dependent upon continuance of governmental "pegging operations" designed to hold money rates to the artificially low level considered desirable because of the exigencies of governmental war financing (R. 313a-314a); that on the basis of the inherent investment qualities of the stocks, they were admittedly not "high grade" but rather "*medium* medium grade" or "low grade" (R. 311a); that even such inherent value as they possessed was in large measure due to the more than $24,000,000 of earnings which the common stockholders had, from the time enactment of the Holding Company Act sealed the company's doom, left in the enterprise to provide for its final liquidation (R. 306a); that the company had sustained heavy losses and sacrifices in carrying out the Commission's Section 11(b)(1) divestment orders, and that such losses had fallen and would necessarily fall on the common stockholders (R. 307a-308a); that the common stockholders had gone without dividends or return of any kind for 15 years while the preferred stockholders received full payment of their dividends over the entire period, aggregating approximately $90 per share (R. 302a, 306a); that in order to pay the preferred holders their full liquidating claim in cash the common stockholders would be required in connection with the liquidation to contribute an additional $22,000,000 cash, and to "mortgage" the assets distributable in the liquidation by advance payment of dividends (R. 308a-310a); that the common stockholders like the preferred stockholders were forced to relinquish continuance of the holding company enterprise in which they had invested (R. 311a, 312a, 316a).

The Court summed up its conclusions by formally finding that the enterprise in which the preferred and common stockholders of Engineers had invested had been frustrated and terminated by governmental action (R. 316a); that there was no valid basis for hypothesizing a "continuing enterprise" or "going concern" (R. 292a, 316a); that the Commission's "investment value ex the Act" doctrine as applied in this case was not only unsound and unrealistic in theory but inequitable and erroneous in application (R. 292a, 316a-317a). It held in the light of its "careful examination of all the relevant factors" that payment to the holders of the preferred stocks of Engineers of any amounts in excess of $100 per share plus accrued dividends would not be warranted or justified; would be unfair and inequitable to the holders of Engineers' common stock; and would contravene the fair and equitable standards of Section 11(e) of the Act (R. 317a).[13]

The Circuit Court's Decision [14]

The Circuit Court rejected the Commission's contention that the District Court under Section 11(e) should be

[13] The District Judge stated that he found it unnecessary to conclude whether the charter liquidation provisions per se foreclosed any amounts in excess of $100 per share plus dividends, because "the conclusion is reached that the preferred stockholders are in any event not entitled to receive any such excess amounts on the basis of all the relevant considerations, even if the charter provision is not itself controlling. Said charter provision, however, if taken into account, constitutes an additional factor supporting the conclusions reached, as above stated" (R. 317a).

[14] Following the entry of the District Court's order, notice of appeal to the Third Circuit Court of Appeals was filed by the Commission and the two groups of preferred stockholders, one of which sought to stay consummation of any portion of the plan. The Commission joined in opposing the stay, which was denied in turn by the District Court, the Circuit Court and by Mr. Justice Burton of this Court. Thereupon, the escrow fund was duly established and the other provisions of the plan were consummated, including payment to the preferred stockholders of $100 per share and accrued dividends.

deemed a mere review court which must bow to the Commission's conclusions unless they wholly lack "any rational or statutory foundation" (R. 21, 34),[15] and held, after careful analysis of the statute and its legislative history, that a Section 11(e) Court must exercise its independent judgment as to the fairness and equity of a plan (R. 23, 33). It found that the District Judge treated the Commission's findings "as was proper * * * with respect" (R. 34), and commended his "careful and far-reaching examination of the relevant factors" (R. 34). It held that the Commission, in failing to take these important factors into account, had reached an inequitable and erroneous result (R. 38).

With respect to the Commission's attempted reliance on the *Otis* decision, the Circuit Court agreed with the District Court that the liquidation of the Engineers system was a complete and definitive termination of the enterprise, and thus differed materially from the mere simplification of a continuing holding company system involved in the *Otis* decisions (R. 36).[16] It held that even if it was permissible under these circumstances to measure security holders' rights on the fictional hypothesis of a "going concern" without regard to the liquidation which was in fact taking place under compulsion of the Act (i.e., "ex the Act"), the so-called "investment value" formula as applied by the Commission in this case to measure only the claims of the preferred holders "ex the Act" failed to produce that "equitable equivalence" for the rights of both classes

[15] The Court pointed out that the Commission's demand that Section 11(e) Courts should be relegated to the position of mere review Courts was at sharp variance with the positions which the Commission has for many years taken before the Courts and before Congress, wherein the independent plenary role of the District Court with respect to 11(e) plans was heavily emphasized (R. 30-31).

[16] As was pointed out *supra* (n. 11), Judge Biggs wrote the Third Circuit's opinion in the *Otis* case as well as in the case at bar.

of security holders which is of the very essence of the *Otis* rationale (R. 38).

The Third Circuit squarely affirmed the determination of the District Court that the provision of the plan for the payment of the premiums was unfair and inequitable (R. 39, 140). It also found "proper" and upheld the escrow arrangements embodied in the District Court's order (R. 40). Yet, notwithstanding its full approval of the District Court's reasoning and findings, the Circuit Court concluded that the District Court should have remanded the proceedings to the Commission.

On the question of remand, the Circuit Court's reasoning was in essence, that the disapproval by the District Court of the provision for payment of the premiums effected an "amendment" in the plan which under the Statute must receive the Commission's approval as well as of that of Court (R. 39). In addition, the Circuit Court's opinion suggests that the District Judge engaged in a species of "valuation" in formally finding that payment to the preferred holders of $100 per share plus dividends would be fair and equitable to the preferred and that payment of any additional amounts would contravene the "fair and equitable standard" of Section 11(e), instead of merely holding the premium payments as proposed in the plan unfair and inequitable and remanding the plan to the Commission. Stating that "The problem is and will remain until its disposition by the Commission, one of valuation of the securities of Engineers, viz., the preferreds and the common" (R. 40), the Court vacated the decree of the District Court [17] and remanded the proceedings to it:

> "with directions to enter an order disapproving the plan as not being fair and equitable within the purview

[17] It is clear that the Court intended to vacate only so much of the District Court's decree as related to the premium payments since the remainder of the plan had already been fully consummated; presumably this will be more precisely stated when the Court's mandate is ultimately issued.

of Section 11(e) of the Public Utility Holding Company Act, and to return the record to the Commission to the end that it may take such action as the facts and the law may require" (R. 40, 41).

Petitions for rehearing were filed by the appellants in the Circuit Court with respect to the Court's affirmance of the determination that the proposed payment of the premiums was unfair and inequitable. Answers thereto and cross-petitions were filed by the appellees (including petitioners) with respect to the requirement for remand to the Commission (R. 97). The Court denied the petitions and cross-petitions, stating in a short opinion its adherence to the views previously enunciated (R. 138).

Reasons Relied On for Allowance of the Writ

The decision of the Circuit Court that these proceedings must be remanded to the Commission for further action raises substantial issues in the administration of the Public Utility Holding Company Act and with respect to the impact of the Act upon the many thousands of security holders of holding companies which are required by the Act to terminate their existence. Issuance of this writ is especially vital if the Court is disposed to grant the petitions heretofore filed by respondents (Nos. 226, 227, 243) in order that the Court may have full latitude to consider and dispose of all the important questions arising from the judgment to be reviewed. Further, it is believed the Circuit Court's requirement for remand of these proceedings to the Commission conflicts with principles enunciated by this Court in other reorganization cases, and presents issues which have both procedural and substantive aspects of importance.

I. Procedural Aspects

(1) The Circuit Court's decision requiring remand negates a sound and essential procedure for coordinating and dovetailing the overlapping statutory roles of the Securities and Exchange Commission and the district courts in approving and effectuating reorganization and liquidation plans under Section 11(e) of the Act. Many plans presented to the district courts involve no controversial questions, and thus ordinarily receive swift approval from the court on the basis of the Commission's findings and opinion. But where, as here, sharp issues are raised bearing on the fairness of the plan to a class of security holders, the Circuit Court recognized and vigorously affirmed that the district court may not enter its decree approving and enforcing a plan merely because "the Commission's conclusions are not wholly lacking in a rational or statutory foundation" (as the Commission and the other appellants before the Circuit Court contended), but must exercise an independent and carefully considered judgment as to whether the plan satisfies the statutory requirement of "fairness and equity" to the persons affected (R. 33.)[18] Concurring as we do in the foregoing view of the respective duties of the Commission and the District Court, we believe the Circuit Court thereafter reached an erroneous and untenable result in concluding that the Commission could not, or that in this instance it did not, give advance approval to an alternative treatment of the preferred stockholders by payment of $100 per share and accrued dividends contingent upon determination by the District Court (subject to appellate review) that payment of the premiums was not fair and

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[18] Cf. *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 479:

> "For example, there may arise controversies over the priority or the validity of claims. A Commission finding involving such problems would require an independent examination and an affirmation by the Court." Cf. *Comstock* v. *Group of Investors*, 68 S. Ct. 1454, 1462.

equitable. The Circuit Court's statement that the statutory requirement for approval of a plan by both the Commission and the District Court may not be "waived" or "rejected" (R. 139) is not to be gainsaid, but this does not mean that the Commission may not foresee the possibility that the courts may reach a contrary conclusion to that of the Commission with respect to one or more phases of the plan, and that the Commission may not provide in advance for its concurrence within specified limits with such judicial determination, especially where it relates to questions which do not go to the heart of the plan. Indeed, it is our view that this is virtually the only sound and rational procedure, within the statutory framework as correctly interpreted by the Circuit Court, for dovetailing the dual functions of the Commission and the courts without interminable delays resulting from shuffling proceedings back and forth from one to the other.[19] This view is supported by, and the Circuit Court's requirement for remand conflicts with, expressions of this Court with regard to the somewhat (though not entirely) analogous roles of the district courts and the Interstate Commerce Commission relative to railroad reorganization under Section 77(e) of the Bankruptcy Act. Thus, in *Ecker* v. *Western Pacific R. R. Co.*, 318 U. S. 448, the Court stated (p. 475): "These reorganizations may be attained only through properly coordinated action between the Commission and the Court"; and admonitions of like import bear-

[19] Respondents have persistently urged, on the other hand, that these functions should be accommodated merely by requiring the District Court to bow to the Commission's judgment unless it "wholly lacks any rational and statutory foundation". We think it is clear that not even this draconian standard of review could save the Commission's decision in the instant case. But in any event the Circuit Court's conclusion that accommodation on this basis cannot be achieved without violation of the clear statutory language and intent is plainly unassailable in the light of its careful reasoning and statutory analysis.

ing on the need for expediting reorganizations of this character have been repeatedly put forth by the Court.[20]

(2) The Commission, in requiring the plan to be amended to propose payment of the premiums over the objections of the company and the common stockholders, was necessarily aware that there existed no judicial sanction whatever for such premium payments, and that to the contrary the Commission itself and numerous Courts, including four different Circuit Courts of Appeals, had consistently and uniformly held over a period of five years that payment of premiums to senior security holders at the expense of the junior holders could not be required in reorganizations or liquidations under Section 11(e) of the Act in consonance with the fair and equitable standard of Section 11(e).[21]

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[20] See also *Continental Illinois Bank* v. *C. R. I. & P. Ry. Co.*, 294 U. S. 648, where the Court stated (p. 685):

> "Not only are those who institute the proceeding and those who carry it forward bound to exercise the highest degree of diligence, but it is the duty of the Court and of the Interstate Commerce Commission to see that they do. Proceedings of this character, involving public and private interests of such magnitude should, so far as practicable, be given the right of way both by the Court and by the Commission to the end that they may be speedily determined."

Cf. also *Insurance Group* v. *Denver & Rio Grande W. R. Co.*, 329 U. S. 607, 612; *Federal Trade Commission* v. *Curtis Co.*, 260 U. S. 568, 580; *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 234, 297.

[21] *New York Trust Co.* v. *S. E. C.*, 131 F. 2d 274 (C. C. A. 2d, 1942), *cert. den.* 318 U. S. 786, *rehearing den.* 319 U. S. 781; *City National Bank & Trust Co.* v. *S. E. C.*, 134 F. 2d 665 (C. C. A. 7, 1943); *Massachusetts Mutual Life Insurance Co.* v. *S. E. C.*, 134 F. 2d 665 (C. C. A. 7, 1943), *cert. den.* 327 U. S. 796; *In re Standard Gas & Electric Co.*, 151 F. 2d 326 (C. C. A. 3, 1945); cf. *Bailey* v. *Minsch*, 168 F. 2d 635 (C. C. A. 1, 1948).

In the District Courts, see *In re North Continent Utilities Corp.*, 54 F. Supp. 527 (D. Del., 1944); *In the Matter of Consolidated Electric & Gas Co.*, 55 F. Supp. 211 (D. Del., 1944); *In re Central States Power & Light Corp.*, 58 F. Supp. 877 (D. Del., 1944);

Under the foregoing circumstances, it would have required a singularly myopic vision (or perhaps an overweening confidence in judicial deference to the Commission's new views) for the Commission not to foresee at least the possibility that the provision for payment of the premiums might be found unfair and inequitable by the courts; and would obviously have been an act of administrative irresponsibility if the Commission did not make appropriat provision for this contingency in order to avoid the necessity for remand to the Commission and subsequent resubmission to the Courts, especially since the question was of relatively narrow scope and in no way touched the heart of the plan. Both the Commission's opinions (R. 75a, 136a) and its amendatory order of February 11, 1947 (R. 165a-174a), were intended to, and did, make such provision by approving as fair and equitable payment to the preferred holders of the liquidating preference of $100 per share plus accrued dividends and such additional amounts, if any, not exceeding the aggregate premiums with interest thereon, as might be thereafter approved by the enforcement Court's order which had become final for lack of appeal or which had been affirmed on appeal. As the Commission has itself stated: "* * * the Commission has already contingently approved an alternative allocation of cash to preferred stockholders at the amount of the liquidation preference if as a result of the processes of review in the District Court and on appeal therefrom this should be judicially determined fair and equitable." [22]

In re Standard Gas & Electric Co., 59 F. Supp. 27 (D. Del., 1945); *In re Interstate Power Co.*, 71 F. Supp. 164 (D. Del., 1947); *In re Laclede Gas Light Co.*, 57 F. Supp. 997 (E. D. Mo., 1944).

With respect specifically to retirement of preferred stocks without premiums, see *Cities Service Power & Light Co.*, Holding Company Act Release No. 4944; *Georgia Power & Light Co.*, Holding Company Act Release No. 5568; *El Paso Electric Co.*, Holding Company Act Release No. 5499.

[22] R. 44, note 1, Commission's petition for rehearing in the Circuit Court.

It is thus apparent that the Commission had given its prior consideration and advance approval to the plan in the form approved and enforced by the District Court's order of May 29, 1947 (R. 318a); and indeed the record discloses that this order was actually drafted and submitted to the District Court for signature by the Commission's attorneys (R. 357a). These circumstances scarcely justify the Circuit Court's statement that the District Court erred in entering an order approving and enforcing the plan as amended *by it*,[23] and without the Commission's prior consideration and approval. On the contrary, the procedure followed by the District Court in every particular was that which the Commission in its opinions and orders and by its attorneys in open court,[24] requested and urged the Court to follow, including establishment of the escrow fund and non-remand of the proceedings to the Commission by reason of the Court's disapproval of the premium payments. Even the very language of the escrow agreement embodied in the Court's decree, as well as the decree itself as has been stated, were formulated and submitted to the Court by the Commission's attorneys. Although concededly these circumstances do not insulate the Court's decree from attack if the Commission's actions were in effect "*ultra vires*", we submit that they do completely refute any suggestion that the Court engaged in a process of amending the plan in respects which procedurally, at least, had not received the full concurrence and approval of the Commission, and, indeed, as to which

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[23] "The Court below, therefore, erred in one particular. *It entered an order approving and enforcing the plan as amended by it.* It was without power to do this. The provisions of Section 11(e) make it clear that the Commission in the first instance must approve the plan and find it to be fair and equitable. If, as here, the district court disagrees with the conclusion of the Commission that the plan is fair and equitable, it must refuse to approve the plan and 'remand' the record to the Commission for further and appropriate action by it" (R. 39; emphasis supplied).

[24] R. 257a-260a, 281a-282a.

the Commission had not actually been the prime mover. Nor do we think the procedure urged upon the Court by the Commission can properly be deemed "ultra vires". If the Courts did not find the Commission's new "investment ex the Act" doctrine consonant with established legal principles and the statutory intent, nothing further remained to be decided; for in such event the preferred holders necessarily must receive the liquidating preference of $100 per share plus dividends, in conformance with a long line of Commission and Court decisions. Accordingly, the Commission correctly recognized that the basic issue was one of legal and statutory interpretation, as to which the last word was not in the Commission but in the Courts.[25] Therefore, in approving as fair and equitable payment of the liquidation preference in the event the District Court held payment of the premiums unfair and inequitable (and such determination became final for lack of appeal or were affirmed upon appeal), it is evident the Commission was not "waiving" or "rejecting" its statutory role, but was performing it in the only way consonant with reason and the repeated admonitions of this Court for expeditious and coordinated procedure in reorganizations of this character.[26]

(3) A valid basis is also lacking for the Circuit Court's suggestion that the District Court may have substituted

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[25] If confirmation be needed for this proposition, it is amply furnished by the legislative history of the statute, to which reference was made in the Circuit Court's opinion (R. 23, 23). For example, Senator Wheeler (who had the Bill in charge in the Senate) stated during the debates:

> "* * * the provision does not oust the jurisdiction of the Court at all, because the Court has to approve the plan even though the Commission approves it. In other words, there is really a double-check upon the plan, *and final determination rests as in the past in the courts*" (79th Cong. Rec. 8845, 74th Cong., 1st Sess.; emphasis added).

[26] See note 20, *supra*. Cf. *Comstock* v. *Group of Investors*, 68 S. Ct. 1454; majority opinion p. 1462, minority p. 1467.

its "valuations" and "estimates" for those of the Commission (R. 39). In essence this seems to reduce itself to a contention that the District Judge should have worded only negatively what he also worded affirmatively; that he should have held the provision for premiums "unfair and inequitable" without also finding affirmatively that the preferred holders received "fair and equitable" treatment upon receipt of $100 per share plus dividends without the premiums.

What the District Court "valued" was not the preferred stocks, but the Commission's "investment value ex the Act" doctrine. The initial and basic issue before the Court was the legal validity of the Commission's new doctrine, and in rejecting this doctrine squarely on the merits as a matter of law,[27] the District Judge merely adverted (though searchingly) to numerous relevant factors which confirmed to his satisfaction as a court of equity that payment of the liquidation preference without premiums would produce a

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[27] Judge Leahy addressed himself to this doctrine as follows (R. 311a-312a):

"Analysis of the value of the Engineers preferreds on a 'going concern' basis is largely an exercise in semantics, since the Act dictates the dissolution of Engineers and of the entire holding company enterprise, and thus makes impossible the 'going concern' in which the preferred and common stockholders engaged to invest. If not for the requirements of the Act, Engineers as a 'going concern' would have been free to take advantage of the present low money markets by calling and redeeming its preferred stocks and replacing them with preferred stocks carrying a lower dividend rate than those now outstanding; it would thus continue to enjoy the leverage advantages of senior capital, but at a substantially lower cost. Under these circumstances, payment of the premiums to the preferred stockholders would have been consonant with the purposes and intent of the charter redemption provision. But the Act has made it impossible for the Company and the common stockholders to avail themselves of these benefits contemplated by the contract, along with the many other advantages which would have accrued to them as a 'going concern, exclusive of the impact of Section 11'."

result wholly fair and equitable in its realistic ("colloquial") sense as well as in the technical statutory sense.[28]

The Circuit Court squarely affirmed the District Court's determination, after reviewing and approving Judge Leahy's reasoning and his "careful and far-reaching examination of the relevant factors" (R. 34, 140). The Circuit Court should therefore have affirmed the District Court's decree, without requiring the remand.[29]

II. Substantive Aspects

The Circuit Court's requirement for remand of the proceedings to the Commission, while couched largely in procedural terms, has undertones which raise substantive issues of far-reaching importance if interpreted as the Commission has already indicated it contemplates in the event of remand of the proceedings to it.[30] These substantive issues stem principally from the sentence near the end of the Circuit Court's opinion which states: "The problem is and will remain, until its disposition by the

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[28] To be sure, the Court also made clear in its findings that even assuming the validity of the Commission's basic doctrine it could not accept the Commission's thesis that "investment values" may properly be determined on the basis of market prices and money rates as of a given moment, without regard to past and future events of significance (Findings 41-54, R. 310a-315a). But here again the Court was not "valuing" stock but pointing to the fallacies in the Commission's formula.

[29] It may be observed that the Circuit Court's expressed hope that the delay might be "of short duration" (R. 139) hardly derives encouragement from the record to date. Engineers' plan was filed with the Commission September 10, 1945; the Commission's findings and opinion were issued December 4, 1946, and its supplemental opinion and order January 8, 1947 (R. 118a, 141a).

[30] In its petition for rehearing in the Circuit Court the Commission stated its understanding of the issue on remand as follows: "* * * to require a remand merely for the purpose of a Commission finding that what the common stockholders receive in the plan is at least equal to what they give up in the plan, *is to require a statement in different terms of what the Commission has already found*" (R. 53; emphasis added).

Commission, one of valuation of the securities of Engineers, viz., the preferreds and the common" (R. 40).

The suggestion that a problem of "valuation" remains for disposition is illusory when viewed together with the preceding portions of the Court's opinion which discuss the fallacies of the Commission's "investment ex the Act doctrine" (R. 36-38) and the "pertinent factors" and "substantial equities" (R. 38) which must be considered whether evaluation proceeds "intra the Act" or "ex the Act". For in the light of these factors (which are the very ones considered by the District Court) no process of "valuation" can produce a result different from the one arrived at by the District Court. Any one of these considerations and factors would present virtually an insuperable barrier to a determination that the preferred holders are entitled to more than the $100 per share plus dividends they have already received; and in combination they are absolutely fatal to any such determination.

If the rights of the stockholders are determined realistically in the light of the authentic and compulsory liquidation which has in fact taken place ("intra the Act") the amount already paid to the preferred stockholders marks the outer limit of the preferreds' claim whether the charter liquidation provisions be recognized as dispositive,[31] or a

[31] Although the District Court found it unnecessary to decide the question of whether the charter provisions are themselves "dispositive of the issue", considering them merely one factor supporting the conclusion that $100 per share plus dividends is fair and equitable (R. 287a, 317a), and the Circuit Court also did not deem them dispositive (R. 34), we continue to maintain that these charter provisions are in fact controlling in respect of the type of final liquidation which both courts found has here taken place. Not only does this create a vital distinction from the *Otis* case, as the Circuit Court held (R. 36), and not only does the Engineers' charter contain significantly different provisions from the charter considered in *Otis*, but that decision held only that the charter liquidation provisions were not "*matured*" or "*accelerated*" by virtue of that pseudo-liquidation compelled by the Act; it did not hold that the maximum amount specified in the charter as payable to the preferred in a liquidation may be *exceeded*.

We also continue to maintain that the overriding of these applicable charter provisions to subserve no purpose reasonably related

species of equitable rescission by operation of law is deemed to have occurred as a result of the governmental frustration of the enterprise,[32] or an overall "weighting" of the equities is made in order to arrive at a result which is fair and equitable in a non-technical ("colloquial") sense.[33] On the other hand, if the rights of the security holders are to be determined on a going-concern basis "apart from liquidation" ("ex the Act"), no amount in excess of $100 per share can be found for the preferred if there merely be restored to the credit of the common holders the more than $24,000,000 left by them in the enterprise to provide for the liquidation (R. 306a, 312a); or if account be taken of the other sacrifices and deprivations sustained by the common in carrying out the liquidation (R. 307a, 36-7); or if their claims be measured consistently with those of the preferred (as the Court held they must, R. 35-8) on a going-concern basis "ex the Act".

Indeed, to the extent that *investment value* is entitled to any weight under the rulings of the Courts below in determining the rights of the security holders in this liqui-

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to the Congressional objective in enacting Section 11 would violate vested rights of the common stockholders protected by the Fifth Amendment of the Constitution, a question which this Court expressly stated it did not reach in that decision (*Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 640; but see dissenting opinion, pp. 645, 648-9).

[32] Cf. District Court Conclusions 2-8 (R. 316a). See also 6 *Williston on Contracts* (1938) 5486 (n. 139) where, in discussing judicial decisions with respect to governmental frustration, it is stated: "These decisions may profitably be compared with those where mutual mistake as to some vital characteristic of a thing contracted for has been held to justify rescission." Elements of this doctrine are also found in the premium decisions cited in n. 21, *supra*.

[33] This was virtually conceded by appellants in the Court below. For example, the Commission's Reply Brief (p. 3) stated: "* * * there are no considerations of colloquial equity upon which the Commission would rely as a basis for according an increased participation to the preferred stockholders."

dation; it alone (and wholly apart from all the other considerations already mentioned) forecloses a finding of more than $100 per share and dividends for the preferred. For the Commission did not and could not determine that these preferreds actually have an authentic, *investment value* in excess of $100 if this term be employed in its normal sense. What the Commission did was merely to credit and accept the testimony of Badger that as of the date of his testimony, these preferreds would have had a *market* value approximating the redemption prices if dissolution were not required by the Act. And Badger's opinion as to this hypothetical market value [34] was based not on the inherent investment qualities of these stocks (which the evidence established was at best a low-grade medium holding company preferred, R. 314a) but on the extremely low money rates and yields prevailing at that particular moment: "the lowest which they have ever been in the history of our country" and "conversely, the prices of such stocks [preferred] are at the highest levels ever experienced" (R. 2065a).

Both Courts below were struck by the Commission's anomalous and almost inexplicable [35] action in terming the momentary market value of the preferreds in May 1946 their "investment value" on a "going-concern" basis; [36] and held that if rights are to be measured on the Commission's fictional theory of "a going-concern", then values must also be determined on that basis (R. 312a-315a, 35-37). The

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[34] Even the actual market values were lower than the redemption prices on the date of Badger's testimony (R. 2062a).

[35] In other decisions the Commission has consistently rejected market values as a criterion for valuation in Section 11(e) plans. Cf. *Washington Railway and Electric Co.*, Holding Company Act Release No. 7410 (May 1947), where the Commission stated (p. 27): "However, we have never considered market values as determinative of the fairness of a Section 11(e) plan."

[36] District Court Findings 48-54 (R. 312a-315a); and see Circuit Court's statement regarding the District Court's "cogent finding" as to Badger's money rates (R. 19).

drastic decline in preferred stock yields and market prices which commenced shortly after Badger's testimony and has continued almost steadily since, adds further incontrovertible proof to the evidence pointed to by Barnes (and found by the District Court) which establishes that the Engineers preferreds have not in the past and cannot now be valued at more than $100 on a going-concern basis. Not only did the Circuit Court find that the evidence in the record bears this out,[37] but the Court was asked to take judicial notice of authoritative and competent data establishing that if the liquidation had not in fact taken place (as the Commission hypothesized) the Engineers preferreds would have a present market value of not more than $90-$95 per share (R. 122-3).

In the light of the foregoing factors, we believe it is evident that remand to the Commission can only lead to a finding by the Commission that in view of the holdings of the District and Circuit Courts, payment to the preferred holders of the amounts already received is fair and equitable, and that this is the "disposition by the Commission" contemplated in the Circuit Court's sentence previously quoted (*supra*, p. 27).[38]

Since, as was pointed out in the earlier discussion, such a finding has *already* been made in alternative contingent form by the Commission in its two opinions and formally embodied in its order of February 11, 1947, no purpose

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[37] Cf. R. 38, where the Court stated with respect to the contention that the redemption prices were the "equitable equivalent" of the rights surrendered by the preferred "* * * we do not believe that such a finding could be supported on the present record".

[38] If, on the other hand, the Circuit Court's language be construed paradoxically as a holding that the Commission may validly determine additional amounts to be payable to the preferred holders in this case, contrary to the determination of the District Court which the Circuit Court affirmed, such a ruling would imperatively call for consideration and determination by this Court of the respective statutory functions of the Commission and the District Court, as well as all those fundamental issues of "fairness and equity" under Section 11(e) which the Circuit Court held were correctly determined by the District Court.

would be served by the remand except to delay distribution to the common stockholders of the escrow fund and further protract the litigation of which the entire expense must be borne by the common stockholders (R. 72a-82a).

CONCLUSION

For the reasons stated, this petition for a writ of certiorari to the Court of Appeals for the Third Circuit should be granted.

Dated: September 4, 1948.

Respectfully submitted,

ALFRED BERMAN,
Attorney for Petitioners.

PHILIP W. AMRAM,
ALFRED BERMAN,
HERBERT L. COBIN,
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ABRAHAM SHAMOS,
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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 266

CENTRAL-ILLINOIS SECURITIES CORP. AND CHRISTIAN A. JOHNSON

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, ET AL., THE HOME INSURANCE CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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1. The Commission agrees that the instant petition should be granted. Petitioners herein are common stockholders of Engineers Public Service Company and are respondents in cases Nos. 226, 227, and 243 wherein the Commission and preferred stockholders of Engineers are seeking review of the judgment of the Court of Appeals for the Third Circuit entered March 19, 1948, and its judgment

denying petitions and cross-petitions for rehearings entered June 11, 1948. The petitions filed by the Commission and the preferred stockholders urged that the court below should have directed the district court to approve and enforce, in accordance with the prior approval of the Commission, the proposal in an otherwise uncontested plan under Section 11(e) of the Public Utility Holding Company Act, to pay the preferred stockholders in satisfaction of their claims amounts equal to the redemption prices. The Court of Appeals for the Third Circuit upheld the district court in its rejection of the Commission's determination, but held that the district court erred in enforcing the plan in accordance with its own view that an amount equal to the involuntary liquidation preference of $100 per share was the amount required by the fair and equitable standard of Section 11(e). The present petition raises questions which closely parallel those raised by petitioners in cases Nos. 226, 227, and 243, except that these questions are, of course, posed from the point of view of common stockholders who disagree with the Commission's determination of what is fair and equitable and seek to support the contrary views of the district court. In addition, the petition urges alternative grounds for support of the district court's decision which both courts below rejected, and argues that if the Commission does not prevail in its effort to have the plan enforced as approved by it, then the court below should be directed to affirm the decision of

the district court rather than to continue in effect the order for remand to the Commission.

2. Although we disagree with many of the arguments advanced by petitioners and with their version of the facts, we do not oppose the issuance of a writ of certiorari on their petition, for we believe the issues petitioners raise and the issues raised by the Commission's petition are interrelated and may appropriately be considered at the same time.

3. The procedural question of whether there should be a remand to the Commission if the district court is upheld in its rejection of the Commission's valuation, is interrelated with the questions as to the proper interpretation of the fair and equitable standard of Section 11(e) and as to the relative roles of Commission and district court in applying those standards.

The Commission's action granting alternative approval to a plan providing for the payment of only $100 per share to the preferred stock and, if the district court should so order, for an escrow of the amount in dispute pending the outcome of the litigation, was premised upon the assumption that the facts were not disputed or susceptible of dispute and that the courts would be confronted only with the issue of whether the involuntary liquidation preference specified in the charter or the fair investment value of the stock was, as a matter of law, the "equitable equivalent" of the rights the preferred stockholders were called upon to surrender.

Both courts below, however, have accepted the Commission's determination that under *Otis* v. *S. E. C.*, 323 U. S. 624, the preferred stockholders' liquidation preference is not "dispositive". Unless petitioner should persuade this Court otherwise, or unless this Court should agree with the district court that its weighing of colloquial equities may be substituted for the Commission's finding of equitable equivalence, we see no escape from the requirement of a remand to the Commission. Acceptance of the views of the court below that the Commission has an unfulfilled valuation function to perform and that the district court may reject the Commission's valuation without laying down a substitute standard which the Commission must follow, appears to make that result inevitable. No waiver on the Commission's part, even if its action could be so construed, could abdicate or delegate to the district court any unfulfilled valuation function vested in it by the statute. *Cf. Schwabacher* v. *United States*, 334 U. S. 182, 198.

The embarrassing and anomalous problem confronting the Commission on such a remand has been pointed out in the petition for a writ of certiorari in case No. 226. Petitioner in the present case agrees that if the decision of the court below leaves it open to the Commission to do any more on remand than accept the determination of the district court "such a ruling would imperatively call for consid-

eration and determination by this Court of the respective statutory functions of the Commission and the District Court, as well as all those fundamental issues of 'fairness and equity' under Section 11(e) which the Circuit Court held were correctly determined by the District Court" (Pet., p. 30, fn. 38).[1]

4. While we believe it premature to argue the merits of the decision below, we note briefly a few of our objections to statements by the present petitioners both in their petition in No. 266 and in their brief in opposition in Nos. 226, 227, and 243. Some of these misstatements appear also in the Boehm and White memorandum in opposition.

A. *It is stated that under today's conditions in the financial market Engineers' preferreds, if still outstanding, "would have a present market value of not more than $90-$95 per share* (R. 122-3)." (By Central Illinois in its petition, p. 30, and in its brief in opposition, Point I). The record references are to Central Illinois' own

[1] This problem would become all the more embarrassing if the present petitioner is right in its contention (brief in opposition, Point IV, p. 34) that the court below "had no intention of insisting upon the exact ascertainment and computation of each loss sustained by Engineers, but merely upon giving reasonable consideration to the fact that such losses (without necessity for precise computation) had been sustained." It is not indicated how the Commission, without reference to proof of actual losses, is to give content in terms of computing the amount of dollars payable to the preferred, to such hypothetical losses. (R. 71a-73a).

arguments, purportedly based on matters of judicial notice set forth in answer to the Commission's petition for rehearing in the court below. These assertions involve, we believe, a gross exaggeration of an admitted change in market conditions since Engineers' preferred stocks were retired under the plan. Central Illinois' highest valuation of $95 per share, if applied to Engineers' 6% preferred stock, could be supported only if securities of comparable quality were presently selling to yield 6.32% or higher. On the other hand, a yield of 5.45% or less on the same class of preferred would support, according to the Commission's approach, a finding that its investment value, if presently outstanding, is equal to the $110 per share redemption price. The Badger testimony, which was accepted by the district court (R. 290a), indicated that, except as limited by the redemption ceiling price, the preferred would sell on a 4.6% yield bases (R. 310a), i. e., in excess of $110 per share. This testimony was based on a comparison of the then current market prices for other "medium grade" preferred stocks which Badger regarded as comparable. Our own computation, based upon market prices of September 22, 1948, show an average yield at the present time of 4.82% for the securities used by Badger as a basis of his comparisons and now outstanding. Thus, even making allowance for the change in market

conditions to date, it is clear that the Commission's original conclusion that the preferred stocks have an investment value of not less than the redemption prices is still valid.[2]

In any event, we believe that the latest relevant date for computing the equitable equivalent in cash of what the preferred stockholders surrendered was the effective date of the plan when their shares were cancelled and their right to future dividends terminated. Thus, even if this Court should accept Central Illinois' exaggeration of the extent of the change in market conditions since that date, that change would not affect either the issue of whether the plan should have been enforced as approved by the Commission, or the issue of what, if any, different standards the Commission should apply if there is to be a remand. Without resolution by this Court of the questions posed in the Commission's petition, remand for the purpose of ascertaining market conditions would be dilatory, futile, and confusing. Moreover, since the court below did not rest its decision upon alleged changes in market conditions, acceptance of Central Illinois' assertions as a basis for denying a writ of certiorari would itself involve a modification of the decision below.

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[2] Central Illinois' computations appear to be based in part upon market figures as of March 26, 1948, and using only three of the securities upon which Badger based his computation.

B. On the basis of quotations out of context it is asserted, as an indisputable fact, that the Commission's decision in the instant case was a novel departure from a "long line of Commission and Court decisions", and the Commission is chided because its opinion "avoided even the slightest reference to the long and deeply-rooted decisions discussed above." (Petition in No. 266, p. 24; Central Illinois brief in opposition, p. 18; Boehm and White memorandum, p. 14.) Apart from the fact that this argument of inconsistency was rejected by both courts below in holding the liquidation preference not "dispositive", the statements give a misleading picture of Commission precedents. The Commission has consistently held that neither redemption prices nor liquidation preferences are necessarily determinative of the equitable equivalent in cash of bonds or preferred stock where the investment is forcibly surrendered under Section 11. The Commission cases on which Central Illinois relies which disallowed payment of redemption prices, while not discussed by the Commission in its *Engineers* opinion, had been fully dealt with in the earlier *American Power and Light* case which the Commission cited (R. 62a, n. 43, citing Holding Company Act Release No. 6176). Indeed, it was in recognition of previous expressions of the Commission's view that the parties to the administra-

tive proceeding offered testimony concerning the "investment value" of Engineers preferreds.[3]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROGER S. FOSTER,
General Counsel,
Securities and Exchange Commission.

OCTOBER, 1948

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[3] Central Illinois' statement that in the United Light and Power debt retirement case "the debentures had been selling at *a permium above par* despite the imminence of retirement" brief in opposition, p. 16) apparently is based upon a Commission footnote which intimates that the premium of "as much as 1½ points above par" (with the issue of the debentureholders' claim for a 9 point premium undecided) was attributable to, rather than "despite", the imminence of liquidation. The footnote referred to reads as follows:

> All the debentures were originally sold to the public during the years 1923 to 1925 at prices ranging between 90 and 95. From 1931 to 1940 market quotations were constantly below par reaching as low as 25 for a time in 1933. Since 1940 and especially since our order of March 20, 1941, for the liquidation and dissolution of Power, market quotations have been close to and sometimes as much as 1½ points above par. [10 S. E. C. 1227, n. 27.]

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No. 266

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE CO., *et al.*

MEMORANDUM OF COMMON STOCKHOLDERS LUCILLE WHITE AND FRANCES BOEHM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 266

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v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE CO., *et al.*

MEMORANDUM OF COMMON STOCKHOLDERS LUCILLE WHITE AND FRANCES BOEHM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Lucille White and Frances Boehm, common stockholders of Engineers, pray that the petition of common stockholders Central-Illinois Securities Corporation and Christian A. Johnson, for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit be granted.

Lucille White and Frances Boehm are respondents with respect to three petitions for certiorari to review the same judgment (Nos. 226, 227, 243) and have filed a brief in opposition to said petitions.

Opinions Below

The opinion and judgment of the Court below (R. 12) and the opinion denying petitions and cross-petitions for rehearings (R. 138) are reported at 168 F. 2d 722. The opinion of the District Court is reported at 71 F. Supp. 797 (R. 283a), but its detailed Findings of Fact and Conclusions of Law (R. 293a-317a) are not reported. The Findings and Opinion of the Commission dated December 4, 1946 and January 8, 1947 have not yet been officially reported but are set forth in the Commission's Holding Company Act Releases Nos. 7041 (R. 25a) and 7119 (R. 128a).

Jurisdiction

The judgment of the Circuit Court of Appeals for the Third Circuit was entered March 19, 1948, and its judgment denying petitions and cross-petitions for rehearing was entered June 11, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 803 (15 U. S. C. 79, *et seq.*).

Statute Involved

Section 11(e) of the Public Utility Holding Company Act of 1935 provides as follows:

> "(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1,

1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

Reasons Relied On For Allowance of Writ

The determination of the Circuit Court directing a remand to the Commission raises issues of substantial importance in the administration of the Public Utility Holding Company Act and directly affects the rights of

many stockholders. If the petitions of appellants for a writ is granted, it is particularly important that this petition be granted in order that this Court may have before it all of the issues raised in this case for a complete determination.

I.

The District Court merely followed the procedure mapped out by the Commission in the event that the District Court found that the preferred stock was not entitled to the redemption premium, and remand to the Commission was unnecessary.

The Circuit Court of Appeals, after affirming the determination of the District Judge that the plan as submitted by the Commission was unfair and inequitable, vacated the decree of the District Judge and remanded the cause to the Commission solely on the ground that the District Judge erred in approving and enforcing the plan as amended by him.

The statement by the Circuit Court on this point is as follows (R. 39):

> "To put the matter briefly, a district court may reject but not amend the plan. The court below, therefore, erred in one particular. It entered an order approving and enforcing the plan as amended by it. It was without power to do this. The provisions of Section 11 (e) make it clear that the Commission in the first instance must approve the plan and find it to be fair and equitable. If, as here, the District Court disagrees with the conclusion of the Commission that the plan is fair and equitable, it must

refuse to approve the plan and remand the record to the Commission for further and appropriate action by it."

In this respect we believe that the Circuit Court is in error. The District Court did not amend the plan. The only question before the District Court was whether the preferred stockholders were entitled to the redemption premium provided by the Engineer's charter to be paid in the event of a voluntary redemption or liquidation. The rest of the plan was not in dispute, and has already been carried out. The amount of this premium, plus expenses, was deposited in Court subject to the determination of that question. The District Court found that it would be unfair and inequitable to pay such redemption premium.

All of the proceedings concerning the amendment of the plan, the provisions for an escrow agreement and the submission to the District Court, were ordered by the Commission, and contemplated and provided for the contingency that the District Court might, as indeed it did, find that the payment of $100 per share plus accrued dividends to the preferred stockholders was fair and equitable and that the payment in excess of $100 per share plus accrued dividends was not fair and equitable, which finding was affirmed by the Circuit Court of Appeals. And it was in accordance with that amended plan as approved by the Commission and the District Court that the preferred stockholders have received $100 per share, plus accrued dividends, and that the amount of the premiums has been deposited in escrow.

That the determination of the courts as to whether or not the preferred stockholders should receive more than $100 per share, should be binding upon the Commission, and that the Commission had thereby given advance ap-

proval, is amply borne out by the record. In its Order of Amendment dated February 11, 1947 (H. C. A. Release No. 7490, R. 165a), the Commission approved payment to the holders of the preferred stock of $100 per share and such additional amounts as may be directed by an order or decree of the United States District Court or any appellate court (R. 174a). Thereafter the Commission approved and joined in presenting to the District Court the escrow agreement, the pertinent provision of which states that the amount of the premium which is deposited in escrow shall be released and paid over to Engineers upon proof of the entry of an order or decree of the Commission, or of an order or decree of any court having jurisdiction, which determines or finds that the holders of the preferred stock are not entitled to receive any amounts in excess of $100 per share plus accrued dividends (R. 328a).

And in oral argument before the District Court in answer to the statement by Mr. Tucker, counsel for Engineers, that if the District Court did not approve the plan in its entirety, it goes back to the Commission, Mr. Slater, counsel for the Commission, stated (R. 281a):

> "If your Honor please, I hesitate to do so, but we must disagree with the statement just made by Mr. Tucker. As we view this escrow, it is a two way escrow. The Commission or the preferred stockholders might appeal in the event that this Court should determine only one hundred dollars is payable. The common stockholders have indicated they would appeal if the Court agreed with the determination of the Commission. But certainly the reorganization process and equity powers of this Court can't be so inflexible that this Court can't by appropriate order approve those portions of a plan which are clearly separable and in no way impinge on the controverted

> portions of a plan. * * * It is just silly to upset ten-elevenths of this plan, at least that, if not ninety-nine one-hundredths, simply because there is a disagreement as to a segregated small portion in relation to the whole of what we are doing here."

That the Commission has consistently maintained this position is apparent from its petition for rehearing in the Circuit Court where the Commission stated (R. 44, note 1):

> "* * * the Commission has already contingently approved an alternative allocation of cash to preferred stockholders at the amount of the liquidation preference if as a result of the processes of review in the District Court and on appeal therefrom this should be judicially determined fair and equitable."

It is thus apparent that not only has the District Court not amended the plan, but has in fact followed a procedure which has been concurred in and approved by the Commission. The procedures and decisions of the Commission and the District Court have fully satisfied the statutory requirement for approval of the plan by the Commission and the enforcing Court.

II.

Should certiorari be allowed, the Court should likewise permit certiorari to review the question, undecided up to now, whether upon a true liquidation under the Holding Company Act, the charter provisions of the corporation to be liquidated, are controlling.

It is further contended by respondents Lucille White and Frances Boehm that the charter provisions in this case are applicable and that the overriding of these charter

provisions is not reasonably necessary to effectuate the provisions of the Holding Company Act, and thereby constitutes a violation of the Fifth Amendment.

The applicable section of the corporate charter of Engineers provides:

> "III. Preference on liquidation, etc. In the event of liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, the holders of the preferred stock of each series shall be entitled to receive, for each share thereof, an amount equal to $100, together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premium for such series, if any, before any distribution of its assets shall be made to the holders of the common stock * * *."

Not only has the Commission conceded that the dissolution in this case is not voluntary, but the District Court found that a plan, whether submitted by the company or the Commission, is not a voluntary plan (R. 287a, note 1).

The case of *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624 (1945), relied on by the Commission in the lower courts as dispositive of this issue is clearly distinguishable. In the Otis case, there was involved a mere simplification and reorganization of a continuing holding company system, in fact only the removal of the top holding company (the lower tier of holding companies remaining and the enterprise continuing), whereas the Engineers case involves a final and complete liquidation, which in fact has already been accomplished.

This distinction is emphasized by this Court in the Otis case when it said that (p. 631):

> "* * * The exercise of legislative power by Congress through §11 (b) (2) to accomplish *simplification* as a matter of public policy and the Commission's administration of the Act *by dissolution of this particular company* results in a type of liquidation which is entirely distinct from the 'liquidation of the corporation, whether voluntary or involuntary' envisaged by the charter provisions of Power for preferences to the senior stock." (Italics supplied).

The provision of the corporate charter providing for payment of a fixed amount to the preferred stockholders in the event of an involuntary dissolution constitutes a contract among the stockholders which is entitled to constitutional protection.

Bedford v. *Eastern Building & Loan Association*, 181 U. S. 227, 21 S. Ct. 597, 45 L. Ed. 834.

Hopkins Federal Savings & Loan Association v. *Cleary*, 296 U. S. 315, 56 S. Ct. 235, 80 L. Ed. 251.

Treigle v. *Acme Homestead Association*, 297 U. S. 189, 194, 196, 56 S. Ct. 408, 80 L. Ed. 575.

And in this connection, the language of the minority in the Otis case is particularly appropriate (p. 647):

> "We can find no basis for saying that it is not fair and equitable, both in a technical as well as a general and non-technical sense, to require the stockholders to abide by their agreement in the very circumstances to which it was intended to apply, and where, as we have said, there is no contention that the contract when made was or is now oppressive, unfair, inequitable or illegal."

The District Court chose not to pass on this point. It said (R. 287a):

> "Certain common stockholders argue that this plan involves a true liquidation as distinguished from the fictitious liquidation involved in re United Light & Power Co., D. C. Del., 51 F. Supp. 247, aff'd. 3 Cir., 142 F. 2d 413, aff'd. sub. nom. Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, and that consequently the stock rights of the various security holders are not to be treated as though in a continuing enterprise. Since this is a true liquidation, the parties argue, the charter provisions do apply and therefore the preferreds are not entitled to a premium. The charter in this case provides that the preferreds shall be entitled to a premium only in the event that the winding up is voluntary; and this and other courts have held that where a company must change its capital structure because of the impact of the Act, the winding up or reorganization is not voluntary. See in re Consolidated Electric & Gas Co., D. C., Del., 55 F. Supp. 211; In re North Continent Utilities Corp., D. C., Del., 54 F. Supp. 527; City National Bank & Trust Co. of Chicago v. S. E. C. and North American Light & Power Co., 7 Cir., 134 F. 2d 65; New York Trust Co., et al. v. S. E. C., 2 Cir., 131 F. 2d 274. This is ingenious argument and, if accepted, would of course be dispositive of the holding that payment of the premiums would not be fair and equitable. I prefer not to definitely decide this particular point. * * *"

Should this Court issue its writ of certiorari as requested by the Commission and the other appellants, then we respectfully submit that it should likewise grant the petition of appellees for the issuance of a writ to determine this question, as well as the question of remand to the Commission.

Conclusion

For the reasons stated, the petition of Central Illinois Securities Corp., et al., for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit should be granted.

Dated: New York, N. Y., October 7, 1948.

Respectfully submitted,

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